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No. 69819-2-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
STATE OF WASHINGTON
DR1

ANN P. GORES,

Plaintiff/Appellant,

v.

SAFEWAY INC.,

Defendant/Respondent/Cross-Appellant.

BRIEF OF RESPONDENT
AND
OPENING BRIEF ON CROSS-APPEAL

John T. Kugler, WSBA #19960
Turner Kugler Law, PLLC
4700 42nd Ave SW, Ste. 540
Seattle, WA 98116
(206) 659-0679
Attorney for Respondent

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The superior court abused its discretion in prohibiting discovery of relevant, unprivileged records (credit card statements) relating to Gores' activities before and after Gores' fall without a showing of harm or "good cause" to prohibit discovery.

Issue Pertaining to Assignment of Error

Whether credit card statements, which show activities which involve spending, are relevant, not privileged and discoverable where a plaintiff in a personal injury action alleges that she is no longer able to engage in activities that she was able to engage in before the alleged injury.

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I. INTRODUCTION

The superior court correctly applied Washington law in dismissing Gores' premises liability claim as a matter of law since there is no evidence that Safeway had actual or constructive notice of the condition which allegedly caused Gores to fall.

The superior court also correctly determined that the *Pimentel* exception to the notice requirement is inapplicable here because there is no evidence that customers, in serving themselves, spill egg whites out of their containers and onto the floor in the subject area, much less evidence of a history showing that such an occurrence is continuous and reasonably foreseeable.

Gores' accusations of "spoliation" of evidence are unsupported by any evidence that Safeway intentionally destroyed anything. Gores' accusations that a claims adjuster told her that there was video of the incident are self-serving and untrue. There was no camera coverage in the aisle where the incident occurred.

II. CROSS-APPEAL ASSIGNMENT OF ERROR

Assignment of Error. The superior court abused its discretion in prohibiting discovery of relevant, unprivileged records (credit card statements) relating to Gores' activities before and after Gores' fall without a showing of harm or "good cause" to prohibit discovery.

Issue Pertaining to Assignment of Error. Whether credit card statements, which show activities which involve spending, are relevant, not privileged and discoverable where a plaintiff in a personal injury action alleges that she is no longer able to engage in activities that she was able to engage in before the alleged injury.

III. STATEMENT OF THE CASE

1. Gores' Slip and Fall.

In the early afternoon of December 2, 2012, Plaintiff/Appellant Ann Gores arrived at a Bellevue area Safeway store to purchase eggs and coffee. (CP 654) She walked down the aisle containing the eggs and put a dozen in her basket. (CP 655) After she placed them in her hand basket, Gores turned to walk away, slipped and fell. (CP 655) The area was well lit but she did not notice anything on the floor before her fall. (CP 656) She did not notice anything amiss regarding the way the eggs were displayed. (CP 656-57)

After she fell, Gores noticed a clear liquid on the floor which she guessed was egg white.¹ (CP 658-59) Gores had been carrying eggs in her hand basket when she fell. (CP 655, 709) Gores

¹ In discovery and in its motion for summary judgment, Safeway assumed that it was egg white as Gores alleged. Contrary to statements in Gores' brief, there is no evidence in the record that anyone from Safeway ever determined what the substance was.

continued her shopping and picked up another item or two, including coffee, before walking to the cashier to check out. (CP 663, 710)

While checking out, Gores told the checker about her fall and the liquid on the floor. (CP 662) The checker asked if Gores was all right and Gores asked to see the manager. (CP 662) The assistant manager who responded also asked Gores if she needed any medical attention, but Gores declined. (CP 664) After Gores reported that she had fallen, store personnel went to the scene and photographed the substance Gores reported. (CP 237)

Gores does not know how the egg white-like substance came to be on the floor or how long it was there. (CP 664). Safeway was not aware of the condition before Gores' fall.

2. Safeway's Housekeeping.

Safeway has policies which make floor safety a priority. (CP 665) The floors are cleaned by a commercial floor cleaning company every night. (CP 665) Employees do cleanups as needed during the day. (CP 665-666) Safeway requires all employees to keep an eye out for hazardous conditions on the store's floors and to immediately address them when discovered. (CP 666).

Since it is possible for substances to get spilled on the floor without the knowledge of any employee, Safeway tries to find spills

and other floor hazards by doing regular floor inspections known as “sweeps” throughout the day. (CP 666) It assigns specific employees the task of periodically walking all of the store’s floors looking for spills or possible safety hazards. (CP 666) Those employees are trained to immediately clean up any spills or otherwise correct any hazards which they may find. (CP 666).

Safeway’s corporate policy is that stores inspect and/or sweep the retail floor area approximately once every sixty minutes. (CP 760) The store where Gores fell had a practice of inspecting floors even more frequently (twice per hour). (CP 666) After completing each inspection and ensuring that the floors are in satisfactory condition or have been made to be in a satisfactory condition, the employee doing the floor inspection is trained to log the inspection on the time clock using their employee card. (CP 666-67, 928). Doing so creates a record of the precise date and time when floor inspections are completed and which employee did them. (CP 667, 928) This floor inspection record is preserved in the same fashion as payroll data and is permanently retained. (CP 667, 928) This record is referred to by Safeway as a “sweep log” and is Safeway’s official record of inspections and who did them. (CP 667, 928)

Safeway trains every new employee about the need to keep the store clean and safe for customers. (CP 666) All employees receive computerized training and are trained by a mentor on-the-job. (CP 666) Safeway also has monthly safety meetings with employees to discuss various safety issues. (CP 666)

Store managers and supervisors also walk the sales floor many times throughout each day to keep an eye on the store's condition and the job being done by its employees. (CP 668) The store manager reviews the sweep log after each day to ensure that regular floor inspections are being done. (CP 667, 928)

The sweep log for the day of Gores' fall is at CP 670. Gores has alleged that the incident occurred just around 1:00 p.m. (CP 709) The sweep log reflects that, before that time, employees conducted and logged twenty floor inspections on the day of the subject incident. (CP 667, 670) The most recent inspections before Gores' fall were:

TIME STAMP	CONVERTED TIME	EMPLOYEE
11.16	11:10 a.m.	by Alex Barcinae
11.76	11:46 a.m.	by Cynthia Ast
12.03	12:02 p.m.	by Cynthia Ast
12.85	12:51 p.m.	by Cynthia Ast

(CP 667, 670)² The last was about ten minutes before the fall.

