

67534-6

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No. 67534-6-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARIE AND ROBERT GEARY

Appellants,

v.

HOME DEPOT, USA, INC., AND GERALD & CHERYL SCOTT,

Respondents.

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 29 PM 1:46

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I. INTRODUCTION

This case arises from an incident at a Home Depot store in which customer Marie Geary was struck and injured by a steel lumber cart which was being maneuvered by another customer.

Geary sued Home Depot in negligence for failure to exercise care to protect her from harm, alleging that it had implemented no policy or procedures to restrict or supervise the use and movement of lumber carts by customers.

Unaware of the true identity of the offending customer, Geary named “John and Jane Doe” as defendants along with Home Depot in her original complaint. Home Depot was timely served with the original summons and complaint.

In subsequent discovery, Home Depot disclosed information which permitted Geary to learn that John Doe’s true name was Gerard Scott. Geary and Home Depot stipulated to the entry of an amended complaint naming Gerard Scott in place of John Doe. Scott was served with the amended complaint after the expiration of the statutory limitation period.

Scott moved for summary judgment alleging violation of the statute of limitations, and arguing that service of the amended pleadings

did not relate back to the original filing pursuant to CR 15 (c). In opposition, Geary argued that RCW 4.16.170 and dicta in **Sidis v. Brody/Dohrmann, Inc.**, 117 Wn.2d 325 (1991) operated to toll the statute of limitations as to Scott upon timely service of one defendant (Home Depot). The trial court granted Scott's motion.

Home Depot moved for summary judgment alleging failure to establish duty and failure to establish both elements of proximate cause – legal proximate cause and cause in fact. The trial court granted Home Depot's motion, finding that there was insufficient evidence to support factual proximate cause and that a jury would have to guess as to how the underlying incident happened.

II. ASSIGNMENTS OF ERROR

A. Summary Judgment – Defendant Scott

Assignment of Error

1. The trial court erred by granting Defendants Scott's motion for summary judgment because service of process on Scott did not violate the statute of limitations where another defendant was timely served within 90 days after suit was filed, Scott was originally designated as

“John Doe”, and the original complaint identified “John Doe” with reasonable particularity.

Issues Pertaining to Assignments of Error

1. Was the statute of limitations tolled as to Scott, originally designated as John Doe, by the timely filing of a summons and complaint and service upon defendant Home Depot within 90 days thereafter?
2. Did the original complaint identify “John Doe” with reasonable particularity, such that the statute of limitations was tolled as to “John Doe” pursuant to RCW 4.16.170 when another named defendant, Home Depot, was served with process within 90 days after the original summons and complaint were filed?
3. Was CR 15 (c) inapplicable, and its “relation back” provision unnecessary, to a determination as to whether service of process on Scott was in violation of the statute of limitations?
4. Was Scott prejudiced by being served with process on 2/13/11 (after expiration of 90 days following filing of the original complaint naming him as “John Doe”) when service on 2/13/11 would have been

timely and authorized by RCW 4.16.170 if Scott had been accurately named in the original complaint?

B. Summary Judgment – Defendant Home Depot

Assignments of Error

1. The trial court erred in granting Defendant Home Depot's motion for summary judgment because Geary presented sufficient evidence to create a genuine issue of material fact as to whether Home Depot's alleged breach of duty to Marie Geary was a proximate cause in fact of the injuries claimed.

2. The court erred in "*finding that there is insufficient evidence to support factual proximate cause between the duties alleged by plaintiffs against defendant Home Depot and the injuries claimed.*" (CP 209-211).

3. The court erred in "*finding that the jury would have to guess that the incident alleged happened one way and not in another way to render a verdict for plaintiffs against defendant Home Depot.*" (CP 209-211).

Issues Pertaining to Assignments of Error

1. Did Geary present sufficient evidence to create a genuine issue of material fact as to whether Home Depot's alleged breach of duty to her, by failing to prohibit, restrict or supervise the movement of loaded lumber carts by customers throughout its store and among other customers, was a proximate cause in fact of her injury and damages?
2. Did Geary present sufficient evidence on the issue of factual proximate cause to permit a verdict in her favor without the jury having to "*guess that the incident happened one way and not in another way*"?

