

No. 69819-2-I

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

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ANN P. GORES, an individual,

Appellant,

v.

SAEFWAY, INC., a Delaware corporation,

Respondent.

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APPELLANT/CROSS-RESPONDENT ANN P. GORES'  
REPLY BRIEF AND OPPOSITION TO  
RESPONDENT SAFEWAY, INC.'S CROSS-APPEAL

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## I. INTRODUCTION

On December 2, 2010, Ann Gores (“Gores”) was shopping for eggs in the self-service dairy aisle at Safeway. CP 709. She chose a carton of eggs from the egg shelf and turned to continue shopping. CP 709-710. As she turned, she slipped on egg whites that had spilled on the floor under the egg shelf, doing “the splits” and simultaneously tearing the meniscus in both her knees. *Id.*; VRP at 21; CP 237-38, 200, 710, 772. She fell so hard that only double knee surgery has partly restored her activities. CP 511-13. While struggling to stand, she saw the clear liquid on which she had fallen near her on the floor under the egg shelf. CP 710.

Before Gores left the store, she spoke with Safeway employees. Safeway’s store manager filed that day a notice of “possible claim.” CP 233. Also that same day, Safeway claims manager Debbie Getz interviewed “the assistant manager and possible customer witness specifically for the purpose of defending against a personal injury claim from” Gores. CP 234. Getz declared: “It was clear from my conversations with her that she was planning to make a claim for personal injuries against Safeway.” *Id.* Getz immediately anticipated a claim here.

On January 11, 2011, just over a month after this injury – and again on January 20, 2011 – Gores demanded that Safeway “preserve evidence and avoid spoliation.” CP 818. Gores specifically identified all

“factual information” including “cameras monitoring the area involved.” Id. Gores further demanded, without limitation, all “records generated or obtained by Safeway in conjunction with this matter.” CP 816. In short, Gores demanded preservation of all the documents Safeway had reviewed.

Despite its own immediate investigation and these warnings, Safeway erased all video from the day Gores fell. Even though a Safeway record references a camera labeled “Dairy” at this store, Safeway produced no video of this aisle. CP 367 fn.2. Safeway also “lost” the handwritten sign-off sheets that could impeach Safeway’s “sweep logs,” which Safeway claims must be taken as conclusive proof of its good housekeeping. Safeway even lost the computer on which its claims manager reviewed all video from this store. Only records Safeway unilaterally deemed to be relevant were preserved and produced to Gores.

Safeway denies all liability. More specifically, after reciting the general rule requiring notice of hazards be proved for premises liability, Safeway vastly overstates its defense: “Because there is no evidence that egg whites *continuously* get on the floor, the exception to the notice requirement is inapplicable.” Defendant’s Brief (“Def. Brief”) at 15 (emphasis added). This is not and never has been Washington law. Safeway cites no authority justifying this vast overstatement. None exists.

In reality, “if the operating procedures of a store are such that unreasonably dangerous conditions are continuous *or reasonably foreseeable*, there is no need to prove actual or constructive notice of the conditions in order to establish liability for injuries caused by them.” Pimentel v. Roundup Co., 100 Wn.2d 39, 44, 666 P.2d 888 (1983) (emphasis added). It is therefore “*unnecessary to establish the length of time for which the particular unsafe condition existed.*” Id. at 49 (same).

Accordingly, the Pimentel “exception to the notice requirement applies where a proprietor's business incorporates a self-service mode of operation and this mode of operation *inherently* creates an unsafe condition that is continuous or reasonably *foreseeable* in the area where the injury occurred.” O’Donnell v. Zupan Enterprises, Inc., 107 Wn. App. 854, 858, 28 P.3d 799 (2001) (emphasis added). Few situations in modern self-service shopping present more “inherently ... foreseeable” risks of slipping and falling than the dropping of egg parts that follows self-service shoppers’ inspecting the condition of eggs sold in openable cartons. Even Safeway’s own corporate website explicitly recommends such inspections.

For all the reasons discussed herein, and in Gores’ opening brief, she respectfully requests this Court reverse the summary dismissal of her claim for negligence against Safeway, and reinstate her right to a jury trial.

## II. ARGUMENT

### A. **Because egg white falling from open egg cartons is an inherently foreseeable risk of selling eggs in easy-open cartons, the Pimentel doctrine properly applies herein.**

A recent appellate decision demonstrates both the limits of the Pimentel/"self-service" doctrine, and its application herein. In Tavai v. Walmart Stores, Inc., 307 P.3d 811 (Wn. App. 2013) the Court held, under this self-service doctrine, that "notice need not be shown" if "the specific unsafe conditions" are "continuous *or foreseeably inherent in the nature of the defendant's business or mode of operation.*" Id. at \*1 (emphasis supplied). No showing of prior spills is needed. Washington law has never required this. Contrary to Safeway's contentions, proof of a "continuous" dangerous condition is just one of two methods for excusing the requirement of notice to the storeowner.

