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No. 65849-2-I

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

DONNARAE LEMCKE and JAMES R. LEMCKE, wife and husband,
and the marital community composed thereof,

Appellants,

vs.

LOWE'S HIW, INC. dba LOWE'S HIW, INC. #285, a Washington
corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANTS'
OPENING BRIEF

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I. INTRODUCTION

Respondent Lowe's HIW, Inc. ("Lowe's") respectfully requests that this Court affirm the trial court's order granting full summary judgment in favor of Lowe's because Appellants Lemcke failed to satisfy their burden of proof in support of their personal injury/premises liability claim. In the trial court and in this appeal, Lemcke failed to present facts to support a *prima facie* finding of breach or causation since there is no admissible evidence from which an inference can be made that a dangerous or hazardous condition existed on Lowe's premises or that any such condition in turn caused Lemcke's accident and injury.

Lemcke has abandoned her negligence/premises liability claim in favor of reliance on the doctrine of *res ipsa loquitur*. However, *res ipsa loquitur* is inapplicable to the facts of the case and does not relieve Lemcke of the duty to come forward with objective evidence on each element of negligence. Accordingly, the trial court's order granting Lowe's summary judgment dismissal of Lemcke's claim should be affirmed.

II. RESTATEMENT OF ISSUES PERTAINING TO APPELLANTS' ASSIGNMENT OF ERROR

1. Should the trial court's ruling, granting summary judgment dismissal of Appellant Lemcke's sole claim of negligence against Respondent

Lowe's, be affirmed because Lemcke failed to present evidence that Lowe's breached any duty to her?

2. Should the trial court's ruling, granting summary judgment dismissal of Appellant Lemcke's sole claim of negligence against Respondent Lowe's, be affirmed because Lemcke failed to present evidence of causation?

3. Should the trial court's ruling, granting summary judgment dismissal of Appellant Lemcke's sole claim of negligence against Respondent Lowe's, be affirmed because the doctrine of *res ipsa loquitur* does not apply since: (a) a box can fall from a shelf in the absence of negligence; and (b) the shelving unit and box were not in the exclusive control of Respondent Lowe's?

4. Should the trial court's ruling, granting summary judgment dismissal of Appellant Lemcke's sole claim of negligence against Respondent Lowe's, be affirmed because Lemcke failed to plead the doctrine of *res ipsa loquitur*?

III. RESTATEMENT OF THE CASE

A. Restatement of the Facts

On September 11, 2006, Appellant Donnaræ Lemcke was shopping at the Lowe's Store in Lynnwood, Washington. (CP 174 at 34:1-19) Lemcke

was pretty familiar with the Lynnwood Lowe's store having been there more than ten times before. (CP 174 at 34:20-25; 35:1-4) When she arrived in the Lowe's store, she believes she obtained a basket style cart and likely went to the garden section of the store. (CP 174 at 35:15-19)

On her way to the cash registers at the front of the store, Lemcke stopped to look at an end-cap display of kitchen organizers. (CP 175 at 40:1-13). The display was a mock-up of a kitchen counter at kitchen counter height and under-counter cabinets which contained various chrome wire organizers, including drawers on runners. (CP 175 at 40:23-25; CP 176 at 10-19) Lemcke was interested in remodeling her kitchen so she stopped to look at the display and pulled out one of the wire drawers. (CP 176 at 44:22-24)

- In Lemcke's own words, this is what happened next:

Q. So I understand you pulled open the wire drawer to check it out, right?

A. Yes.

Q. And did the drawer actually pull out?

A. Yes.

Q. Do you recall if you pulled it out to the point where it stopped?

A. I don't remember.

Q. And what happened when you pulled the wire drawer out?

A. When I pulled the wire drawer out, the box fell from above -- I did not have any sense that anything was, you know, coming down -- and it hit me between the eyes, rolled off my nose, and hit my arm, because my -- the drawer was still open, and then it fell on the floor.

Q. Did you look up --

A. No.

Q. -- before the box fell down?

A. No.

Q. You didn't have any reason to suspect that anything was falling at that time; is that correct?

A. That's correct.

Q. When you pulled open the drawer, did the cabinet display tilt forward or something like that? When you pulled open the drawer?