² The time clock records time to the hundredths of an hour rather than in minutes. (CP 667)

Cynthia Ast did most of these inspections and Gores took her deposition. (CP 727) Ast went down every aisle when she did her inspections. (CP 826) There was no egg white or other liquid substance on the floor in the aisle where the eggs are located when Ast did her floor inspections before the subject incident. (CP 674) Ast has never seen egg whites spilled on the floor. (CP 674)

The store's safety policies and procedures have been effective in keeping the dairy aisle where the eggs are located and where Gores fell in a safe condition. (CP 668) There has been no problem with egg white getting on the floor or of people slipping or falling in front of the eggs before or since Gores' fall. (CP 200, 668)

There is no evidence that anyone from Safeway had knowledge of the condition which Gores alleges caused her to fall. There is no evidence as to when the substance came to be on the floor, nor evidence as to how long it was there, nor that it existed long enough for Safeway to have had an opportunity to discover and remedy it. There is no evidence of any recurring problem with egg whites or other similar substances being spilled by customers in the store's dairy aisle. None of the employees who have given testimony in this matter is aware of such an occurrence occurring before or since Gores' accident.

3. No Intentional Destruction of Evidence or Bad Faith Motive.

a. No Store Security Video of Incident.

After Gores claimed that she was injured, a claims adjuster for Safeway looked for video of the incident from Safeway's security cameras by contacting store management and personally reviewing the closest cameras to the area of the incident. (CP 906, 910) However, none of the store's cameras covered the area of the store where Gores fell. (CP 906, 910, 913, 915) Consequently, there never was any video of the area where Gores fell. (CP 772, 902, 906, 922, 926, 927) The adjuster did not find any relevant images on Safeway's security video system. (CP 806)

Gores confirmed this during discovery by taking depositions of the claims adjuster (CP 915), the store's manager (CP 926) and a manager of store security video systems (CP 922). During discovery, Safeway produced an image from every security camera in the entire store which shows the view of each camera so Gores could see for herself. (CP 806, 902)

b. Daily Floor Inspection Assignment Sheet.

During discovery, Gores requested production of assignment sheets that the store had used to assign employees to do particular

floor inspections around the time of the 2010 incident. (CP 806) The store normally kept the old assignment sheets in the store's attic, but when the store manager looked for the ones Gores requested from 2010, she was unable to find them. (CP 807, 928-29)

The daily assignment sheets are only used temporarily by the store to help the checker assigned to make sure that the floor inspections are being done keep track of the inspections during the day because the checker does not have easy access to the official time clock data. (CP 928) After each day is over, the store manager printed the official sweep log from the time clock and checked it against the assignment sheet, after which, the daily assignment sheet was no longer used. (CP 928)

The official sweep log contains more detail than the assignment sheets. (CP 929) In addition to recording the employee who performed each inspection, the official log includes the different areas of the store that were inspected and the precise time that the inspections were logged. (CP 929) There is nothing on the assignment sheets which is not on the official sweep log. (CP 929)

4. Denial of Safeway's Request for Credit Card Statements.

Gores is a sixty-three year old woman who underwent arthroscopic surgery to repair tears in the meniscus of both of her

knees. (CP 17, 19) Gores claimed that the condition in her knees and need for surgery was caused by her fall at Safeway's store. (CP 19-21) Safeway contended that these were degenerative tears caused by normal aging.

Gores' allegations include that she "was physically active" before her fall, that the fall caused her to have physical limitations, that her "life has changed dramatically as a result of" the fall, that she previously enjoyed recreational activities in which she is now unable to participate, and that her injuries have rendered her unable to "use her legs to exercise." (CP 17, 19-21)

With respect to these allegations, Safeway propounded Interrogatory No. 26 (seeking identification of credit cards used to pay for things in which the Gores participated during the period January 1, 2010, to the present) and Request for Production No. 9 (requesting monthly credit card statements for credit cards used to pay for things in which the Gores participated during the period January 1, 2010, to the present). (CP 23-25) These requests were narrowly tailored to credit cards used to pay for things in which Gores participated for the period beginning eleven months before her fall. (CP 23-25)

Safeway had previously stipulated to a protective order providing that "all materials or information produced by any party in

this litigation shall be used by the non producing party only for purposes of this litigation unless reasonably necessary for the prosecution of the litigation.” (CP 7-8)

Gores refused to provide any of the information Safeway requested about her credit card use for activities she participated in before and after the subject incident. (CP 28-32) Safeway filed a motion to compel discovery. (CP 9-13) The superior court not only denied the motion but prohibited Safeway from engaging in any discovery regarding Gores’ credit card use to determine her activities before and after the subject incident, and did so without a showing or finding of “good cause” as required by CR 26(c). (CP 50-51)

IV. ARGUMENT

1. Standard of Review.

The standard of review for an order of summary judgment is *de novo*. *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn.App. 854, 858, 28 P.3d 799 (2001). The appellate court will consider only the evidence and issues called to the attention of the trial court. RAP 9.12.

Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue as to any material fact, and that the moving party

is entitled to judgment as a matter of law. CR 56(c). A defendant in a civil action is entitled to summary judgment when there is an absence of evidence supporting an element essential to the plaintiff's claim. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 224-26, 770 P.2d 182 (1980). A failure of proof concerning an essential element of the plaintiff's case renders all other facts immaterial. *Young v. Key Pharmaceuticals*, 112 Wn.2d at 225. The primary purpose of the summary judgment rule is to secure a just, speedy, and inexpensive determination of every issue by avoiding an unnecessary trial. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

2. Failure of Proof on Notice Element.

Landowners are not insurers of a business invitee's safety. *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 221, 802 P.2d 1360 (1991). The mere presence of liquid on the floor where the plaintiff slipped is not enough to prove negligence on the part of the owner or occupier of the building. *Wiltse v. Albertsons, Inc.*, 116 Wn.2d 452, 459-60, 805 P.2d 793 (1991); *Brant v. Market Basket Stores*, 72 Wn.2d 446, 448-50, 433 P.2d 863 (1967); *Merrick v. Sears Roebuck & Co.*, 67 Wn.2d 426, 429, 407 P.2d 960 (1965).

It is a basic principle of negligence that the duty to use due care is predicated upon the knowledge of a danger:

As a general rule, a possessor of land is not liable to an invitee unless the possessor of land knew or should have known that the condition presented an unreasonable risk of harm, could not reasonably expect its invitees to realize the risk themselves, and failed to make the condition reasonably safe or warn the invitee.

Trueax v. Ernst Home Center, Inc., 70 Wn. App. 381, 387, 853 P.2d 491 (1993). Stated in another fashion, a landowner has no duty to protect invitees from dangerous conditions of which the landowner has no knowledge. *Sorenson v. Uddenberg*, 65 Wn. App. 474, 478, 828 P.2d 650 (1992); *Wiltse v. Albertson's Inc.*, 116 Wn.2d at 453.

In *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994), the Washington Supreme Court re-emphasized the principle that for a landowner to be liable to a customer for an unsafe condition of the land, the owner must have actual or constructive notice of the unsafe condition:

[It is a] basic and well established principle that for a possessor of land to be liable to a business invitee for an unsafe condition of the land, the possessor must have actual or constructive notice of the unsafe condition. Constructive notice arises where the condition "has existed

for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." The plaintiff must establish that the Defendant had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the plaintiff of the danger.

