

No. 35535-3-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

CT 10/2/18  
STATE OF WASHINGTON  
BY *Comm*

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CARL CHRISTOPHER CAWLEY and  
DONNA CAWLEY, husband and wife,

Appellants,

v.

HARBOR FREIGHT TOOLS USA INC.,  
doing business as HARBOR FREIGHT TOOLS,  
a Delaware corporation,

Respondent.

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BRIEF OF APPELLANTS

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Chris and Donna Cawley brought this action to recover damages for the injuries Chris sustained when a 60-pound display vise fell on his foot in a self-service tool store operated by Harbor Freight Tools. Cawley appeals from the Thurston County Superior Court's rulings to exclude the testimony of his retail safety expert and to deny his proposed jury instruction regarding foreseeability.

**A. ASSIGNMENTS OF ERROR**

1. The trial court erred, on August 21, 2006, by ruling to exclude the testimony of Mary Hollins, Cawley's retail safety expert.

2. The trial court erred, on August 28, 2006, by refusing to offer Cawley's proposed jury instruction regarding the foreseeable risk of harm when customers handle self-service merchandise (Proposed Instruction No. 16).

3. The trial court erred, on October 20, 2006, by entering judgment in favor of Harbor Freight Tools.

**Issue Pertaining to Assignments of Error**

Where the trial court excludes all testimony by the plaintiff's retail safety expert, and where the trial court refuses to offer an instruction addressing the foreseeable risk when customers handle self-service merchandise, is the plaintiff deprived of his right to fully present the duty and breach elements of his negligence claim to the trier of fact? (Assignments of Error 1-3.)

## B. STATEMENT OF THE CASE<sup>1</sup>

Harbor Freight Tools is a corporation with more than 200 tool stores. RP II at 31-32. The tools displayed in the Lacey store include a run of vises – a graduated series of models mounted closely together. *Id.* at 45, 129; Ex 29. One of the vises in the display is Model 5655, a swivel vise distributed exclusively by Harbor Freight Tools. RP II at 47; CP 538.

The display vises are fastened to a table about four feet off the ground. RP II at 54. The tabletop, which is made of plywood covered with blue indoor/outdoor carpeting, is about four feet square. *Id.* at 54-55, 72-73; RP III at 326-27. Merchandise is displayed around the edges, and additional items are stacked in the middle. RP II at 55-56, 130, 192. Saleable units are stored beneath the table. *Id.* at 54.

There are no signs posted at the display that would direct customers to ask for assistance. RP II at 56-57. In fact, customers are encouraged to examine the merchandise. *Id.* at 57. People handle the vises every day, opening and closing the jaws and manipulating the levers. *Id.* at 43, 45-46. The display tables must

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<sup>1</sup> The Verbatim Report of Proceedings consists of four volumes: the August 11, 2006 pretrial conference transcript (RP I); trial excerpts for August 21-23, 2006 (RP II); trial excerpts for August 23 and August 28 (RP III); and trial excerpts for August 24 (RP IV).

be replaced every four to five years due to wear and tear. RP III at 329; RP IV at 70-71.

Charles Patchell, manager of the Lacey store, was at work on December 23, 2000. RP II at 31, 46. It was two days before Christmas, and the store was busy, when one of his employees came to get him, explaining there was a problem. *Id.* at 46.

Patchell went to the store's vise display, where he saw a man sitting on the floor and holding his foot. RP II at 46, 51. He also observed a swivel vise and two screws with washers on the floor.<sup>2</sup> *Id.* at 46-47, 49.

Patchell and another employee assisted the man to the store's break room. RP II at 57, 154. The man told Patchell that the vise had fallen and hit his foot. *Id.* at 59.

The injured man is Chris Cawley, a self-employed dental lab technician who manufactures crowns, bridges, and dental implants for local dentists. RP II at 115; CP 281.