A. No. Not that I was aware of.

Q. And do you recall struggling with the drawer at all to pull it open?

A. No.

Q. Did it roll out like it should --

A. Yes.

Q. -- as far as you can recall?

A. Yes.

Q. Do you know where the box fell from? Do you know where the box came from that fell and hit you on the head?

A. Other than the shelf, you mean? I don't – I mean, it was just up on the shelf above the wire baskets.

Q. How do you know that the box that struck you fell from the shelf above the wire baskets?

A. Only because there was other boxes up there. You know, I don't know where else it would have fallen from.

Q. Because you didn't see the box that struck you on the shelf before it struck you, correct?

A. Correct.

Q. And you didn't see it actually fall from the shelf, correct?

A. Correct.

Q. The first time you saw the box was basically after it struck you and you saw it –

A. Exactly.

Q. -- laying on the ground.

A. Yes.

Q. And I assume you don't have any way of knowing how long that box had been on that shelf before it fell?

A. No.

Q. And you don't have any way of knowing how that box got where it was before it fell?

A. No.

Q. Do you have any information as to why the box fell, what made the box fall?

...

A. I don't, no.

Q. Is there any information you have that would lead you to think that by pulling open the wire drawer, you caused box to fall? Did anything move, shake, tilt, or anything that would lead you to believe that when you pulled open the drawer, that that caused the box to fall?

A. No.

(CP 176 at 44:22; 45:1-16; CP 177 at 46:1-25; 47:1-12; CP 178 at 50: 7-15; 50:19-25; 51:1)

- Lemcke was unable to identify the box that she alleges fell and struck her. She answers as follows:

Q. Can you describe the box at all.

A. Well, I mean, I'm not exactly sure of the size of the box, but I -- you know, it seemed like it was about 24 by 36.

Q. Okay.

A. But I'm not sure because I didn't have a tape measure, so --.

Q. And was it made out of cardboard? Was it a cardboard box?

A. Yes.

Q. Did it have any labels or stickers on it that you recall?

A. No -- I don't know. I was in shock by that point.

Q. Since the accident, have you ever gone back at any time and looked at the boxes or the product that was involved in the accident?

...

A. I don't, no.

Q. Is there any information you have that would lead you to think that by pulling open the wire drawer, you caused box to fall? Did anything move, shake, tilt, or anything that would lead you to believe that when you pulled open the drawer, that that caused the box to fall?

A. No.

(CP 176 at 44:22; 45:1-16; CP 177 at 46:1-25; 47:1-12; CP 178 at 50: 7-15; 50:19-25; 51:1)

- Lemcke was unable to identify the box that she alleges fell and struck her. She answers as follows:

Q. Can you describe the box at all.

A. Well, I mean, I'm not exactly sure of the size of the box, but I -- you know, it seemed like it was about 24 by 36.

Q. Okay.

A. But I'm not sure because I didn't have a tape measure, so --.

Q. And was it made out of cardboard? Was it a cardboard box?

A. Yes.

Q. Did it have any labels or stickers on it that you recall?

A. No -- I don't know. I was in shock by that point.

Q. Since the accident, have you ever gone back at any time and looked at the boxes or the product that was involved in the accident?

A. Yes.

Q. When did you do that?

A. You know, I don't recall if it was the next day or -- but we went back to take a picture, and it was gone.

Q. What was gone?

A. The display was gone. There was nothing --they had removed it.

Q. The entire display was gone?

A. Exactly.

Q. And the boxes that were above the display, were those gone, too?

A. Yes.

Q. Did you end up taking any pictures that trip when you went back to the store?

A. No.

Q. Do you recall anything descriptive about the box besides it being a 24-by-36-size cardboard box? Do you recall anything about a product or any markings, names, anything?

A. No.

(CP 177 at 47:13-25; 48:1-25)

- What actually caused a box to fall in this instance is unknown, as admitted by Lemcke in her deposition testimony:

Q. [Y]ou didn't see the box that struck you on the shelf before it struck you, correct?

A. Correct.

Q. And you didn't see it actually fall from the shelf, correct?

A. Correct.

Q. The first time you saw the box was basically after it struck you and you saw it –

A. Exactly.

Q. -- laying on the ground.

A. Yes.

(CP 177 at 47:2-12)

- Likewise, Lowe's does not know what caused the accident. Benjamin Bear, the Operations Manager for Lowe's, testified about what he did on the day of the incident:

Q: What did you do to try to find out any more information about it [the incident]?

A: Based on what little information I had from this cashier, I went over and tried to look at the location to see if, A, there was still anything going on. I heard the customer had a box, something, fall on them, I heard that the cashier had – they had spoken to a cashier. Found out who that cashier was, went and looked, inspected the general area that I thought they were talking about and couldn't see anything.

(CP 50 at 33:23-25; 34:7)

- A few days after the incident, Lemcke called Lowe's and spoke with Mr. Bear, who completed an Incident Report. He testified as follows:

Q: After talking to her, is it your understanding that that is where she believes the box fell from?

