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No. 67534-6-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

MARIE GEARY AND ROBERT GEARY
Plaintiffs/Appellants

v.

HOME DEPOT, USA, INC., AND
GERARD SCOTT AND CHERL SCOTT,
Defendants/Repondents.

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
CAUSE NO. 10-2-20190-4

BRIEF OF RESPONDENT HOME DEPOT, USA, INC.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON


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I. INTRODUCTION

The issue raised in this Appeal is the same question the Superior Court posed to appellants' counsel during oral argument on respondent Home Depot, USA, Inc.'s (hereafter "Home Depot) Motion for Summary Judgment: what specific *facts* could appellants offer to support proximate causation? Because appellants' counsel was unable to present any specific facts, and only reiterated appellants' theory of liability, the Superior Court granted Home Depot's Motion for Summary Judgment. It is a settled point of law that if a party with the burden of proof on an element of a claim fails to provide sufficient evidence to support that element, the trial court may dismiss the claim on summary judgment. That is what the Superior Court did here. Appellants presented no specific facts to support that – on a more probably than not basis – another customer struck appellant Marie Geary with a cart because Home Depot breached alleged duties owed to appellants. Home Depot therefore respectfully requests that this Court affirm the Superior Court's July 18, 2011, Order granting Home Depot's Motion for Summary Judgment.

II. STATEMENT OF ISSUES

Issue 1: Did the Superior Court properly grant Home Depot's Motion for Summary Judgment for lack of factual proximate causation, where appellants failed to present sufficient evidence to support proximate causation and where the jury would have to guess to render a verdict in appellants' favor?

Issue 2: Regardless of appellants' inability to present sufficient evidence to support factual proximate causation, did the Superior Court nonetheless reach the correct result in dismissing appellants' action where appellants failed to show that Home Depot has a legally cognizable duty to protect them from third-party non-criminal conduct?

Issue 3: Regardless of appellants' inability to present sufficient evidence to support factual proximate causation, did the Superior Court nonetheless reach the correct result in dismissing appellants' action where breach of Home Depot's alleged duties was too remote and insubstantial to impose liability?

III. STATEMENT OF THE CASE

A. Parties

1. Marie Geary and Robert Geary

Marie Geary and Robert Geary are the appellants and were the plaintiffs below. Marie Geary alleged that another customer struck her with a cart at a Home Depot store causing injuries on June 15, 2007, and that Home Depot was negligent for, among other things, permitting the customer to stack his cart too high. Robert Geary, her husband, alleged a loss of consortium.

2. Home Depot

Home Depot is a respondent and was a defendant below. Home Depot is a multinational retailer of home improvement products, with over 2200 stores worldwide and four stores in Seattle, Washington.

3. Gerard Scott and Cheryl Scott

Gerard Scott and Cheryl Scott are also respondents and were defendants below. Gerard Scott is the customer who allegedly struck Marie Geary with a cart. Cheryl Scott is his wife. Appellant Gerard Scott will be referred to as “Scott.”

B. Procedural History

Appellants’ original Complaint was filed on June 7, 2010, naming Home Depot as a defendant as well as John and Jane Doe. (CP 1) On February 4, 2011, appellants filed their First Amended Complaint, adding Scott as a defendant. Scott moved for summary judgment on May 4, 2011, arguing that Appellants’ allegations against him were barred by the statute of limitations. (CP 13) Home Depot moved for summary judgment on May 27, 2011, requesting that Appellants’ allegations be dismissed for a (1) lack of legal duty, (2) lack of factual proximate causation, and (3) lack of legal proximate causation. (CP 22) The Superior Court granted Scott’s Motion for Summary Judgment on June 2, 2011. (CP 27) The Superior Court granted Home Depot’s Motion for Summary Judgment on July 18, 2011. (CP 33) Appellants filed their Notice of Appeal on August 9, 2011. (CP 34)

C. Discovery

1. Appellants' Discovery Responses

In their answers to interrogatories, both appellants indicated that they did not see Scott before he struck Marie Geary with a cart. (CP 23, D, No. 21, E, No. 5)

2. Appellants' Deposition Testimony

Appellant Marie Geary was deposed on October 15, 2010, and testified:

A: As we're walking along, a cart – two men came with a cart. I did not see them, but presumably they came up the side aisle, and they came fast. I can tell you they came fast.

* * *

A: He just came out of the blue. I did not see him.

* * *

A: I was walking I'm not sure which aisle he came up, but I'm going to guess he came up this aisle. I did not – I was not looking. I did not see him, just walking straight across.

* * *

Q: Okay. So you didn't see them before they hit you, correct?

A: I did not.

(CP 23, B, pp. 25-27, 34) Appellant Robert Geary was also deposed on October 10, 2010, and testified:

A: I stopped to look at an umbrella, yeah, and she [Marie] was – she was looking at something, too. I mean, she wasn't just walking ahead of me. We had both stopped and looked.

Q: Okay. So you look at the umbrella. And at that point you hear something?

A: I heard my wife scream.

Q: Okay. And – and what happened?

A: And then, when I turned around and looked, I could see where the cart hit her. And I didn't look at them two guys immediately because I went over to my wife, but then after they got her up in the chair, these two guys were standing there talking to one of the store employees.

* * *

Q: Okay. So at that point, when you first saw Marie, are you aware that there's two fellows there or one fellow there?

A: No. I wasn't aware that there was two.

(CP 23, C, pp. 20-21)

3. Scott's Testimony

Scott filed a Declaration along with his Motion for Summary

Judgment. In the Declaration he averred under penalty of perjury:

Because I was unaware of this litigation, I did not make any efforts to preserve my memories of the events of June 15, 2007 or to contact any other witnesses to the incident. I believe that because of the delay, my wife and I will be prejudiced in defending this lawsuit.

(Appendix A, Declaration of Gerard Scott, ¶ 4.) With the aid of this Declaration, Scott obtained summary judgment. (CP 27)

Scott was deposed on July 7, 2011, and his deposition transcript was not available before the July 15, 2011, hearing on Home Depot's

Motion for Summary Judgment. As a substitute, Home Depots' counsel filed a supplemental declaration reciting material aspects of Scott's testimony, e.g., that he did not have a problem seeing over the cart and that he did not need assistance moving the cart. (CP 31, ¶ 4) Now that Scott's deposition transcript is available, this is his testimony:

Q: Do you have any recollection that it was difficult for you to see over or past the material on the cart as you moved it through the store?

A: No.

* * *

Q: From your testimony today I gather you don't know if you were pulling or pushing the cart?

A: Correct.

Q: You don't know in relation to your son where you were around the cart; is that right? Is that correct?

A: Correct.

* * *

Q: [...] you have no recollection of how the cart was stacked; is that correct?

A: No – yeah, correct.

Q: You have no recollection of whether it was difficult to look over the cart?

A: I figured if I was – or moving it, I was okay.

* * *

Q: You don't recall having any difficulty moving the particular lumber cart that day; is that true?

A: (Witness nods head.)

(Appendix B, Scott Dep, pp. 18, 37-38, 40.)

IV. ARGUMENT

A. Standard of Review

An appeal of an order granting summary judgment is reviewed *de novo*, with the appellate court conducting the same inquiry as the trial court. *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.2d 705 (2007). A party may move for summary judgment, in whole or in part, on two bases. First, where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56. Second, it can point "out to the trial court that the nonmoving party lacks sufficient evidence to support its case." *Guile v. Ballard Community Hospital*, 70 Wn.App 18, 21, 851 P.2d 689 (1993). Summary Judgment should be denied only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248 (1986); *Celotex Corp v. Catrett*, 477 US 317, 322-333 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The non-moving party may not rest upon mere allegations, but must instead set forth specific facts showing the existence

of a genuine issue for trial. CR 56(e); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990).

B. The Superior Court Properly Granted Summary Judgment

1. The Factual Proximate Cause Standard is Settled Law

Proximate causation is a requisite element of a negligence claim. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App 372, 378, 972 P.2d 475 (1999). Proximate causation entails two components: cause in fact and legal proximate causation. *Dougherty v. Municipality of Metropolitan Seattle*, 83 Wn.App 464, 469, 921 P.2d 1098 (1996). A cause in fact analysis looks to *facts* to determine whether “but for” the alleged negligence that plaintiff’s injury would not have occurred. Legal proximate causation asks whether as a matter of public policy and common sense liability should attach. *Id.*

The law on factual proximate causation is well settled in Washington. Back in 1947, the Supreme Court explained factual proximate as follows:

The burden of proving proximate causation is not sustained unless the proof is sufficiently strong to remove that issue from the realm of speculation **by establishing facts** affording a logical basis for all inferences necessary to support it.

Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947)(emphasis added). This settled law on factual proximate causation was applied in

Marshall, supra, and in *Little v. Countrywood Homes, Inc.*, 132 Wn.App 777, 133 P.3d 944 (2006). That is, to prove the factual proximate causation element of a negligence claim, the plaintiff must present sufficient facts and cannot rely on theory or speculation.

In *Marshall*, the plaintiff alleged that she was injured by a treadmill machine at the defendant's health club. Specifically, she claimed that the treadmill suddenly and unexpectedly started and threw her from the treadmill. However, during her deposition the plaintiff testified that she had no memory of the treadmill abruptly starting or of being thrown from the treadmill. Her last memory was only of resetting the treadmill. *Id.* at 375. The defendant moved for summary judgment for a lack of evidence to prove proximate causation. At the summary judgment hearing, the plaintiff's counsel conceded to the trial court that the plaintiff did not recall how the accident happened. *Id.* at 378-379. The trial court granted the defendant's motion for summary judgment, which was affirmed by the Court of Appeals.

In affirming the trial court, the Court of Appeals in *Marshall* first noted that the mere occurrence of an accident is not evidence of negligence. *Marshall*, 94 Wn.App at 377. The Court of Appeals then stated: "Even if negligence is clearly established, the [defendant] may not be held liable unless their negligence *caused* the accident." *Id.* at 378

(emphasis in original). Based on the plaintiff's deposition testimony and the acknowledgement by her attorney that the plaintiff had no recollection of the accident, the Court of Appeals held:

Without any memory of the accident, Marshall simply offers a theory as to how she sustained her injuries. But a verdict cannot be founded on mere theory or speculation.

Id at 378.

In *Little, supra*, the plaintiff, a subcontractor, sued the defendant, the general contractor, for injuries he suffered at the defendant's work site. The plaintiff had apparently fallen from a ladder. However, the plaintiff could not recall how he fell. Plaintiff's brother (and coworker) heard plaintiff fall but he did not see how the accident happened. *Little*, at 778. The plaintiff alleged that the defendant was negligent for not adhering to regulations regarding use of ladders. *Id.* at 780. The defendant moved for summary judgment arguing that the plaintiff could not prove proximate causation. The trial court granted the motion and the Court of Appeals affirmed.

Similar to *Marshall*, the Court of Appeals affirmed the trial court in *Little* by initially observing that **“the mere fact that [plaintiff] sustained an injury does not entitle him to put [defendant] to the expense of trial.”** *Id.* at 781 (emphasis added). The Court of Appeals then reasoned that the plaintiff's lack of evidence to demonstrate how his

injuries were proximately caused by the defendant's breach of alleged duties made summary judgment appropriate. *Id.* at 782.

Therefore, the Superior Court's decision to grant Home Depot's Motion for Summary Judgment for lack of factual proximate causation was clearly controlled by settled law. The plaintiff must still – whether at trial or when opposing summary judgment – present sufficient facts to remove the matter from speculation.

2. The Superior Court's Decision Was Supported by the Evidence

In *Marshall*, the plaintiff could not recall how the accident occurred. In *Little*, the plaintiff could not recall how the accident occurred. Here, while plaintiff Marie Geary did not lose consciousness, she and her husband nonetheless gave unambiguous interrogatory answers and deposition testimony that they did not see how (nor know why) the alleged accident occurred. Scott submitted a Declaration to the trial court, under penalty of perjury, attesting that he had no memory of the alleged accident. On the other hand, his deposition testimony was that his lumber cart was not stacked too high and he had no difficulty moving the lumber cart. Hence, the Superior Court's grant of Home Depot's Motion for Summary Judgment for lack of factual proximate causation was supported by the evidence before it.

Additionally, there was a colloquy at the summary judgment hearing like that mentioned above in *Marshall*. *Id.* at 378-379. Just as the trial court in *Marshall* pressed the plaintiff's attorney on evidence to support factual proximate causation, the Superior Court offered appellant's counsel an opportunity to explain what evidence there was to connect the alleged breach of duties to appellants' injuries:

MR. GEIRSCH: With regard to proximate causation, we have but-for causation here. But for Home Depot creating a store environment in which these things [lumber carts] can be moved around without supervision or restriction and harm other client – customers, this thing could not have happened. Clearly, we may have concurrent causation with Mr. Scott's negligence, but without Home Depot's policy and practices could not have happened, so there's proximate cause.