Ingersoll, 123 Wn.2d at 652 (internal citations omitted). The plaintiff has the burden of proving that the defendant had actual or constructive knowledge of an unsafe condition. *Wiltse v. Albertson's Inc.*, 116 Wn.2d at 459; *Coleman v. Ernst Home Center*, 70 Wn. App. 213, 217, 853 P.2d 473 (1993); *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983).

The notice requirement insures liability attaches only to owners once they have become or should have become aware of a dangerous situation. *Iwai v. State of Washington*, 129 Wn.2d 84, 97, 915 P.2d 1089 (1996); *Wiltse*, 116 Wn.2d at 453-54.

Here, there is no evidence that anyone from Safeway had actual knowledge of the condition that allegedly caused Gores to slip prior to her accident, much less that anyone knew long enough before she fell to have the opportunity to clean it up. There were no Safeway employees in the area at the time of the incident. Safeway learned of

the condition when Gores told a cashier when she paid for her groceries after her fall.

Similarly, there is no evidence that Safeway had constructive notice of the clear liquid on the floor before Gores fell, either. “Constructive notice arises where the condition ‘has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.’” *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d at 652 (quoting *Smith v. Manning’s, Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942)). “The constructive notice rule requires the plaintiff establish how long the specific dangerous condition existed in order to show that the proprietor should have noticed it.” *Wiltse v. Albertson’s, Inc.*, 116 Wn.2d at 458 (emphasis added).

Here, constructive notice cannot be proven because there is no evidence as to how long the substance Gores claims she slipped on had been there, nor evidence which could support a conclusion that it had existed long enough that Safeway should have noticed it. Consequently, there is a failure of proof of constructive notice as well.

Since Gores failed to prove the essential element of notice, all other issues – including the accuracy of Safeway’s “sweep logs”, whether or not the employee who did them has a present recollection

or is credible,³ whether Safeway acted reasonably, etc. – are immaterial. *Young v. Key Pharmaceuticals*, 112 Wn.2d at 225 (a failure of proof concerning an essential element of the plaintiff's case renders all other facts immaterial). The superior court correctly granted summary judgment.

3. Exception to Notice Requirement Does Not Apply

Whether notice is an essential element of Gores' claim is an issue of law, not fact. Because there is no evidence that egg whites continuously get on the floor, the exception to the notice requirement is inapplicable.

The mere fact that customers and store employees take items off shelves does not trigger application of the *Pimentel* exception to the notice requirement. "The *Pimentel* exception is a narrow one limited to specific unsafe conditions in specific areas that are inherent in the nature of self-service operations." *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d at 653; *Wiltse v. Albertson's*, 116 Wn.2d at 461. In *Ingersoll*, the Supreme Court said "[w]e note that even if the injury

³ "[T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment . . . [and] may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627 (1991).

does occur in the self-service department of a store, this alone does not compel application of the *Pimentel* rule . . . the *Pimentel* rule does not apply to the entire area of the store in which customers serve themselves.” As the Supreme Court stated in *Wiltse v. Albertson’s*, “*Pimentel* reaffirmed that most plaintiffs still need to show that a proprietor had actual or constructive notice of an unsafe condition” and the *Pimentel* rule “should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation.” 116 Wn.2d at 460, 461.

In *Wiltse v. Albertson’s*, the plaintiff slipped and fell in a grocery store in water that came from a leak in the roof. *Wiltse*, 116 Wn.2d at 453. The store manager had been past the location minutes before the accident happened and did not notice any water and there was no evidence that the store had any notice of the water on the floor until after the plaintiff fell. *Id.*, at 455-56. The court held that the *Pimentel* exception was inapplicable. *Id.*, at 462. The Supreme Court stated: “[w]e will not abandon principles of negligence and make ‘self-service’ stores liable whether they were aware or should have been aware of a dangerous condition.” *Id.*, at 454.

The Supreme Court again considered the application of *Pimentel* to a spill of which the premises owner had no notice in

Ingersoll v. Debartolo, Inc., *supra*, where the plaintiff slipped and fell on a clear substance at the defendant's mall. *Ingersoll*, 123 Wn.2d at 651. There was no evidence that the premises owner had notice of the spill. *Id.*, at 651-52. Although there were food and drink vendors in the mall, there was no evidence of where the substance in issue came from. *Id.*, at 654. The Court held that *Pimentel* was inapplicable and that the plaintiff's failure to prove that the mall had notice of the condition entitled the mall to summary judgment. *Id.*, at 655.

We note that even if the injury does occur in the self-service department of a store, this alone does not compel application of the *Pimentel* rule. Self-service has become the norm throughout many stores. However, the *Pimentel* rule does not apply to the entire area of the store in which customers serve themselves. Rather, it applies if the unsafe condition causing the injury is continuous or foreseeably inherent in the nature of the business or mode of operation. There must be a relation between the hazardous condition and the self-service mode of operation of the business.

Ingersoll v. DeBartolo, Inc., 123 Wn.2d at 653-654 (citations omitted).

Since *Wiltse* and *Ingersoll*, Washington courts have continued to hold that the *Pimentel* exception is not applicable merely because substances have been spilled in a store. See *Arment v. Kmart Corp.*,

79 Wn. App. 694, 700, 902 P.2d 1254 (1995) (store entitled to summary judgment where no evidence that store had notice of soda spilled between clothing racks; *Pimentel* exception held inapplicable); *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 896 P.2d 750 (1995) (store entitled to summary judgment where no evidence that store had notice of shampoo spilled in coffee aisle; *Pimentel* exception held inapplicable); *Schmidt v. Coogan*, 135 Wn. App. 605, 145 P.3d 1216 (2006), *rev'd on other grounds*, 162 Wn.2d 488, 173 P.3d 273 (2007) (*Pimentel* exception held inapplicable where a plaintiff slipped on shampoo spilled in the shampoo aisle).

As the superior court correctly noted, since *Pimentel* and the Supreme Court's subsequent decisions clarifying its application, the only appellate decision in which a plaintiff has been excused from proving that the defendant in a premises liability case had notice of the subject condition (aside from cases where the condition was caused by the defendant) is *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn.App. 854. In *O'Donnell*, the plaintiff slipped and fell on a piece of produce a few steps inside the check out aisle where customers were responsible for unloading their groceries from their carts onto the conveyor belt at the check stand. 107 Wn. App. at 856. Unlike eggs, produce is typically unpackaged. And unlike in the present matter,

the plaintiff in *O'Donnell* presented evidence that it was not unusual for produce to fall on floor in the process of customers unloading their grocery items from the grocery carts onto the conveyor belt at the check out stand. *Id.* at 857. The plaintiff in *O'Donnell* also presented evidence that employees knew that it was not unusual for this to occur in the check out stand. *Id.*

There is no similar evidence in the present matter. There is no evidence that egg white spills or other substances regularly occur at the location where Gores fell. Gores speculates that it might be possible for eggs to break in their cartons, but this does not mean that there was a recurring condition of egg whites getting spilled on the floor. Gores also speculates that customers are prone to dropping eggs on the floor, but again presented no evidence that this has happened, much less that it is a continuing situation or known to employees. In fact, there is no evidence of egg whites or other liquid ever getting spilled at this location on any other occasion.