On December 23, Cawley was Christmas shopping at Harbor Freight Tools. RP II at 128. He wanted to buy tools for his oldest son and a new vise for himself. *Id.* He was looking at the

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<sup>2</sup> Patchell did not personally install the swivel vise. RP IV at 16. The display had been set up when the store opened – 2-½ years earlier. *Id.* Patchell stated the vise had been attached to the display table with two wood screws, which he found on the floor after the vise fell. RP IV at 9, 14. Patchell testified he does not recall what happened to the screws. RP II at 51.

vises in the store's display, and described what happened next as follows:

I reached back, was trying to feel back there. I couldn't, because the thing was so high. I got tippy toe reaching back there and trying to see if [the vise] had a shaft, and all of a sudden, the next thing I know, I was on the ground, and I remember I was so shocked. I just I thought -- you know, I didn't know what happened to me. I didn't even know the vise had fallen, and it just -- it came down so fast and hit me so hard, that I was just -- I was just dizzy. I was just laying there ready to pass out.

RP II at 132.

The corner of the vise fell directly onto Cawley's toe, cutting through his leather shoe.<sup>3</sup> RP II at 153. After Cawley was taken to the break room, he removed his shoe and iced his foot for about 30 minutes. *Id.* at 154-55.

Cawley then returned to the vise display. RP II at 137; RP III at 262. He inspected one of the screws that had been used to attach the fallen vise to the table, and he identified it as a two-inch sheetrock screw. RP II at 133; RP III at 261-62. He observed that the other vises in the display were also fastened with sheetrock screws – with a screw placed through the hole on either side of each vise's base. RP II at 138.

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<sup>3</sup> There is no evidence to support an assertion that Cawley put a significant amount of weight on the vise. RP I at 37. The jaws of the vise were fully open when he approached the display. RP II at 132. Cawley did not try to remove the vise from the table. RP II at 133; RP III at 256-57. Just the resting pressure of his hand was on the vise at the time it fell. RP III at 258.

Cawley purchased a vise like the one that had fallen on his foot, and he left the store.<sup>4</sup> RP II at 156.

Cawley next drove to the hospital emergency room, where he learned that his second toe had been badly fractured. RP II at 157, 159; Exs 26, 27. As it healed, the toe became increasingly stiff and painful. RP III at 211. In 2004, Cawley underwent surgery to remove joint tissue and to fuse the bones of the toe. *Id.* at 211, 265. He continued to experience pain in his foot, and he received physical therapy to rehabilitate it. *Id.* at 215-16. Additional surgery was necessary in January 2005 to relieve pressure on the tendons of his large toe and to insert an implant in his second toe. *Id.* at 217. Cawley was bedridden for weeks after the surgeries, and he had to deal with crutches and walking casts for months. *Id.* at 229. Cawley's ability to walk is permanently impaired. *Id.* at 219-20.

The injury has impacted Cawley's business. RP III at 227-33. And Cawley is unable to pursue activities he used to enjoy with his family – such as horseback riding, fishing, hiking, and waterskiing. RP II at 107-114.

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<sup>4</sup> The vise Cawley bought was accompanied by an instruction manual. RP II at 144-45. The manual includes a drawing of the base of the vise, which contains three mounting holes. CP 543. In order to install the vise, the owner is instructed to (1) drill appropriate-sized holes through the top of the workbench, (2) insert appropriate-sized bolts through the vise base and the bench top, and (3) install washers and nuts on the bolts underneath the workbench, tightening securely. RP II at 139, 145-46; CP 542.

Cawley filed a complaint in Thurston County Superior Court on April 2, 2003, claiming Harbor Freight Tools “breached its duty to its customer by failing to provide a safe product display in its store.” CP 13. He sought judgment for his damages and for the loss of consortium suffered by his wife. CP 14. In its answer, Harbor Freight Tools asserted contributory negligence by Cawley. CP 18.

During discovery, Cawley requested that Harbor Freight Tools produce the table on which the vises had been displayed at the time he was injured “for inspection, testing, and use at trial.” CP 42. Harbor Freight Tools responded that it had disposed of the table when its store moved to a new location in December 2003. *Id.* Cawley’s pretrial motion to shift the burden of proof to the defendant on the basis of spoliation of evidence was denied.<sup>5</sup> CP 41, 88.