THE COURT: I don't think that's the test for proximate cause, though, is it? I mean but for the store existing, this wouldn't have happened.

MR. GEIRSCH: But –

THE COURT: It's got to – but for Home Depot even opening its doors, it couldn't have happened.

MR. GEIRSCH: Yeah.

THE COURT: But that's strict liability, isn't it?

MR. GEIRSCH: No, no, no. There's a strict nexus between a particular failure of policy as a self-service store for foreseeable risk and the harm that was caused. I mean that's a very close causal connection. It's immediate.

Their failure to – and as I said, that their negligence can be by act or omission, and here it's by omission. They failed to either supervise them or otherwise create conditions that made this safe to move these carts, and they didn't.

So I think we have but-for causation and – and I mean you're right. If the sun hadn't come up that day, it might not have happened either . . .

(Appendix C, Verbatim Report of Proceedings, pp 24-25.)

The Superior Court's exchange with appellant's counsel illustrates that the decision to grant summary judgment for lack of factual proximate causation was not limited to appellants' interrogatory answers, appellants' deposition testimony, Scott's Declaration, and Scott's deposition testimony. The Superior Court signaled to appellant's counsel that it was having difficulty with factual proximate causation. Instead of pointing to facts and constructing a logical (and factual) sequence of events connecting the alleged breach of duties to appellants' injuries, appellant's counsel simply repeated appellants' liability theory. Thus, the Superior Court's decision to grant Home Depot's Motion for Summary Judgment was supported by the evidence when it made the following findings:

The Court finding that there is insufficient evidence to support factual proximate causation between the duties alleged by plaintiffs' against defendant Home Depot and the injuries claimed;

(CP 33)

C. **Appellants' Proposed Proximate Cause Theory Is Speculative and Would Require the Jury to Speculate as Well**

The Superior Court recognized that appellants were not using the proper test for proximate causation when it questioned appellants' counsel at the July 15, 2011, summary judgment hearing. The Superior Court even characterized appellants' position as akin to strict liability. (Appendix C, Verbatim Report of Proceedings, p. 25.) Indeed, in application appellants' notion of factual proximate causation looks to be just that. In deference to appellants, their proximate causation argument appears to be that because Home Depot did not restrict use of lumber carts, appellant Marie Geary was injured by a cart; or, that "but for" Home Depot not implementing these restrictions appellant was injured. For example, their opening Brief surmises: "Had Home Depot taken either of these two measures [restricting use of carts], it would not have been possible for Scott to injure Mrs. Geary." (Appellants' Brief, p. 31.) Yet these are arguments, *not facts*, and arguments of counsel are not evidence. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982); WPI 1.01.

1. Lack of Specific Facts For Proximate Causation

Appellants' proposal for factual proximate causation comes clearer into view when their opening Brief interprets what is, and what is not, a "material fact" for purposes of summary judgment. (Appellants' Brief,

pp. 31-35.) The actions and inactions of Scott are discounted as somehow *not* material and the failure of appellants themselves to offer *specific facts* of how the alleged accident occurred is ignored. Instead, Appellants' Brief advises that the only material fact of consequence is that an injury occurred:

[A]n 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.

(Appellants' Brief p. 35.)(emphasis added).

Appellants' factual proximate causation stance is a legal fallacy (*post hoc, ergo propter hoc*; after this, therefore because of this). It violates a fundamental tenet of the law – “even if negligence is clearly established, the [defendant] may not be held liable unless their negligence *caused* the accident.” *Marshall* at 378 (emphasis in the original). All that appellants could show to the Superior Court, and all that appellants could conjure now, is that appellant Marie Geary was injured. There is no evidence whatsoever that, more probably than not, Scott struck appellant Marie Geary *because* Home Depot did not implement a policy restricting the movement of lumber carts.

To illustrate the point, appellants' Brief dismisses wholesale the absence of facts *proximate* to the occurrence of the alleged injury:

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 these facts are essential to support Geary's claim against either Scott or Home Depot.

(Appellants' Brief, p. 33.) In *Little*, supra, *this* Court, Division I of the Court of Appeals, declined a similar argument proposed by the plaintiff to establish proximate causation:

[The plaintiff] contends that he established, more probably than not, that [the defendant's] negligence was "a 'substantial contributing cause'" of his 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 those conditions constituted breaches of duty that [the defendant] owed to [the plaintiff], he did not provide evidence showing more probably than not that one of those breaches caused his injuries. No one, including [the plaintiff], knows how he was injured.**

Little at 782 (emphasis added).

Correspondingly, even assuming that Home Depot breached the duties allegedly owed to appellants, appellants have provided no evidence showing more probably than not that one of those breaches caused their injuries. No one, including appellants and Scott, knows how appellants were injured.

2. The Jury Would be Required to Speculate

The void of evidence regarding proximate causation invites speculation. To reach the conclusion desired by appellants, that their injuries were proximately caused by Home Depot's breach of the alleged duties, the Jury would have no choice but to go beyond fair inference from established fact to the realm of conjecture. Conjecture, while consistent with known facts, is not deducible from them. Here, the only "material" fact that appellants can supply to the Jury is that an accident occurred. This fact is admittedly consistent with appellants' theory of liability; it is also consistent with a universe of other possibilities:

[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

Gardner at 809.

Thus, the Superior Court's decision to grant Home Depot's Motion for Summary Judgment was supported by the evidence when it made the following findings:

The Court 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 33)

D. The Superior Court Reached The Correct Result

The Superior Court reached the correct result by granting Home Depot's Motion for Summary Judgment for appellants' failure to present sufficient evidence to support factual proximate causation. Nevertheless, Home Depot sought summary judgment on two additional bases: (1) there was no breach of a recognized legal duty and (2) no legal proximate causation. This Court may affirm the Superior Court's grant of summary judgment where the judgment is correct, even though the Superior Court may have given the wrong reason for its conclusion. *Ertman v. City of Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724 (1980); *Niven v. E.J. Bartells Co.*, 97 Wn.App 507, 513, 983 P.2d 1193 (1999)(“A trial court judgment may be affirmed on any grounds supported by the pleadings and the proof, even if the trial court's specific reason for granting judgment was in error.”)

Hence, as there is no recognized legal duty for a proprietor of land to protect a business invitee from non-criminal third-party conduct, and as the alleged breach of duties is too remote from appellants' alleged injuries, the Superior Court's grant of summary judgment should be affirmed.

1. No Duty to Protect Against Non-Criminal Acts of Other Customers

Appellants' charges of negligence against Home Depot are that it: (1) failed to implement policies ensuring that customers were not injured by carts; (2) failed to supervise Scott as he moved his cart; and (3) permitted Scott to move a cart that was stacked too high. (CP 9, ¶ 3.2.) Interestingly, appellants conceded below that their allegations do not arise from a condition of the land. (CP 28, p. 6.) Rather, they argued for expansion of the self-service rule announced in *Pimental v. Roundup Company*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983), to cover the actions of Home Depot and its employees in allowing customer to use carts. (CP 28, p. 6.) The "self-service" rule, of course, is not applicable here as it only relieves the plaintiff's need to show actual or constructive notice – the existence of an unsafe condition still needs to be proved. *Id.*

Because a traditional premises liability analysis cannot be employed (i.e., the allegations do not arise from a condition of the land), appellants must look elsewhere to impose liability on Home Depot. The most analogous case in Washington is *Nivens v. 7-11 Hogay's Corner*, 133 Wn.2d 192, 207, 943 P.2d 286 (1997), where the Supreme Court expanded a land proprietor's duty to now protect business invitees from imminent or

reasonably foreseeable criminal conduct of third parties. But in doing so, the Supreme Court cautioned that:

In the absence of clear articulation of the business's duty, the business could become the guarantor of the invitee's safety from all third party conduct on the business premises. **This is too expansive a duty.**

Id. at 203.

The plaintiff in *Nivens* alleged that the proprietor of land had a duty to protect him against third-party **criminal** conduct which the proprietor was aware existed on the premises. Critically, the Supreme Court explicitly limited its holding to "acts involve[ing] imminent criminal conduct or reasonably foreseeable criminal behavior." *Id.* at 207.; see also *Minahan v. Western Washington Fair Assoc*, 117 Wn.App 881, 892, 73 P.3d 1019 (2003)(recognizing the Supreme Court's holding in *Nivens* as for imminent or reasonably foreseeable **criminal** harm).

Missing from appellants' Brief is **any** case authority either distinguishing *Nivens*, *supra*, or otherwise charging Home Depot with a duty from which proximate causation in this instance can flow. Appellants' Brief compiled various suggestions on what Home Depot could have done regarding customers' use of carts, e.g., requiring lumber carts only be moved by store employees, but these suggestions are not backed up by case authority or expert testimony on the standard of

practice. (Appellants' Brief, p. 31.) The foundation of appellants' alleged duties is just as conjectural as their theory of proximate causation. Moreover, appellants' suggestions are impractical; essentially obligating retail stores to assign chaperones to customers using carts. Put simply, to reverse the Superior Court's Order granting Home Depot's Motion for Summary Judgment, this Court would have to create new law which is contrary to common sense – and appellants' Brief cited no controlling authority warranting such a burdensome expansion of a retailer's duty. This Court should decline the invitation.

In any event, appellants took the CR 30(b)(6) deposition of Marybeth Hovde on June 28, 2011. She testified that Home Depot has policies to ensure that customers use carts safely; such as announcements on the PA system and watching for customers who load items improperly in their carts. (CP 31, ¶ 3, A, pp. 18-25.)

Hence, as appellants here have not alleged that Scott's conduct was criminal, and there is no legally cognizable basis to hold Home Depot liable for appellants' alleged injuries, the Superior Court's July 18, 2011, Order granting summary judgment should be affirmed.

2. No Legal Proximate Causation

Legal proximate causation involves “considerations of policy and common sense as to how far the defendant's responsibility for the

consequences of its actions should extend. The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter.” *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243 (1992)(internal citations omitted).

Obviously, if a duty to protect against non-criminal conduct of third parties does not exist under *Nivens, supra*, there can be no legal proximate causation. Moreover, as a matter of public policy and common sense, should a retailer like Home Depot face liability where one customer injures another customer in its store when, as here, the alleged negligence does not arise from a condition of the land? (CP 28, p. 6.) To allow legal proximate causation in such a scenario would elevate the retailer’s risk of exposure from that of exercising ordinary care to keep the premises in a reasonably safe condition to an insurer of the customer’s safety. *Nivens* at 203. An expansion of the retailer’s duty in this regard is comparable to strict liability.

Therefore, because as a matter of public policy and common sense a retailer should not be held legally liable for the non-criminal conduct of a third-party, the Superior Court’s July 18, 2011, Order granting summary judgment should be affirmed.

V. CONCLUSION

The available evidence to support appellants' claims has been fleshed out. Appellants' interrogatory answers and deposition statements unequivocally provide that they did not see Scott before the accident and they do not know how the accident occurred. For his part, Scott offers two lines of evidence. The first is his Declaration, which he attested to under penalty of perjury and which helped him secure summary judgment below. Scott's Declaration simply disclaimed memory of the accident. Scott's second evidentiary offering is his deposition. He testified (under oath) that he had no difficulty looking over, or moving, the cart and did not need assistance. Hence, unless the Jury is permitted to resort to fiction and create its own evidence *ex nihilo*, there is insufficient evidence to support appellants' theory of factual proximate causation and the Superior Court's July 18, 2011, Order granting summary judgment should be affirmed.

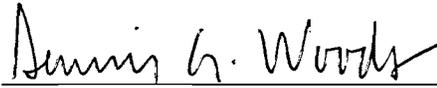
While the Superior Court limited its grant of summary judgment to factual proximate causation, Home Depot also requested dismissal for lack of recognized legal duty and lack of legal proximate causation. The Supreme Court has *not* enlarged the duty of a proprietor of land to cover protecting against the non-criminal conduct of third parties. As a proprietor of land is not the insurer of the business invitee's safety,

appellants have not pleaded a cognizable legal duty against Home Depot. It follows that in the absence of a recognized duty, legal proximate causation cannot be imposed. More to the point, as a matter of public policy and common sense, a retailer should not be legally liable where a customer is injured by the non-criminal conduct of another customer and the alleged negligence does not arise from a condition of the land.

This case is about one customer striking another customer with a cart because he was not paying attention. As the Supreme Court stated in *Nivens*, the proprietor of land is not an insurer of the invitee's safety. But if liability is permissible in this scenario, at what point is *Nivens* to be followed and a retailer not an insurer of a customer's safety? If a customer bumps into another customer while texting on a cell phone – is the retailer liable? If a customer spills liquid on the floor and another customer promptly slips on it – is the retailer liable? How would this not be *de facto* strict liability?

Therefore, Home Depot respectfully requests this Court affirm the Superior Court's July 18, 2011, Order granting Home Depot's Motion for Summary Judgment.

SCHEER & ZEHNDER LLP

A handwritten signature in black ink that reads "Dennis G. Woods". The signature is written in a cursive style with a horizontal line underneath the name.