The other method for excusing proof of notice of a hazard is to demonstrate the foreseeable risks inherent in the defendant's business or mode of operation. Thus, in this case, Safeway's self-service mode of selling eggs in unsealed cartons that can be freely opened -- with the inherently foreseeable risk of eggs dropping -- excuses any proof of notice.

The Tavai decision demonstrates Gores' case for liability herein. Applying this self-service doctrine to an unexplained spot of water, the Tavai court found no liability because the "grab-and-go' drinks ... in

question were sold in sealed bottles, not open cups.” Id. at 816. In contrast, Safeway’s eggs are sold in unsealed easy-open egg cartons, which shoppers are expected to and free to open to inspect for breaks and quality.

The Tavai court also emphasized the lack in that case of “evidence that ... customers were allowed or encouraged to open drinks before purchase.” Id. This case is materially different. Safeway’s customers are both “allowed” and “encouraged to open” egg cartons “before purchase.”

Opening cartons and checking the eggs is a classic case of self-service shopping. Even Safeway’s counsel admitted this is Safeway’s mode of operation in egg sales: “customers sometimes peek in them to see whether they’re cracked or not.” VRP 20-21. This admission makes sense. Self-service egg shopping is nearly universal in modern America. A reasonable juror could use his or her common sense to infer from his or her own knowledge and shopping experience that customers commonly inspect the content of egg cartons in selecting eggs at most grocery stores.

Indeed, Safeway’s own website advises this self-service practice, instructing its customers to inspect all “fresh eggs” to find “cracked” ones:

**Do your own inspection**

Be aware that fresh produce with bruises or breaks in the skin could be contaminated. This includes tomatoes and melons. The same goes for fresh eggs that are cracked and salad bar ingredients that aren’t kept clean and well-chilled.

<http://www.safeway.com/IFL/Grocery/Nutrition?contentURL=http://safeway.staywellsolutions.com/Nutrition/Nutrition/Practices/Safety/1,4210#iiframe-top><sup>1</sup>

In short, Safeway advertises and benefits from self-service egg inspection and shopping. Safeway does not and cannot seriously deny this nearly universal practice. Therefore, Gores need not prove Safeway had actual notice, as her injury occurred in a self-service area where, due to Safeway's choice of a cost-saving self-service mode of operation, the risk of Gores' injuries was an inherently and reasonably foreseeable hazard.<sup>2</sup>

“In choosing a self-service method of providing items, the owner is charged with the knowledge of the foreseeable risks inherent in such a mode of operation.... In a self-service operation, an owner has for his pecuniary benefit required customers to perform the tasks previously carried out by employees.” Ciminski v. Finn Corp., 13 Wn.App. 815, 819, 537 P.2d 850 (1975).<sup>3</sup> Compared to an injured customer, a store “that chooses to adopt the self-service merchandising technique, which allows

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<sup>1</sup> Safeway's public available shopping advice, on its public company website – which contradicts many of Safeway's incredible claims about egg shopping herein -- is subject to judicial notice. ER 201(f); see O'Toole v. Northrop Grumman Corp., 499 F.3d 1218 (10th Cir. 2007) (data on corporate website subject to judicial notice); Laborer's Pension Fund v. Blackmore Sewer Constr. Co., Inc., 298 F.3d 600, 607 (7th Cir. 2002) (same).

<sup>2</sup> See O'Donnell v. Zupan Enterprises, Inc., 107 Wn. App. 854, 28 P.3d 799 (2001); Wiltse v. Albertson's, Inc., 116 Wn. 2d 452, 805 P.2d 793 (1991).

<sup>3</sup> Ciminski “has been quite influential” as many states have followed Washington and “have adopted mode-of-operation rules” that excuse notice. *Comment, Reapportioning The Burden Of Uncertainty: Storekeeper Liability In The Self-Service Slip-And-Fall Case*, 41 UCLA L. Rev. 861, 890 n.144 (1994); see, e.g., Spencer v. Kroger Co., 941 F.2d 699, 703 (8th Cir. 1991) (Missouri law); Kelly v. Stop and Shop, Inc., 281 Conn. 768, 918 A.2d (2007); Jackson v. K-Mart Corp., 840 P.2d 463, 700, 711 (Kansas 1992); Sheehan v. Roche Bros. Supermkts., Inc., 448 Mass. 780, 863 N.E.2d 1276 (2007).

for lower overhead and greater profits, is in a better position to accept the risks involved.” Pimentel v. Roundup Co., 100 Wn.2d 39, 46, 666 P.2d 888 (1983). Safeway long ago made this choice, and accepted these risks.

Moreover, Gores’ expert, Tom Baird, declared that grocery shoppers regularly inspect the contents of egg cartons in the dairy/egg section – so routinely that Safeway should have expected egg parts to fall out of their cartons during such inspections, posing a risk. CP 834-835. This “should have known” doctrine is what Pimentel analysis is all about: a store’s duty to foresee risks inherent in a self-service mode of operation. Thus, Gores’ burden of proving notice is excused because, under Washington law, it is instead “established by the operating methods of the proprietor and the nature of his business.” Pimentel, 100 Wn.2d at 48-49.