III. STATEMENT OF THE CASE

On June 15, 2007, Marie Geary and her husband Robert were shopping at the Home Depot store located at 11616 Aurora Avenue North in Seattle. As Mrs. Geary looked at patio furniture in the main aisle at the front of the store, she was struck by a heavy steel lumber cart containing plywood and other material, which was being maneuvered by another customer. (CP 148-192: Exhibit C - Marie Geary Dep, pp. 24-33). On the lumber cart were two sheets of plywood, four by eight feet in size, and other unidentified merchandise. (CP 148-192; Exhibit C - Marie Geary Dep, pp 32-33; Exhibit B - Hovde Dep, pp. 30-31); Exhibit D - Robert Geary Dep, pp. 17, 21-22). The incident took place in an area removed

from the lumber department which was at the south end of the store. (CP 148-192: Exhibit D – Robert Geary Dep, p.17). After striking Mrs. Geary with his cart, the offending customer approached her, stated that he had not seen her, and asked if she was alright. (CP 148-192: Exhibit C - Marie Geary Dep, pp 26, 35; Exhibit D - Robert Geary Dep, pp. 16-17, 23). Mrs. Geary was attended at the scene by a Home Depot employee who provided her with an ice pack and after some time assisted her from the store to the parking lot where her husband was waiting with their car. (CP 148-192: Exhibit C - Marie Geary Dep, p. 38; Exhibit B - Hovde Dep, p.28).

Neither Marie nor Robert Geary were given or otherwise obtained the name of the man who had struck Marie with the lumber cart. (CP 81, 82).

The incident was witnessed by Home Depot employee Samuel Lowe, who filled out and signed an “Incident Witness Statement” recording his observations. The Incident Witness Statement is a document that is used and maintained by Home Depot as part of its claim investigation process in the regular course of its business. (CP 148-192: Exhibit B - Hovde Dep, pp. 29-30, Exhibit 3). Mr. Lowe reported observing that a customer was “pulling” a lumber cart “down the main

runway” south while facing north when the cart struck Mrs. Geary on the leg and hip. (CP 148-192: Exhibit B - Hovde Dep, Exhibit 3).

The cart in question was designed to store and move lumber products, including plywood, drywall material and similar-type items. It was made of steel, was equipped with four wheels, and had “high” rails to hold material in place. The cart was described by Assistant Store Manager Marybeth Hovde as “heavy” and “sturdy”, such that “...you can’t just pick it up.” (CP 148-192: Exhibit B - Hovde Dep, pp. 16-17).

Home Depot did not have any policies or regulations governing or restricting the use by customers of carts for the storage or movement of lumber or other merchandise. (CP 148-192: Exhibit A - Home Depot Answer to Interrogatory No. 13 and RFP No. 4). As a self-service store, Home Depot permitted customers to shop for lumber products, selecting and loading material on carts which they were then free to move through all parts of the store without restriction or supervision. Customers were not provided with written instruction or guidance regarding the loading of lumber carts. (CP 148-192: Exhibit B - Hovde Dep, pp. 17-18).

On April 17th, 2010, prior to the commencement of this action, Geary’s attorney spoke with Lisa Goodson at Sedgwick Claims Management, representing Home Depot. This was the third in a series of

telephone conferences with Ms. Goodson involving investigation and negotiation of plaintiffs' claim against Home Depot. On that occasion, Geary's attorney asked Ms. Goodson to disclose the identity of the Home Depot customer who had struck Mrs. Geary with the lumber cart, as well as the identity of that person's companion at the scene. Ms. Goodson stated that Home Depot personnel had conducted some investigation of the incident, but had not recorded and did not know the names of either the man who was moving the merchandise cart or his companion. (CP 79-80).

On June 7, 2010, plaintiffs filed an original summons and complaint for damages resulting from Marie Geary's injury, naming and alleging negligence on the parts of Home Depot and "John Doe". (CP 1-5).

The counts against Home Depot alleged that it had breached its duty to maintain a reasonably safe environment and conditions in its store by (1) failing to implement or execute policies to ensure that customers would not be injured by the movement of merchandise carts; (2) failing to supervise or attend "John Doe" as he moved his cart; and (3) permitting the movement of a cart stacked with lumber to a height that impaired vision of others in the cart's path. Further, Geary alleged that Home Depot's breach of duty was a proximate cause of her injury. (CP 1-5).

Regarding “John Doe” the complaint alleged negligence as follows

(CP 1-5):

Defendant John Doe was also a prospective customer in the store and was pushing a heavy four-wheeled merchandise cart on which lumber was stacked. As Defendant Doe emerged from a merchandise aisle, he pushed the cart into Marie, striking her and causing her personal injury.

Home Depot was served with process on July 12, 2010. (CP 9-11).

On July 26, 2010, Home Depot filed its Answer. (CP 12-17).