At the pretrial conference on August 11, 2006, the court considered defendant’s motion in limine to either exclude or limit the testimony of Mary Hollins, Cawley’s retail safety expert, regarding the display of a vise in a retail store. CP 124, 154.

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<sup>5</sup> The defendant’s expert witness, Per Reinhall, conducted static load tests to measure the force required to pull the vise off the display table. RP IV at 24, 41. The actual table and the screws that had fastened the display vise were not available. *Id.* at 66. Reinhall testified that the exemplar table provided to him by Harbor Freight Tools looked new. *Id.* at 35. And he used new screws for his tests. *Id.* at 66.

Hollins' area of expertise is product display and safety in retail settings. CP 116, 122. She personally visited the Harbor Freight Tools store and saw how vises were being displayed. RP I at 33. Hollins opined that a vise should be displayed in accordance with the manufacturer's instructions for how it is to be mounted. CP 109.

The plaintiff's case emphasized the retailer's duty to its customers. RP I at 10. Hollins was "to identify hazards . . . that should have been known or were foreseeable to the store owner." *Id.*

Even Harbor Freight Tools agreed that "the expected conduct of a retail customer may be an appropriate subject for expert testimony." CP 145. But the trial court restricted Hollins solely to explaining documentary exhibits to the jury.<sup>6</sup> RP I at 19.

The trial came before Thurston County Superior Court Judge Chris Wickham, sitting with a twelve-person jury, from August 21 to August 28, 2006. CP 21, 643.

Harbor Freight Tools renewed its concerns about Mary Hollins by moving to strike her videotaped deposition. CP 237.

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<sup>6</sup> Hollins noted that Harbor Freight Tools issued a safety notice a few months before Cawley's injury, alerting its retail stores to securely fasten display items, such as vises, anvils, motors, and hydraulic cylinders, in order to prevent them from falling on customers who had moved and handled them: "Harbor Freight Tools knew that having this vise on this display was a hazard, and that it could cause serious harm." CP 254.

The court considered the motion at the end of the first day of trial. RP II at 85-101.

Cawley stated that Hollins “knows the types of things that happen to displays in retail settings, such as customers using them, moving them, and what you need to do to make a display safe.” RP II at 99.

It was Cawley’s position that Harbor Freight Tools should have recognized the vise display as a hazard. RP II at 86. “[T]he issues in this case deal not just with screws or the vise, it’s with a display as a whole.” *Id.* at 100. Cawley argued that Hollins was the appropriate, qualified expert “to talk about the analysis that should have been undertaken in the design of this display.” *Id.* at 101.

The court stated: “I don’t see how her testimony helps this jury decide if in December of 2000 a vise was placed in a store in a way such that it created an unreasonable risk of harm to this plaintiff.” RP II at 93. The court ruled to exclude Hollins’ testimony completely. *Id.* at 100.

The court subsequently refused to offer Cawley’s proposed jury instruction regarding foreseeability in a self-service setting. RP III at 339; CP 185. The court was not convinced “that the evidence in this case would support a jury finding that the improperly

constructed display was dangerous as a result of the actions of other customers.” RP III at 339.

The jury returned a verdict in favor of Harbor Freight Tools. CP 625. Judgment was entered on October 20, 2006. CP 642. And Cawley’s appeal to this Court followed.<sup>7</sup> CP 648.

### **C. SUMMARY OF ARGUMENT**

Chris Cawley was denied a fair trial because the trial court excluded all testimony by his retail safety expert and refused to offer his proposed jury instruction regarding foreseeability in a self-service store.

### **D. ARGUMENT**

#### **Premises Liability<sup>8</sup>**

The operator of a business owes a duty of reasonable care for the safety of members of the public who are invited as customers to his or her business premises. WPI 120.06.01. A proprietor’s duty to invitees includes a duty to inspect for and warn of dangerous conditions, and to maintain its premises in a reasonably safe condition. *Egede-Nissen v. Crystal Mountain, Inc.*,

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<sup>7</sup> A copy of the Notice of Appeal is included in the Appendix.