In sum, Safeway misconstrues the whole crux of Pimentel analysis:

No longer will the plaintiff be required to show the storeowner’s actual or constructive notice of a dangerous condition at its premises, where, by reason of the business operation, such condition is reasonably foreseeable. In this respect, the mode of operation approach focuses the discovery and evidentiary issues on the nature of the defendant’s business, the location of the incident, the number of employees, their duties and the proximity of those employees to the incident. *Attention will turn to the defendant’s promotional, **advertising** and marketing programs, including the precise manner in which merchandise is sold. ... Relevant industry standards ... will test and examine ... **particular displays, shelving and its patrons’ anticipated examination of goods.*** Part of the exercise will consider the time and the amounts expended

in protecting lawful visitors from dangerous conditions relative to the store's overall budget, income and expenses.

Note, Slip and Fall in Supermarkets: The Mode of Operations Approach, 91 MBA/Mass. L. Rev. No. 2 (2008) (footnote omitted) (emphasis added).

**B. Summary judgment was unjustified, due to fact issues Gores' expert underscored, and the trial court ignored.**

In addition to alleging various procedural bars,<sup>4</sup> Safeway attacks the substance of the testimony of Gores' expert, Tom Baird, primarily on the ground that he "offered only inadmissible argument and opinions of law as to whether there are issues of fact, which is the court's function." Def. Brief at 25. Even a mere perusal of the Baird declaration belies this criticism. Baird did not invade the province of the trial court. He merely offered practical insight on key issues of material fact on which he offered industry knowledge, experience and perspectives that no one else offered.

Expert Baird showed why a reasonable jury should be allowed to hear Gores' claim. Baird confirmed the extraordinarily self-service mode

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<sup>4</sup> The principal procedural bar Safeway asserts is Gores' not disclosing expert Baird earlier. This assertion is false, as the discovery cut-off was still far away when Safeway's motion was ruled upon. See CP 60. In her discovery responses, Gores reserved the right to name experts. Moreover, all the authorities Safeway cites acknowledge judicial discretion to bar some expert testimony, but they do not *require* the trial court to reject it. The trial court should not have rejected this testimony -- the only expert testimony before this court -- particularly given the technical nature of the activities, alternatives and complex standards at issue in this case. See, e.g., Bradford Trust Co. v. Merrill Lynch, 805 F.2d 49, 50 (2d Cir. 1986) (where a trial court "is not competent to make its own determination ... it should be most reluctant to disregard the only expert testimony before it").

of operation of the egg shelf, where shoppers “routinely open the package and handle the product to check for broken eggs. Safeway should have known that eggs could fall out of the carton during this process and end up on the floor, posing a hazard to customers.” CP 834-35.

Baird further explained, from extensive experience, how a mat “near the eggs where customers serve themselves and inspect the product ... would have absorbed the broken egg at issue here and the linoleum surface of the floor would not have been slick.” CP 837. Thus, in contrast with the unsuccessful plaintiff in *Tavai*, Gores offered evidence of an alternative -- “evidence that other flooring material would have been slip resistant or even less slippery when wet.” 307 P.3d at 817. Gores (unlike *Tavai*) adduced “adequate evidence to support her theory” that, by not providing a mat, Safeway’s “selection of its flooring was negligent.” *Id.*

In addition, Baird demonstrated that reasonable jurors can discredit Safeway testimony. Baird highlighted a crucial contradiction: Cynthia Ast of Safeway testified sweeps take her “about 20, maybe 30 minutes.” CP 781, 784. Yet on the day Gores was injured, the sweep log indicates she did two sweeps in just 10 minutes! CP 792, 833.<sup>5</sup> Baird testified -- on the

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<sup>5</sup> Ast testified that it took her 20-30 minutes to perform an inspection. CP 781. Theresa Bryant also allegedly inspected the store just one minute before Ast’s inspection. CP 792. These anomalies call into question the accuracy of the sweep logs and the credibility of Safeway’s witnesses. CP 833-834. These are genuine issues of material fact relating to whether Safeway had notice of the egg

basis of extensive experience<sup>6</sup> -- that a listed “sweep” can be no more than Ast or another employee’s swiping an employee ID card. *Id.* Pretending to do sweeps – i.e., swiping instead of sweeping – is a genuine possibility here. Thus, Baird summarizes: “The ‘sweep logs’ do not demonstrate that the store was swept or cleaned.” *Id.*<sup>7</sup> A reasonable jury could also so find.

Moreover, Gores has the right to a jury’s hearing that Safeway’s employees – even if they made all the sweeps they claim to -- may have done them too quickly, or otherwise “negligently failed to see” these egg whites “which they could and would have seen had they been attentive.” Henson v. Woolworth’s Co., 537 S.W.2d 923 (Tenn. App. 1974).<sup>8</sup> Other states’ courts have held such matters to be material fact issues for the jury.

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whites in the dairy aisle, including how long the egg carton that Safeway photographed had been misplaced on the shelf. CP 235, 238.