Interrogatories and request for production were served on Home Depot on October 4, 2010, and answers were received on November 3, 2010. Home Depot produced a document which identified “Jerry Scott” as a witness and included a telephone number but no address. (CP 79-80). Plaintiffs subsequently determined the probable identity and address of “Jerry Scott”. (CP 79-80).

Geary and Home Depot then agreed that the complaint should be amended to substitute Scott’s true name for the original “John Doe” designation, and a written stipulation to that effect was entered on February 4, 2011. (CP 79-80).

The amended complaint and summons were filed on February 4, 2011 (CP 19-26) and Scott was served on February 13, 2011. (CP 27).

Scott's Motion For Summary Judgment.

Scott filed his motion for summary judgment on May 4, 2011, arguing that service of process on him violated the statute of limitations and that the amended complaint did not relate back to the date the original complaint was filed because the requirements of CR 15 (c) were not satisfied. (CP 26-63).

In opposition, Geary argued that the statute had been tolled as to Scott by naming him as "John Doe" in the original complaint, providing adequate identifying information about him, and timely serving another named defendant, Home Depot. (CP 70-78). Citing RCW 4.16.170 and its interpretation by the Supreme Court in **Sidis v. Brody/Dohrmann, Inc.**, 117 Wn.2d 325 (1991) in support of her position, Geary argued that "relation back" under CR 15 (c) was not required, that the statute had been tolled as to all named defendants including Scott, and that Scott was not prejudiced by service on him of the amended pleadings. (CP 70-78; RP (6/1/11), pp. 13-17).

On June 1, 2011, the trial court heard argument and entered an order granting Scott's motion for summary judgment without findings, conclusions or other comment. (CP 145-147).

Home Depot's Motion For Summary Judgment.

Home Depot filed its motion for summary judgment on May 27, 2011, citing an alleged failure by Geary to establish a legally cognizable duty on the part of Home Depot, and a failure to provide evidence to support either cause in fact or legal proximate cause. (CP 83-100).

The trial court heard argument on July 15, 2011 and entered an order on July 18, 2011 granting Scott's motion for summary judgment with two "findings" (CP 209-211):

" ...that there is insufficient evidence to support factual proximate cause between the duties alleged by plaintiffs against defendant Home Depot and the injuries claimed."

"...that the jury would have to guess that the incident alleged happened one way and not in another way to render a verdict for plaintiffs against defendant Home Depot."

During argument, the court queried whether Geary was arguing for strict liability, and suggested that the test of factual proximate cause is not based on the concept of “but for” causation. (RP (7/15/11), pp. 19, 25).

IV. ARGUMENT

SUMMARY OF ARGUMENTS

1. Standard of Review Is De Novo. In reviewing a summary judgment order, the appellate court conducts the same inquiry as the trial court. The court reviews questions of law de novo. Summary judgment is appropriate when no genuine issue of material fact exists, thus entitling the moving party to judgment as a matter of law. The court must consider evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented.

2. Statute of Limitations Not Violated. The trial court erred in granting Scott’s motion for summary judgment because service of process on Scott did not violate the statute of limitations where another named defendant was timely served within 90 days after suit was filed,

Scott was originally designated as “John Doe”, and the original complaint identified “John Doe” with “reasonable particularity”.

Pursuant to RCW 4.16.170, the statute of limitations was tolled as to all named defendants upon timely filing of the complaint and service of process on Home Depot within 90 days thereafter.

The Supreme Court’s discussion and dicta in **Sidis v. Brody/Dohrmann**, 117 Wn.2d 235, 815 P.2d 781 (1991) establish the proposition that the tolling provision of RCW 4.16.170 applies to “John Doe” defendants who have been identified with “reasonable particularity.”

By detailing the time, place, role and actions of the defendant named as “John Doe”, Geary’s original complaint identified “John Doe” with sufficient particularity to warrant application of the tolling provision of RCW 4.16.170.

No undue prejudice resulted to Scott as a result of his being served with the amended summons and complaint on February 13, 2011 since service on that date or later would have been timely and authorized by RCW 4.16.170 in the event that he had been properly named in the original complaint.

3. Factual Proximate Cause Established.

A genuine issue of material fact exists as to whether Home Depot's breach of duty, based on its failure to exercise requisite care for the safety of its customers, was a proximate cause in fact of Marie Geary's injury and damages.

The trial court erred in finding that "*there is insufficient evidence to support factual proximate causation between the duties alleged by plaintiffs against Home Depot and the injuries claimed*" where the evidence established (1) that Geary was struck and injured by a lumber cart being maneuvered by another customer outside the lumber department and in another area of the Home Depot Store, (2) Home Depot had no policies or regulations governing or restricting the use by customers of carts for the storage or movement of lumber or other merchandise; and (3) Home Depot had taken no measures to restrict customer use of lumber carts to the lumber department or require supervision or attendance by a Home Depot employee.