A: After talking to her, I got the sense that it was from the wire racking that was inside the display. I couldn't figure out what she meant by that because there's no way, as that display is sitting there, to have anything on top of it. And when I looked at it, it's intact. There might have been product up above. To open and close this storage display, there couldn't have been anything on top of it, which I didn't have any idea how it could have occurred.

(CP 51 at 37:3-13)

- The box allegedly fell from a shelf that was immediately above a hands-on kitchen model display and was accessible by Lowe's employees, vendors, and customers. Margaret Thomas, Divisional Safety Manager for

Lowe's, testified as follows:

Q. Ms. Thomas, do you recall earlier in your deposition Mr. Herron asked you some questions about ladders being provided for customers to access above the retail floor?

A. I do.

Q. And you testified that those ladders are not provided to customers for that purpose; correct?

A. Correct.

Q. Are there incidents in Lowe's stores though of customers using ladders that are in the store for accessing shelves above the retail?

A. Yes, there have been some.

Q. And that's despite on some of the ladders that even say, "Do not use, for employee use only"?

A. Correct.

(CP 23 at 44:23-25; 45:1-12)

B. Restatement of Procedural History

In 2009, three years after the incident, Lemcke sued Lowe's, alleging that she was struck by a box that fell from a shelf while she was on Lowe's premises. (CP 221) Lemcke and her husband only alleged and pled a theory of ordinary negligence. (CP 221) They did not plead *res ipsa loquitur* in their Complaint. (CP 220-22)

Respondent Lowe's moved for summary judgment dismissal of Lemcke's sole negligence claim on the basis that Lemcke failed to establish and prove the elements of breach and causation. (CP 202-16). In response to Lowe's motion for summary judgment dismissal, Lemcke expressly acknowledged that "the cause of this box falling is not known." (CP 70 at 2:3) Accordingly, Lemcke's sole argument offered in opposition to Lowe's motion for summary judgment relied entirely upon application of the doctrine of *res ipsa loquitur*.

On July 13, 2010, the Snohomish County Superior Court granted Respondent Lowe's motion for summary judgment dismissal as a matter of law in all respects. On August 11, 2010, Lemcke filed a Notice of Appeal.

IV. ARGUMENTS IN OPPOSITION TO APPELLANTS' OPENING BRIEF

A. The Standard of Review Is De Novo.

The appellate court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court, to determine if the moving party, Respondent Lowe's, is entitled to summary judgment as a matter of law and if there is any genuine issue of material fact requiring a trial. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); Green v. A.P.C., 136 Wn.2d 87, 94, 960 P.2d 912 (1998).

In reviewing the record de novo, all facts, and reasonable inferences there from, must be viewed most favorably to Lemcke, the party resisting the motion. Even if the facts are undisputed (as they are in this case), if reasonable minds could draw different conclusions, then summary judgment is improper. Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 745, P.2d 1 (1997).

Notably, if Lemcke, the nonmoving party, does not come forward with evidence to establish each of the elements of her claim that is put into issue by the moving party's opening papers, then summary judgment is properly granted. An order granting summary judgment may be affirmed on any legal basis supported by the record. LaMon v. Butler, 112 Wn.2d 193,

200-01, 770 P.2d 1027, *cert. denied* 493 U.S. 814 (1989); Hadley v. Cowan, 60 Wn. App. 433, 333, 804 P.2d 1271 (1991).

B. The Summary Judgment Standard Applies.

Respondent Lowe's, the party moving for summary judgment in the trial court, bears the initial burden of showing the absence of an issue of material fact. Cox v. Malcolm, 60 Wn. App. 894, 897, 808 P.2d 758, *rev. denied* 117 Wn.2d 1014 (1991). The moving party may also simply challenge the sufficiency of the plaintiff's evidence. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989), Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 275, 896 P.2d 750, *rev. denied* 128 Wn.2d 1004 (1995). In response, the non-moving party may not merely rely on allegations in its pleading to resist a motion for summary judgment. CR 56(e).

If a non-moving party's response fails to make a showing sufficient to establish the existence of an element essential to a case, then the moving party's motion for summary judgment should be granted. Atherton Condo. Apartments-Owners v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990); Young, 112 Wn.2d at 225. Failure to establish even one of the necessary elements for negligence is sufficient to warrant summary judgment. Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 127-28, 875 P.2d

621 (1994).

Finally, negligence cannot be inferred from the fact of an injury alone. Merrick v. Sears, Roebuck & Co., 67 Wn.2d 426, 407 P.2d 960 (1965), Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 831 P.2d 744 (1992). It is well established that something more is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control of the premises. Las, 66 Wn. App. At 198; see also Hooser v. Loyal Order of Moose, Inc., 69 Wn.2d 1, 416 P.2d 462 (1966); Hanson v. Lincoln First Fed. Sav. & Loan Ass'n, 45 Wn.2d 577, 277 P.2d 344 (1954).

