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NO. 69409-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CINDY and MATTHEW HOLTTUM, husband and wife,
and the marital community composed thereof,

Appellants,

vs.

ROSS STORES INC.,
a foreign corporation licensed to do business
in the State of Washington;
and ROSS DRESS FOR LESS, INC.,
a Washington corporation,

Respondents.

APPEAL FROM THE
SUPERIOR COURT FOR SNOHOMISH COUNTY
THE HONORABLE GEORGE F. APPEL

REPLY BRIEF OF APPELLANTS

LAW OFFICES OF
EUGENE N. BOLIN, JR., P.S.

Eugene Nelson Bolin, Jr.
WSBA #11450
114 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165

Attorney for Appellants

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ROSS'S FOUR MAIN ARGUMENTS	4
	A. ISSUE #1: "ROSS OWED NO DUTY OF CARE TO THE PLAINTIFF BECAUSE ROSS DOESN'T SELL GRAPES"	4
	B. ISSUE #2: "AN ERRANT GRAPE IS NOT A FORESEEABLY DANGEROUS CONDITION"	6
	C. ISSUE #3: "ROSS INSPECTED THE PREMISES HOURLY BEFORE THE INCIDENT."	7
	D. ISSUE #4: "ROSS WAS NOT THE CAUSE IN FACT OR THE LEGAL CAUSE OF THE INCIDENT."	7
III.	LESSER DEFENSES RAISED BY ROSS.....	8
	A. ROSS DOES NOT CONSISTENTLY ENFORCE ITS NO- FOOD POLICY	8
	B. IT IS A QUESTION OF FACT AS TO WHETHER ANY ROSS EMPLOYEE OBSERVED (OR SHOULD HAVE) A CUSTOMER WITH GRAPES BEFORE THE INCIDENT.....	10
	C. STORE MANAGER DAN BREVIG ADMITS THAT HE INTENTIONALLY DESTROYED THE VIDEO IN VIOLATION OF COMPANY POLICY.	10
	D. THE VIDEO WAS INDISPENSABLE TO THE CASE (P.2).....	11

E. THE TRIAL COURT ERRED WHEN IT EXCLUDED THE PLAINTIFFS' EXPERT	12
F. THE APPELLANTS' BRIEF SATISFIED THE REQUIREMENTS OF RAP 10.3(a)(5).....	14
G. ROSS FALSELY CLAIMS THAT HOLTTUM "FIRST GIVES NOTICE OF A CLAIM NEARLY A MONTH LATER" AFTER THE FALL	16
H. ROSS HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE GRAPE	16
I. THE VIDEO WOULD SHOW THAT THE GRAPE ON THE FLOOR WAS A 'CONTINUOUS OR REASONABLY FORESEEABLE RISK'	18
J. MR. HOLTTUM'S CONSORTIUM CLAIM IS "CHALLENGED"	18
IV. ROSS'S INTENTIONAL SPOILIATION MUST RESULT IN REVERSAL	19
V. CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<u>Andrews v. Burke</u> , 55 Wn. App. 622, 626, 779 P.2d 740 (1989)	9
<u>Aviva U.S.A. Corp. v Vazirani</u> , 2012 WL 71020, *8, 2012 US Dist LEXIS 3069, *24	23
<u>Bayne v. Todd Shipyards Corp.</u> , 88 Wn.2d 917, 922, 568 P.2d 771 (1977)	9
<u>Bessinger v. Bi-Lo, Inc.</u> , 329 S.C. 617, 496 S.E.2d 33 (1998)	13
<u>Bloom v. Fry's Food Stores</u> , 130 Ariz. 447 (Ariz. Ct. App. 1981)...	14
<u>Brookshire Food Stores, L.L.C. v. Allen</u> , 93 S.W.3d 897 (Tex. App. 2002)	13
<u>Burgos v Satiety, Inc.</u> , 2011 WL 6936348, *3, 2011 US Dist LEXIS 149707, *6-7 [ED NY, Dec. 30, 2011, No. 10-CV-2680, Gleeson, J.]	23
<u>Burnett v. Ingles Markets</u> , 236 Ga.App. 865, 514 S.E.2d 65 (1999)	13
<u>Byrnie v Town of Cromwell, Bd. of Educ.</u> , 243 F.3d 93 [2001]	22
<u>Clark v. Kmart Corp.</u> , 634 N.W.2d 347 (Mich. 2001)	13
<u>Coleman v. Ernst Home Center</u> , 70 Wn.App. 213, 218, 853 P.2d 473 (1993)	5,6
<u>Corbin v. Safeway Stores</u> , 648 S.W.2d 292 (Tex. 1983).....	14
<u>Dix v. Kroger Co.</u> , 257 Ga.App. 19, 570 S.E.2d 89 (2002)	13
<u>Frederick v. Winn Dixie La., Inc.</u> , 227 So. 2d 387 (La. App. 1969)	14