The trial court erred in "finding" that "*...the jury would have to guess that the incident alleged happened one way and not in another way to render a verdict for plaintiffs*" where undisputed evidence showed that Scott had pulled a loaded lumber cart in the direction of Geary while looking in the opposite direction until the cart struck Geary.

The factual details about which Home Depot contends a jury would have to “guess” in order to render a verdict for Geary are not “material” facts.

A. Standard of Review – Summary Judgment

Review of a grant of summary judgment is de novo. **Bostain v. Food Express, Inc.**, 159 Wn.2d 700, 708 , 153 P.3d 846 (2007). In reviewing a summary judgment order, the appellate court conducts the same inquiry as the trial court. **Parry v. Windermere**, 102 Wn.App. 920, 925, 10 P.3d 506 (2000). Summary judgment is appropriate when no genuine issue of material fact exists, thus entitling the moving party to judgment as a matter of law. **Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co.**, 104 Wn.App. 597, 601, 17 P.3d 626 (2000), review denied, 143 Wn.2d 1023 (2001). The court must consider evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. **Magula v. Benton Franklin Title Co.**, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. **Bostain**, supra, at 708.

B. The statute of limitations was tolled as to all named defendants on July 12, 2010, when Home Depot was served with process.

RCW 4.16.170 provides in pertinent part:

“For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally ... within 90 days from the date of filing the complaint..... If following service the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to have not been commenced for purposes of tolling the statute of limitations”

A literal interpretation of this statutory provision was adopted by a unanimous Washington Supreme Court in **Sidis v. Brody/Dohrmann, Inc.**, 117 W.2d 325, 815 P.2d 781 (1991). **Sidis** involved review of two cases in which the Court of Appeals had affirmed trial court dismissal of named defendants who were not served with process within 90 days following the filing of the complaint. In each case, the Court of Appeals had held that the language of RCW 4.16.170 was ambiguous, and that correct interpretation required that all named defendants be served with process within the 90-day period.

Reversing the Court of Appeals, the Supreme Court held, unanimously, that the language of RCW 4.16.170 was straightforward and unambiguous, and commented:

“if in enacting the present tolling statute the Legislature had intended to require that all defendants be served within 90 days, the words ‘one or more of’ could simply have been omitted , and the statute would read: [T]he plaintiff shall cause the defendants to be served’ “.

Id. at 329.

Addressing the Court of Appeals’ concerns about the fairness of a literal interpretation of RCW 4.16.170, the Court noted:

“It is arguably unfair to require a plaintiff to serve all defendants within a set limitation period, when it may be difficult or impossible to determine the actual location of some defendants before discovery is underway. Statutes of limitations are procedural rules that are properly the realm of the Legislature, and the fairness of such statutes should be left to the Legislature to determine”.

Id. at 330-331.

It is undisputed that plaintiffs Geary filed their original complaint within the 3-year statutory limitation period (CP 1-5), and served one defendant (Home Depot) within 90 days thereafter (CP 9-11), thereby complying with RCW 4.16.170. The statute of limitations was therefore tolled as to all named defendants.

C. The tolling effect of RCW 4.16.170 applies to “John Doe” defendants who have been identified with “reasonable particularity”.

The **Sidis** case did not involve any “John Doe” or otherwise fictitiously named defendants, and the application of the tolling effect of RCW 4.16.170 to such defendants was not directly in issue. However, in responding to arguments that literal interpretation of the statute would encourage claimants to engage in abusive practices such as naming numerous “John Does”, the Court stated:

“We note, however, that in some cases, if identified with reasonable particularity, ‘John Doe’ defendants may be appropriately ‘named’ for purposes of RCW 4.16.170”.

117 Wn. 2d 325, 331.

The Supreme Court’s decision in **Sidis**, including the dicta regarding application of RCW 4.16.170’s tolling provision to fictitiously-named defendants, has been cited and applied in several subsequent decisions of the Court of Appeals.

In **Iwai v. State**, 76 Wn.App. 308, 88 P.2d 936 (1994), a slip-and-fall plaintiff had originally named the State of Washington and “John

Doe” defendants, and served the state within 90 days of filing her complaint. By subsequent amendment, another defendant was added. After expiration of the statute of limitations, plaintiff again amended the complaint to name the correct property-owner defendant. The trial court dismissed plaintiff’s claim against the last-named defendant as barred by the statute of limitations.

