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No. 70933-0-I

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

COURT OF APPEALS
STATE OF WASHINGTON
2014 JAN 28 PM 2:38

LOIS K. CHAMPION, an individual,

Appellant,

vs.

LOWE'S HIW, INC.,

Respondent.

RESPONDENT LOWE'S HIW, INC.'S RESPONSE BRIEF

A. Troy Hunter, WSBA No. 29243
Amber L. Pearce, WSBA No. 31626
Attorneys for Respondent Lowe's HIW, Inc.

Floyd, Pflueger & Ringer, P.S.
200 W. Thomas Street, Suite 500
Seattle, WA 98119-4296
(206)441-4455

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I. INTRODUCTION

This appeal arises from Appellant Lois Champion's fall at an Everett Lowe's retail store in January 2010. While shopping for a commode, then-84-year-old Mrs. Champion fell near a bright red pallet and a six-foot tall, unmoving, bright yellow pallet lift. No one witnessed her fall, nor does she know or remember how she fell. Nevertheless, three years later she sued Lowe's for negligence.

After conducting discovery, Lowe's moved for summary judgment dismissal of her negligence claim. The trial court reviewed persuasive evidence from which reasonable minds could not differ, and found as a matter of law that Lowe's satisfied its duty to exercise reasonable care to its invitees because the condition that Mrs. Champion contends caused her accident and injury was "open and obvious." A color photograph of the pallet and pallet lift is appended hereto as **App.-1**. As other retail customers testified, Lowe's pallet and equipment was vibrant, apparent, and readily visible. In addition, the trial court determined that Mrs. Champion failed to present any competent evidence establishing that Lowe's breached a duty to her or that an alleged breach caused her accident and injuries. In sum, there were no witnesses or reliable evidence establishing how or why Mrs. Champion fell while she was shopping.

Accordingly, the trial court dismissed her negligence claim because she could not satisfy her *prima facie* burden of proof.

Before the trial court dismissed Mrs. Champion's negligence claim, it granted Lowe's motion to strike twelve of Champion's thirteen bare, unsupported, and self-serving assertions and opinions, as well as a witness's declaration that contradicted his deposition testimony. The trial court's two rulings were legally sound and should be affirmed.

II. COUNTER STATEMENT OF THE ISSUES

1. Should the Court affirm the trial court's decision granting Lowe's motion to strike unsupported factual allegations, inadmissible hearsay evidence, unfounded expert opinions, and a declaration that lacked CR 56(e) personal knowledge, all of which Mrs. Champion submitted in her summary judgment response?
2. Should the Court affirm the trial court's decision granting Lowe's summary dismissal of Mrs. Champion's sole negligence claim because she failed to: (a) establish that there was a genuine issue as to any material fact; or (b) present competent evidence to support essential elements of her case?

III. RESTATEMENT OF THE CASE

- A. Mrs. Champion Has No Independent Knowledge about How or Why She Fell in the Aisle.**

Appellant Lois K. Champion filed this negligence action against Lowe's on January 10, 2013, just three years shy of the date of her incident on January 16, 2010. (CP 190-92) On that date, Mrs. Champion—then 84 years old—went to the Everett, Washington, Lowe's store to purchase a toilet and sink for one of her many rental properties. (CP 98 at 15:12-19; CP 99 at 17:7-8) Mrs. Champion had shopped in this particular Lowe's store many times before. (CP 98 at 16:14-17) While shopping for her rental properties she visited Lowe's or Home Depot at least once a week. (*Id.*) As the owner of the rental properties, she made all the decisions related to decorating, color and design for her rentals. (CP 99 at 17:9-11)

When Mrs. Champion and her husband arrived at Lowe's they located the plumbing department together. (CP 99 at 18:16-19) After that her husband returned to their car to take a nap, as he had become accustomed to how long it took her to decide on a purchase. (CP 99 at 18:19-24) She testified in her deposition that "I tend to be indecisive. It takes me a long time to make that kind of a decision." (CP 103 at 33:8-10)

In the plumbing department, Mrs. Champion went to the Service Desk. (CP 101 at 26:9-13) A Lowe's salesman accompanied her, walking

side by side with her for approximately 50 feet, from the location of the Service Desk to the toilet aisle. (CP 101 at 27:11-12) While they were walking, the Lowe's employee discussed toilet options with her, writing down a model number and color on a card for her reference. (CP 102 at 31:3-7) On this visit, Mrs. Champion was looking for a toilet that would fit into the plumbing for an older house – a very specific item. (CP 101 at 26:15-18) Once they arrived at the designated aisle, the salesman left to help other customers. (CP 102 at 32:5-6)

Upon entering the aisle, Mrs. Champion began examining the toilets on the right side of the aisle, which ran for approximately ten feet. (CP 103 at 34:11-15) Mrs. Champion testified that “if you decide on a toilet, you look down below—there are cartons of toilets down below—the toilets are in boxes underneath, and the toilets on display are on top.” (CP 103 at 36:15-20; CP 104 at 37:1-4) The toilets occupy approximately ten feet on the right side of the aisle, displayed side-by-side. (CP 104 at 38:14-21) While looking at the toilets, she walked along the right side of the aisle examining each one – interested in matching the correct color of toilet with a model that would fit into her older rental. (CP 104 at 39:1-5; 39:10-14) She stood about three feet back from the shelves where the

toilets were displayed, walking along considering her options. (CP 111 at 66:13-14; 67:3-6)

Ms. Champion spent “no less than 5 minutes” in the aisle trying to make up her mind and may have taken as much as 10 minutes in the aisle before her accident. (CP 108 at 54:19 to 55:7) She testified in her deposition that *she did not notice* a pallet lift, pallet, or any other type of machinery at any time while she was in the aisle looking at toilets. (CP 108 at 55:17-22)

After spending 5-10 minutes shopping in the aisle, Mrs. Champion “turned around, and that’s all I remember, that I’d turned around. I only remember somebody talking to me. I’m on the cement floor.” (CP 105 at 42:5-7) She did not and does not know what had caused her fall, and at the time she was unsure what had even happened. (CP 105 at 43:24 to 44:4) The only information she obtained about her fall came from third-party witnesses. (CP 105 at 44:11-25; CP 106 at 45:1-10) The customers were later identified as Cecilio Di Gino and Shelby Eaton. However, they each testified that they did not see Mrs. Champion fall, nor do they know why she fell. (*See* Narrative Report of Proceedings at CP 213 at 9-13, approved by the trial court at 194-97)

B. Independent Witnesses Easily Observed the Pallet Lift and Pallet in the Aisle.

Customers Cecilio Di Gino and Shelby Eaton each testified in their depositions about the obvious nature of the pallet lift and pallet in the aisle at the time of Mrs. Champion's incident. However, they also each confirmed, under oath a few months after Mrs. Champion was deposed, that neither one of them saw Mrs. Champion fall and neither one knows how or why she fell.