The only evidence of a prior spill Gores points to is that an employee once cleaned up a container of cottage cheese that had been dropped by a customer. (CP 825, 826-27) There is no evidence that this occurred before Gores' fall. This does not support

an inference that egg white spills or similar liquids are continuous and foreseeably inherent in the nature of Safeway's operation.

Since Gores presented no evidence that she was injured as a result of a condition which was continuous or foreseeably inherent in the nature of the business, the narrow *Pimentel* exception to the notice rule is inapplicable.⁴

4. Reasonableness of Safeway's Housekeeping is Not a Material Issue.

Gores argues that there are issues of fact regarding the reasonableness of Safeway's housekeeping, including how employees inspected the store and recorded their inspections. In light of the failure of proof on the essential element of notice, these facts are immaterial. A failure of proof on an essential element renders all other facts immaterial. See, e.g. *Young v. Key Pharmaceuticals*, 112 Wn.2d at 225.

⁴ Gores makes argument based upon Part II of the first opinion in *Iwai v. State of Washington*, 129 Wn.2d 84, 915 P.2d 1089 (1989), which argued for an expansion of the *Pimentel* exception to the notice rule. However, Part II was a minority opinion supported by only four justices. It was rejected by the other five. 129 Wn.2d at 102 (J. Alexander, concurring) ("I disagree with the reasoning set forth in part II of the opinion"); 129 Wn.2d at 103 (J. Guy, concurring and dissenting, with concurrence of J. Durham, J. Madsen and J. Pekelis concurring) ("As to part II, I dissent to the portion of the opinion that holds a landlord liable without actual or constructive notice of a dangerous condition and a reasonable time for repair.")

Gores argues that *Carlyle v. Safeway, Inc.*, *supra*, 78 Wn. App. 272, supports her argument that issues of fact concerning housekeeping preclude summary judgment. It does not. The superior court in *Carlyle* granted Safeway's motion for summary judgment in that case based on the plaintiff's failure to show that Safeway had actual or constructive notice of the subject spill (shampoo). *Id.* at 274. Like here, the plaintiff in *Carlyle* argued that there was an issue of fact based on Safeway's housekeeping practices, but the Court of Appeals rejected this argument and affirmed summary judgment, stating:

there is no basis for submitting the issue to a jury unless there is some evidence from which it could infer that hourly inspections (or even two or three inspections per 8- to 9-hour shift) were not adequate because the risk of spilled shampoo in the coffee aisle required greater vigilance.

Id. at 278.

The same is true here. Gores produced no evidence from which a jury could infer that the twice hourly inspections being done by Safeway's store were inadequate to deal with the risk of egg white or other liquid substance getting spilled where Gores fell.

In addition to the reason stated by Division III in *Carlisle*, it is also true that any issue of fact regarding housekeeping practices is immaterial unless the plaintiff first presents evidence as to how long the specific dangerous condition existed – an essential element of constructive notice. *Wiltse v. Albertson's, Inc.*, 116 Wn.2d at 458 (“The constructive notice rule requires the plaintiff establish how long the specific dangerous condition existed in order to show that the proprietor should have noticed it.”) Absent evidence to prove this essential element, issues regarding the adequacy of housekeeping practices are immaterial.

Without citation to any authority, Gores also argues that Safeway owed a “higher standard of a care.” (Gores Opening Brief, p. 17) There is no authority supporting this proposition. It does not accurately state the law. Moreover, whether or not Safeway complied with the applicable standard of care is immaterial in light of the failure of proof on the essential element of notice.

5. The Opinions of Tom Baird Were Not Disclosed As Required by Discovery Rules and a Court Order and Were Insufficient to Raise A Genuine Issue of Material Fact.

Gores submitted an “expert” declaration which stated that Baird had reviewed the summary judgment pleadings and which stated his

opinion that they showed a genuine issue of material fact. (CP 831) Gores argues that the superior court abused its discretion in “striking” this declaration but, although the superior court would have been justified in striking Baird’s declaration, it did not do so. Judge Robinson merely commented that “I am hard-pressed to think that whether or not there’s a genuine issue of material fact is a subject for expert testimony” (RP 49) and her conclusion that “much as I like help, I don’t think it’s appropriate for me to look to him for this decision” (RP 52). Judge Robinson was right.

a. Baird’s Declaration Contained Inadmissible Conclusory and Legal Opinions.

Baird’s declaration did not comply with ER 702 and attempted to state inadmissible conclusory and legal opinions.

An expert’s opinion must “assist the trier of fact” and must also be based on “scientific, technical, or other specialized knowledge.” ER 702; *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008), *rev. denied*, 165 Wn.2d 1004 (2008). “[A]n expert’s testimony for summary judgment must be supported by the specific facts underlying the opinion.” *Id.* (citations omitted). “A fact is an event, an occurrence or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from

supposition or opinion.” *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). “[S]tatements of ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to overcome a summary judgment motion.” *Doty-Fielding*, 143 Wn. App. at 566. See also *Vicwood Meridian Partnership v. Skagit Sand and Gravel*, 123 Wn. App. 877, 882, 98 P.3d 1277 (2004) (“conclusory opinions are not material facts admissible in evidence showing there is a genuine issue for trial.”) No witness is permitted to express an opinion of law. See *State v. Clausing*, 147 Wn.2d 620, 628-30, 56 P.3d 550 (2002).

Baird’s declaration failed to conform to these rules. Baird simply read the summary judgment pleadings and attempted to tell the court how to decide Safeway’s summary judgment motion. (CP 831) (“I have been asked by Plaintiff Ann P. Gores’ counsel to review Safeway, Inc.’s (“Safeway”) Motion for Summary Judgment and the records in this case and to form opinions regarding whether there are genuine issues of material fact regarding Safeway’s liability for the injuries sustained by Ms. Gores when she fell . . .”) Baird’s declaration contains no indication that Baird has any training or experience working in the grocery industry. Baird did no inspection, testing or measurement of conditions at the premises. It is apparent

from the declaration that Baird has never been to the subject premises. Baird offered no explanatory theory or method that is generally accepted in the scientific community, as required by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990). See also *State v. Black*, 46 Wn. App. 259, 730 P.2d 698 (1986), *affirmed*, 109 Wn.2d 336 (1987).

Baird's declaration offered only inadmissible argument and opinions of law as to whether there are issues of fact, which is the court's function. See *State v. Clausing*, 147 Wn.2d at 628-30 ("Each courtroom comes equipped with a legal expert, called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.")

b. Baird's Declaration Was Insufficient to Raise a Genuine Issue of Material Fact on the Notice Element.