The Court of Appeals (Division III) affirmed on this issue, rejecting appellant’s argument that the statute of limitations had been tolled as to all defendants, including “John Doe” defendants. The court’s holding on the issue turned on a determination that the original complaint had not described the “John Doe” defendants with sufficient particularity:

“Ms. Iwai’s broad designation of John Doe Defendants allegedly ‘negligent and otherwise responsible’ does not sufficiently identify WAM so as to justify tolling the statute here...”

Id. at 312.

The clear implication from this is that sufficient identification of the John Doe defendant **would have** justified tolling the statute. The court in **Iwai** did not challenge the proposition that the statute of limitations could be tolled as to “John Doe” defendants by operation of RCW 4.16.170. Indeed, its holding on the issue turned, and was specifically

based, on the “reasonable particularity” requirement suggested by the Supreme Court in **Sidis**.

Application of **Sidis** was subsequently considered by Division Two of the Court of Appeals in **Bresina v. Ace Paving Company**, 89 Wn. App. 277, 948 P.2d 870 (1997). There a plaintiff in a trip-and-fall case originally named several defendants, including “ABC CORPORATION, whose true identity is unknown”. Id. at 279. At least one defendant was timely served. With regard to further description of the unnamed defendant in her complaint, plaintiff alleged that ABC CORPORATION may have “constructed, and/or owned, and/or controlled, and/or had some legal responsibility for the area where the fall occurred”. Id. at 280. No other identifying information or description of the unnamed party’s actions, omissions, or relationship to the premises was provided. After the statutory limitations period had run, plaintiff amended her complaint to name Ace Paving Company. The trial court granted Ace’s motion to dismiss the action as barred by the statute of limitations.

On appeal, plaintiff argued that the statute had been tolled as to all defendants, including Ace Paving, citing RCW 4.16.170 and **Sidis v. Brodie/Dohrmann**, supra. Referring to **Sidis** regarding application of RCW 4.16.170 to “John Doe” defendants, the court stated:

“... we assume that a plaintiff can toll the period for suing an unnamed defendant - if, but only if, the plaintiff identifies the unnamed defendant with “reasonable particularity” before the period for filing suit expires. “Reasonable particularity” depends, obviously, on a variety of factors. A major factor is the nature of the plaintiff’s opportunity to identify and accurately name the unnamed defendant...”

89 Wn.App 277, 282. After examining the facts, the court held that Bresina’s naming of “ABC Corporation ” *did not involve a degree of particularity that was “reasonable”*. 89 Wn.App. 277, 282. (In its discussion the court, without citing any authority, focused not on whether the unnamed defendant had been identified with reasonable particularity, but rather whether the plaintiff had made adequate efforts to identify the party. *Id.* at 282. This amounted to an unwarranted conflation of the **Sidis** test (identification with “reasonable particularity”) with tests used to determine “inexcusable neglect” in the context of CR15(c) “relation back” of amendments changing a party).

In both **Iwai** and **Bresina**, the Court of Appeals recognized and applied the **Sidis** decision with regard to the application of CR 4.16.170 to “John Doe” defendants.

D. Plaintiffs’ original complaint identified “John Doe” with

sufficient particularity to warrant application of the tolling provision of RCW 4.16.170.

In its decision in **Sidis v. Brody/Dohrmann**, *supra*, the Supreme Court did not elaborate on the meaning of the phrase “identified with reasonable particularity.” It is clear from the context of the discussion, however, that the Court was addressing the argument that literal application of the tolling provision of RCW 4.16.170 would encourage abusive pleading practices involving the naming of numerous “John Doe” defendants. 117 Wn.2d at 331. It is reasonable to presume that the Court intended that an “identification with reasonable particularity” requirement would address that risk by requiring some showing, within the statutory period, that a particular alleged tortfeasor actually existed whose wrongdoing could be described, and whose identity might later be learned.

Plaintiffs did not obtain the name of defendant Scott or other identifying information at the injury scene or at any time thereafter prior to filing their complaint. (CP 79-80, 82). Upon inquiry of Home Depot’s claims representative in April, 2010 as to the identities of “John Doe” and his companion, plaintiffs’ counsel was told by Home Depot’s representative that Home Depot had not recorded and did not know the

identity of the person who had struck Mrs. Geary with a merchandise cart on June 15, 2007, or that person's companion. (CP 79-80). Plaintiffs consequently named Home Depot in their complaint filed on June 7, 2010, and designated "John and Jane Doe" as additional defendants pursuant to CR 10(a)(2). (CP 1-5).