C. Appellant Lemcke Has the Burden to Prove a *Prima Facie* Case for Each and Every Element of Negligence, Otherwise Summary Judgment Dismissal Should Be Affirmed.

Lowe's submits that based on the foregoing facts, as provided directly from Lemcke, there is an absence of evidence to support Lemcke's allegation of negligence. Based upon undisputed facts, the burden shifts to Lemcke to make out a *prima facie* case. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988). In a situation such as the one presented to the Snohomish County Superior Court, a defendant may move for summary judgment on the grounds that the plaintiff simply cannot

prove an essential element of his case. See Young, 112 Wn.2d at 225, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

[A] defendant moving for summary judgment has a choice: A defendant can attempt to establish through affidavits that no material fact issue exists or, alternatively, the defendant can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of his or her case. . . . If a defendant chooses the latter alternative, the requirement of setting forth specific facts does not apply. The reason for this result is that “a complete failure of proof concerning an essential element of a non-moving party’s case necessarily renders all other facts immaterial.” *Celotex*, 466 U.S. at 323.

Guile v. Ballard Comty. Hosp., 70 Wn. App. 18, 23, 851 P.2d 689 (1993).

In an effort to establish a *prima facie* case, the nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. Las, 66 Wn.App. at 196, 198, *citing Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); *and Little v. Countrywood Homes, Inc.*, 132 Wn.App. 777, 780, 133 P.3d 944 (2006). Further, the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts by conclusory allegations, unsubstantiated assertions or by only a scintilla of evidence. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Rather, the non-moving party must present sufficient evidence demonstrating to the Court that there are genuine issues of material fact as to

each essential element to be decided at trial. FRCP 56(e).

To prevail in reversing and remanding the Snohomish County Superior Court's decision to grant Lowe's summary judgment, it is incumbent upon Lemcke to prove: (1) the existence of a legal duty; (2) breach of that duty; (3) an injury resulting from the breach; and (4) proximate cause. Little, 132 Wn. App. at 780. With respect to Lemcke's premises liability claim, Lemcke must produce *sufficient* evidence to create a genuine issue of fact that:

1. There existed a dangerous or hazardous condition on Lowe's premises that posed an unreasonable risk of harm to Lowe's invitees;

2. The dangerous or hazardous condition was caused or created by acts or omissions by Lowe's employees; *and*

3. Lowe's had actual or constructive knowledge of the condition based upon sufficient time or opportunity to discover it.

Las, 66 Wn. App. at 198; Arment v. Kmart Corp., 79 Wn. App. 694, 696, 902 P.2d 1254 (1995). Based on Lemcke's failure to produce sufficient evidence to create a genuine issue of fact regarding the elements of a premises liability claim, the Snohomish County Superior Court's order granting summary judgment dismissal to Lowe's should be affirmed.

D. Lemcke Has Failed to Demonstrate Facts That Any Act or

Omission by Lowe's Breached Any Duty to Her.

Lowe's accepts the fact that Lemcke was an invitee while on the Lowe's premises and that Lowe's owed her a duty as such. However, Lemcke has failed to present any facts that would create a genuine issue that any duty that Lowe's did owe to her was breached by any conduct or omission by Lowe's. To do so, Lemcke has the burden of first establishing that a dangerous or hazardous condition caused her accident and injury. However, Lemcke has not presented any evidence that a hazardous or dangerous condition even existed on Lowe's premises, much less that Lowe's caused the condition to exist or had actual or constructive knowledge that it existed.

The general rule in Washington for injuries caused by a transitory unsafe condition on property is that the owner or occupier of a building is liable for the injuries if it or its employees caused the unsafe condition or if it has actual or constructive knowledge that an unsafe condition exists. Pimentel v. Roundup Co., 100 Wash.2d 39, 44, 666 P.2d 888, 893 (1983); Hemmen v. Clark's Restaurant, 72 Wash.2d 690, 692, 434 P.2d 729, 732 (1967). Constructive knowledge exists if the unsafe condition has been present long enough that a person exercising ordinary care would have discovered it. Pimentel, 100 Wash.2d at 44, 666 P.2d at 893; Hemmen, 72 Wash.2d at 692, 434 P.2d at 732. The plaintiff has the burden of proving that the defendant had actual or constructive knowledge of the unsafe condition.