Mr. Di Gino is a photographer who has worked as a licensed private investigator. (CP 127 at 17:15-16; 20:19-23) He is also red/green color blind. (CP 128 at 23:21-25) He does not recall the day, month or week that Mrs. Champion's incident occurred, but he does recall going to the Everett Lowe's with his girlfriend, Shelby Eaton, to shop for a toilet. (CP 128 at 24:3-24) He also easily recalls that as soon as he and Ms. Eaton approached the aisle where the toilets are located, he noticed a pallet on the floor:

- Q. So tell me what you recall from the moment you go into the Lowe's store, what you did to start shopping?
- A. We just went walking up and down the aisles looking at stuff. Then we got over to the area where the pallet was on the floor, and I remember telling Shelby to watch out for the pallet... .

(CP 129 at 25:12-18)

Q. So, before the incident with Ms. Champion, you did see the pallet and you knew the pallet was there?

A. Yes. Yes, I did, yes.

Q. And you actually warned Ms. Eaton -- about it?

A. Yeah.

(CP 135 at 50:7-14)

Mr. Di Gino testified that the pallet was a “wood color,” a “standard wood pallet,” the “kind you burn at beach parties.” (CP 130 at 31:19 to 32:9) He was shown a color photograph of the aisle containing the pallet and pallet lift, which was taken a few minutes after Mrs. Champion fell.¹ Mr. Di Gino admitted that because he is color blind, he could not identify the bright red color of the pallet in the photo. (CP 135 at 52:21 to 53:7) Despite not being able to see and appreciate the bright red pallet located in the aisle during Mrs. Champion’s incident, it was still an obvious condition to him:

Q. So it sounds like, to you, that it was pretty obvious from right when you walked into the aisle that that pallet was a hazard?

¹ The photographs were taken by Joe Kimberlin, Lowe’s sales manager, immediately after Mrs. Champion fell, and are date stamped “January 16, 2010.” Lowe’s produced the photographs during discovery and in supplemental response to Mrs. Champion’s First Request for Production to Lowe’s. The discovery responses were verified by Deah Black, a Lowe’s agent.

A. Yeah.

...

Q. And you immediately warned Ms. Eaton of that fact?

A. Correct... .

(CP 137 at 60:15-23)

Similarly, Shelby Eaton testified that she also readily and easily spotted the pallet and the pallet lift in the toilet aisle:

Q. And then what happened after you were looking in that center aisle at toilets and displays?

A. So, I saw a pallet – I noticed that there was a pallet on the floor, and I was looking in the aisle where the pallet was. I don't really remember what I was looking at that point.

Q. And you observed that from the center aisle looking down the aisle where this pallet was?

A. Uh-huh.

Q. Is that correct?

A. Yes, that's correct.

(CP 152 at 23:11 to 24:2)

Ms. Easton also clearly recalled the large piece of equipment (which was taller than her height of 5'- 4") immediately adjacent to the

pallet. (CP 152 at 24:7-18) She also recalled Mr. Di Gino warning her about the pallet:

Q. So, before the incident, you saw this piece of equipment and the pallet and you knew that both of those pieces of equipment were in the aisle?

A. Yes.

(CP 157 at 41:20-23)

Both Ms. Eaton and Mr. Di Gino agreed that there was nothing obscuring or blocking their view of the equipment or the pallet in the aisle.

(CP 131 at 36:25; CP 132 at 37:1-2; CP 157 at 43:14-16)

C. Independent Eye Witnesses Did Not See How or Why Mrs. Champion Fell.

Ms. Eaton testified that while she was shopping in the toilet aisle she heard a noise behind her. When she turned, she saw Mrs. Champion partially lying on a pallet and partially lying on the concrete floor. (CP 154 at 29:17 to 30:7)

Q. And so you didn't see anything about how or why she fell?

A. Uh-huh.

Q. So is that correct, that it was behind you?

A. Yes. Yes, I would say that.

Q. So you were actually facing away from her?

A. Yeah. Yes, because I didn't see anything, even out of my peripheral vision, and if I had been at least in line with her, I would have seen something.

Q. So you can't say what she was doing even immediately before her fall?

A. Correct.

(CP 154 at 30:19 to 31:12) Likewise, after spending considerable time thinking over the events and trying his best to recall what he actually saw, Mr. Di Gino had to concede that he, too, did not see Mrs. Champion fall:

Q. Did you see how she was walking when she fell?

A. No. No, I can't – no.

Q. And do you know, then, exactly what caused her to fall?

A. The pallet did. She hit the pallet.

Q. How do you know that?

A. Because that was the only thing between her and the floor.

Q. How do you know she didn't trip over her own feet? You didn't see it.

A. **I didn't see it.**

Q. So you don't know why she tripped, you just know where she landed.

A. All right. Yeah, I agree with you on that one.

Q. Okay.

A. Yes, I mean, I stumble over my feet, so yeah.

(CP 132 at 38:18 to 39:11)

D. Procedural History: Lowe's Motion for Summary Judgment, Motion to Strike, and Motion to Settle the Record.

Lowe's filed its motion for summary judgment on July 25, 2013, relying on admissible evidence contained in the deposition transcripts of Mrs. Champion, Mr. De Gino, and Ms. Eaton. (CP 162; CP 91-161) Mrs. Champion's response essentially relied on bare assertions from her Complaint. (*Compare* Complaint at CP 190-92 *with* unsupported Summary Judgment Response at CP 77-84) She failed to cite or rely on any deposition testimony, answers to interrogatories, produced documentation, or sworn affidavits. Rather, she deployed speculation, inadmissible hearsay, expert opinion, and allegations lacking personal knowledge that were completely untethered to admissible evidence. (CP 77-84) Additionally, she filed (but did not cite) and apparently relied on Declarations from Mr. De Gino (CP 85-87, dated June 4, 2013) and Ms.