Baird's declaration (CP 831) failed to set forth specific facts, as required by Civil Rule 56(e), relevant to the notice issue. It contained no fact indicating that Safeway had actual notice of the substance on the floor before Gores' fall, nor any fact relating to how long the substance had been present before Gores' accident. The declaration did not provide any factual basis for an opinion on these subjects.

The superior court correctly determined that the Baird declaration was insufficient to avoid summary judgment in light of the lack of proof on the notice element of Gores' claim.

c. Gores' Nondisclosure of Baird Violated Court Rules and a Court Order.

Gores never disclosed Baird's identity or opinions in response to Safeway's interrogatory seeking disclosure of experts and their opinions (CP 901-02), nor as required by the court's case schedule order (CP 60).

Gores was under a duty to supplement her answer and to seasonably disclose experts and their opinions. CR 26(e)(1)(B). "It is well settled that '[e]xclusion of the expert's testimony is an appropriate sanction for failure to supply . . . supplementary responses.'" *M/V La Conte, Inc. v. Leisure*, 55 Wn. App. 396, 402, 777 P.2d 1061 (1989); *Detwiler v. Gall, Landau & Young Constr. Co.*, 42 Wn. App. 567, 572-73, 712 P.2d 316 (1986); *Rupert v. Gunter*, 31 Wn. App. 27, 32, 640 P.2d 36 (1982).

The court's case schedule order (CP 60) also required Gores to disclose primary witnesses, including experts and their opinions, no later than October 15, 2012, but Gores did not disclose Baird or any of his opinions as required by the court's case schedule order, either.

(CP 901-02) When Gores first offered Baird's opinions in response to Safeway's motion for summary judgment in December 2012, Gores did so in violation of discovery rules and a court order.

6. No "Spoliation."

Gores' allegations of "spoliation" are unfounded and unsupported by evidence. Gores made no showing that Safeway intentionally destroyed evidence nor that there was any improper/culpable/bad faith destruction of evidence.

In Washington, spoliation means "intentional destruction of evidence." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475, 478 (1999); *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). In addition, the intentional destruction must be improper, e.g. that the party acted in bad faith and has culpability. *Marshall*, 94 Wn. App. at 480; *Henderson*, 80 Wn. App. at 609. Spoliation is "a term of art, referring to the legal conclusion that a party's destruction of evidence was both willful *and* improper." *Homeworks Construction, Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006) (quoting 6 K. Tegland, *Washington Practice*, § 402.6, at 37 (Supp. 2005)).⁵

⁵ Gores cites a much older case, *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977), and quotes it out of context. *Pier*

In *Marshall*, the plaintiff claimed spoliation because the defendant destroyed the product (a treadmill) that allegedly caused injury to the plaintiff when it replaced the treadmill before the plaintiff inspected it. Both the trial court and the Court of Appeals rejected the

67, Inc. involved an appeal from the county Assessor's property valuation. The property owner (The Edgewater Hotel on the Seattle waterfront) began a series of legal actions in 1964 challenging the assessment method the county used, alleging that the valuations for 1963-1972 were unconstitutionally discriminatory because of unequal allowance of mortgage payment deductions. 89 Wn.2d at 380-81. In challenging a property tax assessment, the plaintiff was required to overcome a presumption that the Assessor's property tax valuations are valid. *Id.* at 384. Litigation continued for more than a decade. *Id.* at 380. Despite the ongoing litigation, the county did not preserve the records showing the valuation technique it used for any of the challenged years except 1968 and 1969. *Id.* at 382, 384, 386. (Although not addressed in the decision, governments also have a duty to preserve records under the Public Records Retention Act, RCW 40.14.) The property owner proved that the valuation was discriminatory for the two years in which the county had maintained records. *Id.* at 382, 386. There was no specific evidence available as to the other challenged years as a result of the county's failure to preserve records. *Id.* Given these circumstances, the Court presumed that the assessments for tax years 1963-1967 were also discriminatory. *Id.* at 386. However, the Court determined it could not conclude that discrimination existed after 1969 because no taxpayers were allowed to use mortgage deductions after 1969. (*Id.* at 386.

The present case is nothing like *Pier 67, Inc.* Record of Safeway's floor inspections (CP 670) was preserved even though no law required it. Unlike government records, there is no law which required Safeway to retain daily sweep assignment sheets. Since *Pier 67, Inc.*, Washington courts have further developed parameters regarding "spoliation" of evidence, as discuss in this brief, and those parameters include elements of intentional destruction and impropriety which do not exist here.

plaintiff's spoliation claim because there was no evidence that the treadmill was destroyed in bad faith. *Id.* at 382-83.

Here, Gores produced no evidence that Safeway intentionally destroyed anything to prevent discovery in a lawsuit. In fact, Safeway's adjuster retained everything she found when she investigated this incident and destroyed nothing. (CP 232-35, 917-918). There never was any video of the area where Gores fell because Safeway's store did not have a camera which covered that area. (CP 772, 902, 922, 926, 927) During discovery, Safeway produced an image from every security camera in the entire store which shows the view of each camera so Gores could see for herself. (CP 902) Gores' allegation that a claims adjuster told her there was video of the incident is self-serving hearsay. Gores either misunderstood what the claims adjuster told her or she is not telling the truth. Regardless, Gores presented no evidence that Safeway intentionally destroyed anything, much less that it destroyed evidence for the improper purpose of preventing its use in litigation.

The sweep assignment sheet was merely a daily sheet that the store used to assign employees to do floor inspections. It is not the official record of floor inspections and merely duplicates some of the information in the official record, which Safeway preserved. The

sweep assignment sheet was a temporarily used during the day, does not contain any information that is not in the official sweep log record, and is not used by the store after the store manager has compared it with the official record. (CP 929)

The sweep assignment sheets and video from cameras which did not show the subject area of the premises have no relevance to the material issue on summary judgment, *i.e.* whether Safeway had notice of the substance on the floor where Gores fell.

Gores cites no legal authority for her contention that Safeway had a duty to preserve sweep assignment sheets or irrelevant video from cameras that did not cover the area of the premises in issue. There is no law which required Safeway to preserve these things. The pre-litigation letter from Gores' attorney, which demanded the claims adjuster's investigation file, did not mention either the sweep assignment sheets or video from cameras which do not show the area of the store where Gores fell. (CP 816, 818) After receiving the attorney's letter, Safeway's adjuster did what Gores' attorney requested: she retained her entire investigation file, including everything she found when she investigated this incident. (CP 232-35, 917-918) There was no bad faith or culpability.

