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Case # 70933-0-1

WASHINGTON COURT OF APPEAL

DIVISION ONE

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LOIS K. CHAMPION APPELLANT

V.

LOWE'S HIW, INC., RESPONDENT

Appeal from Washington Superior Court
For the County of Snohomish
Court File 13-2-02069-4

APPELLANT'S **REPLY** BRIEF

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STATEMENT OF THE CASE IN REPLY

The plaintiff, Lois K Champion (Ms. Champion) is a healthy woman in her mid-80s. Lowe's HIW, Inc. (Lowe's) is a gigantic multi-state warehouse hardware department store company. Ms. Champion went to the Lowe's store in Everett, Washington, in January, 2010, and was caused to fall, to lose consciousness, and become injured on a pallet and pallet lifter in the middle of the aisle in the plumbing aisle in the store.

The pallet and pallet lifter were unattended and unplacarded and otherwise unprotected from the customers. The pallet and pallet lifter were not in use and it was not apparent when they had last been used. The pallet and pallet lifter were not for customer use and were not for sale.

The only question of fact in the whole case, except damages, is what happened in the split second between the time that Ms. Champion was standing looking at the products, and the time that she was on the pallet and pallet lifter. Ms. Champion says that she walked into the pallet and caught her foot while looking up at the plumbing fixtures on the elevated shelf. Ms. Champion brought this action.

Lowe's brought a motion for summary judgment, (CP 162) Lowe's then brought a second motion, to strike thirteen statements presented by Ms. Champion in support of her opposition to summary judgment.

Lowe's also sought to strike the declaration of Mr. Di Gino. (CP 63) Ms. Champion also responded at length to that motion.

The trial court granted both defendant's motions, with the single exception that the trial court allowed Ms. Champion to have the opinion that she was in good health. (CP 1-5) This appeal of those two orders followed.

Ms. Champion filed her appellate brief. Lowe's has now filed its brief in response. Lowe's argues, over and over again, that Ms. Champion cannot prove, beyond any shadow of any doubt, what caused her to fall. The fall was caused by Ms. Champion being directed along a plumbing aisle by the sales associate, looking up at elevated products on display, and coming into contact with a pallet and pallet lifter that had no business being left in the middle of the plumbing aisle. A legitimate inference can reasonably and fairly be drawn from the known facts that Ms. Champion was caused to fall by the improperly placed pallet and pallet lifter.

SUMMARY OF ARGUMENT IN REPLY

All facts are uncontested except the exact and precise reason that Ms. Champion came to be lying on the pallet, and damages. Lowe's tried, and succeeded in the trial court, to hold Ms. Champion to an impossibly high standard of proof, one that is not required in this case. Lowe's spent

its 44 page brief repeating itself that Ms. Champion could not prove exactly what happened so she could not prove her prima facie case.

ARGUMENT

Lowe's appears to believe that Ms. Champion has to prove, without question, what caused her to be on the floor in the store. The American judicial system does not require such absolute proof. The system requires a preponderance of the evidence, or better than 50% proof of a fact. Ms. Champion could not satisfy the absolute proof requirement. No one could. A jury is always expected to make legitimate inferences from the facts that are known.

Issue

What is the proper standard of proof that a plaintiff has to show in a personal injury case?

Rule on Standard of Proof

The proper level of inquiry in a personal injury case is a "preponderance of the evidence." "In a suit for personal injuries plaintiff must show the nature, extent and duration of his injuries by a preponderance of the evidence." *Parris v. Johnson*, 479 P.2d 91, 3 Wn.App. 853 (Wash.App. Div. 2 1970). "In this footnote, the court quotes from comment a to Restatement (Second) of Torts § 433B(1), to the

effect that the plaintiff must establish by a preponderance of the evidence that the conduct of the defendant was a substantial factor in bringing about the harm to the plaintiff." *Herskovits v. Group Health Co-op. of Puget Sound*, 664 P.2d 474, 99 Wn.2d 609 (Wash. 1983).

Argument

A personal injury case, unless it involves intentional conduct, should be based on an unexpected event, an event that is not being watched or monitored by any person. A common phrase in personal injury cases is "I did not see it" or "I only turned around after I heard a noise." By example, "I couldn't tell you whether they were on or off. I did not see them." *Crowe v. Prinzing*, 468 P.2d 450, 77 Wn.2d 895 (Wash. 1970). If a person was aware of a pending situation that could result in injury that person would normally warn the other person of the impending danger or take actions to protect them from injury. Most people will not sit idly by while an unsuspecting person accidentally puts themselves in harm's way.

Neither will most people simply stare at other people when there is no reason for their vigilance. Unless a person looks like they are about to be injured or there is some other reason for concern, most people will mind their own business.

Therefore, there is no advance notice of a normal personal injury.

The event unfortunately occurs and the parties and witnesses are left to reconstruct the scene from the facts they experience, after the fact, and are able to remember or view.

In this case, it is admitted by all parties that Ms. Champion was in the store, in the plumbing aisle, assisted by Mr. Nash, and looking up at the products she sought, toilets, while walking near an unattended and unplacarded pallet and pallet lifter. A split second later she was on the ground, partially on the pallet, injured, and with a damaged foot that she believes was caused by the pallet that caught her foot and caused her to fall. Two eye witnesses corroborate her story.