<u>H.E. Butt Groc. Co. v. Resendez</u> , 988 S.W.2d 218 (Tex. 1999)....	14
<u>Hartley v. State</u> , 103 Wn.2d 768, 777-780, 698 P.2d 77	8
<u>Henderson v. Tyrrell</u> , 80 Wn. App. at 605 and fn. 3 at 606, 910 P.2d 522 (1996)	20
<u>Hertog v. Seattle</u> , 138 Wn.2d 265, 979 P.2d 400 (1999).....	8
<u>Homeworks Construction, Inc. v. Wells</u> , 133 Wn. App. 892, 138 P.3d 654 (2006)	20
<u>J.H. Harvey Co. v. Reddick</u> , 522 S.E.2d 749 (Ga. 1999)	13
<u>Joyce v. State Dep't of Corrections</u> , 155 Wn.2d 306, 324 119 P.3d 825 (2005)	9
<u>Kassick v. Spicer</u> , 490 P.2d 251 (Ok. 1971).....	14
<u>Kelly v. Howard S. Wright Const. Co.</u> , 90 Wn.2d 323, 338, 582 P.2d 500 (1978)	9
<u>Kim v. Budget Rent-a-Car</u> , 143 Wn.2d, 190, 203, 15 P.3d 1283 (2001)	8
<u>Kravtsov v Town of Greenburgh</u> , 2012 WL 271966 2012 US Dist LEXIS 94819 [2012].....	23
<u>Kronisch v United States</u> , 150 F.3d 112, 125-128 [2d Cir 1998]	22
<u>Leon v. IDX Sys. Corp.</u> , 2004 WL 5571412, *3 (W.D.Wash. Sept. 30, 2004), <i>aff'd</i> , 464 F.3d 961 (9th Cir. 2006).....	21
<u>Long v. National Food Stores, Inc.</u> , 262 N.C. 57, 136 S.E.2d 275 (1964).....	14

<u>Malaney v. Hannaford Brothers Co.</u> , 177 Vt. 123, 861 A.2d 1069 (Vt. 2004)	14
<u>Mangione v. Jacobs</u> , 37 Misc.3d 711, 950 N.Y.S.2d 457 (2012)	22
<u>Maringer v. Hill</u> , 131 N.Y. Supp. 445 (1911).....	13
<u>Marshall v. Bally's Pacwest, Inc.</u> , 94 Wn. App. 372, 972 P.2d 475 (1999)	20
<u>Mass Marketing Inc. v. Gaines</u> , 70 SW 3d 261 (Tex. App. 2001)..	13
<u>McCullough v. Kroger Co.</u> , 231 Ga.App. 453, 498 S.E.2d 594 (1998)	14
<u>Miller v. Big Sea Trading, Inc.</u> , 641 So.2d 911 (Fla. 3rd DCA 1994)	14
<u>Mullen v. Winn-Dixie Stores, Inc.</u> , 252 F.2d 232 (4 th Cir. 1958).....	14
<u>Napster, Inc. Copyright Litig.</u> , 462 F.Supp.2d 1060, 1068 (N.D. Cal. 2006).....	21
<u>Nettles v. Winn-Dixie</u> , 496 So.2d 1296 (La.App. 1986)	14
<u>Nicholson v Board of Trustees for the Conn. State Univ. Sys.</u> , 2011 WL 4072685, 2011 US Dist LEXIS 103094 [D Conn, Sept. 12, 2011, No. 3:08cv1250 (WWE)]	23
<u>Nisivoccia v. Glass Gardens, Inc.</u> , 818 A.2d 314 (N.J. 2003).....	14
<u>Nordstrom v. White Metal Rolling & Stamping Corp.</u> , 75 Wn.2d 629, 453 P.2d 619 (1969)	9
<u>Pimentel v. Roundup Co.</u> , 100 Wn.2d 39,666 P.2d 888 (1983)	1,2,3,5,7,18

<u>Ritter v Meijer, Inc.</u> , 128 Mich. App 783, 341 NW2d 220 (1983) ...	13
<u>Rojas v. Supermarkets General Corp.</u> , 656 N.Y.S. 2d 346 (1997), app. den. 698 N.E.2d 956 (N.Y. 1998).....	13
<u>Rotella v Wood</u> , 528 U.S. 549 [2000]	23
<u>Sheehan v. Roche Brothers Supermarkets, Inc.</u> , 448 Mass. 780 (2007).....	13
<u>Sprague v. Lucky Stores, Inc.</u> , 109 Nev. 248, 849 P.2d at 323 (1993).....	14
<u>Suazo v. Linden Plaza Assoc., L.P.</u> , 2013 NY Op 00407 [102 AD3d 570]	11
<u>Taggart v. State</u> , 118 Wn.2d 195, 226-227, 822 P.2d 243	8
<u>Volcan Group, Inc. v T-Mobile USA, Inc.</u> , 2011 WL 6141000, 2011 US Dist LEXIS 142159 [WD Wash, Dec. 9, 2011, No. C10 711 RSM].....	23
<u>Voom HD Holdings LLC v. EchoStar Satellite L.L.C.</u> , 93 AD3d 33, 43 [1 st Dept 2012]).....	11
<u>Wallace v. Wal-Mart Stores</u> , 272 Ga.App. 343, 612 S.E.2d 528 (2005).....	13
<u>Williamson v. Food Lion, Inc.</u> , 131 N.C. App. 365 (N.C. 1998).....	14
<u>Wiltse v. Albertson's, Inc.</u> , 116 Wn.2d 452, 456, 805 P.2d 793 (1991).....	5
<u>Wood v Pittsford Central School Dist.</u> , 2008 WL 5120494, 2008 US App LEXIS 24733 [2d Cir, Dec. 8, 2008, No. 07-0892-cv]	22