In their original complaint, Plaintiffs averred (CP 1-5, Paragraph 2.3):

"Defendant John Doe was also a prospective customer in the store and was pushing a heavy four-wheeled merchandise cart on which lumber was stacked. As Defendant Doe emerged from a merchandise aisle, he pushed the cart into plaintiff Marie, striking her and causing her injury".

This description of "John Doe" included the sum total of the information in plaintiffs' possession prior to the filing of their original complaint. It identified the time, location and circumstances of the incident and a detailed description of the behavior of the individual named as "John Doe". The only missing identifier was the tortfeasor's real name.

By contrast, in the **Iwai** and **Bresina** cases, the identification of the unnamed defendants was non-existent or general, with no indication of what role the defendants played or what behavior warranted their inclusion in the lawsuits. In **Iwai**, plaintiff had alleged that unnamed defendants were "negligent or otherwise responsible", apparently without further

details as to the nature of the parties, the roles they played, or specific acts or omissions alleged. 76 Wn.App. at 312. In **Bresina**, the plaintiff had identified the unnamed defendant in her complaint as an “unknown entity having ‘some legal responsibility’ for plaintiff’s injuries”. 89 Wn.App. at 279-280. Again, no identification of the party’s nature, character, role, acts, omissions, or relationship to the premises was included.

In both **Iwai** and **Bresina**, the courts determined that unnamed defendants had not been identified with “reasonable particularity”, and consequently RCW 4.16.170 did not apply to toll the statute of limitations. In neither case did the court provide meaningful guidance as to what kind or amount of information, short of the defendant’s actual name, would satisfy the “reasonable particularity” standard.

In the case at bar, however, the only meaningful identifying information which was **not** included in plaintiffs’ original complaint was Gerard Scott’s real name. The Geary contends that she identified “John Doe” with “reasonable particularity” within the plain meaning of that phrase as stated by the Supreme Court in **Sidis v. Brody/Dohrmann**, supra, by stating the exact time, place, circumstances, and details of his actions. The tolling provision of RCW 4.16.170 therefore applied to defendant Scott.

E. Tolling of the statute of limitations as to Defendants Scott was not dependent on “relation back” of Plaintiffs’ amended complaint pursuant to CR 15(c).

RCW 4.16.170, as interpreted by a unanimous Supreme Court in **Sidis v. Brody/Dohrmann, Inc.**, 117 Wn.2d 325 (1991), supra, provides clear authority for the proposition that the statute of limitations was tolled as to all named defendants, including “John Doe” later identified as Scott, independent of CR 15 and its “relation back” provision (CR 15 (c)). This authority is the product of the state legislature expressing and codifying public policy, and statutory interpretation by the state’s highest court.

In arriving at its endorsement of a literal interpretation of RCW 4.16.170, the Supreme Court in **Sidis** considered arguments questioning the fairness of literal interpretation. In response, and in affirming the right of the legislature to determine what is “fair”, the Court noted:

“It is arguably unfair to require a plaintiff to serve all defendants within a set limitation period, when it may be difficult or impossible to determine the actual location of some defendants before discovery is underway.

117 Wn.2d at 330-331.

Addressing the argument that literal interpretation of RCW 4.16.170 might encourage plaintiffs to name numerous “John Doe” defendants in an arguable abuse of process, the Court stated:

“We note, however, that in some cases, if identified with reasonable particularity, ‘John Doe’ defendants may be appropriately ‘named’ for purposes of RCW 4.16.170”.

117 Wn.2d 325, 331.

The Court’s clear intent in **Sidis** was to acknowledge that timely service on one named defendant can toll the statute of limitations with respect to “John Doe” defendants who are identified and served after the expiration of the statutory period plus 90 days. The Court clearly contemplated that there are situations where identification and service on “John Doe” defendants might not be possible before discovery is underway. Upon discovery of a “John Doe” defendant’s true identity, amendment of the complaint pursuant to CR 15(a) is the appropriate mechanism with which to properly name the correct party. Such amendment is merely ministerial, and does not implicate the statute of limitations or issues related to tolling.

In other words, “relation back” of the amended pleading under

CR 15(c) is not required to toll the statute of limitations as to the “John Doe” defendant who has been newly identified and served. It is not the service of process on the newly-named party, but rather the original timely service on at least one named defendant, which operates to toll the statute as to all named defendants, including “John Doe” defendants who were “identified with reasonable particularity”. In this class of cases, therefore, relation back under CR 15(c) is irrelevant to tolling, and need not be invoked or satisfied.