Easton (CP 88-90, dated June 6, 2013) that pre-dated and contradicted their deposition testimony of July 17, 2013.

Lowe's moved to strike thirteen statements from Mrs. Champion's Response. (CP 63-75) Specifically, Lowe's moved for the following statements contained in Mrs. Champion's response—none of which are supported by any citation to admissible evidence—be stricken and disregarded by the trial court in its determination of Lowe's summary judgment motion:

Statement 1 provides: "While shopping she was directed to look up into the shelves as she was directed along the aisle by Mr. Nash." (CP 78)

Lowe's argued that this statement is speculative as without personal knowledge (ER 602), conclusory, and incompetent lay opinion (ER 602). This statement is also from an unidentified speaker and is hearsay. ER 801(c). (CP 69)

Mrs. Champion's opening brief contains a similar statement that should be stricken for the same reasons. She contends that "[i]n the plumbing aisle Ms. Champion was directed to look upwards into the shelves." (Opening Brief at 8)

Statement 2 provides: "Suddenly Ms. Champion caught her foot and fell onto a wooded pallet that was attached to a pallet lift in the middle of the aisle." (CP 78)

Lowe's argued that this statement is speculative (ER 602) and therefore inadmissible, since Ms. Champion has testified under oath that she cannot say for certain why she fell. (CP 69)

Mrs. Champion's opening brief contains a similar statement that should be stricken for the same reasons. She contends that "[a]s she was directed along the aisle by Mr. Nash Ms. Champion suddenly caught her foot[.]" (Opening Brief at 8)

Statement 3 provides: "Ms. Champion hit her head and lost consciousness for a moment but then found herself being aided by Mr. Nash and two other shoppers, Shelby Eaton and Cecilio Di Gino." (CP 78)

Lowe's argued that this statement is speculative and therefore inadmissible (ER 602), since Ms. Champion has no personal knowledge of what happened immediately before, during, or after her fall. (CP 69)

Mrs. Champion's opening brief contains a similar statement that should be stricken for the same reasons. She contends that "Ms. Champion hit her head and lost consciousness for a few moments." (Opening Brief at 8)

Statement 4 provides: "She was advised to go to the hospital but declined." (CP 78)

Lowe's argued that this statement is from an unidentified speaker and is hearsay. ER 801(c). (CP 69)

Mrs. Champion's opening brief contains a similar statement that should be stricken for the same reasons. She contends that "She was advised to go to the hospital but declined." (Opening Brief at 11)

Statement 5 provides: "The defendant bases its whole motion on the deposition of the plaintiff and the depositions of two eye witnesses,

claiming that since the plaintiff suffered a concussion due to her fall at the store, she is unable to remember what happened to her.” (CP 78)

Lowe’s argued that this statement is incorrect, untrue, and immaterial. Lowe’s based no part of its Motion for Summary Judgment on Mrs. Champion’s concussion, as evidenced by the pleadings and files before the trial court. This statement is also irrelevant to the determination of genuine issues of fact in consideration of summary judgment. (CP 69-70)

Statement 6 provides: “Further, the pallet and pallet lifter were left in an aisle where the shoppers [sic] attention was directed upwards and away from the dangerous condition.” (CP 81)

Lowe’s argued that this statement is speculative as without personal knowledge (ER 602), conclusory, and incompetent lay opinion (ER 602). (CP 70)

Statement 7 provides: “The facts of this case, both direct and circumstantial, lead to the conclusion that Ms. Champion’s injuries were caused by the improperly placed pallet and pallet lifter in the common area aisle at the self-service store.” (CP 82)

Lowe’s argued that this statement is speculative as without personal knowledge (ER 602), conclusory, and incompetent lay opinion (ER 602). (CP 70)

Statement 8 provides: “In this case, the plaintiff’s injuries were caused when she fell on the pallet that was left in the plumbing aisle.” (CP 82)

Lowe’s argued that this statement is speculative as without personal knowledge (ER 602), conclusory, and incompetent lay opinion (ER 602). Ms. Champion has no personal knowledge as to what caused her fall or her injuries. (CP 70)

Statement 9 provides: “ The known facts establish That [sic] Ms. Champion was in the Lowe’s store on the day of the injury, that she was unattended by a salesperson and was looking at items on an elevated shelf

when she came in contact with a pallet and pallet lifter that were improperly left unguarded in a common area.” (CP 84)

Lowe’s argued that this statement is speculative as without personal knowledge (ER 602), conclusory, and incompetent lay opinion (ER 602). Ms. Champion has no personal knowledge as to what she came into contact with. (CP 70)

Lowe’s also contended that the following statements were unsupported expert opinions and should be stricken and disregarded:

Statement 10 provides: “The plaintiff, Lois K. Champion (Ms. Champion) is a healthy woman in her mid-80s.” (CP 77)

The trial court admitted this statement and Lowe’s did not assign error to this ruling.

Statement 11 provides: “Lowe’s is at fault for leaving a pallet and pallet lifter in a self-service aisle and for having the plaintiff’s attention directed away from the ground by having products on high shelving.” (CP 79)

Lowe’s argued that this statement is not evidence regarding Lowe’s equipment policies, customer safety policies, or expert opinions of a human factors or retail safety expert. It is conclusory and incompetent lay opinion as to customer, and not evidence regarding Lowe’s policies and procedures. ER 701. (CP 72)

Statement 12 provides: “Here, the defendant created an unsafe condition by placing a pallet and pallet lifter in the middle of the plumbing aisle a [sic] common area in the store. Neither the pallet nor the pallet lifter were of any use or benefit to the shoppers or to Ms. Champion. The pallet and pallet lifter were in the aisle only for the benefit of Lowe’s, were unattended and without placard or safety cone, and created an unsafe condition that caused Ms. Champion’s injuries.” (CP 80)