<u>Zubulake v. UBS Warburg LLC</u> , 220 F.R.D. 212, 216 (S.D.N.Y.2003).....	21
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Rules

RAP 10.3(a)(5)	14
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Treatises

7 MOORE'S FEDERAL PRACTICE, § 37A.55 (3d ed. 2011)	22
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I. INTRODUCTION

Ross Stores, Inc. (Ross) obtained summary judgment in the trial court with bare denials of facts, arguing the wrong law, and aided by its intentional destruction of indispensable evidence. In this appeal, Ross attempts the same strategy, along with framing incorrect and misleading issues. In the introduction to its brief, Ross argues four bases for affirming the trial court's dismissal of the Holttums' complaint:

1. Ross owed no duty of care to the plaintiff because Ross doesn't sell grapes;
2. An errant grape is not a foreseeably dangerous condition;
3. Ross inspected the premises before the incident; and
4. Ross was not the cause of Cindy Holttum's fall.

The first argument misstates the issue. Ross did owe a duty of care to the plaintiff because she was a business invitee, regardless of what Ross sells. And since this is not a Pimentel case, the products that Ross sells are therefore immaterial to the dangerous condition that caused Cindy Holttum's permanent injuries.

The second argument also misstates a key issue. This appeal is not about whether “an errant grape is [or is] not a foreseeably dangerous condition.” The issue is whether a jury could find that a cashier should have noticed an unescorted, three-year old child eating and dropping grapes onto the floor from a clear plastic bag right in front of the cashier. We know this is what happened because witnesses testified that the video captured at least this much. Even if the court determines that the answer to this question is no, the intentional destruction of indispensable evidence requires the denial of Ross’s motion for summary judgment.

The third argument also misstates another key issue. Ross is not immune from liability because it claims it conducted regular inspections of the store. This is another misleading attempt to frame this case as a Pimentel case. It is not. The issue is whether store employees were either inattentive in failing to see what was right before them, or negligent in failing to respond to what they saw.

The fourth argument raises factual and legal causation as a defense. Ross’s chief defense is that it does not sell grapes and, for that reason alone, “an errant grape on the floor is not a

foreseeably dangerous condition.” This is (again) a Pimentel defense. Cindy Holttum would not have been injured “but for” the inattentiveness and neglect of store employees. Store policy prohibited unescorted children and eating in the store. Employees negligently permitted both to occur and this was the cause of Cindy Holttum’s injuries. There is also conflicting evidence as to whether store inspections were performed on the night of the incident.

Ross conspicuously omits any reference of the video which its store manager permitted to be destroyed in the body of its “counter-statement” of the facts. The destruction of the video is instead relegated to a mere footnote in the “counter-statement” of the case. This is perhaps the key issue in this appeal.

In the “argument” portion of its brief, Ross claims that Holttum “failed to show that Ross intentionally destroyed the surveillance video.” This claim directly contradicts the testimony of Ross’s own store manager, Dan Brevig. Store policy required all evidence involved in an injury should be preserved. The video was intentionally destroyed. Brevig knew that Holttum may well assert a claim when he destroyed the video, because Holttum called him the morning after her injury to report it. Preserving video is easy to do and he could have recorded a CD of the entire video. Brevig has

never offered a plausible explanation of why he failed to save the video.

Ross also claims that Holttum failed to show that “the video was indispensable to the case . . .” The falsity of this assertion is proven by the dismissal of the plaintiffs’ complaint on summary judgment by the trial court. What if the video showed a store employee talking to the child? Or what if the video showed an employee picking up some (but not all) of the grapes dropped on the floor? Or what if the video revealed there was no inspection of the area, as Ross claims? And what if the video showed the truly forceful nature of the fall and Holttum crying or hurt? All of this would have been indispensable in the Holttum’s defense of Ross’s motion for summary judgment.

Finally, the striking of the entire declaration of Holttum’s expert was clearly error. The court should have stricken (at most) a single paragraph of her declaration, which contained opinion testimony. The balance of her declaration was proper and should have been admitted.