The inability to find an old document that is no longer used does not mean that the document was intentionally destroyed to prevent its discovery in litigation. Unintentional destruction of evidence is not sanctionable. Intentional destruction of evidence without culpability is not sanctionable, either. See *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. at 382-83 (finding no error in superior court's rejection of spoliation claim based on defendant's destruction of treadmill); *Henderson v. Tyrell*, 80 Wn. App. at 606-11 (finding no error in superior court's rejection of spoliation claim based on defendant's destruction of car after accident even though the plaintiff's attorney had written a letter which specifically requested that the car be preserved); *Homeworks Construction, Inc. v. Wells*, 133 Wn. App. 892, 138 P.3d 654 (2006) (holding that superior court abused its discretion in sanctioning the defendants for "spoliation" where the defendants had no culpability).

Gores cites *Equal Employment Opportunity Commission v. Fry's Electronic's Inc.*, 2012 WL 1642305, No. C10-1562RSL (W.D. Wash. May 10, 2012), a trial court decision which applies federal, not Washington state, law. *Fry's* involved a motion for sanctions where a defendant wilfully violated a discovery order. *Id.* Safeway did not violate a discovery order.

The superior court did not abuse its discretion in declining to sanction Safeway at Gores' request.

7. No Abuse of Discretion in Denying Gores' Motion to Strike Second Declaration of Patricia Johnson.

Gores made her "spoliation" accusation in response to Safeway's motion for summary judgment. (CP 667-68) Safeway rebutted Gores spoliation accusation in its summary judgment reply (CP 898-99) and supported the facts it asserted on this issue, in part, with the Second Declaration of Patricia Johnson (CP 927). Johnson's second declaration discussed the things Gores claimed were "spoliated," explained how they were used and kept in the course of Safeway's business, and described what she did to respond to Gores' request for production of these things. (CP 927)⁶

This second Johnson declaration was properly filed in accordance with court rules. CR 56(c) (permits a moving party to file and serve "rebuttal documents"); LCR 7(b)(4)(E) (permits a moving party to reply to the nonmoving party's opposition).

⁶ To the extent that the matters addressed in Johnson's second declaration overlapped with housekeeping issues, such facts had been included in Johnson's original declaration filed with Safeway's summary judgment motion. (CP 665)

Gores relies upon authorities which address new legal arguments raised for the first time in a reply brief – not to information submitted in rebuttal to issues raised by the party opposing the motion in its response to the motion. *Yakima County (West Valley) Fire Protection Dist. No. 12*, 122 Wn.2d 371, 397, 858 P.2d 245 (1993) (reply brief raised new legal argument that right to sign or not sign an annexation petition is equivalent to right to vote and protected by constitution); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (new estoppel argument raised for first time in reply brief); *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (where summary judgment motion did not seek summary judgment on issue of proximate cause, this issue could not be raised in a reply brief).⁷

There is nothing in any of the cases cited by Gores which suggests that a party moving for summary judgment cannot file

⁷ The non-Washington case Gores cites, *Provenz v. Miller*, 102 F.3d 1478 (9th Cir. 1996), does not identify whether the “new” information was submitted to rebut a claim in the nonmoving party’s opposition or to support the motion, but it appears to address the latter. The court held that the district court erred by not allowing the non-moving party to respond to the new evidence, but it did not suggest that the new evidence should have been stricken. Unlike in *Provenz*, Judge Robinson did not prohibit Gores from filing any response.

evidence to rebut an issue raised by the nonmoving party's opposition. To the contrary, *White v. Kent Medical Center* points out that the civil rules specifically allow the moving party to file and serve rebuttal documents regarding its motion, and that "rebuttal documents" are "those which explain, disprove, or contradict the adverse party's evidence." 61 Wn. App. 168-69 (quoting Black's Law Dictionary 1139 (5th ed. 1979)).

Safeway did not raise any new issue for the first time in its reply brief. Gores – not Safeway – raised the spoliation issue. Safeway's response, including the Second Declaration of Patricia Johnson, explained and disproved Gores' allegation of spoliation and was therefore a proper "rebuttal document" submitted "in strict reply" to Gores' response to Safeway's motion.

Johnson's second declaration did not provide any new basis for summary judgment that was not set forth in Safeway's motion. The basis for the motion – the absence of evidence that Safeway had notice of the condition plaintiff slipped in and the absence of evidence under which the narrow exception to the notice requirement can properly be applied – remained the same.

There was nothing unfair about allowing Safeway to respond to Gores' spoliation accusation. She attempted to defeat Safeway's

motion by making an untrue allegation that Safeway was guilty of misconduct. The civil rules specifically permit a moving party to rebut the assertions of a party opposing a motion. Gores implied suggestion that she was surprised by the facts contained in Johnson's second declaration is disingenuous. Gores had previously taken Johnson's deposition (CP 924) and Gores set forth her legal argument and evidence on the issue when she raised the issue. (CP 687-89, 702) Gores did not request permission to file anything further on the issue and the superior court did not prohibit her from doing so.

Johnson's second declaration was properly filed in rebuttal to Gores' spoliation accusation. The superior court did not abuse its discretion when it denied Gores' motion to strike.

8. No Abuse of Discretion in Entering Protective Order to Protect Safeway's Work Product and Disallowing a Second Deposition of Safeway's Claims Adjuster.

Debbie Getz is the claims adjuster who attempted to adjust Gores' claim after Gores' reported that she was injured. (CP 329) Her job is to investigate and adjust claims, retain legal counsel and oversee litigation. (CP 329) Adjustment of claims includes communicating with claimants and their lawyers about claims, allegations and possibility of compromise. (CP 329)

Getz has no role in the operation or maintenance of the subject grocery store. (CP 330) She was not present at the store at or near the time of Gores' accident and has no personal knowledge of Gores' accident or the facts relating to it. (CP 330) She is not involved in creating documents, such as floor inspections logs or documents assigning persons the task of floor inspections, that Safeway's store personnel generate in the course of maintaining the store. (CP 330) Her knowledge of Gores' accident consists solely of her mental impressions and opinions formed in the course of investigating and adjusting Gores' claim and overseeing Safeway's defense. (CP 330)

In an attempt to determine whether there was a possibility of compromise, Getz communicated with Gores and her legal representatives about Gores' claim. (CP 330) Getz also assisted Safeway's attorney in gathering information necessary to respond to Gores' discovery requests. (CP 330)

Gores' attorney deposed Getz regarding "the efforts made by Safeway to comply with the document requests propounded upon it in this matter." (CP 340-41) Getz answered all questions about what she did to answer locate and respond to Gores' requests. (CP 330)

At the deposition, Gores' attorney did not confine questions to the topics contained in the deposition notice. (CP 330-31, 334, 340-

41, 343) In addition to asking about what was done to answer Gores' discovery requests, Gores' attorney also examined Getz about her job history as a claim adjuster, jobs she had before coming to work at Safeway, her duties as a claims adjuster at Safeway, what she did to investigate Gores' claim in 2010 and 2011 before Gores commenced this lawsuit, what information she obtained when she investigated, what witnesses she contacted, what witness statements she obtained, what video she reviewed at that time, what her attempts were to find and retain information from Safeway's security video system, and what documents she gathered during her investigation of Gores' claim. (CP 331) Gores' attorney also examined Getz about Safeway's policies and procedures relating to these and the computers she has used at Safeway. (CP 331)