F. No prejudice resulted to Scott as a result of his being served with the amended summons and complaint on February 13, 2011 since service on that or a later date would have been timely and authorized by RCW 4.16.170 in the event that he had been properly named in the original complaint.

Had Scott been accurately named in Geary’s original complaint, RCW 4.16.170 would have permitted delay in service of process on him as long as the action had not been dismissed and remained pending against one defendant. **Fittro v. Alcombrack**, 23 Wn.App. 178, 596 P.2d 665 (1979). Had he been accurately named, Scott could have been properly

served at any time before Home Depot was granted summary judgment on July 18, 2011. In fact, Scott was served approximately six months earlier, on February 13, 2011. (CP 27). It is clear, therefore, that application of the tolling provision of RCW 4.16.170 to Scott, and reversal of the trial court's summary judgment in his favor, will not cause him undue harm or prejudice.

G. A genuine issue of material fact exists as to whether Home Depot's breach of duty to exercise ordinary care for the safety of its customers by failing to prohibit, restrict or supervise the use by customers of lumber carts was a proximate cause in fact of Marie Geary's injury and damages.

In granting Home Depot's Motion For Summary Judgment, the trial court found that (CP 209-211):

1. "*... there is insufficient evidence to support factual proximate cause between the duties alleged by plaintiffs against defendant Home Depot and the injuries claimed*", and
2. "*...the jury would have to guess that the incident alleged happened one way and not in another way to render a verdict for plaintiffs.*"

“Cause in fact” refers to the actual “but for” cause of an injury. Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury. **Schooley v. Pinch’s Deli Market, Inc.**, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). It involves the “but for” consequences of an act. **Miller v. Likins**, 109 Wn.App.140, 145, 34 P.3d 835 (2001). As a fact question, cause in fact is not appropriately determined on summary judgment unless but one reasonable conclusion is possible. **Hartley v. State**, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

In opposition to Home Depot’s motion for summary judgment, Geary presented evidence to establish the following salient (and largely uncontroverted) facts:

(1) Marie Geary was a customer shopping in Home Depot’s store, in an area away from the lumber department, and was looking at patio furniture when, without warning, she was struck and injured by a heavy steel lumber cart being maneuvered by another customer. The cart was loaded with two or more sheets of plywood (each 4 by 8 feet) and additional pieces of lumber.

(2) A Home Depot employee observed the customer pulling the loaded lumber cart in Marie Geary’s direction while facing away from her

until the cart struck Geary. (That employee's written report of his observations was before the trial court and part of the record on summary judgment. (CP 148-192: Exhibit B - Hovde Dep, Exhibit 3).

(3) Home Depot operated on a self-service system, whereby customers could select and load lumber products on lumber carts provided by Home Depot, and move loaded carts throughout the entire store, among other customers, without direction, supervision or restriction by Home Depot personnel.

(4) Home Depot had no policies or procedures in place governing or restricting the use or movement by customers of lumber carts for the storing or movement of merchandise.

Plaintiff's Complaint alleged that Home Depot's failure to implement or execute policies and practices to ensure that persons lawfully on its premises would not be injured by merchandise carts being moved by customers through its store, and its failure to supervise and/ or attend Scott as he moved the cart in question, constituted a breach of duty which proximately caused Geary's injury.

Although the nature and scope of Home Depot's duty is not in issue on appeal, recitation of examples of preventative measures readily available to Home Depot informs analysis of factual proximate cause. In the exercise

of ordinary care to protect its customers from injury, Home Depot could have restricted the use of lumber carts to the lumber department, prohibited the movement of lumber carts to other areas of its store among unsuspecting customers, required lumber carts to be moved only by store employees, or required that a store employee supervise or attend such movement. Had Home Depot taken either of the first two of these measures, it would not have been possible for Scott to injure Mrs. Geary. Either of the second two measures would have virtually eliminated the risk that Scott or anyone else would injure her with a lumber cart. **“But for”** Home Depot’s failure to take such or similar steps in the exercise of ordinary care for the safety of its customers, the incident would not have occurred. In pursuing its self-service mode of operation, Home Depot created, set in motion, and then failed to control, the precise dangerous instrumentality which directly caused Geary’s injury. Conceding for present purposes that reasonable minds could differ on the issue, factual proximate cause should be left for a trier of fact.

H. The material facts leave no room for conjecture as to “what happened.”

In its motion for summary judgment (CP 83-100, pp. 5-6), Home Depot challenged the sufficiency of the evidence to establish factual proximate cause and framed the issue as

...Whether plaintiffs have failed to establish 'but for' proximate causation, where the jury would have to speculate that the alleged negligent customer's cart was stacked to high with lumber, that a Home Depot employee knew the lumber was stacked too high for the customer to see others, and that the high [sic] of the lumber prevented the customer from seeing plaintiffs.