<sup>8</sup> Actionable negligence “requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury.” *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

93 Wn.2d 127, 132, 606 P.2d 1214 (1980); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 123-24, 372 P.2d 193 (1962).

“Generally, a business owner is liable to an invitee for an unsafe condition on the premises if the condition was ‘caused by the proprietor or the proprietor’s employees, or the proprietor [had] actual or constructive notice of the unsafe condition.’” *Frederickson v. Bertolino’s Tacoma, Inc.*, 131 Wn. App. 183, 189, 127 P.3d 5 (2005) (quoting *Wiltse v. Albertson’s, Inc.*, 116 Wn.2d 452, 460, 805 P.2d 793 (1991)). But there is a recognized exception to this general requirement, which is articulated in *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983).<sup>9</sup>

Under the *Pimentel* exception (mode of operation rule), if the business is a self-service operation, the plaintiff is relieved of the burden of establishing a proprietor’s actual or constructive knowledge of an unsafe condition if it can be shown that the nature of the business and its methods of operation are such that unsafe conditions are reasonably foreseeable where the injury occurred. *Id.* at 40; *see also Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994). For the exception to apply, “there must be a

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<sup>9</sup> The *Pimentel* court, which reversed a defense verdict in an action for injuries caused when a paint can fell on the plaintiff’s foot, did not distinguish between slip-and-fall cases and falling merchandise cases in a self-service setting: “The foreseeability that customers will handle, examine and replace merchandise is a risk within the reasonable foresight of the storekeeper and the same to both situations.” 32 Wn. App. 647, 653, 649 P.2d 135 (1982).

relation between the hazardous condition and the self-service mode of operation of the business.” *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 277, 896 P.2d 750 (1995).

“Once a hazard is shown to have caused an injury to the consumer, the burden of proof shifts to the store owner to show that he was not negligent and kept the premises in a reasonably safe and properly maintained condition.” *Pimentel v. Roundup Co.*, 32 Wn. App. 647, 654, 649 P.2d 135 (1982).

**1. The trial court abused its discretion by excluding the testimony of Mary Hollins.**

The admissibility of expert testimony in Washington is governed by ER 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule requires a two-step inquiry: (1) whether the witness qualifies as an expert; and (2) whether the expert’s testimony would be helpful to the trier of fact. *Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995).

Hollins’ qualifications as an expert are considerable: She is a law school graduate. CP 245. For several years, she worked as safety director for a chain of department stores and a mental health

facility in Oregon. *Id.* And for the last ten years, Hollins has operated her own risk management consulting business. *Id.*

Hollins is a member of several professional organizations, including the American Society of Safety Engineers, the National Safety Management Society, the Risk & Insurance Management Society, the Society for Human Resource Management, Professionals in Workers' Comp, the Washington Self-Insurers Association, and the Washington State Healthcare Safety Council. CP 246-47.

Among other things, Hollins has developed a risk management hierarchy that could be helpful to the jury in analyzing a customer injury situation. It includes identifying and anticipating hazards, eliminating risks that present a probability of harm, and minimizing hazards that cannot reasonably be eliminated. CP 249. In the present litigation, she both reviewed case documents and visited the Harbor Freight Tools store. *Id.* at 250.

“Trial courts have broad discretion in determining the admissibility of expert testimony . . . .” *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). On the other hand, “[c]ourts generally interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.” *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

Hollins' testimony should have been admitted because it satisfied the requirements for expert opinion under ER 702. At a minimum, Hollins should have been allowed to testify as a fact witness. The trial court's decision to exclude her testimony altogether was unreasonable and premature.

**2. The court's instructions did not adequately present Cawley's case to the jury.<sup>10</sup>**

"Each party is entitled to have his theory of the case presented to the jury by proper instructions, if there is any evidence to support it, and this right is not affected by the fact that the law is covered in a general way by the instructions given." *DeKoning v. Williams*, 47 Wn.2d 139, 141, 286 P.2d 694 (1955).

Under Cawley's theory of the case, it was foreseeable and expected that many customers would handle the vises in the store's display. It was also foreseeable that any customer would be at risk if a heavy vise was not properly secured to the display table.