Opposing the view that Ms. Champion caught her foot is the defendant, Lowe's which says nothing more than "no, you didn't." Lowe's offers no other alternative fact pattern except to suggest that she might have tripped over her own feet. There is no support for that position by Lowe's. It is nothing more than speculation to avoid responsibility for its actions.

From a "preponderance of the evidence" position, only Ms. Champion has put in any evidence of the cause. Lowe's has offered nothing. The preponderance standard favors Ms. Champion.

Summary Judgment in Reply

Summary judgment was granted on only two points of law:

2. The condition complained of by Plaintiff qualifies under the law and the undisputed facts as an open and obvious condition for which Lowe's owed no duty to warn or protect.
3. Plaintiff has failed in her burden of proof with regard to the neglegence element of causation.

OPEN AND OBVIOUS

The first part of the summary judgment, open and obvious, is a fact question that may not be determined by the court as a matter of law. "If there is a question as to the open and obvious nature of a sidewalk offset, the supreme court has held that this is a question of fact that should be presented to the jury." *Millson v. City of Lynden*, 298 P.3d 141 (Wash.App. Div. 1 2013).

While summary judgment is supposed to be awarded based on a view of the facts most favorable to the non-moving party, a view not taken by the trial court in this case, the law of the issue is that the question is a jury question and not a question of law. The trial court should not have tried to make the determination as a question of law.

In response Lowe's suggests that this case is similar to *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 826, P. 3d 1097, (2003). But in

that case the question of the open and obvious nature of the item went to the jury, as it should have in this case. There is no case cited by Lowe's for the proposition that an open and obvious condition can be determined as a matter of law.

The trial court must be overturned on this point.

PROOF OF CAUSATION

The second, and final, determination by the court is a lack of causation. The court found that Ms. Champion could not prove, apparently beyond a shadow of a doubt, what caused her to fall.

Causation is a fact question and, barring a total lack of any proof as to causation, is a question for a jury. Here, again, the trial court failed to determine the matter based on the facts that were most favorable to Ms. Champion, but rather determined it based solely on the facts in favor of the moving party, Lowe's.

And Lowe's did not present any argument or evidence on any issue of duty, breach, or damages at the trial court. Duty can be a question of law, and is probably more often a question of law than a question of fact. Breach would be a question of fact, as would the existence and the amount of damages. But none of those arguments were made by Lowe's at the trial level. Lowe's only argued, and received and order on, causation, a

fact question.

Errors in Brief of Respondent

In its brief Lowe's suggests, in its introduction, that Ms. Champion failed to prove a breach of any duty to her or that the breach caused her damages. The question of breach was not presented at the trial court and was not a part of the court order. Lowe's cannot present new arguments through its responsive brief on appeal.

On page 22 of Lowe's brief it acknowledges that Ms. Champion made a statement that her foot was "caught under a mental (sic) thing on the floor," or "caught under a platform." Lowe's believes that this is called a "contention" and does not explain why she fell. Instead, this is a fact statement made by Ms. Champion to explain, in layman's terms, what caused her to fall. Here, Lowe's calls a fact statement a "contention" and they make no counter argument or statement of face.

On page 34 Lowe's argues that "Ms. Champion confuses deposition testimony with Rules of Evidence." Apparently, Lowe's is trying to use its evidence, or cover up its error in entering all of the deposition testimony, just for itself and to limit Ms. Champion from using the same evidence. That is not the law of this state. Lowe's put the evidence in the record, without objection or limiting order. The evidence

is available to all parties. "Absent a request for a limiting instruction, evidence which is admitted as relevant for one purpose is deemed relevant for others." *Lockwood v. AC & S, Inc.*, 744 P.2d 605, 109 Wn.2d 235 (Wash. 1987)

Attorney's fees on appeal

The appellant requests attorney's fees on this appeal and in this Reply. The actions of the defendant in the trial court were without merit and were presented for the purpose of delay and to harass the plaintiff. Any response in this court is for a similar purpose. Rule 18.1, RPA, Rule 18.9, RPA.

Conclusion

Lowe's is a national warehouse hardware store. Ms. Champion was an elderly shopper at Lowe's store. Ms. Champion is seeking just compensation for the injuries she suffered in Lowe's Everett store. In opposition, Lowe's is using its size and financial strength to attempt to overwhelm Ms. Champion with legal procedure and pointless arguments to deny her just compensation. Somehow, Lowe's was able to find a trial court to grant its frivolous motions. There is no mechanism whereby the trial court can strike Ms. Champion's. Ms. Champion's factual statements are fully supported by evidence that was presented by Lowe's itself.

Lowe's acts in bad faith when it moves to strike evidence that it put in the court record.

Summary judgment is never granted when there are issues of material fact. How Ms. Champion came to be on the floor is a disputed material fact. Summary judgment was erroneously granted here and should be overturned.

Date January 31, 2014

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Lois K. Champion Appellant	)	
vs.	)	CERTIFICATE OF SERVICE
Lowe's HIW, Inc., Respondent,	)	

This is to certify under penalty of perjury that on the 14th day of February, 2014, I, served, by US Postal Service, postage paid, the APPELLANT'S REPLY BRIEF to the parties named below:

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