Gores will never have the opportunity to compare the sweep sheets to the handwritten sign-off sheets because Safeway “lost” them, with no satisfactory explanation herein.

<sup>6</sup> While authoring “numerous articles on property negligence” and related topics, Baird handled “hundreds of personal injury and wrongful death investigations involving issues related to premises liability and floor safety, including cases involving accidents and injuries sustained in grocery stores.” CP 832, 840-85.

<sup>7</sup> The possibility of Safeway employees’ mere card swiping (v. actual sweeping) is made much more credible due to spoliation of the handwritten sign-off sheets, the underlying source documents that Safeway “lost.” See Section II.C., *infra*.

<sup>8</sup> In Henson v. Woolworth’s Co., in an action against a store after a customer slipped on a soapy-like substance in the toy aisle, the manager had walked along that aisle -- and the store supervisor had passed the scene just a few seconds before the fall but did not look at the floor, although it was her duty to watch floors for obstructions – the court held jury issues of fact existed as to: whether the bubble solution was spilled before employees walked down the aisle; whether they had negligently failed to see the solution; and whether the plaintiff’s injuries resulted from the failure of two employees to see the slippery substance on floor.

Thus, in this case a “jury could find” Gores’ “injuries were the direct and proximate result of the failure of defendant’s ... employees to see the slippery substance on the floor and warn plaintiff of the danger.” Id. A trial is required so that a jury can determine if Safeway’s story is credible.

Thus, all these issues and more -- on which Baird offered factually detailed assessment and alternatives -- are issues of material fact, evincing what a reasonable jury could find herein, precluding summary judgment. See, e.g., Schmidt v. Coogan, 162 Wn.2d 488, 492, 173 P.3d 273 (2007). (“Whether a defective condition existed long enough so that it should have reasonably been discovered is ordinarily a question of fact for the jury.”) (citations omitted); O’Donnell v. Zupan, 107 Wn.App. 854, 860, 28 P.3d 799 (2001) (whether store acted with “reasonable care” to “inspect for dangerous conditions and provide such repair, safeguards, or warning as may be reasonably necessary to protect its customers” is an issue of fact); Carlyle v. Safeway Stores, 78 Wn.App. 272, 276, 896 P.2d 750 (1995) (“vigilance” required in a store’s “housekeeping practices” is an issue of fact); Coleman v. Ernst Home Center, 70 Wn.App. 213, 223, 853 P.2d 473 (1993) (“The adequacy of housekeeping procedures is a jury question.”); accord Head v. Nat’l Super Markets, Inc., 902 S.W.2d 305, 308 (Mo. App. 1995) (“the foreseeability of the risk and the reasonableness of the care to plaintiff ... is a question of fact to be determined by the totality of the

circumstances, including the nature of the store's business and the method of its operation"; citing Ciminski); Mizell v. K-Mart Corp., 406 S.E.2d 310, 310 (N.C. App. 1991) ("issue of material fact exists as to whether the liquid remained on the floor for such a length of time that defendant knew or should have known of its existence"), aff'd, 413 S.E.2d 799 (1992); Corbin v. Safeway Stores, 648 S.W.2d 292 (Texas 1983) (whether Safeway "should have known of the premises condition" is "a jury question"); Rhoades v. K-Mart Corp., 863 P.2d 626, 630-31 (Wyoming 1993) ("what K-Mart, in the exercise of reasonable care, should have known of the foreign substance on the floor" is "for the jury to determine"; "operating methods" also material issue of fact); see also, e.g., Doody v. Hannaford Bros., 672 A.2d 598 (Me. 1996) (the nature and the "adequacy of lighting conditions" that may have "blocked an overhead light" was a "material fact" issue if the plaintiff "failed to see the egg" she slipped in "because of poor lighting in the vicinity of the egg display").

**C. Prejudicial spoliation has occurred and this case should have gone to trial, with a negative inference instruction.**

Contrary to Safeway's excuses, spoliation "encompasses a broad range of acts beyond those that are purely intentional or done in bad faith." Homeworks Constr., Inc. v. Wells, 133 Wn. App. 892, 900, 138 P.3d 654 (2006). The gravamen of spoliation is not intent, but the lack of "relevant

evidence ... within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation ....” Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

Safeway has no satisfactory explanation for its spoliation. Indeed, Safeway’s hurdle is high here, as its investigation moved to anticipation-of-litigation posture within mere hours after Gores’ injury. On the same day this accident occurred, Safeway decided it was a “possible claim.” CP 233. It was assigned that very day to claims manager Debbie Getz of the divisional Risk Management Department, which “retains legal counsel and oversees litigation.” CP 232. That same day, Getz interviewed “the assistant manager and possible customer witness specifically for the purpose of defending against a personal injury claim from” Gores. CP 234. Getz declared: “It was clear from my conversations with her that she was planning to make a claim for personal injuries against Safeway.” *Id.*

Thus, Safeway plainly anticipated litigation very early in this case. Safeway’s only excuses for spoliation are that the evidence was irrelevant, and was destroyed unintentionally. Of course, no one outside of Safeway will ever know whether this evidence was irrelevant. Indeed, it could have been not just highly relevant, but potentially dispositive. Safeway looked at all the evidence within days after this accident – and destroyed all of it. Safeway’s early anticipation of litigation, together with Gores’ counsel’s

early demands for preservation of all evidence, distinguish this case from others such as Tavai, which emphasized “no evidence [video] was deleted after Tavai asked for the footage” and the demand for preservation was made “over two years after Tavai fell.” 307 P.3d at 817, 818.