The evidence showed that Harbor Freight Tools had to replace its display tables every few years due to the wear and tear of customer use – and that the table in question was aging. The evidence also showed the vise that injured Cawley was not installed in accordance with its instruction manual. Instead of being

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<sup>10</sup> A copy of the Court's Instructions to the Jury is included in the Appendix.

properly secured by three bolts, washers, and nuts, the vise was attached to the table with only two sheetrock screws.

Cawley's case focuses on the store's duty to its customers and its breach of that duty. There were hazards in the way Harbor Freight Tools was displaying its self-service merchandise, and those hazards were foreseeable:

Harbor Freight Tools . . . is fully aware that customers will come into their store and they will handle these displays: they will move them around; they will open and close the jaws of the vise; they will swivel it, because it's a swivel device; they will turn it; they will do all kinds of things with this display vise, because [it] is a display and people handle displays.

RP II at 22.

The trial court should have instructed jurors that it is foreseeable, in a self-service store, that customers will handle merchandise – and that their acts constitute a risk within the reasonable foresight of the proprietor, as set forth in Cawley's proposed instruction:

Instruction No. 16

**FORESEEABILITY – SELF-SERVICE SETTING**  
Pimentel v. Roundup Co., 32 Wn. App. 647 (1982)

In a self-service setting, foreseeability that customers will handle, examine and replace merchandise is a risk within the reasonable foresight of a storekeeper.

CP 185. The proposed instruction is a correct statement of the law governing the case.

Instead, the trial court gave only the following general instruction regarding the defendant's duty:

#### INSTRUCTION NO. 7

The operator of a retail store owes to a person who has an express or implied invitation to come upon the premises in connection with that business a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that such person is expressly or impliedly invited to use or might reasonably be expected to use.

CP 634.<sup>11</sup>

When a party requests an appropriate instruction that relates the principles of law involved to the specific factual issues of the case, it is not enough for the instructions to set forth the law in a general way. See, e.g., *Dabroe v. Rhodes Co.*, 64 Wn.2d 431, 435, 392 P.2d 317 (1964); *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 480, 624 P.2d 215 (1981); *Kiemele v. Bryan*, 3 Wn. App. 449, 452, 476 P.2d 141 (1970). Thus, stating the general duty of a store operator does not satisfy the obligation of instructing the jury specifically on Harbor Freight Tools' self-service operation.

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<sup>11</sup> The parties do not dispute that Cawley was a business invitee. CP 230. The trial court, however, did not define "business invitee" for the jury.

The trial court refused to give Cawley's proposed instruction, ruling as follows: "I'm not going to give the *Pimentel* instruction, because I'm not persuaded that the evidence in this case would support a jury finding that the improperly constructed display was dangerous as a result of the actions of other customers." RP III at 339. Cawley submitted supplemental briefing on the issue, as well as excepting to the ruling on the record.<sup>12</sup> RP III 340-42; CP 612.

The court's failure to give the proposed instruction deprived Cawley of having his specific theory of negligence presented to the jury:

Basic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed.

*Leek v. Tacoma Baseball Club, Inc.*, 38 Wn.2d 362, 365, 229 P.2d 329 (1951).

It was prejudicial error for the trial court not to give the proposed instruction.

The trial court's decisions on underlying issues of law, as reflected in the jury instructions, are subject to de novo review on

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<sup>12</sup> Cawley argued as follows: "I would just like to mention that this is what Ms. Hollins' testimony was about. I think it is a misunderstanding of this Court and by defendant of what plaintiff's theory of the case is, and I again take exception to the exclusion of Ms. Hollins." RP III at 341.

appeal. See *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001).

In sum, the trial court erred both by excluding the testimony of Mary Hollins and by refusing to offer Cawley's proposed jury instruction.

As a result of the court's erroneous rulings, Cawley's ability to argue his theory of the case was compromised, and he was deprived of a fair trial.

**E. CONCLUSION**

The Court should reverse the judgment on the verdict and remand this matter for a new trial.

DATED this 18th day of April, 2007.