Lowe’s argued that this statement is not evidence regarding Lowe’s equipment policies or customer safety policies. It is

conclusory and incompetent lay opinion as to customer safety and not evidence regarding Lowe's policies and procedures concerning power equipment on the retail floor. ER 701. (CP 72)

Statement 13 provides: "Without some other intervening force or some other explanation the reasonable inference is that she was caused to fall by the pallet." (CP 83)

Lowe's argued that this statement is a conclusory opinion of "fact," a conclusory lay opinion of law and proximate causation, and was made without personal knowledge or factual basis and is therefore inadmissible. ER 701; ER 602. (CP 72)

Finally, Lowe's moved to strike the June 4, 2013 Declaration of Mr. Di Gino (CP 85-87) because it contradicted his sworn deposition testimony of July 17, 2013, and he lacked personal knowledge of what caused Mrs. Champion's fall. (CP 73-74)

On September 4, 2013, the Honorable Millie M. Judge granted Lowe's Motion to Strike all statements, except for Statement No. 10. (Mrs. Champion is a healthy woman in her mid-80s.) (CP 4-5) The trial court also granted Lowe's Motion for Summary Judgment, finding as follows:

1. 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.

2. Plaintiff has failed in her burden of proof with regard to the negligence element of causation.

3. Plaintiffs' claims and allegations against Defendant Lowe's HIW, Inc. are dismissed in their entirety as a matter of law, with prejudice and without an award of costs including attorney's fees. (CP 2)

Mrs. Champion appealed these rulings, then filed a Narrative Report of Proceedings. Lowe's filed its Objection (CP 216); submitted its Proposed Narrative Report of Proceedings (CP 212-14), then moved the trial court to settle the record pursuant to RAP 9.5(c). (CP 203-10) The trial court granted Lowe's Unopposed Motion to Settle the Record, and approved its Narrative Report of Proceedings. (CP 194-96)

IV. LEGAL ARGUMENT

A. The Standard of Review Is *De Novo*.

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

Hosp. & Med. Ctr., 49 Wn. App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988).

Likewise, a nonmoving party (Mrs. Champion) attempting to resist a summary judgment “may not rely on speculation, argumentative assertions that unresolved factual matters remain,” rather “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” Halvorsen v. Ferguson, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987).

An appellate court may affirm a trial court’s disposition of a summary judgment motion on any basis supported by the record. Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. The Summary Judgment Standard.

The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. Cox v. Malcolm, 60 Wn. App. 894, 897, 808 P.2d 758, *rev. denied* 117 Wn.2d 1014 (1991). Summary judgment is proper where, after considering the evidence and all reasonable inferences therefrom, reasonable persons could reach but one conclusion. Turngren v. King Cnty., 104 Wn.2d 293, 705 P.2d 258 (1985).

In a situation such as the one presented to the trial court, a defendant may move for summary judgment on the grounds that the plaintiff simply cannot prove an essential element of her case. See Young v. Key Pharms., 112 Wn.2d 216, 226, 770 P.2d 182 (1989) *citing* Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L.Ed.2d 265, 106 S. Ct. 2548 (1986). The moving party may simply challenge the sufficiency of the plaintiff's evidence.

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

Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 23, 851 P.2d 689 (1993), *review denied*, 122 Wn.2d 1010 (1993). Here, Lowe's established that Mrs. Champion lacked competent evidence to support essential elements of her claim, based upon undisputed facts. Accordingly, the burden shifted to her to make out a *prima facie* case. Hash, 110 Wn.2d at 915. She could not meet her burden, so the trial court properly granted Lowe's summary judgment.

C. The *De Novo* Standard of Review Governs a Motion to Strike.

The Court of Appeals applies the *de novo* standard of review when reviewing all trial court rulings made in conjunction with a summary judgment motion. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party and the requirement that the appellate court conduct the same inquiry as the trial court. *Id.*

D. The Trial Court Correctly Struck Twelve Statements from Mrs. Champion's Response to Summary Judgment.

Mrs. Champion's response to Lowe's Motion for Summary Judgment (CP 77-84), was replete with unsupported factual assertions, inadmissible hearsay, statements untethered to personal knowledge, and improper expert opinion. Those specific assertions and a summary of Lowe's legal rationale about why they are inadmissible or do not meet the requirements of CR 56(e) are set forth in Lowe's "Procedural History" herein.

Burmeister v. State Farm, 92 Wn. App. 359, 966 P.2d 921 (1998) holds that when a document submitted in support of or in opposition to a summary judgment motion fails to satisfy CR 56(e) (*i.e.*, contains inadmissible evidence, such as hearsay) it is within the court's discretion

to strike such evidence upon proper motion. Additionally, CR 56(e) specifies that affidavits, declarations, and arguments submitted in connection with summary judgment proceedings should set forth facts based upon personal knowledge. CR 56(e).

It is well established that courts will not consider mere conclusions that simply reiterate the allegations in the complaint or answer. Atherton Condo. Apartment-Owners Ass'n Bd. Of Directors v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990); Henry v. St. Regis Paper Co., 55 Wn.2d 148, 346 P.2d 692 (1959). Likewise, mere opinions or conclusions, without factual support, are insufficient to defeat a motion for summary judgment. Roger Crane & Assoc., Inc. v. Felice, 74 Wn. App. 769, 875 P.2d 705 (1994).

Similarly, statements of information and belief do not reach the level of testimonial knowledge required in order to be considered in a summary judgment proceeding. Mansfield v. Holcomb, 5 Wn. App. 881, 491 P.2d 672 (1971); Carr v. Deking, 52 Wn. App. 880, 765 P.2d 40 (1988).

Mrs. Champion's deposition testimony is clear and unequivocal. After spending 5-10 minutes shopping in the aisle, Mrs. Champion "turned around, and that's all I remember, that I'd turned around. I only remember

somebody talking to me. I'm on the cement floor.” (CP 105 at 42:2-7) She *did not*, and *does not* know what caused her fall, and at the time was unsure what had even happened.

Mrs. Champion admitted in response to Lowe's motion for summary judgment that she did not recall what happened. “[S]he does not personally remember the specific act that caused her to fall.” (CP 82 at 6:22-23) The contention that her foot was “caught under a mental [sic] thing on the floor,” or “caught under a platform” (Opening Brief at 9) is just that—a contention—and without more does not explain how or why she fell, much less that Lowe's breached its duty of ordinary care to her.