Despite its early litigation posture, Safeway failed to produce any video from any of its 32 surveillance cameras from the accident day. CP 821-822. Safeway claims it has no surveillance camera footage from its store on that day because the camera was not pointed at the dairy aisle. CP 906. Getz testified that she reviewed the video, but did not save it as it would have taken too long, and she felt that it was irrelevant. CP 909-918. Conveniently for Safeway – and somewhat shockingly – Safeway even destroyed the computer on which Getz viewed the pertinent day’s videos.

Safeway now tries to make virtue from its vice: “Safeway has no written policy regarding retention of DVR data.” CP 808. Even more surprising: “Gores cites no legal authority for her contention that Safeway had a duty to preserve sweep assignment sheets or irrelevant video ... There is no law which required Safeway to preserve these things.” Def. Brief at 30. These surprising claims evince Safeway’s brazen attempt to rewrite spoliation law. Having no retention policy cannot be a spoliation defense. Nor is Safeway entitled to be the sole arbiter of relevance herein. Gores has cited in this appeal, and to the trial court, voluminous and

settled Washington law requiring Safeway to preserve this evidence. Were Safeway's view correct, no "litigation hold" would ever be required.

Spoliation matters in this case. The spoliated video and sign-off sheets could have been crucial. They may have shown or indicated that no actual "sweeps" or inspections were performed.<sup>9</sup> Video may have shown a customer dropping an egg by the egg shelf that remained there for some time. Video may have shown that Cynthia Ast -- the employee identified by Safeway as the individual responsible for sweeping/"inspecting" the aisles on the day of this accident -- in fact did not perform her inspections, which, if conducted, may have prevented this accident. Or they could have shown Ast or others did not perform other sweeps, impeaching their credibility. No one outside Safeway knows, as it destroyed all the records.

These multiple instances of Safeway's egregious destruction of critical evidence precluded dismissal, because this evidence was crucial to Gores, and Safeway was at fault for destroying it. Homeworks, 133 at Wn. App. 892. Inferences of material adversity are exceptionally justified if the adverse party was never given any opportunity to examine the

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<sup>9</sup> Cynthia Ast of Safeway testified that sweeps take her "about 20, maybe 30 minutes." CP 781, 784. However, on the day Gores was injured, the sweep log indicates she finished two sweeps in just 10 minutes! CP 792, 833. Pretending to perform sweeps -- i.e., swiping instead of sweeping -- is a crucial possibility here.

spoliated evidence. See, e.g., Henderson v. Tyrell, 80 Wn.App. 592, 607, 910 P.2d 522 (1996).

As discussed herein and in Gores' opening brief, Safeway "lost" all surveillance camera footage and all handwritten "sign-off sheets" from the store on the day of Gores' accident, despite notice from Gores' counsel shortly after the accident to preserve all such documentation. CP 375. On January 11, 2011 – just a month after Gores' accident -- James A. Smith, Jr., her attorney, requested that Safeway risk management representative Getz share all records she saw while "investigating" Gores' accident. CP 816-817. This letter should have independently triggered a litigation hold.

On January 20, 2011, Smith wrote to Getz again, demanding that Safeway preserve all evidence. CP 818-819. Thus, Safeway knew very early it had a duty to preserve this evidence.<sup>10</sup> CP 234, 248-250, 709-716.

Independent of this or any accident, Safeway's own written policy required retention of the sign-off sheets. CP 794. Safeway's written policy correctly instructs: "Claims arising out of alleged slip and fall accidents can result in substantial costs to the Company. Experience shows that our ability to defend and dispose of these claims is significantly

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<sup>10</sup> Immediately after Gores reported her fall, Safeway even photographed the substance Gores slipped in and apparently determined this liquid was egg whites. CP 237-38, 772.

enhanced when we have complete and accurate sweep log records.” CP 760. Yet despite this instruction, Safeway contends now that such “complete and accurate” records are irrelevant to Gores. Safeway cannot have it both ways. These logs plainly matter here.

Moreover, Safeway’s own internal written policy explicitly commands its employees to: “Print a sweep log report every morning and compare it to the previous day’s sign-off sheet for accuracy.” CP 794. Safeway’s policy and practice was and is to verify its “sweep logs” by comparing them to the handwritten “sign-off sheets.” *Id.* These missing sign-off sheets might well have contradicted the Safeway employees’ testimony about their inspection and sweeping activities (or lack thereof). Again, Safeway violated its own policy by destroying such crucial records.