Home Depot then argued that the facts shown would necessarily invite impermissible conjecture and guess-work by a jury as to

...whether Scott's view was impaired, or whether Scott pushed or pulled the cart, or whether Scott maneuvered the cart to fast from an aisle. (CP 83-100, p.13).

In its summary judgment order, the trial court found

"...the jury would have to guess that the incident alleged happened one way and not in another way to render a verdict for plaintiffs." (CP 209-211).

This “finding” was not accompanied by any comment or explication, and it must be assumed, for present purposes, that the court was endorsing Home Depot’s argument.

The trial court erred in its “finding.” First, the court failed to appreciate that CR 56 (c) speaks to issues of “material fact.” A “material fact” is one upon which the outcome of the litigation depends, in whole or in part. **Jacobson v. State**, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977); **Barber v. Bankers Life & Casualty Co.**, 81 Wn.2d 140, 144, 500 P.2d 88 (1972). “Material” is defined as “important,” “more or less necessary,” “having influence or effect,” and “essential to a claim...without which it could not be supported.” **McDonald v. Murray**, 83 Wn.2d 17, 19, 515 P.2d 151 (1973), citing **Hansen v. Sandvik**, 128 Wash. 60, 63, 222 P. 205 (1924).

The factual details about which Home Depot contends a jury would have to “guess” in order to render a verdict for Geary are not “material” facts. Whether Scott pulled or pushed his cart, could see over the stacked merchandise, or moved too fast from an aisle before striking Geary are not issues of material fact. None of those facts are essential to support Geary’s claim against either Scott or Home Depot. In particular, the outcome of the litigation **against Home Depot** does not depend on any

of them. Given Geary's theory that Home Depot breached its duty to exercise care to protect her from being injured by lumber carts by permitting their unrestricted and unsupervised use by other customers, none of the factual issues cited by Home Depot bear on or would change the "cause in fact" link between Home Depot's breach and the resulting injury to Marie Geary.

Home Depot's reliance on **Gardener v. Seymour**, 27 Wn.2d 802, 180 P.2d 564 (1947) is misplaced. (CP 83-100, pp. 11-13). In that case, an individual at his place of employment was found at the bottom of an elevator well with injuries which soon proved fatal. His estate sued the employer alleging wrongful death. A verdict-based judgment in favor of plaintiff's estate was reversed on appeal because plaintiff had failed to establish sufficient facts at trial from which to determine proximate cause. In its decision, the Supreme Court noted: "*As to what actually happened in this case we have no idea.*" 27 Wn.2d 802, 805. It pointed out that there were two plausible factual theories that could explain the victim's fall – one which would support the employer's liability and one which would not. The Court based its holding on the settled proposition that a jury cannot base a verdict on conjecture about how an accident happened if there is nothing more tangible to proceed upon than two or more conjectural theories, under one or

more of which the defendant would be liable, and under one or more of which he would not. *Id.*, at 809.

Unlike the situation in **Gardner**, there is no room for conjecture at all in the case at bar as to the material facts and circumstances leading to Geary's injury. Simply put: an unattended customer moved a loaded lumber cart into another part of the store and caused it to strike and injure Marie Geary. Home Depot had taken no steps, in policy or practice, to prevent or protect against such occurrences.

Ultimately, because reasonable minds could (arguably) differ on the "but for" consequences of Home Depot's acts and omissions, "proximate cause in fact" is an issue which should be left for the trier of fact.

V. CONCLUSION

For the foregoing reasons, Geary requests that this Court reverse the trial court, vacate the judgments in favor of Scott and Home Depot, and remand for further proceedings.

DATED: October 24, 2011.



Paul Giersch, WSBA #11282

Attorney for Appellants

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2
3 COURT OF APPEALS
4 DIVISION I
5 OF THE STATE OF WASHINGTON

6 MARIE GEARY and ROBERT GEARY,
7 husband and wife,
8 Appellants,

9 v.

10 HOME DEPOT U.S.A., Inc.,
11 a foreign corporation,

12 GERALD T. SCOTT and CHERYL SCOTT,
13 Respondents.

NO. 67534-6-I

CERTIFICATE OF SERVICE OF
BRIEF OF APPELLANT

14 I certify that on October 24, 2011, I arranged for service of the Brief Of Appellant by legal messenger to the parties in this matter as follows:

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2011 OCT 25 PM 1:46