The only information Mrs. Champion gleaned about her fall was from two customers: Cecilio Di Gino and Shelby Eaton. However, Ms. Eaton did not see Mrs. Champion fall. (CP 154 at 30:19 to 31:12) Likewise, Mr. Di Gino testified in his deposition that he did not see Mrs. Champion fall. (CP 132 at 38:18 to 39:11)

Lowe's moved for summary judgment based upon this undisputed sworn testimony directly from Mrs. Champion, the sole testamentary witness with actual knowledge of the facts and circumstances of her accident, and the sworn testimony of two Lowe's customers who had actual knowledge of the facts and circumstances as they recall them.

Neither witness saw why she fell—she could have easily tripped over her own feet.

In response to summary judgment, Mrs. Champion admits that “she does not personally remember the specific act that caused her to fall,” but nevertheless contends that Lowe’s breached a duty that caused her to fall, merely because the bright, readily viewable pallet lift and pallet were present in the aisle. Her summary judgment response does not differ from allegations in her Complaint. She did not submit rebuttal evidence that the pallet lift and pallet were *not* open and obvious, or that its location violated any rule, regulation, safety guideline, policy, or procedure.

Likewise, Mrs. Champion’s opening brief conveniently omits key testimony of Mr. Di Gino. Mrs. Champion argues that the pallet caused her to fall because Mr. Di Gino opined that it “was the only thing between her and the floor.” (Opening Brief at 10) However, when pressed further, Mr. Di Gino admitted that he did not see her fall.

Q. And do you know, then, exactly what caused her to fall?

A. The pallet did. She hit the pallet.

Q. How do you know that?

A. Because that was the only thing between her and the floor.

Q. How do you know she didn't trip over her own feet?
You didn't see it.

A. **I didn't see it.**

Q. So you don't know why she tripped, you just know where she landed.

A. All right. Yeah, I agree with you on that one.

Q. Okay.

A. Yes, I mean, I stumble over my feet, so yeah.

(CP 132 at 38:18 to 39:11)

In sum, and considering the evidence and all reasonable inferences therefrom in the light most favorable to Mrs. Champion, she failed to present any competent evidence to establish the elements of her negligence claim. The trial court properly dismissed her claim. This Court should affirm the dismissal.

E. Assertions Rendered as “Statements of Fact” Were Correctly Stricken.

The trial court correctly struck twelve statements from Mrs. Champion's summary judgment response. Mrs. Champion *admitted* that at least six of her “statements of fact” were actually “statements of opinion” or “postures” and “positions.” Mrs. Champion's response to

Lowe's Motion to Strike was conveniently free and untied to the Rules of Evidence. For example:

Statement 1. Mrs. Champion relied on citations that did not support the alleged fact that "Mr. Nash directed plaintiff to look up into the shelves." (CP 14 at 2:9-10) At most, it suggested that Mrs. Champion was "looking up" when she passed in front of witness Mr. Di Gino.

Statement 2. No one can and no one has testified that Mrs. Champion "caught her foot" on anything, much less a pallet or pallet lift. (CP 14 at 2:11-12) Her deposition testimony established that her only knowledge of what happened is based upon the hearsay evidence obtained from witness Cecilio Di Gino. However, Mr. Di Gino clearly testified that he did not see Mrs. Champion trip and does not know how or why she fell.

Statement 3. There is no evidence that plaintiff lost consciousness, and certainly no medical evidence. (CP 14 at 2:13-14) All that could be said by Mr. Di Gino was that the "porch light was on but nobody was home" and that she was "dazed and confused" but no evidence of unconsciousness. (CP 133 at 43:21-25)

Statement 4. This statement is from an unidentified speaker and is hearsay. ER 801(c).

Statement 5. Mrs. Champion admitted that this statement “is not, by itself, statement of fact, but rather a statement of opinion.” (CP 14 at 2:18-19) Accordingly, it is nothing more than a bare allegation that was properly stricken.

Statement 6. This statement was an unsupported allegation, legal conclusion, and lay opinion that a “dangerous condition” existed. It was properly stricken.

Statements 7 and 8. Mrs. Champion admitted that these statements are “not, by itself, statement of fact, but rather a statement of opinion.” (CP 15 at 3:2-3; CP 15 at 3:5-6) Indeed, they are nothing more than bare allegations, and were properly stricken.

Statement 9. Mrs. Champion admitted that this statement is not a statement of fact, but rather a “posture” or a bare allegation. (CP 15 at 3:9-10) The trial court properly struck it.

Statement 10. The trial court admitted Mrs. Champion’s statement that she was a healthy woman in her mid 80s. Lowe’s did not assign error to this ruling.

Statements 11, 12 and 13. Mrs. Champion admitted that these statements are “positions” or “postures” but “not, by itself, statement of fact, but rather a statement of opinion.” (CP 15 at 3:21-22; CP 16 at 4:1;

CP 16 at 4:4-5) Accordingly, the statements were nothing more than bare allegations that were properly stricken.

F. Lowe's Is Not Liable for the Open and Obvious Condition of a Six-Foot Tall Bright Yellow Pallet Lift and a Bright Red Pallet Sitting in Plain Sight.

Lowe's owes an invitee a duty to keep the premises reasonably safe and to warn of unknown, dangerous conditions on the property. Phillips v. Kaiser Aluminum, 74 Wn. App. 741, 748, 875 P.2d 1228 (1994). Washington has adopted the Restatement (Second) of Torts §343 and §343A with respect to liability to a business invitee injured on the premises. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 138, 875 P.2d 621 (1994).

Under Restatement § 343A(1):

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Suriano v. Sears, Roebuck & Co., 117 Wn. App. 819, 826, P.3d 1097 (2003) *review denied*, 151 Wn.2d 1012 (2004).