Under Washington law, the logical inference to be drawn from Safeway’s fully informed, wholesale spoliation of this video and sweep records is that they contained evidence that was unfavorable to Safeway.<sup>11</sup> Indeed, the best Safeway’s counsel can do now is to belittle as “self-serving hearsay” Gores’ explicit memory of Safeway investigator Getz’ admission that a dairy aisle video existed. *Compare* Def. Brief at 29, *with* CP 710. A reasonable jury may choose to credit Gores over Safeway’s

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<sup>11</sup>See *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

agent Getz, whose stridency alone may make her less credible at trial than Gores. For this reason alone, the trial court should have denied dismissal. See, e.g., Kroger Co. v. Walters, 735 S.E.2d 99, 104 (Ga. App. 2012) (trial court properly denied summary judgment as sanction for destroying video from store where slip-and-fall occurred, after store anticipated litigation).

**D. Johnson’s Second Declaration was improperly considered.**

The trial court should have rejected Safeway manager Patricia Johnson’s Second Declaration, by which Safeway improperly, in Reply, inserted new material facts into this case, to which Gores had no opportunity to respond. “An issue raised and argued for the first time in a reply brief is too late to warrant consideration.” Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 858 P.2d 245 (1993). Allowing new issues in rebuttal/reply is improper because the nonmoving party has no opportunity to respond. See, e.g., White v. Kent Medical Center, Inc., 61 Wn. App. 163, 168, 810 P.2d 4 (1991); accord Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996). Furthermore, the contents of this Second Johnson Declaration were not in strict reply, thus obviously violating King County Local Rule 7(b)(4)(E).

Johnson testified about the missing handwritten “sign off sheets,” and about what her view of these records might have shown. CP 927-931. Gores was provided no opportunity to test or respond to these statements,

which directly contradicted Johnson's statements at deposition. The trial court unwisely accepted what Johnson manufactured, at the eleventh hour.

Moreover, Johnson's Declaration was independently unreliable, as she impeached her own deposition on a key issue of spoliation that Gores raised. CP 928. Safeway deployed this Declaration to brazenly attempt to impeach the need for and the history of the most crucial documents herein. Indeed, this Declaration did not even rule out the possibility that *someone else* at Safeway might have had (or could still have) the dispositive records Gores sought: "I am simply unable to find the sweep assignment sheet at this time. **I have many different assistants who help me** with paperwork and storing of paperwork." CP 929 (emphasis added). Because the trial court simply accepted this Declaration, its decision was materially flawed.

**E. Safeway claims manager Getz is subject to deposition on facts she put at issue, making herself a fact witness.**

Safeway admits the core of Gores' arguments for her right to depose Safeway claims manager Debbie Getz personally. First, Safeway admits "the superior court never said that the communications between Getz and Gores were privileged." Def. Brief at 41. This admission is correct. Gores has never sought to invade any privilege herein. CP 368.

Second, Safeway admits the "protective order was entered after Gores had already taken the deposition of" Getz. *Id.* at 42. This admission

is also correct. Safeway sandbagged Gores by refusing Getz' personal deposition only after her 30(b)(6) deposition was done. In short, Safeway admits Gores was never given an opportunity to depose Getz personally, on matters Getz put into issue by making statements of fact to Ms. Gores, Mr. Gores and/or others. Getz made herself a witness by representing both that a video existed, and then that it did not exist; and that no Safeway employee was near the egg shelf when this accident occurred. These are facts so material that they may change the outcome of this case.

When Getz was deposed as a CR 30(b)(6) designee of Safeway, its counsel objected vigorously to questions beyond the scope of this designation. Safeway objected to such basic questions as what Getz did on the day of this accident. CP 365, 368. Nor did Getz explain the existence of a document that referenced a camera labeled "Dairy" at this store -- while Safeway claims to have no video of this aisle. CP 367 fn. 2.

The rule in Washington is clear: "A person can be both a fact witness and a CR 30(b)(6) witness." Flower v. T.R.A. Industries, Inc., 127 Wn.App. 13, 40, 111 P.3d 1192 (2005). "CR 30(b)(6) expressly states that it does not preclude a deposition by any other procedure. Thus, a party who wishes the deposition of a specific officer . . . may still obtain it." Id. (internal citations omitted). Gores followed this rule to the letter by taking as much of Getz' deposition as counsel for Safeway would allow; and by

giving Safeway notice at least one week before -- as well as during and after Getz' 30(b)(6) -- that Gores intended to depose Getz about facts that might be known to her, such as a conversation in which Getz told Gores Safeway had video of this accident. Safeway's counsel disallowed such questioning. Gores should be permitted to ask Getz about all she knows.

Moreover, Gores had no control over what representatives Safeway designated to testify on the matters set forth in Gores' 30(b)(6) deposition notice. CP 382-86, 388. A corporate defendant like Safeway cannot prevent a fact witness from being deposed by designating that person a 30(b)(6) representative. This is not the way the Civil Rules are intended to operate and Safeway cannot manipulate the discovery process in this manner. This manipulation is especially egregious given long advance notice by Gores' counsel -- well before the 30(b)(6) deposition -- that Gores wanted to depose Getz personally; and Safeway's objections to questions posed to Getz as "beyond the scope" of the 30(b)(6) definitions.