Dennis G. Woods, WSBA No. 28713
Gregory P. Thatcher, WSBA No. 40902

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

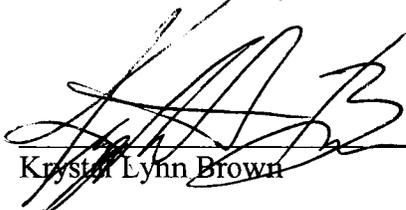
I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<u>CO/Plaintiffs</u> Paul Giersch Law Office of Paul Giersch, P.S. 333 Taylor Avenue North Seattle, WA, 98109	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Via E-Mail <input type="checkbox"/> Via Overnight Mail
<u>CO/Defendants Gerald and Cheryl Scott</u> David B. Jensen Merrick Hofstedt & Lindsey PS 3101 Western Ave Ste 200 Seattle, WA 98121-3017	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Via E-Mail <input type="checkbox"/> Via Overnight Mail

DATED this 23rd day of November, 2011, at Seattle, Washington.



 Krystal Lynn Brown

RECEIVED
 COURT OF APPEALS DIV 1
 STATE OF WASHINGTON
 2011 NOV 23 PM 3:50

EXHIBIT - A

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

MARIE GEARY and ROBERT GEARY,)
husband and wife,)
)
) Plaintiffs,)
)
) v.)
)
HOME DEPOT, U.S.A., INC. a foreign)
corporation, GERARD T. SCOTT and)
CHERYL SCOTT, and the marital community)
composed thereof,)
)
) Defendants.)

NO. 10-2-20190-4
DECLARATION OF GERARD SCOTT
IN SUPPORT OF DEFENDANTS
GERARD T. SCOTT AND CHERYL
SCOTT'S MOTION FOR SUMMARY
JUDGMENT

I, Gerard Scott, declare as follows:

1. I am over the age of 18, competent to testify, and make the following statements based upon my personal knowledge.
2. I first learned of the above-captioned lawsuit when my wife, Cheryl, and I were served with and read the First Amended Summons and First Amended Complaint on February 13, 2011, three years and eight months after the June 15, 2007 incident. I did not anticipate this lawsuit being filed prior to receiving the First Amended Summons and First Amended Complaint.
3. During the summer of 2010, I received a telephone call from a male person who stated he was an attorney for Home Depot. The man asked me if I remembered the June 15, 2007 incident at Home Depot. I told him that I did not remember the exact incident. Our

1 telephone conversation lasted three to five minutes. During the conversation, the man did not
2 mention this lawsuit. This conversation did not lead me to believe that a lawsuit had been filed.
3 Rather, I first learned about this lawsuit on February 13, 2011 when my wife and I read the First
4 Amended Summons and First Amended Complaint.

5 4. Because I was unaware of this litigation, I did not make any efforts to preserve
6 my memories of the events of June 15, 2007 or to contact any other witnesses to the incident. I
7 believe that because of the delay, my wife and I will be prejudiced in defending this lawsuit.

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

10 EXECUTED this 28 day of April, 2011, at Seattle, Washington.

11
12
13 
14 Gerard Scott

EXHIBIT – B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MARIE GEARY and ROBERT GEARY,)
husband and wife,)
)
 Plaintiffs,)
)
vs.) No. 10-2-20190-4 SEA
)
HOME DEPOT U.S.A., Inc., a)
foreign corporation,)
)
GERARD T. SCOTT and CHERYL SCOTT,)
husband and wife, and the marital)
community composed thereof,)
)
 Defendants.)

Deposition Upon Oral Examination of

GERARD SCOTT

REPORTED AT: 333 Taylor Avenue North
 Seattle, Washington

REPORTED BY: Michelle Neale, CCR #2494

REPORTED ON: July 7, 2011

Treece, Shirley & Brodie
1415 North 200th Street, Suite B-7, Shoreline, WA 98133
Phone: (206) 624-6604

Deposition of Gerard Scott, 7/7/11

2

APPEARANCES

FOR PLAINTIFFS: PAUL GIERSCH
 Law Office of Paul Giersch, P.S.
 333 Taylor Avenue North
 Seattle, WA 98109

FOR DEFENDANT GREGORY P. THATCHER
 HOME DEPOT: Scheer & Zehnder
 701 Pike Street
 Suite 2200
 Seattle, WA 98101

FOR DEFENDANT DAVID B. JENSEN
 SCOTTS: Merrick, Hofstedt & Lindsey
 3101 Western Avenue
 Suite 200
 Seattle, WA 98121

Deposition of Gerard Scott, 7/7/11

4

1 BE IT REMEMBERED that on July 7, 2011,
 2 at 10:20 a.m., appeared the aforementioned witness before
 3 Michelle Neale, CCR, Notary Public, in and for the state
 4 of Washington, residing in Covington.
 5 WHEREUPON, the following proceedings
 6 were had, to wit:
 7 GERARD SCOTT, having been called as a witness, was
 8 duly sworn and testified as follows:
 9 EXAMINATION
 10 BY MR. GIERSCH:
 11 Q. Good morning, Mr. Scott.
 12 A. Good morning.
 13 Q. Thanks for appearing today.
 14 Would you begin by stating your full name
 15 and spelling your last name?
 16 A. Gerard Scott, G-e-r-a-r-d, S-c-o-t-t.
 17 Q. How old are you?
 18 A. Fifty-one.
 19 Q. What is your occupation?
 20 A. Steam plant engineer.
 21 Q. Are you currently employed?
 22 A. Yes.
 23 Q. By whom?
 24 A. Seattle Steam Company.
 25 Q. Were you employed in June of 2007 at the same

3

I N D E X

WITNESS	PAGE
Gerard Scott	
Examination, By Mr. Giersch	4, 40
Examination, By Mr. Thatcher	34

EXHIBITS	
NO.	PAGE
1 Photo	38

Deposition of Gerard Scott, 7/7/11

5

1 place?
 2 A. Yes.
 3 Q. What's your home address?
 4 A. 7511 - 31st Avenue Northwest; Seattle,
 5 Washington.
 6 Q. How long have you lived at that address?
 7 A. Twenty-eight years, something like that.
 8 Q. Is it a single-family home?
 9 A. Yes.
 10 Q. Do you own it?
 11 A. Yes.
 12 Q. Are you married?
 13 A. Yes.
 14 Q. What is your wife's name?
 15 A. Cheryl Scott.
 16 Q. How long have you and Cheryl been married?
 17 You'd better remember.
 18 A. Yeah, I know. See, that's why I didn't just let
 19 her come in.
 20 Twenty-eight, 29, years.
 21 Q. (By Mr. Giersch) Okay. Do you have children?
 22 A. Yes.
 23 Q. How many?
 24 A. Two.
 25 Q. What are their names and ages?

6

1 A. Allison, 25, Spencer, 19.
2 Q. Back in June of 2007 who all constituted your
3 household?
4 A. Allison, Spencer, Cheryl, and me.
5 Q. In this matter, Plaintiffs Marie and Robert
6 Geary have alleged, among other things, that on June 15,
7 2007, while shopping at the Bitter Lake Home Depot store
8 on Aurora Avenue that Mrs. Geary was struck by a lumber
9 cart allegedly maneuvered by you.
10 Do you recall such an incident?
11 A. Now I do, yes --
12 Q. Okay.
13 A. -- through this.
14 Q. Have you shopped at that store at times through
15 the years?
16 A. Yes.
17 Q. On approximately how many occasions would you
18 estimate?
19 A. Several. I'm not quite sure.
20 Q. Okay. Do you recall any specific instances in
21 which you purchased lumber products there?
22 A. I wouldn't say specific, but I have purchased
23 lumber products there.
24 Q. Back in June of 2007 do you recall whether you
25 were there to purchase lumber, and specifically on

7

1 June 15, 2007?
2 A. Yes.
3 Q. I understand it's a long time ago and that you
4 perhaps haven't had reason to think about it during much
5 of the time since, but do you recall whether there was a
6 particular project you were working on that prompted you
7 to purchase lumber that day?
8 A. It was work on a fence.
9 Q. At your home?
10 A. Yes.
11 Q. Before I get into asking many more details about
12 the events that day, could you kind of tell me, without
13 telling me what your attorney may have told you or spoken
14 to you about at any time or anybody else, how you
15 reconstructed some recollection of the events of that day?
16 Does that make sense?
17 A. I'm going to just ask for the purposes of this
18 deposition or for some other purpose?
19 Q. Oh, no. I'm wondering generally how you
20 reconstructed a recollection of the events of that day
21 after being advised that there was a claim pending?
22 MR. JENSEN: I'm going to object to
23 the form. To the extent that he has a reconstructed
24 recollection, I guess, he can answer.
25 A. Yeah. I mean --

8

1 MR. GIERSCH: I can rephrase it and go
2 in another direction, if you'd like?
3 MR. JENSEN: As long as he's
4 comfortable answering the question, that's fine.
5 I mean, if you understand where he's coming
6 from.
7 A. Well, can you say that again?
8 Q. (By Mr. Giersch) Sure. Let me ask a different
9 question.
10 I understand that you received a phone call
11 from an attorney in the summer of 2010 asking you about an
12 incident as I've described at Home Depot; is that right?
13 A. Correct.
14 Q. When you got that call and the subject was
15 raised, at that time did you have any clear
16 recollection --
17 A. I did not.
18 Q. Some months subsequent, in fact in February of
19 this year, I believe, you or your wife was served with
20 papers at your home.
21 At that time did you have a chance to read
22 the summons and complaint?
23 A. Yes.
24 Q. At that time did you have a clear recollection
25 of the events of June 15, 2007?

9

1 A. No, I did not have a clear recollection.
2 Q. What did you recall at that time, at the time
3 you were served with the papers, for instance?
4 MR. JENSEN: Are we talking about
5 independently or based on what he read in the papers?
6 MR. GIERSCH: Independently.
7 Q. (By Mr. Giersch) Or as refreshed by what you
8 read in the papers.
9 A. Do you mean the Geary papers?
10 Q. Yes.
11 MR. JENSEN: Again, correct me if I'm
12 mischaracterizing this, but what I think he wants to know
13 is what you remembered versus what you read.
14 THE WITNESS: Versus what I read?
15 Q. (By Mr. Giersch) Sure, that's fine.
16 A. What I remembered was purchasing wood and going
17 to purchase -- pick up other things that I needed, and at
18 some point that's when Mrs. Geary was struck.
19 Q. Okay. Since you were served with those papers
20 and read those papers have you enlarged your recollection
21 of the details of that day?
22 MR. JENSEN: I'm going to object to
23 the form.
24 Q. (By Mr. Giersch) You can answer if you can
25 answer.

10	<p>1 MR. JENSEN: Do you understand the</p> <p>2 question?</p> <p>3 THE WITNESS: I understand the</p> <p>4 question.</p> <p>5 MR. JENSEN: Okay.</p> <p>6 A. I can't recall those. I'm still back to the</p> <p>7 basic of what I stated.</p> <p>8 Q. (By Mr. Giersch) Okay. I guess my question is</p> <p>9 this: Do you remember more about the details of that day</p> <p>10 now than you did the day you were served with those</p> <p>11 papers?</p> <p>12 A. No. I mean, that's when I said -- you know,</p> <p>13 when I was served with the papers, that's when I recalled.</p> <p>14 Q. Okay.</p> <p>15 A. And I can't -- I can't recall.</p> <p>16 Q. To your knowledge and recollection, have you</p> <p>17 ever been involved in any other incidents at a Home Depot</p> <p>18 store in which a person was struck with a lumber cart that</p> <p>19 you were using?</p> <p>20 A. No.</p> <p>21 Q. So to the best of your knowledge the incident</p> <p>22 with the Gearys was the only such incident that you've</p> <p>23 ever been involved in?</p> <p>24 A. Yes.</p> <p>25 Q. Let me back up for a minute to your purchases</p>	12
11	<p>1 that day.</p> <p>2 Do you recall precisely what you purchased?</p> <p>3 A. Cedar planks for a fence.</p> <p>4 Q. Do you know the dimensions of the planks and how</p> <p>5 many planks?</p> <p>6 A. One by sixes, and I don't know how many.</p> <p>7 Q. Could you estimate the number of planks that you</p> <p>8 purchased?</p> <p>9 MR. JENSEN: If you know.</p> <p>10 A. Twenty?</p> <p>11 MR. JENSEN: If you don't know, don't</p> <p>12 speculate.</p> <p>13 THE WITNESS: Okay.</p> <p>14 A. (continuing) I don't want to speculate. I'm</p> <p>15 sorry.</p> <p>16 Q. (By Mr. Giersch) That's all right.</p> <p>17 Were the cedar planks for the fence project</p> <p>18 that you've alluded to?</p> <p>19 A. Yes.</p> <p>20 Q. Was the fence going to be a new fence?</p> <p>21 A. The planks were new.</p> <p>22 Q. Okay. How long an area in linear feet, for</p> <p>23 instance, were you going to cover with planks for the</p> <p>24 fence, approximately?</p> <p>25 A. Fifteen feet.</p>	13
10	<p>1 Q. Fifteen feet?</p> <p>2 A. Approximately.</p> <p>3 Q. Was that on a portion of your property?</p> <p>4 A. Correct.</p> <p>5 Q. What portion?</p> <p>6 A. The north.</p> <p>7 Q. Is that the front of your house?</p> <p>8 A. Side.</p> <p>9 Q. So the cedar planks you bought were to create</p> <p>10 fencing for a length of about 15 feet?</p> <p>11 A. Yes.</p> <p>12 Q. In addition to the cedar planks, were there</p> <p>13 other items that you purchased that day?</p> <p>14 A. I don't recall what they were but -- I don't</p> <p>15 recall exactly what they were, no.</p> <p>16 Q. Do you recall, however, that there were other</p> <p>17 items that you purchased?</p> <p>18 A. Well, I don't want to speculate, but ...</p> <p>19 MR. JENSEN: If you don't recall, you</p> <p>20 don't recall.</p> <p>21 A. (continuing) Yeah. I don't recall exactly what.</p> <p>22 Q. (By Mr. Giersch) Do you have a belief that you</p> <p>23 probably purchased items beyond the cedar planks that day?</p> <p>24 MR. JENSEN: Asked and answered.</p> <p>25 MR. GIERSCH: He can answer unless</p>	13