At the same time that Gores took Getz' deposition, Gores' attorney gave notice of a second deposition of Getz. (CP 334, 345) When asked what the purpose of this deposition would be, Gores' counsel asserted that Getz has "personal knowledge" of Safeway documents relating to the incident, and that she intended to examine Getz about her communications with Gores during her attempt to adjust this claim. (CP 335) However, when asked whether she had any more questions for Getz at the conclusion of Getz' deposition,

Gores' attorney stated that she had no other questions for Getz at that time but insisted that she planned to take Getz deposition again "in her personal capacity." (CP 334)

Gores' notice of a second deposition of Safeway's claims adjuster was unlimited in scope. (CP 345) Although Getz spoke to witnesses and gathered documents created by others in her capacity as a claims adjuster, she has no personal knowledge of the events in issue. (CP 330)

a. Good Cause for an Order Protecting the Mental Impressions and Opinions of Safeway's Claims Adjuster.

There was good cause for a protective order. The mental impressions and opinions of Safeway's claims adjuster, which she gained in investigating and adjusting Gores' claim in anticipation of litigation (as well as during the ensuing litigation), are privileged under Civil Rule 26(b)(4). This rule also specifically provides that the court "shall" protect the representatives of a party from discovery regarding mental impression work product:

a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney,

consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

CR 26(b)(4) (emphasis added). The immunity for opinion work product – the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation – is nearly absolute and cannot be overcome by a showing of need. *In re Detention of West*, 171 Wn.2d 383, 403, 256 P.3d 302 (2011).

Taking the deposition of a claims adjuster is highly unusual and it presents concerns for the protection of privileged mental impressions and opinions. It exposes a defendant and its legal representative to harassment. Gores cited no legal authority suggesting that a claims adjuster's mental impressions and opinions should not be protected from discovery as directed by CR 26(b)(4) – and she cites none in her appeal brief.

Gores' second deposition notice was unlimited in scope. The superior court ordered that "[d]iscovery of mental impressions and opinions of Ms. Getz shall not take place." (CP 463) CR 26(b)(4) required the court to protect the opinion work product of Safeway's representative from discovery. The superior court did not abuse its discretion in doing so.

b. Prohibiting Further Deposition of Safeway's Claims Adjuster Was Not an Abuse of Discretion.

The court's July 20, 2012, order also prohibited Gores from further deposing Safeway's claims adjuster. (CP 463) There was good cause to do this as well. The superior court noted that, in response to the motion for protective order, the only new topics that Gores identified were the substance of Getz' communications with witnesses, Getz' review of "sweep logs" from December 2, 2010, and Getz comments on those documents to third parties. (CP 463) These subjects all implicate Getz' mental impressions and opinions about the case. They encompass witness statements which Getz obtained in anticipation of litigation. The court noted that Gores "has not made a showing that she is unable to interview witnesses who may have first-hand knowledge of the conditions in the Safeway when she fell." (CP 463)

On appeal, Gores argues that the court erroneously concluded that Getz's communications with Gores constituted privileged work product. (Brief of Appellant, p. 38) However, the superior court never said that the communications between Getz and Gores were privileged. (CP 462-63) At the time, Gores was seeking to depose Getz on other matters that are privileged.

The scope of discovery under Civil Rule 26(b) may be broad, but it does not authorize discovery into irrelevant matters. Safeway's claims adjuster has no personal knowledge of the events in issue. What the claims adjuster believes and what she said to Gores in the context of denying liability and exploring the possibility of compromise is irrelevant.

ER 408 specifically makes inadmissible evidence of statements made in the context of compromise negotiations. If not for this rule, parties in every lawsuit could attempt to harass their adversary by taking depositions of their claims adjusters and other representatives regarding statements that were allegedly made during communications about the claim. In the underlying motion, Gores provided no legal authority or argument as to why she should be permitted to engage in discovery as to communications with a claims

adjuster who has no personal knowledge of the events in issue, and she presents none here.

In fact, Gores herself has asserted the applicability of ER 408 in asserting immateriality and inadmissibility as to the statements communicated by her own representatives to Safeway before her lawsuit. (See CP 816, 818, in which Gores' representatives labeled their correspondence with Getz as "For Settlement Purposes Only, Inadmissible Per ER 408.") This is exactly the same kind of communication that Gores wants to depose Safeway's representative about. Would it be proper to allow Safeway to depose Gores' lawyers to determine the source of their factual assertions about this matter and what investigation they did before making their assertions?

Gores obviously believes that she can gain advantage in the litigation by harassing Safeway's claims adjuster. This discovery tactic is improper and should not be condoned. A protective order was appropriate. The superior court did not abuse its discretion in prohibiting further deposition of Safeway's claims adjuster.

c. Gores Was Permitted to Conduct Extensive Discovery.

The court's July 20, 2012, protective order was entered *after* Gores had already taken the deposition of Safeway's claims adjuster.

The court's order did not prevent Gores from conducting extensive discovery into her unfounded "spoliation" arguments, including taking depositions of the store manager, a manager of video security systems, and the claims adjuster.

V. CROSS-APPEAL

1. **The Credit Card Statements Sought by Safeway Are Relevant, Not Privileged and Discoverable.**

The fundamental principle of discovery is that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" CR 26(b)(1); *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1). Civil Rule 26(b)(1) is designed to permit a broad scope of discovery. *Ollie v. Highland Sch. Dist. No. 203*, 50 Wn.App. 639, 642, 749 P.2d 757, *review denied*, 110 Wn.2d

1040 (1988) (citing *Barfield v. City of Seattle*, 100 Wn.2d 878, 883, 676 P.2d 438 (1984)).

Safeway's discovery request for information regarding Gores' credit card use easily met this standard. Gores placed her activities before and after her fall at Safeway's store into issue. She alleged that she was "very physically active" before her fall at Safeway's store, that she is now unable to participate in the activities that she engaged in before her fall, such as golfing and other recreational activities, that she is "not able to use her legs to exercise," and that she is no longer physically active.

Credit cards are commonly used to pay expenses of or associated with activities such as shopping, travel, golfing, and other activities of daily life. Credit card statements are likely to contain detailed information about Gores' activities before and after her fall, including where she went, what kinds of things she was doing and information which may lead to other potential sources of other records relating to the activities she engaged in, such as records from places where she engaged in recreational or other physical activities. Safeway's request was calculated to lead to the discovery of objective evidence relevant to her claims about a difference in her activities before and after the alleged incident. Records of Gores' credit card

use may be the only independent, objective evidence available to judge the truth and accuracy of Gores' allegations about her activities before and after the alleged incident. The information Safeway requested is relevant.