II. ROSS’S FOUR MAIN ARGUMENTS

A. ISSUE #1: “ROSS OWED NO DUTY OF CARE TO THE PLAINTIFF BECAUSE ROSS DOESN’T SELL GRAPES”

This argument misleads the court. Holttum has *not* asserted the Pimentel exception to premises liability cases. Pimentel v. Roundup Co., 100 Wn.2d 39, 666 P.2d 888 (1983). Pimentel involved an injury sustained by the plaintiff in a self-service store. The court created an exception for self-service stores which eased the usual notice requirements in premises liability cases. Only in Pimentel cases are the products sold by the defendant, relevant to the case. In Coleman v. Ernst Home Center, the court quoted Wiltse v. Albertson's, Inc., 116 Wn.2d 452, 456, 805 P.2d 793 (1991), another premises liability case, which explained the purpose Pimentel exception:

The Pimentel rule does not apply to all self-service operations, but only if the particular self-service operation of the defendant is such that it is reasonably foreseeable that unsafe conditions *in the self-service area* might be created.

Pimentel speaks to specific self-service operations and specific operating procedures of the store. Pimentel realized that *certain departments of a store, such as the produce department*, were areas where hazards were apparent and therefore the owner was placed on notice by the activity. Hence, the actual cause of the hazard is relevant in establishing whether the unreasonably dangerous condition was continuous or reasonably foreseeable because of the *specific* self-service operation. Because Pimentel is a *limited rule* for self-service operations, not a *per se* rule, the rule should be limited to specific unsafe conditions that are

continuous or foreseeably inherent in the nature of the business or mode of operation.

Coleman v. Ernst Home Center, 70 Wn.App. 213, 218, 853 P.2d 473 (1993). (*Emphasis in original*). (Emphasis added).

Holtum was obviously a business invitee because she went to the store Ross Store to shop and she purchased goods there. Traditional premises liability analysis applies. Ross's repeated arguments concerning "continuous" or "foreseeable" dangers simply do not apply in this case. The dangerous condition in this case was created by the negligence of Ross employees in failing to enforce store policies, inattentiveness, and failing to take action if they saw what the camera captured.

B. ISSUE #2: "AN ERRANT GRAPE IS NOT A FORESEEABLY DANGEROUS CONDITION"

This is not the issue. All three Ross employees (Gartland, Kubek and Brevig) who were deposed, testified that they watched the surveillance video and saw a two or three year old child in the check-out area eating grapes from a bag and dropping at least one of them. (CP 86-104). If a jury could see the same video, they could find that store employees were negligent in failing to notice the child, return her to her parents, and prevent further eating of grapes by the child while in the store. A jury could have also

determined whether the area was actually “inspected” as Ross contends, and whether the employees were inattentive.

C. ISSUE #3: “ROSS INSPECTED THE PREMISES HOURLY BEFORE THE INCIDENT.”

Ross erroneously argues that it is immune from any premises liability as long as it performs regular inspections of its store. This is false because such an argument applies only in Pimentel cases. This is (again) not a Pimentel case.

D. ISSUE #4: “ROSS WAS NOT THE CAUSE IN FACT OR THE LEGAL CAUSE OF THE INCIDENT.”

The factual cause of Cindy Holttum’s injuries was the inattention and negligence of Ross employees to the extent that they failed to see, failed to intervene when they did see, a three-year old child walking alone, eating grapes from a bag and dropping them on the floor of the store. Not only were store employees inattentive, but they negligently failed to enforce store policies specifically intended to prevent eating food in the store. It was also a violation of store policy to permit unescorted children to roam the store alone (CP 119 at pg. 33). Even if the policies were followed, Kubek testified that he would have been fired if he actually tried to enforce the policies. (CP 118 at pg. 31). But for such negligence, Cindy Holttum would not have been injured. See

discussion of Taggart v. State, 118 Wn.2d 195, 226-227, 822 P.2d 243, at pgs. 24-26 of Holttum's opening brief. Questions of "cause in fact" are normally left to the jury. See Kim v. Budget Rent-a-Car, 143 Wn.2d, 190, 203, 15 P.3d 1283 (2001).

Legal causation involves "mixed considerations of logic, common sense, justice policy, and precedent." Hartley v. State, 103 Wn.2d 768, 777-780, 698 P.2d 77 (1985). Ross has failed to provide any analysis (beyond bare argument) to support its claim that there is no "legal causation" here. Besides quoting a definition of legal causation from Hertog v. Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999), no other case law, authority or analysis is provided to support this claim. The factual and legal cause of Holttum's injuries was the negligence of Ross employees.

III. LESSER DEFENSES RAISED BY ROSS

A. ROSS DOES NOT CONSISTENTLY ENFORCE ITS NO-FOOD POLICY

Ross claims in its brief that it "posts a no food and drink" policy conspicuously at the store entrance, and *enforces* this policy." (Page 2, *emphasis added*). This is not an accurate statement of the testimony. Store employee Matthew Kubek testified that he would get fired if he actually tried to enforce the "no food and drink" rule. (CP 118 at pg. 31).

The store manager, Dan Brevig, also violated a third company policy when he intentionally permitted the loss of the surveillance video of the entire incident. (CP103 and 138 at pg. 68). See discussion *supra*.