Wiltse v. Albertson's, Inc., 116 Wn.2d 452, 459, 805 P.2d 793 (1991)

(emphasis added) (holding that plaintiff failed to offer any evidence as to the cause of the unsafe condition, therefore he was unable to establish negligence).

By Lemcke's own testimony, as set forth in the foregoing Restatement of Facts: (a) she did not see where the object that allegedly struck her came from; (b) she does not know what caused the object to fall; (c) nobody told her what caused it to fall; and (d) there are no facts from admissible evidence that would support even an inference that any act or omission by Lowe's employees caused or contributed to the condition. Rather, Lemcke testifies that a cardboard box of unknown origin and description fell onto her head and right shoulder. That alone, is insufficient to maintain a negligence action against Lowe's. The Snohomish County Superior Court's order granting summary judgment dismissal should be affirmed.

The mere fact that Lemcke may have sustained an injury while on Lowe's premises does not entitle her to put Lowe's to the expense of a trial in its defense. Las, 66 Wn. App. at 199; Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 377, 972 P.2d 475 (1999) (an accident does not necessarily lead to an inference of negligence). Instead, Lemcke must submit facts supported by admissible evidence that would allow a reasonable person to

infer, without speculating, that some act of Lowe's breached its duty of care and that the breach more probably than not caused the accident. Marshall, 94 Wn. App. at 378. There is no such evidence that Lowe's breached any duty to Lemcke herein and dismissal of the suit should be affirmed.

In Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 831 P.2d 744 (1992), the plaintiff was looking at a display of stacked pans on the second-to-the-bottom shelf of a five-shelf display. As plaintiff was looking at the pans, five or six pans fell from the stack and onto the floor. At least one of the pans struck plaintiff's foot. She sued Yellow Front alleging that its negligence caused her injury. The trial court granted summary judgment in favor of Yellow Front, and plaintiff appealed.

The Court of Appeals, Division One, upheld the dismissal of Yellow Front on summary judgment since plaintiff failed to offer any facts to support a finding that an unreasonably dangerous condition existed on the store premises:

To establish a dangerous condition Las expresses a "belief" that the pans must have been unbalanced or precariously stacked. There are no facts supporting this belief. She cannot testify to how the pans were stacked and, in fact, her view of the pans was obstructed by the other shelves. There is no evidence of Yellow Front's practice as to stacking the pans, nor any expert testimony as to how frying pans should be safely stacked. The mere existence of the accident is insufficient proof of an unreasonable risk, absent facts

justifying application of *res ipsa loquitur*. We decline to hold as a matter of law that stacking iron skillets creates an unreasonably dangerous condition.

Las, 66 Wn. App. at 199.

In addition, the Las Court held that the doctrine of *res ipsa loquitur* did not apply since the condition was not in the exclusive control of Yellow Front since customers had access to the merchandise and the occurrence could have been caused by means other than the negligence of Yellow Front. The same logic applies in the current case against Lowe's.

In Little v. Countrywood Homes, Inc. 132 Wn. App. 777, 133 P.3d 944 (2006), the plaintiff was employed by a subcontractor and was injured while installing gutters on a house for Countrywood as the general contractor.

The plaintiff was found by a co-worker lying on the ground, his ladder lying nearby. Plaintiff sustained injuries to his brain, knee, and pelvis but had no recollection as to what had occurred to cause him to fall, if indeed he did fall.

The Court of Appeals, Division One, affirmed summary judgment dismissal of Countrywood on grounds that the plaintiff failed to satisfy his burden of proof on breach and causation:

To meet his burden, Little needed to present proof sufficient to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that the moving party should be held liable. Gardner v. Seymour, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947).

He [Little] needed to submit evidence allowing a reasonable person to infer, without speculating, that Countrywood's negligence more probably than not caused the accident.

Little contends he established, more probably than not, that Countrywood's negligence was "a substantial contributing cause" of the accident and resulting injuries. We disagree. One may speculate that the ladder was not properly secured at the top, or that the ground was unstable. But even assuming that those conditions constituted breaches of a duty that Countrywood owed Little, he did not provide evidence showing more probably than not that one of those breaches caused his injuries. No one, including Little, knows how he was injured.

Little, 132 Wn. App. 777, 781-82, 133 P.3d 944 (2006); citing Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 972 P.2d 475 (1999) (On summary judgment, the plaintiff in Marshall also failed to establish proximate cause since she had no memory of the accident and could only offer a theory as to the cause of her injuries).