Respectfully submitted,

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# Appendix

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SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY

CARL CHRISTOPHER CAWLEY  
and DONNA CAWLEY,  
husband and wife,

Plaintiffs,

v.

HARBOR FREIGHT TOOLS USA INC.,  
d/b/a HARBOR FREIGHT TOOLS,  
a Delaware corporation,

Defendant.

NO. 03-2-00600-6

NOTICE OF APPEAL TO  
COURT OF APPEALS

Plaintiffs Carl Christopher Cawley and Donna Cawley seek review by the  
designated appellate court of the Judgment entered October 20, 2006.

A copy of the decision is attached to this notice.

Dated: November 8, 2006

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CERTIFICATE OF SERVICE

I certify that on November 8, 2006, I sent a true and correct copy of the foregoing Notice of Appeal by legal messenger to:

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EXPEDITE (if filing within 5 court days of hearing)

Hearing is set:

Date: Friday, October 20, 2006

Time: 9:00 a.m.

Judge/Calendar: Chris Wickham

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WASH.

06 OCT 20 PH 2:08

BETTY A. GULLO, CLERK

BY \_\_\_\_\_  
DEPUTY

03-4824

IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

CARL CHRISTOPHER CAWLEY and  
DONNA CAWLEY, husband and wife,

NO: 03-2-00600-6

Plaintiffs,

**JUDGMENT FOR DEFENDANT**

vs.

HARBOR FREIGHT TOOLS USA INC.,  
d/b/a HARBOR FREIGHT TOOLS, a  
Delaware corporation,

Defendant.

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's

Execution Docket:

1. Judgment Creditor: Harbor Freight Tools USA Inc.
2. Judgment Creditor's Attorney: Joseph A. Hamell, Gierke, Curwen, Metzler & Erie, P.S.
3. Judgment Debtor: Carl Cawley and Donna Cawley and their marital community.
4. Amount of Judgment: \$0.00
5. Amount of Interest Owed to Date of Judgment: \$0.00
6. Total of Taxable Costs and Attorney Fees: \$534.18

LAW OFFICES

Gierke, Curwen, Metzler & Erie, P.S.

JUDGMENT FOR DEFENDANT - 1

06-9-01003-8

**ORIGINAL**

S C

TACOMA OFFICE  
SUITE 400, BUILDING D  
2102 NORTH PEARL STREET  
TACOMA, WA 98406-2550  
(253) 752-1600 / (253) 383-3781  
TOLL FREE: (877) 797-1600  
FACSIMILE: (253) 752-1666

SEATTLE OFFICE  
UNION BANK OF CALIFORNIA  
SUITE 3250  
900 4TH AVENUE  
SEATTLE, WA 98164-1006  
TOLL FREE: (877) 797-1600  
FACSIMILE: (206) 382-9109

S C A N N E D

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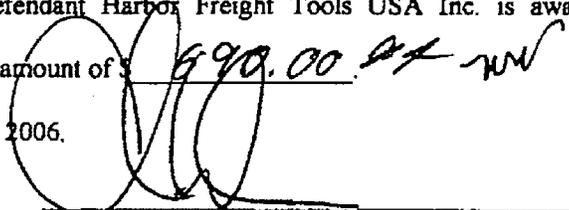
1 This matter was tried by a jury of 12 from August 21, 2006 to August 28, 2006, the  
2 Honorable Chris Wickham presiding. Plaintiffs Carl Cawley and Donna Cawley appeared  
3 personally and through their attorney of record, Marie Docter. Defendant Harbor Freight Tools  
4 USA Inc. appeared through its corporate designee, Charles Patchell and through its attorney of  
5 record, Joseph Hamell.

6 The parties presented evidence and testimony to the jury and on August 29, 2006, the  
7 jury returned a verdict in favor of the defendant on all claims. A copy of the jury's verdict is  
8 attached as Exhibit A.