Comment (e) to the Restatement states:

The possessor of the land may reasonably assume that [the invitee] will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if

he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warnings, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

Negligence cannot be inferred from the fact of an incident alone. Merrick v. Sears, Roebuck & Co., 67 Wn.2d 426, 407 P.2d 960 (1965). It is well established that something more than a mere incident causing injury is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control of the floor. Hooser v. Loyal Order of Moose, Inc., 69 Wn.2d 1, 416 P.2d 462 (1966). Further, owners of property are not insurers against all happenings that occur on the premises. Fernandez v. Dep't of Highways, 49 Wn. App. 28, 36, 741 P.2d 1010 (1987). Rather, the owner's duty is to exercise reasonable care for the invitee's protection. There is no liability for harm from a non-defective condition from which no unreasonable risk was to be anticipated.

Suriano v. Sears perfectly illustrates the issues at play in this case. In Suriano, the plaintiff fell in a Sears store and alleged that the base of an advertising sign located in the center of the main aisle cause her fall and injury. At trial, the jury rendered a verdict for Sears. Plaintiff appealed,

contending that the trial court erred in adopting the Tincani instruction based upon the Restatement:

The owner of a retail store is not liable to customers for physical harm caused to the customers by an activity or condition in the store whose danger is known or obvious to the customers, unless the owner should anticipate the harm despite such knowledge or obviousness.

Suriano, 117 Wn. App. at 824-25.

The Suriano Court cited and referred to a dozen cases from other jurisdictions supporting the general proposition that § 343A applies to retail establishments, and that a seven-foot by two-foot display sign set in the center of a well-lit department store aisle is open and obvious for purposes of establishing the store owner's duty. *Id.* at 828-29.

Ultimately, the Suriano Court upheld the application of the instruction based upon Tincani and the Restatement (Second) of Torts, holding:

Here, the sign was an open and obvious obstruction in the center of a major aisle of the department store, at least for a person perceiving and approaching it from a distance of 20 feet.

...

The potential tripping hazard was obvious as well, as the sign and its base were situated in the middle of a main aisle; a shopper's thoroughfare.

Id. at 829. There could be no better example of an open and obvious condition than the undisputed facts of the present case. The condition that Mrs. Champion alleges caused her to fall is a six-foot tall bright yellow pallet lift and bright red pallet that was located some 20 feet into the plumbing accessories aisle of the Everett Lowe's store. Photographs of the pallet lift and pallet demonstrate the obviousness of the condition and the ample space in the aisle approaching the condition and the wide berth allowed for navigating around it. (CP 143-45)

Mr. Di Gino and Ms. Eaton both exemplify the "average reasonable customer." They both testified that they quickly and easily spotted the pallet on the floor from as far away as the center aisle of the Lowe's store before ever entering the aisle where the toilets are located. The pallet was readily open and obvious to Mr. Di Gino, even though he is color blind and could not appreciate the bright red color of the pallet. They both immediately recognized the potential tripping hazard that the open and obvious pallet on the floor could pose to someone who did not exercise reasonable care for their own safety. Based upon the undisputed facts of this case, reasonable minds could not differ that pursuant to Tincani, Restatement (Second) of Torts and Suriano, Lowe's met its duty to Mrs. Champion by ensuring that the pallet lift and pallet were so bright

and obvious that any reasonable customer would have discovered and appreciated the nature of it.

A color copy of the pallet and pallet lift are appended hereto as **App.-1**. Mrs. Champion belatedly asserts on appeal that this photograph, admitted into evidence in support of summary judgment, should have been stricken because Lowe's attorney did not have personal knowledge of the photograph. (Opening Brief at 19-20) However, Mrs. Champion did not move to strike it at the summary judgment proceeding, and has now waived any purported deficiency. "The record does not reveal that any timely motion to strike the affidavits was interposed prior to entry of the judgment of dismissal. Failure to make such a motion waives the deficiency." Meadows v. Grant's Auto Brokers, 71 Wn.2d 874, 881, 431 P.2d 216 (1967).

Second, (though not a part of the record, since she failed to raise it in the trial court) this photograph, among others, was submitted in supplemental response to Plaintiff's Interrogatories and Requests for Production on July 18, 2013, before the motion for summary judgment was set.² Third, it is part of discovery that Lowe's agent, Deah Black,

² Mrs.Champion contends that "Lowe's has not provided all of its discovery responses." (Opening Brief at 11) However, Mrs. Champion fails to explain or identify what discovery she contends has not been provided. Lowe's not only answered all discovery, but supplemented discovery responses.

signed through a notary, and verified as being “true and correct.” Finally, Lowe’s discovery response states that the photo was taken by its sales manager, Joe Kimberlin, immediately following the incident on January 16, 2010. Under CR 56(e), the “court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.” If Mrs. Champion doubted the veracity of the photographs, she could have deposed Mr. Kimberlin or Ms. Black and/or moved to strike the photo admitted into evidence.

G. Mrs. Champion Failed to Present Admissible Evidence of Lowe’s Negligence, and therefore Could Not Meet her Burden of Proof.

Even if the Court finds that the six-foot tall, bright yellow pallet lift and bright red pallet that accompanied it were not an open and obvious condition, thereby relieving Lowe’s of a duty to warn or protect, there is no question of fact that Mrs. Champion failed to present admissible evidence that the alleged condition, open and obvious or not, caused her to fall.

“To succeed on a negligence claim, the plaintiff must prove: (1) the existence of a legal duty; (2) breach of that duty; (3) an injury resulting from the breach; and (4) proximate cause.” Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 780, 133 P.3d 944 (2006),

review denied, 158 Wn.2d 1017 (2006). “Negligence will not be presumed. The party alleging negligence must prove that negligence existed and, further, that the negligence was the proximate cause of the injury.” Carley v. Allen, 31 Wn.2d 730, 737, 198 P.2d 827 (1948) (citations omitted).³ This showing must be based on more than speculation and conjecture. Daugert v. Pappas, 104 Wn.2d 254, 260, 704 P.2d 600 (1985).