As in the cases of Little and Marshall, Appellant Lemcke only offers speculation and theory as to what hazardous or dangerous condition may have existed at the time of her accident and injury, if any. She has no evidence of the cause since she did not see what happened and was never told by anyone what happened. She can offer no admissible evidence from which a jury could infer that a hazardous or dangerous condition existed on Lowe's premises which Lowe's caused, knew existed, or should have discovered

exercising reasonable care. In the absence of any evidence to establish breach of any duty, the trial court's order, granting summary judgment dismissal of Lemcke's sole claim of negligence against Lowe's, should be affirmed.

E. Lemcke Has Failed to Demonstrate That Any Act or Omission or Condition at Lowe's Proximately Caused Her Claimed Injuries. Summary Judgment Dismissal Should Be Affirmed.

In the improbable event that Lemcke succeeds in showing, on appeal, that some act of Lowe's breached its duty to Lemcke, she must still prove that the alleged act proximately caused her claimed injuries on a more likely than not basis. Little, 132 Wn. App. at 782 (affirming summary judgment for defendant because there was insufficient evidence linking plaintiff's injury to the alleged safety violations); *see also* Marshall, 94 Wn. App. at 377-78 (stating that defendants were liable only if "their negligence caused the accident").

To establish proximate cause, Lemcke must show that Lowe's act or omission was the cause in fact and the legal cause of her injury. Ang v. Martin, 154 Wn.2d 477, 482, 114 P.3d 637 (2005). "To establish cause in fact, a claimant must establish that the harm suffered would not have occurred but for an act or omission of the defendant. There must be a direct, unbroken sequence of events that link the actions of the defendant and the

injury to the plaintiff.” Joyce v. State, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). “Cause in fact is usually a question for the jury; it may be determined as a matter of law only when reasonable minds can differ.” Id. “Legal causation is a determination that the cause in fact of the plaintiff’s harm should be deemed the legal cause of the harm.” Little, 132 Wn. App. at 780. The legal causation determination is a question of law. Id.

Again, the mere occurrence of an injury does not prove negligence; the defendant’s conduct must be a proximate cause of the plaintiff’s injury. Herskovits v. Group Health Coop., 99 Wn.2d 609, 615, 664 P.2d 474 (1983). A determination of proximate cause may not rest on speculation or conjecture. Schneider v. Rowell’s, Inc., 5 Wn. App. 165, 167-68, 487 P.2d 253 (1971). And the doctrine of negligence per se is no longer viable in Washington. Rather, violation of a legal requirement is merely evidence of negligence. Pettit v. Dvoskin, 116 Wn. App. 466, 472, 68 P.3d 1088 (2003) (citing RCW 5.40.050); Mathis v. Ammons, 84 Wn. App. 411, 416-17, 928 P.2d 431 (1996).

In this case and in Lemcke’s opening brief, she did not offer any facts to support even an inference that any acts by Lowe’s or any condition of the premises on September 11, 2006 in any way caused her accident and injury.

Lemcke cannot offer any facts to support an inference that her injuries were proximately caused by any act of Lowe's because her claim rests solely on speculation. Schneider, 5 Wn. App. at 167-68. Therefore, reasonable minds could not differ on finding that there is no evidence to support a finding of causation and summary dismissal by the court on proper motion is appropriate.

F. The Doctrine of *Res Ipsa Loquitur* Does Not Apply to This Case.

“*Res ipsa loquitur* is ordinarily sparingly applied, ‘in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.’” Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 929 P.2d 1209 (1997) (quoting Morner v. Union Pac. R.R. Co., 31 Wn.2d 282, 293, 196 P.2d 744 (1948)). Whether this doctrine is applicable can only be determined “in the context of each case.” Zukowsky v. Brown, 79 Wn.2d 586, 594, 488 P.2d 269 (1971). This high degree of scrutiny is necessary since the doctrine allows the *inference* of negligence without the need for direct evidence but only when:

- (1) The accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence;
- (2) The injuries are caused by an agency or instrumentality within the exclusive control of the defendant; and

(3) The injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003) (quoting Zukowsky, 79 Wn.2d at 593).

The evidence here does not allow for an inference of negligence against Lowe's because the alleged occurrence producing the alleged injury is *not* of a kind which ordinarily does not happen in the absence of someone's negligence, and the injuries were *not* caused by an agency or instrumentality within the exclusive control of Respondent Lowe's.

1. A box can fall from a shelf in the absence of negligence.

In order for the doctrine of *res ipsa* to apply, the occurrence producing the injury must be of a kind which ordinarily does not happen in the absence of negligence. Pacheco, 149 Wn.2d at 436 (citation omitted). The accident must be of such character to raise the presumption of negligence *from the occurrence itself*. Morner, 31 Wn.2d at 292. This type of occurrence may be found in three limited situations:

(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law...;

(2) when the general experience and observation of mankind teaches that the result would not be expected without

negligence; and

(3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

Robison v. Cascade Hardwoods, Inc., 117 Wn. App. 552, 566, 72 P.3d 244 (2003).