14

1 A. Well, being we don't keep our receipts that
 2 long.
 3 Q. Nor do I.
 4 Robert Geary has testified in deposition
 5 that the cart involved contained at least two pieces of
 6 plywood each four by eight feet in dimension.
 7 Do you have reason to dispute that
 8 description?
 9 A. I have a Toyota Tacoma truck with a canopy and I
 10 can't fit four by eights in there. So, no -- I mean, I
 11 don't think I had four by eights in there.
 12 Q. Okay. Do you recall whether you had taken your
 13 Tacoma truck to the Home Depot store that day?
 14 A. I would have for wood, yes, sir.
 15 Q. Preliminarily, I presume you owned the vehicle
 16 at that time?
 17 A. Yes.
 18 Q. Do you know whether you purchased any other
 19 dimension of plywood products that day?
 20 A. No. I don't recall purchasing anything else.
 21 Q. Can you recall any purpose you might have had
 22 for sheets of plywood in June of 2007?
 23 A. No.
 24 Q. When you went to the store that day, were you
 25 alone or were you accompanied by someone else?

15

1 A. I was with someone else.
 2 Q. Who was that?
 3 A. My son.
 4 Q. Spencer?
 5 A. Yes.
 6 Q. How old was Spencer at that time?
 7 A. Fifteen.
 8 Q. Was there any particular reason why Spencer
 9 accompanied you that day, if you recall?
 10 A. We have done projects together so he likes going
 11 to Home Depot.
 12 Q. Have you undertaken any projects in or about
 13 your home that involved the use of plywood products?
 14 A. No. Within that time period?
 15 Q. Yes.
 16 A. No.
 17 Q. Has Spencer, to your knowledge, had any use for
 18 plywood products since June of 2007 --
 19 A. No.
 20 Q. -- or in that time frame?
 21 A. (Witness shakes head.)
 22 Q. The answer's no?
 23 A. No.
 24 Q. Do you recall what type of cart you put your
 25 cedar planks on that day?

16

1 A. It was a steel side -- well, steel push cart.
 2 Q. Do you know its approximate dimensions or
 3 weight?
 4 A. No.
 5 Q. It was a cart that was made available to you by
 6 Home Depot?
 7 A. Yes.
 8 Q. Did you locate the cart in the lumber
 9 department, if you recall?
 10 A. They have them outside the lumber department.
 11 Yes, outside the store.
 12 Q. Okay. Do you recall whether the lumber that you
 13 did purchase that day was loaded onto the cart by you,
 14 yourself, and/or your son?
 15 A. Yes, by me.
 16 Q. Did Spencer take part in that process?
 17 A. No.
 18 Q. Do you recall that specifically or are you
 19 presuming that that's the case?
 20 A. Well, I -- I usually pick out the wood and I
 21 figured I -- I guess I shouldn't be so specific because I
 22 don't remember that.
 23 Q. So is it fair to say you're presuming that?
 24 A. Yeah, because I -- I do pick out the wood
 25 myself, though.

17

1 Q. When you say that, that you pick out the wood
 2 yourself, does that imply that there had been a number of
 3 occasions on which you'd been there and picked out wood?
 4 A. In the past?
 5 Q. Yes.
 6 A. (Witness nods head.)
 7 Q. Maybe I asked this -- and excuse me if I did --
 8 but, to your knowledge, have you ever purchased plywood
 9 products at the Home Depot store?
 10 MR. JENSEN: As opposed to cedar
 11 planks?
 12 MR. GIERSCH: Yes.
 13 A. No. I don't remember purchasing plywood
 14 products.
 15 Q. (By Mr. Giersch) Ever at the Home Depot store?
 16 A. I just don't remember any projects I would do
 17 with -- with the plywood.
 18 Q. Fair enough. Okay.
 19 Going back to the events of that day, do
 20 you recall whether you received any instructions either
 21 verbal or written from Home Depot employees regarding
 22 loading or movement of your cart?
 23 A. No.
 24 Q. Does that mean you don't recall that you
 25 received such things or --

18

1 A. Oh, I'm sorry. I don't -- I don't recall.
 2 Q. Have you ever in your recollection received
 3 instructions from anybody in the lumber department at Home
 4 Depot as to how to load or move carts?
 5 A. Not to my recollection.
 6 Q. Do you recall whether any restrictions were put
 7 on where you could move that lumber cart once you've
 8 loaded it within the store?
 9 A. No. I do not recall that there were any
 10 restrictions.
 11 Q. Do you have a recollection as to how high the
 12 material that you did buy rose on the cart that you were
 13 using?
 14 A. I didn't feel it was too high for -- for
 15 movement.
 16 Q. Okay. Let me ask this: Do you have a specific
 17 recollection or mental picture of the cart --
 18 A. No.
 19 Q. -- as it was stacked?
 20 The answer's no?
 21 A. I don't have a specific recollection.
 22 Q. Do you have any recollection that it was
 23 difficult for you to see over or past the material on the
 24 cart as you moved it through the store?
 25 A. No.

19

1 Q. Could you describe the sequence of events from
 2 the time you loaded your lumber material on the cart up
 3 until and including the contact with Mrs. Geary to the
 4 best of your recollection?
 5 A. To the best of my recollection, I loaded the
 6 wood. I went for, I suppose, other products. I was
 7 moving the cart. And at some point it -- it hit Mrs.
 8 Geary.
 9 Q. Okay. Do you recall what if any other specific
 10 products you were shopping for that day?
 11 A. I would have to assume that maybe screws. But I
 12 do not know if there was anything else --
 13 Q. Okay.
 14 A. -- I was shopping for.
 15 Q. Do you recall how you moved the cart, whether
 16 you pushed it, pulled it, or otherwise made it move?
 17 A. That's something I -- I cannot -- I can't
 18 remember exactly how I was -- how I was moving it.
 19 Q. Okay.
 20 A. It's just ...
 21 Q. I'm going to read to you from a document
 22 entitled Incident Witness Statement purportedly prepared
 23 and signed by a Home Depot employee named Samuel Lowe, and
 24 which was introduced as an exhibit to the Deposition of
 25 Marybeth Hovde, H-o-v-d-e, the Assistant Store Manager who

20

1 was present that day, if I may.
 2 MR. GIERSCH: I'm not having it marked
 3 as an exhibit.
 4 Do you want to take a look at it?
 5 MR. JENSEN: Yes. If he's going to
 6 answer any questions off of it, I'd like for him to have a
 7 chance to review it.
 8 MR. GIERSCH: Sure.
 9 MR. JENSEN: When you've had a chance
 10 to review it, let us know.
 11 A. (Witness complies.)
 12 (Pause in the proceedings.)
 13 MR. JENSEN: I don't know if he'll ask
 14 you this, but let him know if it's something you've seen
 15 before.
 16 A. (continuing) I've never seen this before.
 17 Do you mean at the time?
 18 Q. (By Mr. Giersch) No, have you ever seen that
 19 before today, or a copy of it?
 20 A. I've never seen a copy of it given ...
 21 (Pause in the proceedings.)
 22 A. (continuing) I've never seen a copy of this.
 23 Q. (By Mr. Giersch) Okay. It appears that you've
 24 read over the document, is that true?
 25 A. Yeah.

21

1 Q. Okay. May I borrow that back from you?
 2 A. (Witness complies.)
 3 Q. Thanks. In this document, Mr. Lowe purportedly
 4 states that on June 15, 2007, at about 4:15 p.m. he
 5 witnessed a gentleman pulling a lumbar cart south down the
 6 main runway. He goes on to say, "I saw him face north and
 7 continue walking. There was a lady and her husband
 8 standing in front of the patio furniture shopping. The
 9 Customer A pulled the lumbar cart into Party B hitting her
 10 the leg and hip."
 11 Does that refresh your recollection as to
 12 the precise events or sequence?
 13 A. That's basically what I said.
 14 Q. Okay. Does it give you any better mental
 15 picture of the scene and the events as you think about it?
 16 A. No, not really.
 17 Q. Do you have any reason to believe that you were
 18 pushing the cart rather than pulling it when it struck
 19 Mrs. Geary?
 20 A. I don't know. I -- I really don't know.
 21 Q. That's fine. You can't tell us what you don't
 22 know.
 23 A. Yeah.
 24 Q. Do you recall when you first saw Mrs. Geary or
 25 became aware that she was involved somehow?

22

1 A. A scream or a loud noise and ...

2 Q. Did the scream or loud noise appear to come from

3 her?

4 A. Yes.

5 Q. Did you within seconds identify that she had

6 apparently been struck by the cart?

7 A. Yes.

8 Q. What do you recall, if anything, seeing there as

9 to her position and her movements and behavior?

10 A. I don't recall exactly, you know, what kind

11 of -- it was a bit of a blur. But I know she -- she

12 stepped back and sat on a chair.

13 Q. Do you have a mental picture of seeing her

14 sitting on a chair?

15 A. I do -- I do have that.

16 Q. Okay. As you approached her with the cart was

17 the cart between you and Mrs. Geary?

18 A. I don't -- I don't know.

19 Q. Was Spencer participating in the maneuvering of

20 the cart?

21 A. He was behind but I was -- well, I don't know.

22 I assume I was with the -- with the cart.

23 Q. So you and Spencer were on different sides of

24 the cart?

25 MR. JENSEN: Object to form,

23

1 mischaracterizes his testimony.

2 Q. (By Mr. Giersch) Let me rephrase it.

3 Were you and Spencer on different sides of

4 the cart?

5 A. I don't remember exactly where both of us were,

6 really.

7 Q. Okay. Do you recall what you did after you

8 heard this scream or loud noise and saw Mrs. Geary?

9 A. We stayed there and Home -- Home Depot employees

10 came and they -- one of them -- one of the ladies went to

11 get a -- a manager. And I was staying -- I was there

12 the -- the whole time there waiting for the manager. I do

13 recall that.

14 Q. You do recall that?

15 A. (Witness nods head.)

16 Q. That's a yes?

17 A. Yes.

18 Q. Do you know how long you stayed at the scene

19 after the incident happened?

20 A. Until after the manager came. I don't know

21 the -- I don't know time -- time -- the timetable.

22 Q. Do you have a sense that you were there another

23 20 minutes as opposed to another hour, for instance?

24 A. It wasn't an hour, no.

25 Q. Okay.

24

1 A. It wasn't that long.

2 Q. Did you speak with Mrs. Geary?

3 A. You know, I don't recall if I -- what I --

4 exactly I said or if I said some -- I'm sure -- well, I

5 just -- I don't know exactly what I said to her.

6 Q. Apart from the precise words that you may have

7 uttered, do you recall speaking to her?

8 A. This being my own recollection, not in there,

9 no, I don't ...

10 Q. Do you believe that you approached her?

11 A. That's something I would do, yes.

12 Q. Do you believe that you asked if she was all

13 right?

14 A. That's something I would do.

15 Q. Is it fair to say you don't have a precise

16 recollection of doing it, though?

17 A. No.

18 Q. Okay. Do you recall anything she said at the

19 scene?

20 A. I just -- no, just being hurt -- saying she was

21 hurt.

22 Q. Can you describe her demeanor after the incident

23 happened?

24 A. She was hurting. That's about all. I -- you

25 know, I can't really ...

25

1 Q. Do you remember whether she was crying or not?

2 A. No, I don't remember that.

3 Q. You don't recall any specific comments she

4 directed your way?

5 A. That she directed my way? No, I don't remember

6 any comments.

7 Q. Do you remember having any interaction with her

8 husband at the scene?