Washington case law has long held that a defendant's policies and procedures may be used as evidence of the standard of care, and as evidence of negligence if not followed. Kelly v. Howard S. Wright Const. Co., 90 Wn.2d 323, 338, 582 P.2d 500 (1978) (a company's own manuals or guidelines may be used as evidence of the standard of care in the industry); Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wn.2d 629, 453 P.2d 619 (1969) (same); Joyce v. State Dep't of Corrections, 155 Wn.2d 306, 324, 119 P.3d 825 (2005) (internal directives, department policies, and the like provide evidence of the standard of care and therefore are evidence of negligence); Andrews v. Burke, 55 Wn. App. 622, 626, 779 P.2d 740 (1989) ("Standards adopted by private parties or trade associations are admissible on the issue of negligence where shown to be reliable and relevant"); Bayne v. Todd Shipyards Corp., 88 Wn.2d 917, 922, 568 P.2d 771 (1977) (same).

B. IT IS A QUESTION OF FACT AS TO WHETHER ANY ROSS EMPLOYEE OBSERVED (OR SHOULD HAVE) A CUSTOMER WITH GRAPES BEFORE THE INCIDENT

Ross claims that it “did not observe any customer with grapes, or any grapes on the floor *before the incident.*” (Page 2, *emphasis in original*). Of course this claim is greatly aided by the destroyed surveillance video, which would have been the Holttum’s only meaningful way to challenge this claim.

C. STORE MANAGER DAN BREVIG ADMITS THAT HE INTENTIONALLY DESTROYED THE VIDEO IN VIOLATION OF COMPANY POLICY.

In its brief (page 2), Ross claims that the Holttums “failed to show that Ross intentionally destroyed the surveillance video of the area . . .” This is simply false, unless one unreasonably limits the definition of “intentionally destroyed” to exclude any type of passive conduct. Store manager Dan Brevig destroyed the surveillance video in the same way one might destroy a car – by simply doing nothing to maintain it.

Brevig testified that preserving a clip of video from the surveillance system was not difficult; that he had done so before but he nonetheless let the system record over the video clip of the child eating the grapes and Holttum’s fall. (CP104 and 140).

In Suazo v. Linden Plaza Assoc., L.P., 2013 NY Op 00407 [102 AD3d 570], the court also addressed the issue of a destroyed video under very similar circumstances. The court reasoned that the defendants were “on notice of a credible probability that [they would] become involved in litigation” (Voom HD Holdings LLC v. EchoStar Satellite L.L.C., 93 AD3d 33, 43 [1st Dept 2012]). The plaintiff demonstrated that defendants’ failure to take active steps to halt the process of automatically recording over 30-45 day-old surveillance video and to preserve it for litigation constituted spoliation of evidence (*id.* at 41,54). The court therefore awarded relief to the plaintiff who was burdened by the spoliation.

D. THE VIDEO WAS INDISPENSABLE TO THE CASE (P.2)

Ross claims at page 2 of its brief that Holttum failed to show “that the video was indispensable to [her] case . . .” Even Ross employees Kubek and Gartland thought the video was good or helpful in understanding what happened. (CP 112 at 5/20-25). The indispensability of the video is evidenced by the court’s willingness to grant Ross’s motion for summary judgment. Holttum was entitled to marshal all evidence relevant to Ross’s motion for summary judgment and she was deprived of the best evidence –

the video. It alone captured the entire incident from start to finish and was worth 1,000 words.

Had the Holttums had the benefit of the video in the trial court, the outcome would have been different. The video would reveal at least what Ross employees described, and probably more: an unescorted, three-year old child eating grapes in the check-out area, and then dropping of one or more grapes. Is it reasonable to believe that the destroyed video would have no effect on a judge or jury's view of Holttum's claims? Is it reasonable to believe that Ross would have destroyed the video if it was helpful to Ross's defense? Even the store security manager Kubek assumed that he video would not be destroyed. (CP 115 at pg. 20).

E. THE TRIAL COURT ERRED WHEN IT EXCLUDED THE PLAINTIFFS' EXPERT

Ross mischaracterized Joellen Gill's declaration by claiming that it consists entirely of "speculation" or "impermissible opinion." It does not--and the trial court improperly struck the entire declaration. Ms. Gill asserted in her declaration (CP 161-171) that small fruits are a known hazard to retailers in this part of the country and that they are capable of causing serious injury. This much is evident from the sheer volume of premises liability claims

brought all around the country involving grapes and slip-and-fall incidents.

Even Ross appears to concede that a grape can indeed cause serious injury to a consumer. It cited two cases in the trial court in which injuries were caused by a grape. Rojas v. Supermarkets General Corp., 656 N.Y.S. 2d 346 (1997), app. den. 698 N.E.2d 956 (N.Y. 1998) and J.H. Harvey Co. v. Reddick, 522 S.E.2d 749 (Ga. 1999). (CP 42-43). Neither case, however, was cited in their appellate brief. It is not difficult to find many other cases involving persons who alleged they slipped on grapes and were seriously injured: Maringer v. Hill, 131 N.Y. Supp. 445 (1911); Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 496 S.E.2d 33 (1998); Ritter v Meijer, Inc., 128 Mich. App 783, 341 NW2d 220 (1983); Sheehan v. Roche Brothers Supermarkets, Inc., 448 Mass. 780 (2007); Dix v. Kroger Co., 257 Ga.App. 19, 570 S.E.2d 89 (2002); Burnett v. Ingles Markets, 236 Ga.App. 865, 514 S.E.2d 65 (1999); Wallace v. Wal-Mart Stores, 272 Ga.App. 343, 612 S.E.2d 528 (2005); Mass Marketing Inc. v. Gaines, 70 SW 3d 261 (Tex. App. 2001); Brookshire Food Stores, L.L.C. v. Allen, 93 S.W.3d 897 (Tex. App. 2002); Clark v. Kmart Corp., 634 N.W.2d 347 (Mich. 2001); Malaney v. Hannaford Brothers Co., 177 Vt. 123,