In this instance, a box allegedly fell from an overhead shelf and struck Lemcke. The issue, then, is whether a box can fall from a shelf in a public area in the absence of negligence. Lemcke contends that a box falling from a shelf is so “palpably negligent” that it may infer negligence as a matter of law. Appellants’ Opening Brief at 10-11. However, the type of situations that have been deemed so palpably negligent that negligence may be inferred as a matter of law are very limited and include such egregious acts as leaving a foreign object in a patient’s body during surgery or amputation of the wrong limb. Id. A box falling from a shelf is plainly dissimilar to amputating the wrong limb and does not rise to the same level of palpable negligence.

Further, although Lemcke contends that *res ipsa* applies here, they cite no case law and make no argument other than the bare assertion of the doctrine itself. The Court should not consider this bare assertion: “Where no authorities are cited, the court may assume that counsel, after diligent search, has found none.” Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co.,

104 Wn. App. 597, 606, 17 P.3d 626 (2000); “[W]e will not review an issue that was addressed by an inadequate argument or that is given only passing treatment.” Timson v. Pierce County Fire Dist., 136 Wn. App. 376, 385, 149 P.3d 427 (2006) (citing State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004)).

Lemcke also opines that “[w]e know from general experience and observation... that boxes do not ordinarily fall from overhead shelves unless someone has been negligent in storing, stocking, or placing of the boxes.” Appellants’ Opening Brief at 11. This contention is also unsupported by any applicable case law. Not only is there is no evidence that “general experience” establishes that boxes cannot fall from overhead shelves in a store open to the public in the absence of the store’s negligence, it plainly suggests that other actors may well be at fault. Generally speaking, negligence *cannot* be inferred from an injury alone. Merrick v. Sears, Roebuck & Co., 67 Wn.2d 426, 407 P.2d 960 (1965), Las v. Yellow Front Stores, 66 Wn. App. 196, 831 P.2d 744 (1992).

Las v. Yellow Front Stores is instructive. The plaintiff was injured when pans stacked on a display fell. Plaintiff contended that the stacked pans constituted a dangerous condition, but the Court of Appeals, Division One,

found this was merely her belief, and no evidence supported this contention.

Las, 66 Wn. App. at 198. Division One states as follows:

There are no facts supporting this belief. She cannot testify to how the pans were stacked and, in fact, her view of the pans was obstructed by the other shelves. There is no evidence of Yellow Front's practice as to stacking the pans, nor any expert testimony as to how frying pans should be safely stacked. The mere existence of the accident is insufficient proof of an unreasonable risk...

Id. at 198-199. Las is directly on point and tracks with Lemcke's own testimony herein where she admits: (a) she has no evidence regarding how the Lowe's boxes were stacked or stored; (b) she has no evidence that Lowe's violated any of its practices, policies, or procedures for stacking boxes; and (c) she has no expert testimony establishing that the boxes were stacked improperly. In short, there simply is no evidence that a dangerous or hazardous condition even existed on Lowe's premises or that the condition caused or contributed to Lemcke's accident and injury.

Further, the Court of Appeals in Las v. Yellow Front Stores specifically refused to apply the doctrine of *res ipsa loquitur*, finding pans falling from a shelf did *not* constitute an occurrence which does not occur in the absence of negligence:

Las continually asserts the pans could not have fallen without negligence on someone's part, but she fails to demonstrate that the pans could not have fallen without the negligence of

Yellow Front Stores. It is quite easy to contemplate an accident such as this without the “negligence” of any party. The fact there was an accident and an injury does not necessarily mean there was negligence.

Las, 66 Wn. App. at 201-02. This logic and reasoning applies in the present case as well; a box can fall from a shelf without the negligence of any party and Lemcke has failed to establish that the box fell specifically because of some negligence on the part of Lowe’s.