There is no evidentiary privilege for records of credit card use. Safeway's request for these records was calculated to lead to the discovery of relevant and potentially admissible evidence. Gores did not cite any authority for prohibiting Safeway from obtaining discovery of information reflected in her credit card statements in connection with her activities before and after her fall. At one point, she cited a federal law relating to *financial institution* use of consumer financial information (15 U.S.C. § 6801), but this law specifically states that it was not intended to alter *financial institutions'* obligation to disclose customer nonpublic, personal information whenever required by law, including in response to a subpoena:

Subsections (a) and (b) of this section shall not prohibit the disclosure of nonpublic personal information . . . (8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities . . .

15 U.S.C. § 6802(e)(8). Safeway could have issued a subpoena to Gores' financial institutions to obtain her records if Safeway had been permitted to discover Gores' credit card issuers and account numbers.

Gores argued that Safeway should be restricted to asking her about her activities in her deposition and to the information she voluntarily chose to provide to Safeway (things that she herself created). But blindly asking Gores about her activities is no substitute for evidence which is uncolored by an adversary's bias and unimpaired by the adversary's memory. Gores also argued that since Safeway could ask Gores, it did not "need" information from other sources to defend itself. These arguments ignore Civil Rule 26(b), which broadly allows a party to obtain discovery as to any information that is relevant and not privileged. Rule 26 does not require a party to be limited in discovery to what its adversary says or thinks its opponent needs.

Generally, a trial court's discovery order will be reviewed for an "abuse of discretion". *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court would necessarily abuse its discretion if it based its ruling

on an erroneous view of the law.” *Washington State Physicians Ins. Exchange & Assn’ v. Fisons Corp.* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Here, the trial court gave no reason for its denial of discovery of this relevant and unprivileged information. Evidence of consumer spending is far less “invasive” than evidence of one’s medical care, yet a personal injury plaintiff cannot shield evidence of his or her medical care from discovery where he or she has put her physical condition into issue in a lawsuit. *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994). Moreover, Safeway previously stipulated to a protective order which limits the use of all information produced by the parties in the present lawsuit, which order provided protection to Gores. (CP 7-8)

There is no tenable ground for depriving Safeway of discovery of unprivileged records of Gores’ activities before and after her fall. This information is relevant to the alleged impact of the fall on Gores’ activities and life. The trial court’s order prohibiting Safeway from engaging in discovery of this evidence is manifestly unreasonable and, therefore, an abuse of discretion.

2. No Showing or Finding of Good Cause to Prohibit Discovery.

In addition, the trial court does not have discretion to enter a protective order under CR 26(c) absent a finding of “good cause.” It is well recognized that a court may only grant a protective order upon a showing of “good cause.” CR 26(c); *McCallum v. Allstate*, 149 Wn. App. 412, 423, 204 P.3d 944 (2009).

To establish good cause, the party should show specific prejudice or harm will result if no protective order is issued. When possible, the party must use affidavits and concrete examples to demonstrate specific facts showing harm; broad or conclusory allegations of potential harm may not be enough.

Id. (internal citations omitted). “The reasons for protecting a party or person must be found to exist and be stated as such.” *Doe v. Puget Sound Blood Center*, 117 Wn.2d at 777.

Gores presented no specific facts showing harm or prejudice to her in allowing Safeway to obtain records relating to her activities before and after her fall. The declaration she filed in response to Safeway’s motion to compel did not show “concrete examples to demonstrate specific facts showing harm,” nor did it even allege that any prejudice or harm would result if this discovery were allowed. (CP 41-43) Gores did not establish “good cause” to prohibit this discovery.

The trial court made no determination that “good cause” exists to prohibit discovery of this relevant and unprivileged evidence. (CP 50-51) There is no basis in the record for a finding that there was “good cause” for the protective order entered by the trial court. The trial court abused its discretion when it entered this order.

VI. CONCLUSION

There is no genuine issue of material fact. There is no evidence to prove the essential element that Safeway had actual or constructive notice of the spill before Gores fell. There is no evidence that the alleged condition was one that is continuous and known to employees, so the *Pimentel* exception to the notice requirement is inapplicable. Summary judgment was proper and should be affirmed.

The declaration of Tom Baird contained inadmissible conclusions and legal opinions and contained no admissible facts or opinions regarding the material issues of whether Safeway had actual notice of the subject condition and how long the condition existed before Gores’ accident. Gores never disclosed Baird or his opinions as required by discovery rules and a court order.

The superior court did not abuse its discretion in refusing to sanction Safeway for “spoliation.” Safeway had no duty to preserve sweep assignment sheets or irrelevant video. Safeway preserved its

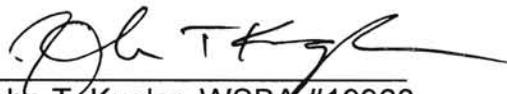
investigation file as demanded by Gores' attorney. Gores presented no evidence that Safeway intentionally destroyed anything for the purpose of preventing its use in litigation.

The superior court did not abuse its discretion in entering its July 20, 2012, protective order which protected Safeway's privileged work product from discovery, as required by CR 26(b)(4), nor in declining to allow Gores to take a second deposition of Safeway's claims adjuster.

The superior court's only error was in prohibiting discovery of the relevant, unprivileged information about Gores' activities before and after the incident contained in her credit card statements. It did so without a showing of any harm or good cause which would justify prohibiting this discovery. The May 8, 2012, order which prohibited this discovery should be reversed and vacated.

Dated this 7th day of August, 2013.

TURNER KUGLER LAW, PLLC

By: 
John T. Kugler, WSBA #19960
Attorney for Defendant/Respondent
Safeway Inc.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ANN P. GORES,
Plaintiff/Appellant,
vs.
SAFEWAY INC.,
Defendant/Respondent/
Cross-Appellant.

No. 69819-2-I
DECLARATION OF SERVICE

On August 7, 2013, I served copies of the following documents:

- 1) Motion for Extension of Time to File Response Brief;
- 2) this Declaration of Service.

pursuant to agreement between the parties, by e-mailing a copy to the following attorneys for the plaintiff:

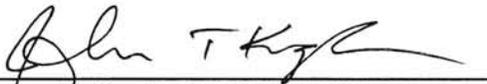
Whitney I. Furman
James A. Smith
SMITH & HENNESSEY, PLLC
316 Occidental Ave. S, Suite 500
Seattle, WA 98104
(206) 292-1770
wfurman@smithhennessey.com
jas@smithhennessey.com



1 I declare under penalty of perjury under the laws of the State of Washington
2 that the foregoing is true and correct.

3 Dated: This 7th day of August, 2013.

4 TURNER KUGLER LAW, PLLC

5 By: 
6 John T. Kugler WSBA #19960
7 Attorney for Defendant/Respondent/
8 Cross-Appellant Safeway Inc.

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