9 Consistent with the jury's verdict in this action, the court enters final judgment in this  
10 matter as follows:

- 11
- 12 1. All claims made by plaintiffs Carl and Donna Cawley in this action are dismissed  
13 with prejudice.
  - 14 2. Defendant Harbor Freight Tools USA Inc. is awarded costs in the amount of  
15 \$534.18.
  - 16 3. Pursuant to ER 904 Defendant Harbor Freight Tools USA Inc. is awarded  
17 reasonable attorney fees and costs in the amount of \$ 990.00 *MA*

18 Dated this 20<sup>th</sup> day of October, 2006.

19  
20   
21 JUDGE CHRIS WICKHAM

22 Presented by:  
23 GIERKE, CURWEN, METZLER & ERIE, P.S.

24 By: *Joseph A. Hamell*  
25 JOSEPH A. HAMELL, WSBA #5978

26 *Marie Docter*

JUDGMENT FOR DEFENDANT - 2

LAW OFFICES

Gierke, Curwen, Metzler & Erie, P.S.

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900 4TH AVENUE  
SEATTLE, WA 98164-1005  
TOLL FREE: (877) 797-1800  
FACSIMILE: (206) 382-8109

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# EXHIBIT A

SCANNED

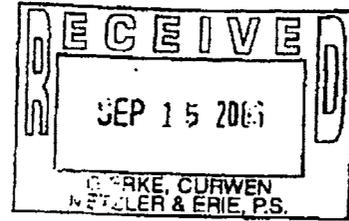
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03-4824

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IN THE SUPERIOR COURT OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

03-4824

CARL CHRISTOPHER CAWLEY and  
DONNA CAWLEY, husband and wife,

NO 03-2-00600-6

Plaintiffs,

SPECIAL VERDICT FORM

vs

HARBOR FRIGHT TOOLS USA INC,  
d/b/a HARBOR FRIGHT TOOLS, a  
Delaware corporation,

Defendant

We, the Jury, answer the questions submitted by the court as follows

Questions 1 Was the defendant negligent?

Answer No (Write "Yes" or "No")

(INSTRUCTION If you answer "no" to question 1, sign this verdict form If you  
answered "yes" to question 1, answer Question 2 )

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Questions 2 Was the Defendant's negligence a proximate cause of injury to the plaintiff?

Answer \_\_\_\_\_ (Write "Yes" or "No")

(INSTRUCTION If you answer "no" to question 2, sign this verdict form If you answered "yes" to question 2, answer Question 3 )

Questions 3 What do you find to be the plaintiff's amount of damages? Do not consider the issue of contributory negligence, if any, in your answer

- Answer (1) for past economic damages \$ \_\_\_\_\_
- (2) for future economic damages \$ \_\_\_\_\_
- (3) for past and future noneconomic damages \$ \_\_\_\_\_

(INSTRUCTION If you answer Question 3 with any amount of money answer Questions 4 If you found no damages in Question 3, sign this verdict form )

Questions 4 Was the Plaintiff also negligent?

Answer \_\_\_\_\_ (Write "Yes" or "No")

(INSTRUCTION If you answer "no" to question 4, sign this verdict form If you answered "yes" to question 4, answer Question 5 )

Questions 5 Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

Answer \_\_\_\_\_ (Write "Yes" or "No")

(INSTRUCTION If you answer "no" to question 5, sign this verdict form If you answered "yes" to question 5, answer Question 6 )

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Questions 6 Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the plaintiff's negligence and what percentage of this 100% is attributable to the negligence of the defendant? Your total must equal 100%

**Answer**

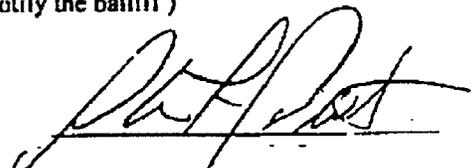
To Plaintiff Carl Cawley \_\_\_\_\_ %

To Defendants Harbor Freight Tools USA, Inc \_\_\_\_\_ %

**TOTAL** 100%

(INSTRUCTION Sign this verdict form and notify the bailiff)

DATE 29 Aug 06

  
\_\_\_\_\_  
Presiding Juror

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SUPERIOR COURT  
THURSTON COUNTY WASH  
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DEPT. CLERK  
By 14  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THURSTON COUNTY