Here, it is undisputed that Mrs. Champion was a business invitee to whom Lowe’s owed a duty of ordinary care. Zenkina v. Sisters of Providence in Washington, Inc., 83 Wn. App. 556, 561, 922 P.2d 271 (1996), *review denied*, 131 Wn.2d 1003 (1997). Mrs. Champion’s first step in proving a breach of this duty is to produce admissible evidence from which it can be inferred that an unsafe condition existed. Watters v. Aberdeen Recreation, Inc., 75 Wn. App. 710, 714, 879 P.2d 337 (1994). In the case at bar, Mrs. Champion did not meet her burden of proof. Her attorney’s *opinion* that an open and obvious pallet and pallet lift is unsafe does not prove that it is. Finally, for Lowe’s to be held liable for

³ See also Hansen v. Washington Natural Gas, 95 Wn.2d 773, 778, 632 P.2d 504 (1981) (“The fact of an injury is not, of course, sufficient to prove a dangerous condition”); Read v. School Dist., 7 Wn.2d 502, 507, 110 P.2d 179 (1941) (“a liability for injuries cannot be predicated upon conjecture or speculation. It must be based upon actual proof both of negligence and of a causal relation between that negligence and the injury sustained”); Toler v. Northern P. R. Co., 94 Wash. 360, 367, 162 P. 538 (1917) (“[T]he mere fact of the injury raises no ... presumption of negligence[.]”).

negligence, the claimed breach of duty must be a proximate cause of Mrs. Champion's injury. Crowe v. Gaston, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998).

Here, Mrs. Champion demonstrated that she had no admissible evidence to demonstrate that her fall was caused by any hazardous or unsafe condition existing at the time of her fall, or that Lowe's had any knowledge or notice of a "hazardous" condition. She failed to present admissible evidence that any Lowe's employee breached the duty of reasonable care to her or otherwise caused or contributed to her fall. This Court should affirm the trial court's summary judgment dismissal, and end its analysis here.

Inexplicably, Mrs. Champion confuses deposition testimony with the Rules of Evidence. She repeatedly asserts that because Lowe's made the entire deposition transcripts of Mrs. Champion, Mr. Di Gino, and Ms. Eaton part of the trial court record, all of the testimony is automatically admissible. (*See* Opening Brief at 6: "The factual evidence was put in the record by the defendant itself and there is no rule allowing the court to strike argument."; Opening Brief at 15: Instead, Lowe's chose to enter all of the evidence, making it equally available to the plaintiff as to Lowe's. Lowe's cannot now be heard to complain of the truth or existence of those

facts.”; Opening Brief at 16: “All of the statements are made from personal knowledge by Ms. Champion, as shown by her deposition that Lowe’s put in the record.”; Opening Brief at 18: “All of the evidence is in the record due to Lowe’s, who thereby consents to its authenticity. The evidence cannot then be speculative.”; Opening Brief at 19: “It is bad faith for Lowe’s to argue against facts that it put in the record.”)

The Rules of Evidence “govern proceedings in the courts of the State of Washington[.]” ER 101. Its purpose is to “secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end *that the truth may be ascertained and proceedings justly determined.*” ER 102 (emphasis added); *see also* ER 602; Hollingsworth v. Washington Mut. Sav. Bank, 37 Wn. App. 386, 681 P.2d 845, *review denied*, 103 Wn.2d 1007 (1984) (holding that ER 602 bars testimony that purports to relate facts, but which is based only on the reports of others). Based on the foregoing, a deponent’s testimony is not automatically admissible—it must adhere to the Rules of Evidence.

H. Mrs. Champion Failed to Present Admissible Evidence to Show What Caused Her to Fall.

If the Court determines that Lowe’s breached its duty of reasonable care to Mrs. Champion, then Lowe’s submits that the breach did not cause

her accident. Under Washington law, “no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way.” Gardner v. Seymour, 27 Wn.2d 802, 810, 180 P.2d 564 (1947).

Where causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.

Sanchez v. Haddix, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981).

“When reasonable minds could reach but one conclusion regarding claims of disputed facts, such questions may be determined as a matter of law.” Christiano v. Spokane Health Dist., 93 Wn. App. 90, 93, 969 P.2d 1078 (1998), *review denied*, 163 Wn.2d 1032 (1999); *see also* La Plante v. State, 85 Wn.2d 154, 159-60, 531 P.2d 299 (1975) (“where the facts are undisputed and do not admit of reasonable differences of opinion, the question of proximate cause is one of law”); Briggs v. Pacificorp, 120 Wn. App. 319, 323, 85 P.3d 369 (2003), *review denied*, 152 Wn.2d 1018 (2004) (“proximate cause may be determined as a matter of law where reasonable minds could not differ”).

Based upon all the facts presented, there is no admissible evidence

that Lowe's caused Mrs. Champion to fall when she was in the aisle shopping for toilets. There are no witnesses to testify about what caused her fall. More importantly, *Mrs. Champion is unable to identify what caused her fall*, despite spending a significant amount of time in the aisle. Without this evidence, she cannot meet her burden of proof under the proximate cause element of her negligence claim.

Proximate causation requires both cause in fact and legal causation. 'Cause in fact' refers to a physical connection between an act and the injury. The claimant must establish that the harm he suffered would not have occurred but for an act or omission of the defendant. Legal causation is a determination that the cause in fact of the plaintiff's harm should be deemed the legal cause of that harm. Cause in fact usually is a question for the jury. But factual causation may become a question of law for the court if the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion. Legal causation presents a question of law.

Little, 132 Wn. App. at 780 (citations omitted).

Little is directly analogous to the present case. Mr. Little, who worked as a subcontractor on a construction project, was injured while using a ladder to install gutters on a house. Little and his ladder were found on the ground and he seemed disoriented. He was alone and no other person witnessed his apparent fall from the ladder. Mr. Little sued the general contractor, Countrywood Homes, asserting a negligence claim. Countrywood filed a motion for summary judgment.

The Superior Court granted the motion, which Little appealed. The appellate court affirmed dismissal, holding that Little failed to establish proximate cause in his negligence action because neither Little nor anyone else knew how his accident occurred or how he was injured. He failed to present any evidence that would have allowed a reasonable person to infer, *without speculating*, that Countrywood’s negligence more probably than not caused the accident and injury:

“The mere fact that Little sustained an injury does not entitle him to put Countrywood to the expense of trial (an accident does not necessarily lead to an inference of negligence). He needed to submit evidence allowing a reasonable person to infer, *without speculating*, that Countywood’s negligence more probably than not caused the accident.”