The trial court's wrongful entry of a protective order precluding Getz's personal deposition is particularly prejudicial in this case as Getz has knowledge about documents that she reviewed, but which Safeway spoliated before Gores could review them. Getz also has knowledge -- independent from her 30(b)(6) testimony -- about the affirmative, voluntary and non-privileged statements she made directly to both Gores.

Safeway attempts to shield Getz by alleging that Gores “seek[s] to depose Getz on other matters that are privileged.” Def. Brief at 41. This allegation is untrue. Gores does not now and has never sought to pierce any privilege. CP 368. Gores seeks simply the right to hear Getz’s live testimony on matters like her contradiction of Gores about once-existing video: “The allegation that I told plaintiff there was a video showing the areas of the incident is untrue.” CP 234. Getz chose to speak with Gores and then contradict her. Such a dispute is a genuine issue of material fact.

By contrast, Gores’ recollection of her conversation with Getz is more vivid: Getz “told me that Safeway did not dispute that I had fallen or that there was a substance on the floor. She said the security video showed that the store had swept the floor at 1:07 p.m. that day. ... I thought it was a good thing because Safeway would also have video of my accident.”<sup>12</sup> CP 425. Gores should be allowed to clarify this key dispute.

Similarly, Getz made herself a witness by stating: “To my knowledge there were no Safeway employees present in the area of the alleged fall at the time it happened.” CP 235. The basis for this statement, and especially the lack thereof, could potentially be determinative herein.

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<sup>12</sup> Notably, Gores’ testimony here in this regard is a genuine issue of material fact precluding summary judgment.

Safeway contends that “[w]hat [Getz] believes and what she said to Gores in the context of denying liability and exploring the possibility of compromise is irrelevant.” Def. Brief at 41. However, Getz’s voluntary communications with Gores and her statements about the existence of video and witnesses are not “irrelevant” facts, nor are they privileged. Safeway cites no authority showing how ER 408 applies to claims manager Getz, nor why ER 408 should preclude critical discovery herein.

Getz fully injected herself here, making and disputing key statements of fact. If a lawyer had made such statements to an opposing party prior to litigation, about evidence that the lawyer later allowed to be destroyed, that lawyer would be a fact witness subject to deposition. Similarly, nothing precludes Getz’s deposition in this case. Moreover, CR 26(b)(1) specifically provides: “It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Safeway’s argument that Getz is being “harassed,” because Gores wants to depose her about key facts in this case, are false, hyperbolic and self-serving. Gores simply seeks to discover all key facts.

For these reasons, the trial court lacked good cause to issue this protective order. See CR 26(c); McCallum v. Allstate Property and Cas. Ins. Co., 149 Wn.App. 412, 204 P.3d 944 (2009) (protective order

improper for insurer's law-related claims manuals, claims bulletins and training manual). "To establish good cause, the party should show specific prejudice or harm will result if no protective order is issued. When possible, the party must use affidavits and concrete examples to demonstrate specific facts showing harm; broad or conclusory allegations of potential harm may not be enough." McCallum, 149 Wn. App. at 423 (citations omitted). Falsely claiming to be "harassed" is not good cause.

Here, the harm to Gores if she is not allowed to depose Getz – especially regarding Getz' communications with either Mr. or Ms. Gores, immediately after this accident, only on matters of fact -- vastly outweighs any risk Gores may discover Getz' "mental impressions" or "work product." Moreover, it cannot be reasonably said that Getz's free and voluntary communications to Gores about the evidence in this case constituted "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." CR 26(b)(4). Therefore, Gores respectfully requests this Court reverse the unjustified protective order that issued below and allow Getz' deposition.

**F. This Court should again affirm its Commissioner’s denial of review of Safeway’s motions to compel Gores’ production of her confidential credit card statements.**

**1. The trial court acted wisely to limit the discovery of duplicative and confidential credit card data.**

In its cross-appeal, Safeway asks, yet again, for virtually limitless discovery under CR 26(b)(1). Ironically, Safeway devotes much more of its brief to denying Gores’ right to see any of Safeway’s spoliated records.

By contrast, Gores’ credit card statements concern activities about which Safeway has a great deal of discovery already. Moreover, the credit card data sought goes back a year before Gores’ accident. Safeway seeks discovery from Gores so broad as to render personal privacy meaningless.

In support of its position, Safeway alleges: “Evidence of consumer spending is far less ‘invasive’ than evidence of one’s medical care ....” Def. Brief at 47. Safeway does not explain why this allegation is true. It is not true. Discovery of all “consumer spending” would provide a pretext for an endless fishing expedition. Gores did not put her whole life at issue by shopping and getting badly injured at Safeway, nor by filing this action.