CARL CHRISTOPHER CAWLEY and  
DONNA CAWLEY, husband and wife,

Plaintiffs,

vs

HARBOR FREIGHT TOOLS USA INC,  
doing business as HARBOR FREIGHT  
TOOLS, a Delaware corporation,

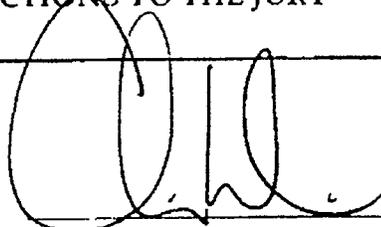
Defendant

NO 03-2-00600-6

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COURT'S INSTRUCTIONS TO THE JURY

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JUDGE CHRISTOPHER WICKHAM

SCANNED

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## INSTRUCTION NO 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about, the ability of the witness to observe accurately, the quality of a witness's memory while testifying, the manner of the witness while testifying, any personal interest that the witness might have in the outcome or the issues, any bias or prejudice that the witness may have shown, the reasonableness of the witness's statements in the context of all of

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the other evidence, and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In

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the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

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## INSTRUCTION NO 2

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true

## INSTRUCTION NO 3

The plaintiff has the burden of proving each of the following propositions

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent,

Second, that the plaintiff was injured,

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff

The defendant has the burden of proving both of the following propositions

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent,

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence

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**INSTRUCTION NO 4**

Negligence is the failure to exercise ordinary care It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances

**INSTRUCTION NO 5**

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances

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**INSTRUCTION NO 6**

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

**INSTRUCTION NO 7**

The operator of a retail store owes to a person who has an express or implied invitation to come upon the premises in connection with that business a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that such person is expressly or impliedly invited to use or might reasonably be expected to use.

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### INSTRUCTION NO 8

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

### INSTRUCTION NO 9

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

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**INSTRUCTION NO 10**

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence.

If you find for the Plaintiff, you should consider the following past economic damages elements:

The reasonable value of necessary medical care, treatment, and services received to the present time.

The reasonable value of earnings and business opportunities lost to the present time.

In addition you should consider the following future economic damages elements:

The reasonable value of necessary medical care, treatment and services with reasonable probability to be required in the future.

The reasonable value of earnings and business opportunities with reasonable probability to be lost in the future.

In addition you should consider the following noneconomic damages elements:

The nature and extent of the injuries.

The disability, disfigurement and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.

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The pain and suffering, both mental and physical, and other nonmonetary losses, including, but not limited to inconvenience, emotional distress, loss of society and companionship, and loss of consortium

Loss to the plaintiff wife of the consortium of her husband

The term "consortium" means the fellowship of husband and wife and the right of one spouse to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure non-economic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

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**INSTRUCTION NO 11**

A person who is liable for an injury to another is not liable for any damages arising after the original injury that are proximately caused by failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damage.

The defendant has the burden to prove plaintiff's failure to exercise ordinary care and the amount of damages, if any, that would have been minimized or avoided.

**INSTRUCTION NO 12**

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

**INSTRUCTION NO 13**

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

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**INSTRUCTION NO 14**

You must not discuss or speculate about whether any party has insurance or other coverage available. Whether a party does or does not have insurance has no bearing on any issue that you must decide. You are not to make, decline to make, increase, or decrease any award because you believe that a party does or does not have medical insurance, workers' compensation, liability insurance, or some other form of coverage.

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## INSTRUCTION NO 15

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, nor in any other way express

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your opinions about the case

In order to answer any question, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that the jury has reached a verdict, and the bailiff will bring you back into court where your verdict will be announced.

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STATE BY Chm

CERTIFICATE OF SERVICE

I certify that on April 18, 2007, I sent a true and correct copy of the Brief of Appellants by first class mail, postage prepaid, to:

Gregory B. Curwen and Jeffery D. Bradley  
Gierke, Curwen, Metzler & Erie, P.S.  
2102 North Pearl Street, Suite 400, Building D  
Tacoma, Washington 98406

Dated: April 18, 2007

Anne Watson  
Anne Watson, WSBA #30541