861 A.2d 1069 (Vt. 2004); Williamson v. Food Lion, Inc., 131 N.C. App. 365 (N.C. 1998); Long v. National Food Stores, Inc., 262 N.C. 57, 136 S.E.2d 275 (1964); Mullen v. Winn-Dixie Stores, Inc., 252 F.2d 232 (4th Cir. 1958); McCullough v. Kroger Co., 231 Ga.App. 453, 498 S.E.2d 594 (1998); Kassick v. Spicer, 490 P.2d 251 (Ok. 1971); H.E. Butt Groc. Co. v. Resendez, 988 S.W.2d 218 (Tex. 1999); Bloom v. Fry's Food Stores, 130 Ariz. 447 (Ariz. Ct. App. 1981); Nettles v. Winn-Dixie, 496 So.2d 1296 (La.App. 1986); Sprague v. Lucky Stores, Inc., 109 Nev. 248, 849 P.2d at 323 (1993); Frederick v. Winn Dixie La., Inc., 227 So. 2d 387 (La. App. 1969); Corbin v. Safeway Stores, 648 S.W.2d 292 (Tex. 1983); Miller v. Big Sea Trading, Inc., 641 So.2d 911 (Fla. 3rd DCA 1994); Nisivoccia v. Glass Gardens, Inc., 818 A.2d 314 (N.J. 2003).

F. THE APPELLANTS' BRIEF SATISFIED THE REQUIREMENTS OF RAP 10.3(a)(5)

Ross claims in its brief (page 2) that Holttum's "Statement of the Case should be disregarded for failing to comply with the record citation requirements of RAP 10.3(a)(5)." Holttum cited to her brief in opposition to Ross's motion for summary judgment in the trial court, which contained over 80 citations to the record.

Ross's appellate brief recites virtually all of the same material facts found in Holttum's statement of the case. For

example, Ross admits that it is a “clothing and housewares dealer” (page 4); that Ross has a “no food and drink policy” (page 5); that its employees are “trained to enforce that policy by asking customers to dispose of any food or beverage” (*id.*); that on March 23, 2011, Holttum and a friend were “shopping at the Ross store in Lynnwood, Washington” (*id.*); that “the checkout area [was where the] Plaintiff fell” (page 6); that “the store has a theft surveillance camera system” (*id.*); that the “video surveillance is stored on a hard drive, and is automatically recycled and overwritten every 17 days” (*id.*); that Holttum began unloading the contents of the [shopping] cart onto the cash register countertop” (page 7); that “Holttum then moved her cart to the cart corral near the front of the store” (*id.*); that “as she walked back to the cash register, she fell in the checkout isle” (*id.*); that “[a]fter her fall, Holttum observed a flattened grape stuck to her boot” (*id.*); that “[s]he believes this grape caused her fall” (*id.*); that “she did not see the grape before she stepped on it” (*id.*); after Holttum’s fall, employees Kubek and Gartland “pulled the theft video surveillance video (sic) and reviewed it” (*id.* at note 3); “[t]he video showed a small child walking into the area where the incident occurred, possibly eating grapes”

(*id.*); and that “[m]oments later, Holttum and her friend arrived at the register” (*id.*).

Ross complains that Holttum’s statement of the case “includes statements that distort the record or simply have no evidentiary support at all”---but fails to identify a single example. In fact, the parties argue almost entirely on a single set of undisputed facts. The quarrel which is this appeal, concerns the legal interpretation of those facts, not the facts themselves.

G. ROSS FALSELY CLAIMS THAT HOLTUM “FIRST GIVES NOTICE OF A CLAIM NEARLY A MONTH LATER” AFTER THE FALL

This is false. Holttum was hurt when she fell at the store, according to Ross employee Sarah Gartland. (CP 94 and 151). Holttum provided her contact information to store employees at the time of the fall. She also called the store manager Brevig the next morning to report the fall. Brevig, however, took no notes and does not recall the substance of the call. (CP 103-104 and 139). Store employee Kubek also understood that the corporate office was notified of Holttum’s injury within 24 hours after it occurred. (CP 100 and 116). Holttum acted quickly in all respects.