Little, 132 Wn. App. at 378 (emphasis added).

Moore v. Hagge, 158 Wn. App. 137, 241 P.3d 787 (2010), *review denied*, 171 Wn.2d 1004 (2011) is also applicable. Ronald Moore, a pedestrian, was struck by a vehicle and injured along a residential street in the City of Des Moines, Washington. *Id.* at 140. The driver of the vehicle, Hagge, as well as the driver of the vehicle behind Hagge, witnessed the events leading up to the incident. *Id.* at 141. Neither witness, however, saw where Moore came from, what he was doing just before, or when he collided with Hagge’s car. *Id.* According to Hagge, “something kind of

popped on my car.” *Id.* The officer called to the scene determined that no one at the scene actually saw Moore before the collision, or saw Hagge’s vehicle collide with Moore. *Id.* at 142.

Mr. Moore sued Hagge and the City of Des Moines. *Id.* The city moved for summary judgment, which the trial court granted. *Id.* at 143-46. On appeal, the court affirmed, holding that Moore failed to establish proximate cause in his negligence action because no one, not even Moore, could give a firsthand account of how the accident happened. The other drivers did not see it and Moore could not remember it. The court noted that “here, similar to *Little*, Moore has no memory of the accident, and no one else witnessed the events just before the collision.” *Id.* at 154. Relying on Gardner, the court held ““since there is nothing more tangible to proceed upon than two or more conjectural theories, summary judgment is appropriate.”” *Id.* at 154, quoting Gardner, 27 Wn.2d at 809.

Here, Mrs. Champion, like Mr. Little and Mr. Moore, failed to produce any admissible evidence of a cause in fact – including her own account of how the accident happened. No one actually witnessed Ms. Champion fall. Ms. Eaton testified that the event happened *behind* her and she could not offer any observations about what Mrs. Champion was doing just prior to her fall or how or why she fell. Likewise, Mr. Di Gino

testified that Mrs. Champion *may have well tripped over her own feet rather than tripping on the pallet* since he didn't actually see her trip and fall, only observing her after the fact.

To establish liability, something more than the fact that plaintiff fell is required. Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 448, 433, P.2d 863 (1967). Plaintiff's burden of proving proximate cause 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, 27 Wn.2d at 809.

Mrs. Champion repeatedly confirmed that she had no personal knowledge about how she fell.

- "I don't recall the fall at all." (CP 97 at 10:13)
- "I don't really remember what happened, but I evidently fell." (CP 99 at 19:17-18)
- "I don't remember anything. I don't remember a thing about the fall." (CP 108 at 53:7; 53:9)
- "Well, I don't know what I hit, to tell you the honest to God truth." (CP 108 at 56:16-17)

Likewise, witness Shelby Eaton did not see her fall because her back was turned away from Mrs. Champion when she fell. Finally, the deposition testimony of Cecilio Di Gino clarified and invalidated the

declaration prepared for him by Mrs. Champion's counsel when Mr. Di Gino testified under oath:

Q. Did you see how she was walking when she fell?

A. No. No, I can't – no.

Q. And do you know, then, exactly what caused her to fall?

A. The pallet did. She hit the pallet.

Q. How do you know that?

A. Because that was the only thing between her and the floor.

Q. How do you know she didn't trip over her own feet? You didn't see it.

A. I didn't see it.

Q. So you don't know why she tripped, you just know where she landed.

A. All right. Yeah, I agree with you on that one.

Q. Okay.

A. Yes, I mean, I stumble over my feet, so yeah.

(CP 132 at 38:18 to 39:11)

In the realm of speculation, there is any number of reasons why Mrs. Champion fell while shopping in the Lowe's store, including but not

limited to stumbling over her own feet. It is equally possible, given her past medical history of Hyperlipidemia, Atrial Fibrillation, Hypertension, Seizures, Type II Diabetes Mellitus (CP 23), and findings of cortical atrophy and chronic small vessel ischemic changes in the white matter of both hemispheres of her brain, (CP 27) that she suffered from a Transient Ischemic Attack (“TIA”) which caused her to fall, since she exhibits all of the major risk factors and presents with a nearly identical symptom set. (CP 29-30)

The point is that Mrs. Champion offered the trial court nothing more than speculation and conjecture as to the cause of her fall. There are clearly multiple possible causes that have nothing to do with Lowe’s duty to her and would not result in liability assessed against anyone for her accident, much less Respondent Lowe’s.

In the trial court, Mrs. Champion argued that the doctrine of *res ipsa loquitor* applied. (CP 82-83) However, she did not assign error to the trial court’s unwillingness to deny summary judgment based on this theory and she did not raise the argument in her opening brief. Accordingly, it is not subject to appellate consideration. Pettet v. Wonders, 23 Wn. App. 795, 599 P.2d 1297, *review denied*, 93 Wn.2d 1002 (1979) (the appellate

court will not consider alleged errors not pointed out in the assignments of error).

V. CONCLUSION

The facts presented to the trial court and this Court contain no evidence establishing what caused Ms. Champion to fall in the aisle of the Everett Lowe's store. Moreover, the alleged condition was open and obvious to everyone who observed it. As a result, Mrs. Champion is unable to establish that Lowe's breached any duty to her that in turn caused her accident and injuries. The failure to make a *prima facie* case of negligence is fatal to her claim against Lowe's.

Based upon the well-reasoned case authority set forth above, the trial court had a sound legal basis to grant Lowe's motion for summary judgment on not just one, but two bases, and dismiss Mrs. Champion's claim in its entirety. The Court of Appeals should affirm the dismissal.

Lowe's respectfully requests its attorneys' fees and costs incurred pursuant to RAP 14.1, RAP 14.2, and RAP 14.3.

Respectfully submitted this 21 day of January, 2014.

FLOYD, PFLUEGER & RINGER, P.S.



A. Troy Hunter, WSBA #29243
Amber L. Pearce, WSBA #31626
Attorneys for Respondent Lowe's HIW, Inc.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 2~~nd~~ day of January, 2014, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

Jamie Jensen
Mukilteo Law Office
4605 116th St SW Ste 101
Mukilteo, WA 98275-5301



Tracy A. Brandon
Legal Assistant

Appendix