2. Lowe’s Was Not in Exclusive Control of the Shelving Unit or Box.

In order for *res ipsa loquitur* to apply, the injuries complained of must be caused by an agency or instrumentality within the *exclusive* control of defendant Lowe’s. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003) (citing Zukowsky, 79 Wn.2d at 593). Significantly, what actually caused a box to fall in this instance is unknown, as admitted by Lemcke herself in her deposition testimony:

Q. [Y]ou didn't see the box that struck you on the shelf before it struck you, correct?

A. Correct.

Q. And you didn't see it actually fall from the shelf, correct?

A. Correct.

Q. The first time you saw the box was basically after it struck you and you saw it –

A. Exactly.

Q. -- laying on the ground.

A. Yes.

(CP 177 at 47:2-12)

The shelving unit from which the box allegedly fell and the box itself were not in the exclusive control of Lowe's, a busy home improvement retail store. The shelving unit that Lemcke contends the box fell from was in an area open to the retail public. The box allegedly fell from a shelf that was immediately above a hands-on kitchen model display and was accessible by Lowe's employees, vendors, and customers. Margaret Thomas, Divisional Safety Manager for Lowe's, testified as follows:

Q. Ms. Thomas, do you recall earlier in your deposition Mr. Herron asked you some questions about ladders being provided for customers to access above the retail floor?

A. I do.

Q. And you testified that those ladders are not provided to customers for that purpose; correct?

A. Correct.

Q. Are there incidents in Lowe's stores though of customers using ladders that are in the store for accessing shelves above the retail?

A. Yes, there have been some.

Q. And that's despite on some of the ladders that even say, "Do not use, for employee use only"?

A. Correct.

(CP 23 at 44:23-25; 45:1-12)

In Las v. Yellow Front Stores, the Court found that "the pans [that fell from a shelf] were not in the exclusive control of Yellow Front Stores. Other customers could take out a pan and then replace it." Las, 66 Wn. App. at 202. Despite allegations to the contrary, there is no evidence the Lowe's box itself was inaccessible to customers. Further, the evidence does not establish that the shelving unit, which held the boxes, was inaccessible to customers. Customers could access the shelving unit which held the boxes at issue. Lemcke herself could have access to the boxes at issue. Plainly, Lowe's did not have exclusive control of instrumentality of Lemcke's alleged injury. For this reason as well, the doctrine of *res ipsa loquitur* does not apply.

G. Lemcke Failed to Plead *Res Ipsa Loquitur* and Is, Therefore, Precluded from Claiming its Applicability.

Lemcke plead a theory of general ordinary negligence. (CP 220-22) They did not specifically plead *res ipsa loquitur*. Notably, *res ipsa* is a rule of evidence. Covey v. W. Tank Lines, 36 Wn.2d 381, 390, 218 P.2d 322 (1950). As Lemcke states in her opening brief, a *res ipsa* case must have

three specific elements. Appellants' Opening Brief at 7-8; see also Pacheco, 149 Wn.2d at 346. If the doctrine is found to apply by the Court, then a specific jury instruction must be given to the finder of fact. WPI 22.01.

If a plaintiff desires to proceed under a theory of *res ipsa*, it must be pled in his/her complaint. *See* CR 8. Lemcke failed to properly plead *res ipsa loquitur*. Accordingly, Lemcke should be precluded from utilizing a theory that they failed to plead.

V. CONCLUSION

The Court of Appeals should affirm the Superior Court's summary judgment dismissal of Lemcke's sole claim of negligence against Respondent Lowe because Lemcke failed to present evidence in support of a negligence theory. Instead, Lemcke attempts to apply the doctrine of *res ipsa loquitur* to her case, essentially conceding that absent application of this doctrine, summary dismissal of her claim by the trial court was not an error.

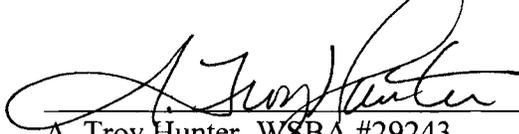
A box falling from a shelf can occur in the absence of negligence, and the shelving unit and box at issue were not in the exclusive control of Respondent Lowe's. Therefore, the doctrine of *res ipsa loquitur* does not apply to the facts of this case, and summary judgment dismissal should be affirmed.

Pursuant to RAP 14.1 and RAP 14.2 Respondent Lowe's respectfully requests that it be awarded all expenses and fees provided in RAP 14.3, if it prevails on appeal.

Dated this 20th day of January, 2011.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.

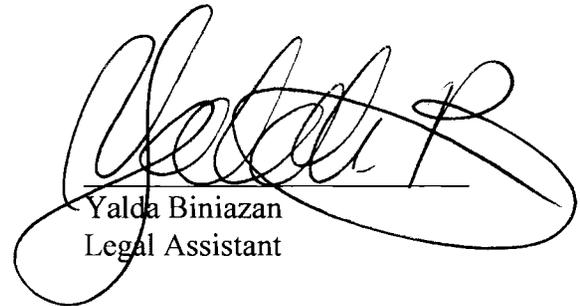
A handwritten signature in cursive script, appearing to read "A. Troy Hunter", is written over a horizontal line.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 20th day of January, 2011, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

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Yalda Biniazan
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