Nor does Safeway mention the extensive discovery Gores already has produced in this case: her tax returns, personal calendars, exhaustive medical records and invoices, two Statements of Damages, and far more. Safeway deposed Gores exhaustively, including about her “consumer

spending,” her “recreational or physical activities” and many “other activities of life” that Safeway claims are crucial. See Def. Brief at 44. Safeway has gotten full discovery here and has shown no unique gaps.

Thus, Safeway simply cannot show a unique and compelling harm caused by lack of credit card data. Safeway accomplishes nothing new by continuing to allege, with no new factual basis, its purported need for ever more details about Gores’ “shopping, travel, golfing, and other activities of life.” Def. Brief at 44. Thus even if Safeway could identify a gap in its discovery (which it has not), demanding *all* Gores’ credit card information would remain vastly, improperly overbroad. Like most people, Gores uses credit cards for buying much more than “travel, golfing” and “recreational ... activities” – activities having no reasonable relevance to this case. Id.

The trial court acted well within its broad discretion by refusing to order Gores to produce her credit card records in response to Safeway’s irrelevant and unduly burdensome discovery requests. Washington trial courts possess broad discretion to control and shape the discovery process to secure disclosure of relevant data while also guarding against harmful side effects. Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff’d*, 467 U.S. 20 (1984); see Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 628-29, 818 P.2d 1056 (1991).

Furthermore, the trial court was in the best position to weigh fairly the competing needs and interests of the parties and used its substantial latitude to deny Safeway's desired discovery. See T.S. v. Boy Scouts of America, 157 Wn.2d 416, 138 P.3d 1053 (2006); Harstad v. Metcalf, 56 Wn.2d 239, 242, 351 P.2d 1027 (1960) (appellant had "no right to a fishing expedition in respondent's private affairs."). Thus, even if "an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable." Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. at 457, 463 232 P.3d 591 rev. denied, 169 Wn.2d 1029, 249 P.3d 623 (2010). The trial court had ample reason to deny Safeway's motion to compel and thereby refuse to compel Gores to produce duplicative and confidential credit card records.

**2. The Court of Appeals should stand by the three prior decisions that denied Safeway this confidential data.**

On March 8, 2012, the trial court denied Safeway's motion to compel. On December 7, 2012, this Court affirmed its Commissioner's September 10, 2102 denial of Safeway's motion for discretionary review of the March 8 Order denying this discovery. These three prior decisions were correct. Safeway offers no new or compelling basis for overturning

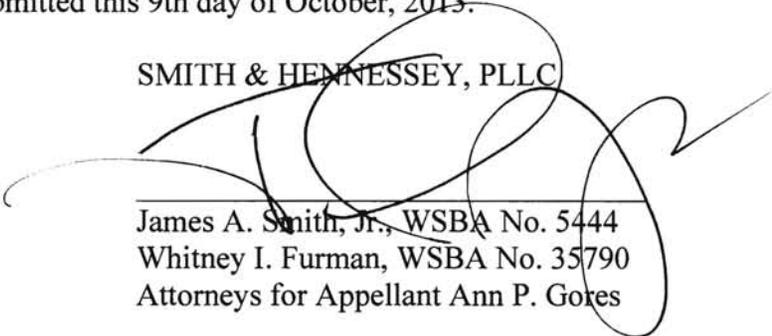
the trial court's denial of discovery of Gores' credit card data. Safeway's cross-appeal continues to lack colorable merit and should again be denied.

### III. CONCLUSION

For all of the foregoing reasons, Gores respectfully requests that this Court (1) reverse the order granting summary judgment to Safeway and remand the case for further proceedings in the trial court; (2) reverse the order granting summary judgment as a sanction for Safeway's spoliation of highly relevant evidence; (3) admit the expert testimony of Tom Baird; (4) strike the Second Declaration of Safeway store manager Patricia Johnson on spoliated evidence; (5) reverse the order granting Safeway's motion for protective order and allow Gores to depose Safeway employee Debbie Getz regarding her non-privileged knowledge; and (6) affirm the trial court's order protecting Gore's credit card records.

Respectfully submitted this 9th day of October, 2013.

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No. 69819-2-I

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

ANN P. GORES,

Appellant,

vs.

SAFEWAY, INC., a Delaware  
Corporation,

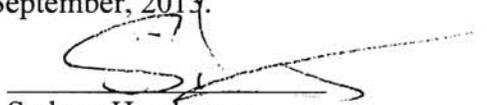
Respondent.

CERTIFICATE OF SERVICE

I, Sydney Henderson, hereby certify that I am over the age of eighteen, employed by Smith & Hennessey, PLLC and not a party to this action. On October 9, 2013, I caused to be served Appellant/Cross-Respondent Ann P. Gores' Reply Brief and Opposition to Respondent Safeway, Inc.'s Cross-Appeal, via electronic mail per agreement of the parties, to counsel for Respondent listed below:

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Dated this 9<sup>th</sup> day of September, 2013.

  
Sydney Henderson

2013 OCT 9 PM 4:52  
SMITH & HENNESSEY  
PLLC  