H. ROSS HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE GRAPE

Ross claims in its brief (page 3) that “Holtum has no evidence that Ross had actual or constructive knowledge of the grape on the store floor prior to the incident.” Ross later emphasizes this claim:

It is undisputed that neither Ross nor its employee caused the unsafe condition, i.e., dropped the grape on the floor. *So the only question [in this appeal] is whether Ross had actual or constructive knowledge of the errant grape on the ground.*

Page 14. (*Emphasis added*).

This argument brings back into focus again, the surveillance video which Ross intentionally destroyed. Holtum’s best chance of proving actual or constructive knowledge to the trial court, was the surveillance video. The loss of the video eliminated any possibility that Holtum could show the trial court that Ross employees either knew or should have known of the unsafe condition before Holtum ever arrived at the checkout stand.

The testimony of employees who saw the video is conflicting. Mr. Kubek testified that approximately 20 to 30 minutes passed from the time the child left the checkout area until Holtum appeared. (CP 114 at pages 13-14). What happened in this 20 – 30 minute period? Was there an inspection of the area? Was the grape on the floor obvious? It is not unreasonable to believe that

Ross's store manager would have permitted the destruction of the video if it aided Ross in a defense of Cindy Holttum's claim? The video was not destroyed by accident or without thought to the consequences – not by a manager who knew the store policies. Store rules required Dan Brevig to preserve evidence in the case of a customer or employee injury in the store. He either knowingly or recklessly disposed of the video. Reasonable minds can reach no other conclusion.

I. THE VIDEO WOULD SHOW THAT THE GRAPE ON THE FLOOR WAS A 'CONTINUOUS OR REASONABLY FORESEEABLE RISK'

Ross also claims that "Holttum has no evidence that the grape on the floor was a 'continuous or reasonably foreseeable risk,' given Ross's mode of operation, i.e., that it does not sell grapes." This is yet another Pimentel argument which has no application under the facts of this case.

J. MR. HOLTUM'S CONSORTIUM CLAIM IS "CHALLENGED"

Ross also claims in its brief (page 3) that "the trial court's grant of summary judgment on Mr. Holttum's loss of consortium claim should be affirmed where the ruling goes unchallenged on appeal." Mr. Holttum's consortium claims are derivative of his wife's claims. His claim is not viable if his wife's claim is not viable. There

is no dispute on this issue. When the Holttums filed their notice of appeal in the trial court, they sought review of “all adverse orders entered against them” in the trial court. CP 1. This included Mr. Holttum’s derivative consortium claim. It would be absurd to reverse the dismissal of Ms. Holttum’s claims while affirming the dismissal of Mr. Holttum’s consortium claim. Ross has not cited any authority to support its two-sentence argument on this issue, because none exists.

IV. ROSS’S INTENTIONAL SPOILIATION MUST RESULT IN REVERSAL

The Holttums devoted a substantial portion of their opening brief to the issue of the store surveillance video and store manager Dan Brevig’s intentional destruction of the video. (*See* pgs. 1-2, 5-8, 13-19). Ross, on the other hand, devoted precious little space and time to this issue. In fact, the video is not even discussed in the body of Ross’s “counter-statement” of the case. The facts relating to the video and its destruction are relegated to a *footnote* on page 8 of Ross’s brief. Ross does worse than merely minimize the spoliation issue in its treatment of the facts----it virtually ignores the facts of the spoliation issue.

At the same time, Ross's brief is literally *saturated* with claims that it had no actual or constructive notice of any dangerous condition that might have warranted action or warning to business invitees. Ross does not even bother to acknowledge the hypocrisy in its argument. The Holttums could very likely prove – in a very compelling way – that the store employees did have actual notice: first by way of the child, then by way of the grape(s) she left on the floor.

To remedy spoliation, the court may use its discretion to craft an appropriate sanction. Sanctions may include an adverse inference jury instruction, a rebuttable presumption applied to the evidence, summary judgment, or other sanctions. Henderson v. Tyrrell, 80 Wn. App. at 605 and fn. 3 at 606, 910 P.2d 522 (1996); Homeworks Construction, Inc. v. Wells, 133 Wn. App. 892, 138 P.3d 654 (2006). Two general factors are weighed in crafting a sanction: “(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.” Henderson, 80 Wn. App. at 607; Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 972 P.2d 475 (1999). “Whether the missing evidence is important or relevant obviously depends on the

particular circumstances of the case. Another important consideration is whether the loss or destruction of the evidence has resulted in an investigative advantage for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence.” Henderson, 80 Wn. App. at 607 (internal citations omitted). “[I]n determining the adverse party’s culpability, the trial court can consider the party’s bad faith, whether that party had a duty to preserve the evidence, and whether the party knew that the evidence was important to the pending litigation.” Homeworks, 133 Wn. App. at 900. “[A] party may be responsible for spoliation without a finding of bad faith.” *Id.*

A litigant or a potential litigant has a duty to preserve evidence in its possession that it knows or should know is relevant to litigation or might lead to the discovery of admissible evidence. Leon v. IDX Sys. Corp., 2004 WL 5571412, *3 (W.D.Wash. Sept. 30, 2004), *aff’d*, 464 F.3d 961 (9th Cir. 2006). The duty attaches even before a complaint is filed. *Id.*; *In re Napster, Inc. Copyright Litig.*, 462 F.Supp.2d 1060, 1068 (N.D. Cal. 2006).