9 A. No.

10 Q. Do you recall being aware that her husband was

11 present?

12 A. Yes.

13 Q. Do you recall having any dialogue or

14 conversation with him?

15 A. I don't recall.

16 Q. Do you recall whether he said anything in your

17 presence that you overheard?

18 A. No, I don't recall it.

19 Q. I want to ask the same question about Mrs.

20 Geary.

21 Apart from what discussion you and she may

22 have had, if anything, do you recall overhearing anything

23 she may have said to anybody else?

24 A. No.

25 Q. Okay. Did you speak to the Home Depot personnel

26

1 who responded to the scene of the incident?
2 A. The manager when he showed up.
3 Q. The manager was a male, as far as you recall?
4 A. I think so.
5 Q. The employee, Samuel Lowe, whose statement I had
6 you look at a moment ago, was described as the head
7 cashier of the store and apparently a black man.
8 Do you recall there being a black man
9 present?
10 A. No, no, I don't. I don't recall a black man
11 being present.
12 Q. Do you recall one or more female --
13 A. Yes.
14 Q. -- employees?
15 A. Yes.
16 Q. Do you recall how many were involved?
17 A. No.
18 Q. Do you recall anything about the specifics of
19 what you might have told them about the incident?
20 A. No.
21 Q. Do you know what part of Mrs. Geary's body was
22 impacted by the lumber cart?
23 A. From -- from my remember -- recollection, before
24 reading that, I thought I hit her in the ankle. I thought
25 she was hit in the ankle.

27

1 Q. When you say before reading that or looking at
2 that, what are you referring to?
3 A. Some of the paperwork.
4 Q. Now, in preparation for today's deposition, were
5 there specific documents that you looked at?
6 A. My own declaration.
7 Q. Which is a two-page document, I believe?
8 A. Yes.
9 Q. Were there any other documents you looked at
10 before today's deposition?
11 A. My wife's --
12 Q. Your wife's declaration?
13 A. -- declaration.
14 Q. Was there anything else that you looked at?
15 A. A few other ones. I'm not quite sure.
16 Q. Other --
17 MR. JENSEN: They came from me. You
18 can just say that they came from me and don't tell him
19 what was in them or what the content was.
20 THE WITNESS: Okay.
21 A. (continuing) Paperwork from my lawyer to me.
22 Q. (By Mr. Giersch) What made you think that it was
23 Mrs. Geary's ankle that was injured?
24 A. Well, that's -- that's what my recollection was,
25 you know, three years down the line.

28

1 Q. Okay. Do you know what part of the cart struck
2 Mrs. Geary?
3 A. No.
4 Q. I understand --
5 A. Just that --
6 Q. Go ahead, I'm sorry.
7 A. Sorry. I don't want to assume, but it had to
8 be.
9 Q. Fair enough.
10 Do you recall enough of the features of the
11 cart to tell me whether there were, for instance, bars at
12 a particular height on one side or another of the cart?
13 A. I assume there were bars, yes.
14 Q. You don't have a particular recollection but --
15 A. The bar ones. I don't know what they're called.
16 Q. Okay. Did you ever have any contact with Mr. or
17 Mrs. Geary after June 15, 2007?
18 A. No.
19 Q. To your knowledge, have you ever seen her since?
20 A. No.
21 Q. Or Mr. Geary?
22 A. No.
23 Q. After that day did you have any follow-up
24 contact with anyone from Home Depot about the incident?
25 A. Other than --

29

1 Q. At any time.
2 A. Up until now?
3 Q. Sure.
4 A. You mean -- we already talked about last summer.
5 Q. Okay. Say before you were served with papers in
6 February of this year -- I believe it was February -- had
7 you had any contact from people at Home Depot after the
8 incident?
9 MR. JENSEN: Other than what he's
10 already testified to?
11 A. No.
12 MR. GIERSCH: Yes.
13 A. (continuing) No, I haven't.
14 Q. (By Mr. Giersch) Have you conducted any personal
15 investigation either of the incident and/or of Mrs. Geary
16 or her activities?
17 A. No.
18 Q. Have you talked to Spencer about the events of
19 that day, June 15, 2007?
20 A. Yes.
21 Q. Describe, if you would, the timing and content
22 of those discussions.
23 A. When we were served, we mentioned it to him, and
24 last night we were talking with him.
25 Q. Can you tell me what Spencer shared with you of

30

1 his recollections of the events of that day?
2 MR. JENSEN: I'm going to object to
3 form and hearsay. To tell you the truth, I'm not sure if
4 this is covered by a family privilege or not.
5 But just to move things along and so you
6 don't have to depose him, I'll let my client go ahead and
7 say if there's anything of substance that they discussed.
8 But I want him to be able to do it without waiving any
9 applicable privilege, if that's okay with you?
10 MR. GIERSCH: Sure. I don't know that
11 there is a --
12 MR. JENSEN: I don't know that there
13 is, either. I don't want to have to go crack a book.
14 MR. GIERSCH: Sure.
15 Q. (By Mr. Giersch) (continuing) Can you answer the
16 question?
17 A. He said last night he thought the cart was going
18 north on the aisle.
19 Q. Rather than south?
20 A. Yes.
21 Q. Do you recall what --
22 A. Yeah.
23 Q. I'm sorry, go ahead.
24 A. He -- I think he said, yeah, he said north on
25 the aisle.

31

1 Q. Had you had a contrary or a different
2 recollection or belief?
3 A. I just didn't recall which way or -- or -- yeah,
4 I didn't recall exactly where it was going.
5 Q. Okay. Did Spencer say that in response to a
6 question you posed or someone else posed?
7 A. Well, I asked him.
8 Q. What did you ask him?
9 A. Did he know how the cart was moving?
10 Q. Is that the first time you'd asked him that, to
11 your knowledge, and this was last night?
12 A. That was last night, uh-huh.
13 I probably -- I -- that was the first time
14 I asked him that question, last night.
15 Q. Do you recall why you asked him that particular
16 question?
17 A. Because I was not sure which way the cart was
18 moving or if it was taking a turn.
19 Q. Okay. Can you share with me any other details
20 of what Spencer said about his recollection of the events
21 of June 15, 2007?
22 A. That was about it. That was it. He did say he
23 was behind me.
24 Q. Behind you?
25 A. (Witness nods head.)

32

1 Q. Did you understand that to mean on the same side
2 of the cart as you?
3 A. I don't know. He just said behind -- yeah, he
4 just said behind. I didn't ask him what side of the cart.
5 Q. What other sort of subtopics relating to this
6 were discussed with Spencer last night?
7 MR. JENSEN: Object to form, asked and
8 answered?
9 THE WITNESS: Pardon me?
10 MR. JENSEN: Was there anything
11 further?
12 A. Oh. No, that was my -- my main question was his
13 recollection of which way the cart was moving.
14 Q. (By Mr. Giersch) Has Spencer ever indicated to
15 you that he saw the cart strike Mrs. Geary?
16 A. No.
17 Q. Has Spencer ever indicated to you one way or
18 another whether the cart was being turned at the time it
19 struck Mrs. Geary?
20 A. No, other than last night when I asked him the
21 direct question.
22 Q. Well, it sounds as though that direct question
23 sort of was just isolated and came out of no other
24 context. I'm just kind of wondering what the rest of the
25 context was.

33

1 A. I'm trying to re -- or help me reconstruct the
2 incident from getting the wood -- getting the wood and --
3 and what happened.
4 Q. Okay. Has he ever said to you or indicated to
5 you that he recalls more of the events than you recall?
6 A. No.
7 Q. Has he ever indicated to you that he recalls the
8 loading and movement of the cart up to the point of
9 striking Mrs. Geary?
10 A. I haven't asked him that question of loading it,
11 no.
12 Q. I guess what I'd like to ask is -- and if I
13 have, I beg your pardon -- but what has Spencer ever said
14 to you about his recollection of details of that day?
15 A. Just that -- well, I mean, he -- he said that he
16 was -- that it was -- he was sorry -- or it was -- he was
17 sorry the person got hit. That's what he -- he said.
18 Q. Okay. Is there anything else he's ever said in
19 terms of details of the events?
20 A. Not that I can recall exact details.
21 Q. Do you recall whether the cart was being moved
22 too rapidly for the conditions that prevailed there?
23 MR. JENSEN: Asked and answered. It
24 also asks for an expert opinion.
25 Go ahead --

34

1 MR. THATCHER: I'll just join in form
2 and join his objection.
3 Go ahead.
4 THE WITNESS: Okay.
5 A. No. I don't -- I don't recall if it was -- if
6 it was going too fast or not.
7 Q. (By Mr. Giersch) Mr. Scott, when you loaded the
8 lumber cart that day, do you recall whether any Home Depot
9 employee offered assistance?
10 A. I don't recall.
11 Q. Was it your impression or understanding on that
12 day that lumber carts were available for the use of
13 customers and could be moved about the store without
14 restriction?
15 A. That was my understanding.
16 MR. GIERSCH: I don't think I have any
17 other questions.
18 EXAMINATION
19 BY MR. THATCHER:
20 Q. Sir, my name is Greg Thatcher. I'm the attorney
21 for Home Depot. I just have some follow-up questions on
22 things I just want to confirm and then we'll get you out
23 of here.
24 The first thing is, you were asked at the
25 beginning of the deposition how many times you'd been to

35

1 the Bitter Lake store.
2 I think you said three times or several; is
3 that right?
4 A. Several. I don't -- I don't know how many. It
5 was -- it was a fair amount. I mean, I've been there.
6 Q. More than three, less than three?
7 A. More than three.
8 Q. Okay. More than 10 or less than 10?
9 A. More than 10.
10 Q. So more than several?
11 A. Yes.
12 Q. Just double checking --
13 A. Well, whatever definition of several is.
14 Q. Well, I think several is three but I guess --
15 A. Oh, okay.
16 Q. But nonetheless, I just was trying to --
17 MR. JENSEN: I never knew.
18 MR. THATCHER: I'm like a little
19 Wikipedia myself.
20 Q. (By Mr. Thatcher) You just testified that you
21 have no recollection of any Home Depot person I guess
22 offering assistance for you that day; is that correct?
23 A. Correct.
24 Q. Now, do you feel that you and your son needed
25 assistance loading the cart that day?

36

1 A. If I did, I would have asked for it. I'm -- I
2 don't mind asking for help.
3 Q. But as you sit here today you don't know whether
4 or not you did or did not; is that correct?
5 A. That's correct.
6 Q. As to moving the cart it's my understanding that
7 it's at least -- well, you can gather -- your son was with
8 you, right?
9 A. Yes.
10 Q. He told you, anyway, that he was behind --
11 A. Yes.
12 Q. -- whatever that means.
13 Do you know what that means?
14 A. Not really.
15 Q. Well, nonetheless, you do have some recollection
16 of what happened that day, right, correct?
17 A. Yes.
18 Q. Do you feel that you and your son needed
19 assistance moving the cart?
20 A. I think we were -- were okay.
21 Q. Now, I think we've covered this. I just want to
22 confirm.
23 Do you know how Mrs. Geary was struck? Do
24 you have anything more to add? Because my understanding
25 is you don't know. But if I'm wrong on that, just correct

37

1 me.
2 A. Well, I assume -- well, she was struck by the
3 cart and that's basically what I know. I -- I don't know
4 exactly where she was struck or -- or what part of the
5 cart struck her. I don't -- I don't -- I don't recall
6 that.
7 Q. From your testimony today I gather you don't
8 know if you were pulling or pushing the cart?
9 A. Correct.
10 Q. You don't know in relation to your son where you
11 were around the cart; is that right? Is that correct?
12 A. Correct.
13 Q. To the best of your recollection -- as you've
14 mentioned, perhaps this discussion has refreshed something
15 in your mind -- did you have any trouble at all moving the
16 cart, maybe a wheel was off or something like that?
17 A. Well, let's see. I don't think a wheel was off.
18 Q. Okay. It might have been hard to pull or push
19 it. All right.
20 I also want to confirm -- you were asked
21 earlier -- just to confirm my understanding -- you have no
22 recollection of how the cart was stacked; is that correct?
23 A. No -- yeah, correct.
24 Q. You have no recollection of whether it was
25 difficult to look over the cart?

38

1 A. I figured if I was -- or moving it, I was okay.

2 Q. All right. I think we've kind of touched on it

3 here and there.

4 Do you remember where in the store this

5 happened?

6 A. The northern end.

7 Q. All right. I have a picture. I'll represent it

8 was taken in the last several weeks.

9 MR. THATCHER: Let's mark this.

10 (Exhibit No. 1 was marked.)

11 Q. (By Mr. Thatcher) Sir, I just would like you to

12 look at that. It's my understanding and I have the

13 impression that the incident occurred in this general

14 vicinity.

15 Am I right or am I wrong?

16 A. Correct.

17 Q. Is there any aspect about this picture that you

18 recall? Again, this picture was taken maybe three weeks

19 ago. It wasn't taken in June of 2007.

20 A. Yeah.

21 Q. But does it look, to the best of your

22 recollection, how it looked back in '07?

23 MR. JENSEN: I'm going to object to

24 the form. There's a lot of different components to this

25 picture that could be different than it was back in '07.

39

1 MR. THATCHER: Fair enough.

2 MR. JENSEN: So with that

3 understanding, answer the best that you can.

4 A. Well, the plumbing and tools banners are on the

5 northern end.

6 Q. (By Mr. Thatcher) Now, again, maybe this

7 refreshes your memory and maybe it doesn't, but there's a

8 chair at the bottom right; do you see that?

9 A. Yeah.

10 Q. Is that the area where Mrs. Geary was when you

11 first saw her?

12 A. I don't -- I don't recall exact -- you mean at

13 the time when I --

14 Q. Yes, when you first saw her.

15 A. When I first -- as in after I hit her. Um, I

16 mean, I thought I initially hit on the -- I thought she

17 was initially hit on the -- on the aisle side.

18 MR. JENSEN: Can you tell from that

19 photo one way or the other?

20 MR. THATCHER: I guess that's the

21 ultimate question.

22 MR. JENSEN: Given the photo was taken

23 two weeks ago, I don't know that we want to go too far

24 using this as a basis for figuring out where things were

25 more than four years ago.

40

1 Q. (By Mr. Thatcher) If you don't know, **that's** a

2 perfectly acceptable answer.

3 A. I don't -- I don't know.

4 Q. Okay. All right.

5 MR. THATCHER: I don't have **any**

6 further questions.

7 MR. GIERSCH: Just a follow-up

8 question, Mr. Scott.

9 **FURTHER EXAMINATION**

10 **BY MR. GIERSCH:**

11 Q. You don't recall having any difficulty **moving**

12 the particular lumber cart that day; is that true?

13 A. (Witness nods head.)

14 Q. Do you recall ever having difficulty **on any**

15 occasion moving a cart with lumber on it?

16 A. No.

17 MR. GIERSCH: That's all. Thank you.

18

19 -----

20 (Deposition concluded at 11:24 a.m.)

21 (Exhibit No. 1 is attached.)

22 (Signature was not waived.)

23

24

25 **AFFIDAVIT**

41

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2

3 STATE OF WASHINGTON)

4) SS.

5 COUNTY OF KING)

6

7 I have read my within

8 deposition, and under penalty of perjury the same is true

9 and correct, save and except for changes listed by me on

10 the CORRECTION SHEET hereof.

11

12

13 _____

14 GERARD SCOTT

15 _____

16 Date of Signature

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1 WITNESS: GERARD SCOTT
 2 PLEASE MAKE ALL CHANGES OR CORRECTIONS ON THIS SHEET,
 3 SHOWING PAGE, LINE AND REASON, IF ANY. SIGN THIS
 4 SHEET; SIGN THE DEPOSITION UNDER PENALTY OF PERJURY ON
 5 LINE PROVIDED; RETURN THE ORIGINAL DEPOSITION TO MICHELLE
 6 M. NEALE, COURT REPORTER, 25906 177TH PLACE SE, COVINGTON,
 7 WASHINGTON, 98042, FOR DELIVERING TO THE ORDERING ATTORNEY
 8 TO BE FILED WITH THE COURT.

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 24 (MMN) _____
 25 GERARD SCOTT

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1 examination was by me duly sworn to testify the truth, the
 2 whole truth and nothing but the truth;
 3 I further certify that the deposition, as
 4 transcribed, is a full, true and correct transcript of the
 5 testimony, including questions and answers, and all
 6 objections, motions and exceptions of counsel made and
 7 taken at the time of the foregoing examination and was
 8 prepared pursuant to Washington Administrative Code
 9 308-14-135, the transcript preparation format guideline;
 10 I further certify that I am sealing the
 11 deposition in an envelope with the title of the above
 12 cause and the name of the witness visible, and I am
 13 delivering the same to the appropriate authority;
 14 I further advise you that as a matter of firm
 15 policy, the Stenographic notes of this transcript will be
 16 destroyed three years from the date appearing on this
 17 Certificate unless notice is received otherwise from any
 18 party or counsel hereto on or before said date;
 19 IN WITNESS WHEREOF, I have hereunto set my hand
 20 and affixed my Washington State CCR Seal this 14th day of
 21 September, 2011.
 22
 23 _____
 24 Certified Court Reporter No. 2494 in and for the
 25 State of Washington, residing at Covington, WA.

My CCR certification
 expires December 11, 2011.

43

1 CERTIFICATE
 2
 3 STATE OF WASHINGTON)
 4) ss.
 5 COUNTY OF KING)

6 I, the undersigned Washington Certified Court
 7 Reporter, pursuant to RCW 5.28.010 authorized to
 8 administer oaths and affirmations in and for the State of
 9 Washington, do hereby certify that the annexed and
 10 foregoing deposition consisting of Page 1 through 40 of
 11 the testimony of each witness named herein was taken
 12 stenographically before me and reduced to a typed format
 13 under my direction;
 14 I further certify that according to CR 30(e) the
 15 witness was given the opportunity to examine, read and
 16 sign the deposition after the same was transcribed, unless
 17 indicated in the record that the review was waived;
 18 I further certify that all objections made at
 19 the time of said examination to my qualifications or the
 20 manner of taking the deposition or to the conduct of any
 21 party have been noted by me upon each said deposition;
 22 I further certify that I am not a relative or
 23 employee of any such attorney or counsel, and that I am
 24 not financially interested in the said action or the
 25 outcome thereof;
 I further certify that each witness before

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NO. 67534-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARIE GEARY and ROBERT GEARY,)	
husband and wife,)	
)	
Appellants,)	King County
)	Superior Cause
vs.)	No. 10-2-20190-4
)	SEA
HOME DEPOT U.S.A., Inc., a)	
foreign corporation,)	
)	
GERALD T. SCOTT and CHERYL)	
SCOTT, husband and wife, and)	
the marital community composed)	
thereof,)	
)	
Respondents.)	

VERBATIM REPORT OF PROCEEDINGS
RESPONDENT HOME DEPOT'S MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE STEVEN GONZALEZ

JULY 15, 2011

RECORDING TRANSCRIBED BY: ANDREA D. FAUBION, CCR 2843

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A P P E A R A N C E S

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4	<p>1 behalf of Robert and Marie Geary. 2 THE COURT: Welcome. 3 MR. THATCHER: Okay. Your Honor, this 4 is Home Depot's motion for summary judgment. It's -- 5 there's three bases for the motion. There's the 6 argument that there's no duty -- at least the duty 7 alleged by plaintiff, it's not recognized in the state 8 of Washington. There's no factual proximate causation, 9 and there's no legal proximate causation. 10 A quick background, the case, of course, 11 happened at a Home Depot store June 15, 2007 I think is 12 the day. And from what we know, from what we can 13 gather at this point, there's a fellow named Gerard 14 Scott who was at the store, and he -- I understand -- I 15 think he had a lumber cart, and he was with his son. 16 We just learned that. And somehow -- no one knows 17 how -- he hits Plaintiff Marie Geary. And that's the 18 -- that's the entire case. 19 Home Depot's here today, because Home Depot 20 says in this situation, Home Depot can't be liable, not 21 under the law, not under proximate causation, not -- 22 either factual or legal. As I -- I -- I would -- both 23 parties of course submitted briefing, and it looks like 24 both parties agree that the case here, at least as it 25 concerns duty -- the case that we want to look at and</p>	6	<p>1 And because it wasn't criminal, Nivens -- the Nivens 2 one say there is no duty here. But nonetheless, 3 plaintiff is asking the court that -- at least I can 4 appreciate the plaintiff is asking the court to 5 recognize the duty that, in fact, a business owner must 6 protect customers against other customers for 7 noncriminal conduct. 8 If the court did recognize such a duty, to me 9 there would be a glaring contradiction in the law of 10 Washington or at least a confusion, because we do 11 have a rule called the self-service rule, the exception 12 of -- the self-service exception to premises liability. 13 And it says -- and plaintiff quoted this in her 14 response. And in that, of course, it says that, you 15 know, in that situation, the plaintiff does not have to 16 prove notice if there was injury, just that there was a 17 dangerous condition. 18 However, if you accept plaintiff's position 19 that there is a duty, then there's really no way that a 20 store could operate as a self-service store. It would 21 just be completely impractical. And I don't imagine 22 that the court -- that the law would pretty much accept 23 that or recognize it. 24 But then again even if we did, how far do we 25 let the duty go? A retailer would have to supervise</p>
5	<p>1 discuss is Nivens, Nivens versus Hoities[phonetic] 2 7-11. I think it's Hoities. 3 That case -- and that case dealt with a 4 criminal assault. And ultimately the court -- the 5 Supreme Court came down and said, You know what? We've 6 looked at the law in this state, and, first off, we 7 don't really have anything when it comes to customer or 8 customer-to-third-party conduct on premises. We've got 9 nothing, so we've got to look to other places. 10 And as plaintiff pointed out in the response, 11 well, the court -- Supreme Court did look to the 12 restatements entered and it quoted some of the 13 restatements, but at the end of the day, the Supreme 14 Court said we are not saying that we are -- that a 15 business owner has a duty to protect against all 16 third-party conduct. The Supreme Court says that 17 rather exclusively. And it says to recognize such a 18 duty would be too expansive. 19 The court said -- after doing its analysis, 20 the court again made clear that its holding was as to 21 imminent or a foreseeable criminal conduct on the 22 premises. And I don't think there's any dispute here 23 that conduct, at least the alleged conduct of 24 Mr. Scott, who, of course, was dismissed I think a 25 couple of weeks ago from this case, was not criminal.</p>	7	<p>1 every customer in the store. You know, is your cart 2 too big or is too much on your cart and how much is too 3 much, and what cart are we talking about? Is it just 4 the big carts? Is it just the small carts? And does 5 it -- does it deal with carts at all? I mean what if 6 one customer has merchandise in their arms and they 7 bump into another and that causes an accident; what if 8 one customer's on the phone, not paying attention, 9 bumps into another; is a retailer responsible for that? 10 Ultimately -- and I think it's pretty clear, because 11 plaintiff was not able to cite any contrary authority 12 to Nivens, no Court of Appeals cases questioning 13 Nivens, no Supreme Court case saying, You know what? 14 Maybe we should revisit this, nothing whatsoever. 15 There is no duty in the state of Washington 16 for a retail store to supervise its customers in the 17 nature and the manner that plaintiff requests or to 18 move the carts for the customers. Again, if we had 19 such a duty, there could be no self-service stores. 20 This, of course, would apply to QFC, Wal-Mart, Fred 21 Meyer, Lowe's, on and on and on. 22 And as the court -- again going back to the 23 beginning of what I was saying, as the court said, such 24 a duty goes too far. In fact, the court, I believe, 25 put a bright-line rule in the situation. It's got to</p>