Cases such as Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y.2003), have focused attention on spoliation in the sense of a duty to preserve evidence for litigation. But spoliation

is more than that; it also encompasses the “intentional destruction, mutilation, alternation or concealment of evidence that may be used by another party in pending or future litigation.” See 7 MOORE’S FEDERAL PRACTICE, § 37A.55 (3d ed. 2011).

In Mangione v. Jacobs, 37 Misc.3d 711, 950 N.Y.S.2d 457 (2012), the plaintiff in a personal injury action proceeded with surgery without first providing CR 35 examinations requested by defense counsel. In a 22-page decision, the court reviewed all available sanctions available to it for the intentional spoliation of evidence. The court specifically reviewed the authority supporting a denial of a motion for summary judgment filed by the spoliator:

Permitting a victim of spoliation who has amassed other proof to survive the spoliator’s motion for summary judgment. (See Wood v Pittsford Central School Dist., 2008 WL 5120494, 2008 US App LEXIS 24733 [2d Cir, Dec. 8, 2008, No. 07-0892-cv] [reversing lower court, Second Circuit held that intentional destruction of relevant evidence warranted that defense motion for summary judgment be denied]; Byrnie v Town of Cromwell, Bd. of Educ., 243 F.3d 93 [2001] [defendants’ spoliation of evidence was adequate grounds for denying their summary judgment motion based on qualified immunity]; Kronisch v United States, 150 F.3d 112, 125-128 [2d Cir 1998] [same; “(A)t the margin, where the innocent party has produced some (not insubstantial) evidence in support of his claim, the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the

line"], overruled on other grounds *Rotella v Wood*, 528 U.S. 549 [2000]; *Kravtsov v Town of Greenburgh*, 2012 WL 2719663, 2012 US Dist LEXIS 94819 [2012], *supra*; *Aviva U.S.A. Corp. v Vazirani*, 2012 WL 71020, *8, 2012 US Dist LEXIS 3069, *24 ["If Plaintiffs believe that Defendants' spoliation affects their ability to dispute summary judgment, Plaintiffs may propose an appropriate adverse inference in response to any motion for summary judgment"]; *Burgos v Satiety, Inc.*, 2011 WL 6936348, *3, 2011 US Dist LEXIS 149707, *6-7 [ED NY, Dec. 30, 2011, No. 10-CV-2680, Gleeson, J.]; *Volcan Group, Inc. v T-Mobile USA, Inc.*, 2011 WL 6141000, 2011 US Dist LEXIS 142159 [WD Wash, Dec. 9, 2011, No. C10 711 RSM] [striking all motions other than the spoliation motion and staying all proceedings, recognizing that the remedies for eviscerating a party's case takes precedence over any other motion]; *Nicholson v Board of Trustees for the Conn. State Univ. Sys.*, 2011 WL 4072685, 2011 US Dist LEXIS 103094 [D Conn, Sept. 12, 2011, No. 3:08cv1250 (WWE)] [dispositive motion by defendants for dismissal or summary judgment would be denied as a sanction for spoliation].)

37 Misc.3d at 730-731. (Emphasis added).

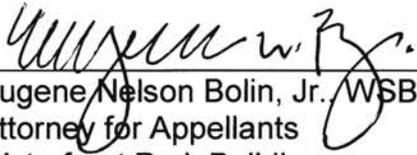
Spoliation is perhaps the key legal issue in this appeal. Ross knowingly destroyed the best evidence of the plaintiffs' claims against it just 17 days after the incident occurred. By then, everyone at Ross – from the Alderwood Store to corporate headquarters – knew about her fall and that she had taken steps to report it. Yet without any notice to Holttum, they destroyed the video. Worse, their store manager, Dan Brevig, did so in

contravention of the company's explicit policy to preserve evidence when an injury occurred. For all of these reasons, Ross's motion for summary judgment should be reversed.

V. CONCLUSION

The Holttums respectfully request that this Court reverse the trial court's summary judgment and remand this case for trial.

RESPECTFULLY SUBMITTED this 29th day of April, 2013.



Eugene Nelson Bolin, Jr. WSBA No. 11450
Attorney for Appellants
Waterfront Park Building
144 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 29, 2013, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk
Court of Appeals – Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

via U.S. Mail
 via E-mail
 via Facsimile
 via Overnight Mail

D. Michael Reilly, WSBA #14674
Jacob M. Downs, WSBA #37983
Laura T. Morse, WSBA #34532
Lane Powell, PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101
206-223-7000
Email: reillym@lanepowell.com
Email: downsj@lanepowell.com
Email: morsel@lanepowell.com

via U.S. Mail
 via E-mail
 via Facsimile
 via Overnight Mail

DATED this 29th day of April, 2013, at Edmonds, WA.



Counsel for Appellants
Eugene Nelson Bolin, Jr., (WSBA No. 11450)
Waterfront Park Building
144 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165

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