8	<p>1 be imminent or foreseeable criminal conduct for us to 2 have a discussion. If it's not, there is no duty. 3 And again, just to stress this, this case is 4 about one customer who hits another. And I -- there -- 5 I just can't imagine that the -- that there could be a 6 duty in this situation to protect -- or that somehow a 7 retailer could be liable for this. And after all, as I 8 put in our reply -- 9 THE COURT: Let me ask you -- let me ask 10 you to maybe separate that argument into two pieces, 11 because in my mind, it conflicts two different things. 12 MR. THATCHER: Okay. 13 THE COURT: One is what duty does the 14 store owner have; and two, in this instance, is there 15 any evidence that that duty was breached if the -- if 16 the duty exists. And I'm frankly at the point where I 17 think there is a duty to make sure that if you're a 18 self-service store that the customers are not going to 19 endanger each other. So you have to take reasonable 20 steps, I think, to make sure that that's the case. And 21 you would acknowledge that. 22 MR. THATCHER: Well, I would. 23 THE COURT: All right. 24 MR. THATCHER: I would acknowledge that. 25 But the question is what's the duty. As the Supreme</p>	10
9	<p>1 Court in Nivens was -- when it comes to premises 2 liability and the dangerous condition, we've pretty 3 much settled that. Our law is good on that. But when 4 it comes to third-party conduct, we really don't have 5 anything. And that's the point I'm trying to make is 6 that yes, we have premises liability and a dangerous 7 condition, but when it comes to customer-to-customer 8 conduct, that's what Nivens was talking about, not 9 premises liability, but customer-to-customer. 10 And it said, The confines is for criminal 11 conduct. And that's -- we're not saying, of course, 12 that a -- it's -- that a store wouldn't have a 13 responsibility if you have some sort of, you know, a 14 customer that wasn't paying atten- -- or doing 15 something bad that they knew about, something -- 16 something to that effect. But in this situation, one 17 customer striking another, I -- I -- there is no duty 18 recognized in the law, at least not from Nivens and 19 nothing cited by plaintiff, so this court would have 20 to, itself, recognize such a duty. 21 And then the question is what is the -- how 22 far does this duty go. And it makes sense, in any 23 event, we wouldn't be (Indecipherable) in liability 24 anymore. We're -- we're just in the simple negligence. 25 And, again, there would have to be a brand new duty</p>	11
	<p>1 recognized by this court. 2 And as -- I think it was last week we had the 3 opportunity to depose Mr. Gerard Scott, who, again, was 4 I think dismissed a couple weeks ago. 5 THE COURT: And you -- you did cover 6 that, but said that there's no transcript yet. 7 MR. THATCHER: Yeah. It -- 8 THE COURT: Right. 9 MR. THATCHER: There's no transcript 10 yet. And if -- if -- if Paul has a different 11 recollection, he can let you know, but my recollection 12 is what I put in my -- in my declaration. And he 13 testified that he did not believe his cart was over 14 stacked; he was able to see over the cart; he had no 15 problem moving the cart. And on top of that he had his 16 son with him. So those are the facts of the case. 17 I mean because when we -- we brought our 18 motion, we didn't have those facts. And, in fact, I 19 think earlier on Mr. Gerard had submitted a declaration 20 to this court saying, I don't remember anything. What 21 transpired between that and here, well, you know, 22 whatever. But plaintiff didn't witness it, and, of 23 course, no one else (Indecipherable) witnessed what 24 happened, but that's -- but nonetheless, those are the 25 facts leading up to the accident --</p>	
	<p>1 THE COURT: Wasn't there -- 2 MR. THATCHER: -- that we have. 3 THE COURT: Wasn't there a store witness 4 who filled out an incident report? 5 MR. THATCHER: There was -- there was. 6 Well, I think that was Sam Lowe. 7 THE COURT: Yeah. 8 MR. THATCHER: And I think the 9 declaration -- his incident saying I saw him pulling 10 it. I haven't had reason, an op- -- well, I have 11 spoken to Sam Lowe. I don't know how much -- how far 12 this gets into evidence, but he said he -- he was just 13 taking down what somebody else said. And I've provided 14 that number to -- contact number to Mr. -- Mr. -- 15 MR. GIERSCH: Geary. 16 MR. THATCHER: Giersch. 17 But any event, the customer himself says my -- 18 I was -- my cart was not over stacked. So okay. Then 19 I guess taking what your Honor was pointing out, let's 20 say that plaintiff has a -- there is a duty, that if 21 the cart is over stacked, a store has to intervene with 22 -- against the customer. 23 I'll make two points here. One, the testimony 24 of Mr. Scott says that wasn't the case at all; and 25 Number 2, plaintiffs have abandoned that theory,</p>	

12	<p>1 because in their reply, they -- they make the point --</p> <p>2 they say it is irre- -- it does not matter whether or</p> <p>3 not he could see or -- see over or past the</p> <p>4 merchandise. Even though that was one of their</p> <p>5 original allegations, they apparently have dropped that</p> <p>6 allegation. So at this point, I -- I think the only</p> <p>7 duty that plaintiff would like the court to recognize</p> <p>8 is a duty to supervise customers or move their carts.</p> <p>9 They've abandoned the -- the theory about it being over</p> <p>10 stacked. So I guess in that sense, even if we accepted</p> <p>11 the duty, there's no evidence that that duty would have</p> <p>12 been applied here.</p> <p>13 And, of course, it's also telling that in</p> <p>14 plaintiff's response, they -- they made rather explicit</p> <p>15 that they were not -- that this -- the incident here</p> <p>16 did not involve the condition of the land, which again</p> <p>17 takes it out of premises liability.</p> <p>18 The second point -- again, there's three bases</p> <p>19 for this summary judgment motion. The second point is</p> <p>20 factual proximate causation. I mean you need facts.</p> <p>21 The jury has got to have something, and plaintiff</p> <p>22 admits that they don't have it. In fact, it seems to</p> <p>23 me, reading it, what they've done is they've employed a</p> <p>24 fallacy. If we go back to law school, some of us maybe</p> <p>25 not so long ago maybe, more for others. There's that</p>	14	<p>1 I give that when there is the prior declaration that I</p> <p>2 don't remember and I did nothing to preserve my memory?</p> <p>3 MR. THATCHER: Well, then if -- well, if</p> <p>4 we're in that situation, then the court -- then the</p> <p>5 jury is back to having absolutely nothing. So either</p> <p>6 you take the declaration -- you take the testimony of</p> <p>7 Scott, which would probably just go to his credibility.</p> <p>8 I know it's -- how do you -- these are obviously very</p> <p>9 opposed.</p> <p>10 THE COURT: Um-hum.</p> <p>11 MR. THATCHER: If you take the testimony</p> <p>12 of Scott, there's no proximate cause. If you -- if you</p> <p>13 go by his declaration, there's no proximate cause. At</p> <p>14 least you can't prove it. Because either you look at</p> <p>15 the evidence he gives us, no proximate cause. If you</p> <p>16 take all that entirely, then what is the jury looking</p> <p>17 at? How does a jury render a proximate cause decision</p> <p>18 for plaintiff without guessing, because you have to say</p> <p>19 how does this happen. How is it that if, in fact,</p> <p>20 there was a duty to monitor customers using carts, how</p> <p>21 is it that Home Depot's breach of that duty led to this</p> <p>22 accident. It just couldn't -- well, it happened</p> <p>23 therefore. I mean again the law is pretty clear. The</p> <p>24 occurrence of the accident -- a mere occurrence of an</p> <p>25 accident is not evidence of negligence. You've got to</p>
13	<p>1 legal fallacy -- at least we put it in Latin -- Post</p> <p>2 hoc ergo propter hoc, after this, therefore because of</p> <p>3 this.</p> <p>4 And that seems to be the entire basis of</p> <p>5 plaintiff's factual proximate causation argument. They</p> <p>6 admit they have no facts. But they say, Well, because</p> <p>7 Mr. Scott struck Marie Geary, well, there we have</p> <p>8 proximate cause. And as -- I think that law is pretty</p> <p>9 clear. The jury just can't make that guess. You've</p> <p>10 got to give the jury something.</p> <p>11 And what we have now, which we didn't have</p> <p>12 actually --</p> <p>13 THE COURT: After this, because of this.</p> <p>14 So what is the this?</p> <p>15 MR. THATCHER: Because -- because there</p> <p>16 was an accident, it must have been because of this.</p> <p>17 Because there was an accident, it must have been</p> <p>18 because Home Depot wasn't supervising Mr. Scott. But</p> <p>19 the facts we have now, which we didn't have before, are</p> <p>20 from Mr. Scott himself in that I wasn't over stacked, I</p> <p>21 could see over the cart, I had no problem moving the</p> <p>22 cart; and, in fact, my son was with me.</p> <p>23 The one thing we don't know and we didn't get</p> <p>24 from Mr. Scott was how it happened.</p> <p>25 THE COURT: And how much credibility do</p>	15	<p>1 have more. The jury's got to be able to look at</p> <p>2 something.</p> <p>3 And, of course, if we just go back and say,</p> <p>4 Mr. Scott, we're just going to say you don't remember</p> <p>5 anything, because that's what you told us. And, in</p> <p>6 fact, he got out on summary judgment saying that.</p> <p>7 So what is the -- what is the jury left with?</p> <p>8 The jury is left with Ms. Marie -- Marie Geary, the</p> <p>9 plaintiff, saying I don't -- I don't -- I didn't see it</p> <p>10 when it happened. You have Robert Geary saying I</p> <p>11 didn't see it when it happened. So what does the jury</p> <p>12 have to say? I mean even if this duty is recognized,</p> <p>13 how do you get to that next point? And even -- I mean</p> <p>14 there are four separate elements, and plaintiff has to</p> <p>15 prove all four. You get one -- maybe you get one, but</p> <p>16 that doesn't just give you the second. You've got to</p> <p>17 have evidence to prove the second, and the plaintiff</p> <p>18 doesn't have it.</p> <p>19 But if you accepted plaintiff's notion, then</p> <p>20 we're back -- we're into the situation where it -- a</p> <p>21 retailer would be held strict liability if one customer</p> <p>22 hit another. (Indecipherable) well, you know, you</p> <p>23 don't actually need evidence of how it happened, but if</p> <p>24 one customer hit another, you're liable. That's what</p> <p>25 they want to give. That's what they want to say.</p>

16	<p>1 THE COURT: Well, to be fair, I think I 2 would reword what they're asserting, and that is that 3 if one customer hits another and the store hasn't taken 4 adequate precautions to prevent that, then the store is 5 liable. So they would have to show that the store has 6 had inadequate safety measures in place, recognizing 7 this potential hazard. I think that would be a more 8 fair statement of (Indecipherable.) 9 MR. THATCHER: That would be more -- and 10 then I would just go back and say Supreme Court in 11 Nivens didn't recognize that for one. But even if we 12 did accept that as being the rule, the duty they'd 13 like, as pleaded in their complaint, as pleaded in 14 their complaint, doesn't happen here, because one, 15 there's -- if you take Mr. Scott's testimony, my cart 16 was -- there was nothing wrong with my cart. My cart 17 was fine. I could look over it. But if you take his 18 declaration, there's no evidence whatsoever one way or 19 the other, and the jury is not allowed to make that up. 20 THE COURT: Right. 21 MR. THATCHER: The last basis is simply 22 legal proximate cause. You know, how far -- let's 23 assume everything Mr. -- plaintiff says is correct. As 24 a matter of public policy, do we want liability to be 25 here? And of course when we -- when you look at legal</p>	18	<p>1 customer being injured by another customer on a 2 premises, and I -- having a duty like that I think is 3 far beyond what the Supreme Court was doing in Nevins. 4 And then as a matter of policy, you know -- 5 THE COURT: Let me -- let me ask you to 6 reserve some time in -- in reply, if you would. 7 MR. THATCHER: Okay. 8 THE COURT: Counsel. 9 MR. GIERSCHE: Thank you, your Honor. 10 I'm not sure where to start, but with regard 11 to the facts, we do have the evidence from Sam Lowe, 12 who did see the incident happen, he claims. And he 13 says that Mr. Scott was pulling his cart in the 14 direction of Mrs. Geary, apparently didn't see her, 15 crashed into her and that's how it happened. So there 16 is evidence as to what happened and -- 17 Secondly, I think that to the extent that 18 Nivens -- 19 THE COURT: Well, let me ask -- ask a 20 question about that -- 21 MR. GIERSCHE: Yeah. 22 THE COURT: -- if I could. So if we 23 were -- if we take the facts in the light most 24 favorable, and that is, as you said, Mr. Lowe has 25 described it that Mr. Scott pulled the cart, either</p>
17	<p>1 proximate cause, you -- we look at logic, common sense, 2 justice, policy, and precedent. The precedent I would 3 just say is go back to Nivens. You know, the Supreme 4 Court did not expand this brand new duty to cover non 5 negligent conduct between customers. They didn't do 6 that. Of course they could have. And I think we 7 should give deference to the Supreme Court that if it 8 wanted to, it could have, but it didn't. 9 It made explicit at least twice in its opinion 10 this is about criminal conduct. It's not about all 11 third-party conduct on premises. It's got to be 12 criminal. Now within common sense, having a -- have a 13 store responsible if one customer doesn't pay attention 14 to another customer, because that -- that really kind 15 of goes back, I think, what you were saying, you know, 16 a pol- -- whether there was duty to, in fact, make sure 17 that things were safe. Well, how do we know that that 18 was the reason this didn't happen. How did we know it 19 wasn't just -- I mean how, in fact, does a retailer get 20 into somebody's mind and make sure -- make sure that 21 when you turn here, you look? How does a retailer do 22 that? I don't know how a retailer does that. 23 So as a matter of common sense, do we want 24 stores liable if one customer bumps into another? It's 25 not really about the cart at all. It's about one</p>	19	<p>1 wasn't looking or somehow failed to see and bumped into 2 another customer, where is the breach on the part of 3 the defendant in that scenario? 4 MR. GIERSCHE: Home Depot. Home Depot 5 created the entire condition that permitted that 6 incident to happen. And that incident was a 7 foreseeable risk of harm inherent to their business 8 operation, the self-service part of their business 9 operation. So -- 10 THE COURT: It -- it is -- in 11 all instances where there's a cart, there's the 12 possibility that one will hit another. 13 MR. GIERSCHE: It is. 14 THE COURT: So is it strict liability at 15 that point? 16 MR. GIERSCHE: No. No, it's not strict 17 liability. It's -- it is a negligence analysis 18 ultimately using the case law that we've cited. And 19 the -- the -- the omissions upon which I would 20 predicate Home Depot's liability are the failure to 21 implement any rules or policies to prevent this kind of 22 thing from happening. 23 Now, the question is, I guess -- I suppose 24 it's a jury question -- whether that's possible. But I 25 can -- I think any reasonable person would say, number</p>

20	<p>1 one, they could limit the movement of lumber carts to 2 the lumber department, not have it move among the whole 3 store population of unsuspecting customers. They could 4 have, once a lumber cart is loaded, a requirement that 5 a employee takes that cart to the register area for 6 check out. That's safe.</p> <p>7 Now, this guy wasn't carrying a -- you know, a 8 package of paper towels. He was pushing a big steel, 9 four-wheeled lumber cart loaded with, in his 10 estimation, 20 pieces of cedar planking, and, according 11 to the witnesses, one or two or more 4 by 8-foot sheets 12 of plywood. So it's a big heavy instrumentality that 13 Home Depot has created, has set in motion and has 14 failed to restrict or -- or otherwise regulate to avoid 15 harm to other unsuspecting customers. Other customers 16 can't be expected to be watching all directions at all 17 times for these big steel lumber carts that might be 18 coming at them.</p> <p>19 THE COURT: Did it happen in the lumber 20 department or --</p> <p>21 MR. GERSCH: No.</p> <p>22 THE COURT: -- somewhere else?</p> <p>23 MR. GIERSCH: It happened in the patio 24 furniture department or in the main aisle next to some 25 patio furniture, because my client was on her way,</p>	22	<p>1 that the store had an obligation to have security 2 guards. And it was that narrow fact that the court 3 said, We're not going to take the duty that far.</p> <p>4 But in getting there, they made wholesale 5 adoptions of the restatement, Section 344. And I think 6 I need to just quote briefly from it, because it's 7 fairly short, two things. It says, A possessor of land 8 who holds it open to the public for entry for his 9 business purposes is subject to liability to members of 10 the public while they are upon the land for such a 11 purpose, for physical harm by the accidental, 12 negligent, or intentional harmful acts of third persons 13 or animals or -- and by the failure of the possessor to 14 exercise reasonable care to discover that the acts are 15 being done, to give adequate warning, or to protect 16 them against them.</p> <p>17 Now, that's what Section 344 Restatement says. 18 The court then went on to say, We believe that Section 19 344 is consistent with any natural extension of 20 Washington law and properly delimits the duty of the 21 business to an invitee we expressly adopted for a 22 business owner and business invitees. That's a 23 wholesale adoption and a specific holding we expressly 24 adopted, it says.</p> <p>25 And it talked -- and so it's clear that Nivens</p>
21	<p>1 according to the evidence, to the garden department to 2 buy flowers for her garden. She happened to stop and 3 look at the patio furniture when this fellow ran into 4 her. And that's what Mr. Low's declaration essentially 5 says or the statement says.</p> <p>6 So going back to your question about the 7 facts. Oh, the -- the -- the duty of Home Depot. So 8 Home Depot created the condition, number one; and 9 secondly, had notice that there was risk of harm, 10 because it's inherent in their store operation, and 11 they failed to take any action to either restrict 12 Scott, customers in general or the lumber operation so 13 that this kind of thing couldn't happen.</p> <p>14 Whether that was inherent in their 15 self-service operation, I think it was. And I think 16 the jury would -- could so find. Very modest steps 17 could have been taken to avoid this.</p> <p>18 I was going to say that counsel, I think, 19 fundamentally misinterprets the Nivens decision to the 20 extent that the court finds that case central to its 21 determination here. You know, the Nivens case was one 22 in which it was criminal conduct on the premises of a 23 7-11 store apparently that was in play. And ultimately 24 the court's decision, affirming the lower court, was 25 based on the narrow fact that plaintiff had alleged</p>	23	<p>1 is saying that accidental and negligent acts of third 2 parties are within the purview of this rule. The fact 3 that in Nivens it was criminal conduct that we were -- 4 that was being complained about and that the case had 5 to turn on that ultimately is -- is apart.</p> <p>6 So I -- I think that counsel and I disagree 7 about the meaning of Nivens. Nivens either does adopt 8 Section 344, which includes negligent acts, or it 9 doesn't. I think it does. When they say we expressly 10 adopt this, I think they mean it.</p> <p>11 The comment to that section, which they also 12 adopted, ends up saying that, If the place or the 13 character of the business is such that the business 14 owner should reasonably anticipate careless -- care less 15 or criminal conduct on the part of third persons either 16 generally or at some particular time, he may be under a 17 duty to take precautions against it and to provide a 18 reasonably sufficient number of servants to afford a 19 reasonable protection. Home Depot could have done 20 that. They could have provided one servant to attend 21 this lumber cart to restrict its movement within the 22 store to make sure it didn't hurt somebody.</p> <p>23 So the other thing is that counsel, I think, 24 perhaps unintentionally mischaracterizes our 25 allegations. We've alleged that Home Depot owed the</p>

24	<p>1 duty to provide a reasonably safe environment and 2 conditions, and we alleged that they breached it in 3 several ways, but the first is that it failed to 4 implement or execute policies to ensure that persons 5 wouldn't be injured by merchandise carts, which I've 6 already argued; secondly, that it failed to supervise 7 and/or attend to Defendant Scott as he moved the 8 merchandise cart, which it could have done easily, and 9 it had control over whether it did or not; and thirdly, 10 permitted Scott to move a cart when the lumbar was 11 stacked too high. And we're not abandoning that third 12 potential allegation. We just don't know. Scott says 13 it wasn't piled too high. Maybe it was; maybe it 14 wasn't. But that's not critical to our allegations in 15 our complaint. 16 With regard to proximate cause, we have 17 but-for causation here. But for Home Depot creating a 18 store environment in which these things can be moved 19 around without supervision or restriction and harm 20 other client -- customers, this thing could not have 21 happened. Clearly, we may have concurrent causation 22 with Mr. Scott's negligence, but without Home Depot's 23 policy and practices could not have happened, so 24 there's proximate cause. 25 THE COURT: I don't think that's the</p>	26	<p>1 harm done, and here it's not at all remote. There's a 2 specific relationship between Home Depot and Marie 3 Geary that the law has premised certain duties upon. 4 So this is not like -- like the law school case where 5 the clock falls down on the train tower because of a 6 bomb going off and you're talking about foreseeability. 7 Public policy does not or would not here urge that -- 8 that there's no connection. There's no attenuation 9 here at all. 10 So in a nutshell, I think counsel has 11 misconstrued the duty. The duty does -- is one of 12 general duty of a land owner and business operator to 13 provide reasonably safe conditions for its customers. 14 And that is a negligence analysis, and it is a premises 15 liability analysis. Those things are not usually 16 exclusive. Premises liability law is basically 17 negligence law and has its own set of circumstances and 18 rulings and precedent, but it is negligence analysis. 19 So it has that general duty, and it also has 20 the duty to protect against the negligent acts of third 21 parties. As I've cited these authorities, it failed to 22 do so. And I think that a reasonable jury could 23 conclude that Home Depot could have made very simple 24 steps and changes in its policy and procedure that 25 would have avoided this.</p>
25	<p>1 test for proximate cause, though, is it? I mean but 2 for the store existing, this wouldn't have happened. 3 MR. GIERSCH: But -- 4 THE COURT: It's got to -- but for Home 5 Depot even opening its doors, it couldn't have 6 happened. 7 MR. GIERSCH: Yeah. 8 THE COURT: But that's strict liability, 9 isn't it? 10 MR. GIERSCH: No, no, no. There's a 11 strict nexus between a particular failure of policy as 12 a self-service store for foreseeable risk and the harm 13 that was caused. I mean that's a very close causal 14 connection. It's immediate. 15 Their failure to -- and as I said, that their 16 negligence can be by act or omission, and here it's by 17 omission. They failed to either supervise them or 18 otherwise create conditions that made this safe to move 19 these carts, and they didn't. 20 So I think we have but-for causation and -- 21 and I mean you're right. If the sun hadn't come up 22 that day, it might not have happened either, but -- 23 With regard to legal proximate causation, 24 that's the argument that there's an attenuation or a 25 remote connection between the alleged breach and the</p>	27	<p>1 Now, I wonder if this had been a toddler 2 standing there instead of a 79-year-old woman and this 3 steel lumber cart had run over the toddler and caused 4 catastrophic -- would Home Depot throw up its arms and 5 say, Well, we don't have any responsibility? How could 6 we have known something? What could we have done? I 7 think a jury has a right to decide what they could have 8 done, because the things that they could have done are 9 so simply identifiable. 10 THE COURT: All right. Reply, please. 11 MR. THATCHER: Okay. Just -- just for 12 the record, I mean I guess Mr. Giersch and I do 13 disagree about the holding of Nivens, but I would just, 14 for the record, cite to Page 203 of that case 133 Wn.2d 15 203 under a heading titled Nature of the Duty, where 16 the court -- Supreme Court says, In the absence of a 17 clear articulation of the business's duty, the business 18 could become the guarantor of the invitee's safety from 19 all third-party conduct on the business premises. This 20 is too expansive a duty. 21 So I would agree with Mr. Giersch that the 22 court -- Supreme Court looked at the restatement. It 23 also narrowed it down specifically. We've got this, 24 but this is what we mean. Yes, we show you this, but 25 this is what we mean, not all third -- all third-party</p>

28	<p>1 conduct. The store is not the guaranteeor (sic) of 2 safety.</p> <p>3 And going back to Nivens, even if we -- let's 4 say we try to make an anala- -- if we -- let's say we 5 applied Nivens to a civil situation and we said for 6 imminent or foreseeable tort conduct, well, it -- I 7 don't think there's any evidence of imminent. I don't 8 know how Home Depot -- any of it could have known that 9 this was going to be imminent unless they had somebody 10 trailing the guy.</p> <p>11 And as to foreseeable, I have not seen any 12 evidence, nor has plaintiff presented any evidence or 13 asked for evidence of any prior acts at the store or 14 any other Home Depot store regarding these carts and 15 accidents with customers. There's no evidence of that 16 whatsoever. There's no evidence whatsoever of 17 foreseeability except speculation.</p> <p>18 And as your Honor pointed out, you know, you 19 -- if the store wasn't open, this thing wouldn't have 20 happened. And you have to have facts to establish 21 causation. And I -- in -- in the response today, I 22 didn't hear any facts. If we accept Sam Low's incident 23 report for what it is and -- he said -- if we accept 24 that he saw this, that he saw a customer pulling the 25 cart and strike another, where are the facts here about</p>	30	<p>1 we put this in our reply. The -- plaintiffs took the 2 deposition of Marybeth Hovde, H-O-V-D-E, and she was 3 asked specifically about policies and procedures. She 4 said there was nothing written, but we do -- we do have 5 a unwritten policy. If we see somebody who's, you 6 know, not doing something right, we step in. She 7 testified to that, and that testimony was attached to 8 my declaration. And so with that -- and -- well, so 9 that -- any event, that shows there were, in fact, 10 policies at Home Depot and policies now that if a 11 customer is just running crazy with a cart, you know, 12 we're not just going to stand there and say, Oh, do 13 what you want to. No. We're not doing that.</p> <p>14 So -- so the -- so in conclusion, there is no 15 duty. Nivens -- reading Nivens beyond what the Supreme 16 Court specifically said to read it -- and I think is -- 17 should not be done and -- and I -- recognizing the duty 18 plaintiff would like the court to recognize is highly 19 -- very expansive. There are no facts to support 20 proximate cause. And -- and as a matter of legal 21 proximate cause, recognizing such a duty and having 22 liability would -- would be, again, very detrimental to 23 all retail stores in the state of Washington.</p> <p>24 Thank you, your Honor.</p> <p>25 THE COURT: All right. Thank you both.</p>
29	<p>1 proximate cause? Why does -- I mean that doesn't tell 2 you how it happened, that he was pulling it and then he 3 struck another. Okay. What more than that? How 4 does -- how does that implicate any -- any duty? I 5 mean that's what I don't understand. What's the jury 6 going to use with that and say, Okay, he was pulling 7 it, and he struck her. Well, how did he strike her? 8 Did he not see her? Well, he already told us his cart 9 wasn't over full and oh, well, he doesn't remember 10 whatsoever. Nobody remembers what happened. So that 11 alone, I don't see how a jury could say, Well, that 12 gives you proximate cause.</p> <p>13 And if the court does recognize and reads 14 Nivens as plaintiff would like the court to, then that 15 applies to all retail stores. That applies to -- you 16 go to QFC. You've got to have -- this is your 17 chaperone today. He's going to be walking around to 18 make sure you use the cart safely, because after all, 19 we -- we really can't be sure that you're going to do 20 that.</p> <p>21 I -- I -- such a ruling, I think, would have a 22 very detrimental impact on retail stores in Washington, 23 and that would be an extraordinary thing -- duty for 24 this court to recognize.</p> <p>25 And, oh, and just -- the final thing is I --</p>		

1 I'll have my ruling no later than Monday morning.

2 MR. THATCHER: Okay. Thank you.

3 FEMALE VOICE: All rise.

4 (END OF TRANSCRIPTION)

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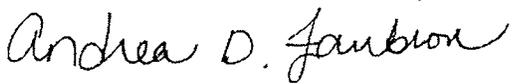
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