

No. 35535-3-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

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.

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY SPURIN
DEPUTY

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

Chris Cawley sued Harbor Freight Tools for failing to provide a safe product display in its store. Cawley was severely injured when a 60-pound vise, which broke away from a display table in the store's self-service area, landed on his foot.

The trial court's erroneous ruling to exclude the testimony of Cawley's retail safety expert and its refusal to offer his proposed jury instruction regarding foreseeability deprived Cawley of a fair trial.

Cawley replies to the Brief of Respondent, with respect to Harbor Freight Tools' factual and legal allegations, as follows:

B. ARGUMENT

1. Harbor Freight Tools improperly incorporates argument into its statement of the case.

Under the Rules of Appellate Procedure, the brief of respondent is to contain a statement of the case, including "[a] fair statement of the facts and procedure relevant to the issues presented for review, *without argument*. RAP 10.3(a)(5) (emphasis added). "Reference to the record must be included for each factual statement." *Id.*

Without citation to the record, Harbor Freight Tools comments: “Appellants['] appeal centers on two minor issues in this case.” Br. of Resp’t at 5. Harbor Freight Tools then inserts its own interpretation of Cawley’s purpose for offering his expert witness – also without reference to the record. *Id.* at 6. Harbor Freight Tools mischaracterizes Cawley’s case as dealing “only with a vise on display at the Harbor Freight [s]tore.” *Id.* at 9. And the respondent discusses the *Pimentel* case, citing to the subsequent argument section of its own brief. *Id.* at 9-10.

The designated passages constitute impermissible argument in violation of RAP 10.3. The Court should disregard them.

2. Harbor Freight Tools misrepresents material facts.

As though it were undisputed fact, Harbor Freight Tools states that “[t]he vise was mounted with wood screws.” Br. of Resp’t at 5. This assertion is directly controverted by Cawley, who testified the display vises, including the swivel vise that fell on him, were fastened with sheetrock screws. RP II at 138.

Cawley picked up one of the screws after he was hurt, but Charles Patchell, a Harbor Freight Tools employee, asked him to return it before Cawley left the store. *Id.* at 140-41. When questioned at trial about what had become of the screws, Patchell replied: “I don’t recall.” *Id.* at 51.

Harbor Freight Tools also states categorically that “[a]s the vise was installed, it would take a minimum of 200 lbs. of force to pull the vise off.” Br. of Resp’t at 5. Harbor Freight Tools disposed of the display table in December 2003 – after Cawley’s complaint had been filed and before he examined it.¹ CP 42. **Neither the display table nor the screws that held the vise were available for testing.** RP IV at 66.

Harbor Freight Tools states that Cawley “grabbed hold of the back of the vise” while he “was leveraged up on the display table.” Br. of Resp’t at 4. Cawley testified that he reached to the back of the vise, but that just the resting pressure of his hand was on the vise when it fell. RP II at 132; RP III at 258. No one other than Cawley himself witnessed the event.

The Court should consider Harbor Freight Tools’ factual recitation only to the extent it fairly reflects the record.

3. The trial court committed prejudicial error by interpreting the helpfulness of Hollins’ testimony too narrowly.

Harbor Freight Tools argues Mary Hollins, Cawley’s retail safety expert, would simply testify that “mounting a heavy vise on a

¹ Patchell testified the display table was probably set up when the store opened in 1998 – about 2-½ years before Cawley was hurt. RP IV at 16. Display tables must be replaced every 4 to 5 years due to wear and tear. RP III at 329.

table presented a hazard.”² Br. of Resp’t at 19. And the trial court described the question before it as “whether or not a particular vise was placed in such a way as to create an unreasonable risk of harm to a store customer.” RP I at 22.

Cawley’s stated theory of the case, however, is substantially broader:

From plaintiff’s perspective, this case is about the retail owner’s duty to their customers, and in this case, we are arguing that the display setting was unsafe, that there were hazards . . . in the way they were displaying this merchandise, and as a safety expert, [Hollins] is being called in to identify hazards . . . that should have been known or were foreseeable to the store owner.

Id. at 10.

The court initially ruled Hollins would be allowed to testify.

Id. at 32-33. Relying on that ruling, Cawley videotaped Hollins’ preservation deposition.³ RP II at 81. At the end of the first day of trial, however, the court entertained a motion by Harbor Freight Tools to strike Hollins’ testimony. CP 237; RP II at 85-101.

² Hollins’ testimony is probative since the defendant did not concede this point at trial. Even in its brief to this Court, Harbor Freight Tools asserts: “[T]he mounting of a vise on a table, in and of itself, [is not] a continuous or easily foreseeable hazard.” Br. of Resp’t at 40.

³ When Hollins’ testimony was delayed, she was no longer available to appear in person. CP 245. This gave Harbor Freight Tools the opportunity to preview the videotape and to further challenge her testimony. Similarly, when the trial date was moved from October 2005 to August 2006, Harbor Freight Tools’ expert used the extra time to conduct additional testing. CP 96; RP IV at 62-63.

Reversing its pretrial decision, the court excluded her testimony entirely.⁴ RP II at 100.

Cawley was depending on Hollins to introduce the vise manufacturer's instruction manual, which specified the vise was to be installed with bolts, washers, and nuts to secure it. CP 252, 542. Hollins would have opined that a vise should be displayed in accordance with the manufacturer's instructions for how it is to be mounted. *Id.* at 109.

Hollins was also expected to testify about a notice issued by Harbor Freight Tools about five months before Cawley was hurt:

[I]t states that the issues in this Safety Notice require immediate attention in each retail store.

And one of the particular items communicated says that display items that could fall, such as vises, anvils, motors, hydraulic cylinders, et cetera, must be securely fastened to the display deck.

⁴ The trial court and Harbor Freight Tools fault Hollins for failing to visit the store's display where the incident occurred. RP II at 88, 98; Br. of Resp't at 18. In fact, Harbor Freight Tools moved its store to a new location in December 2003 – almost three years before trial. CP 42. Harbor Freight Tools itself disposed of the display table at that time. *Id.*

The trial court also states that Hollins "has never advised a retail store in how to set up a display safely." RP II at 88. This is incorrect. Hollins testified that, as safety director for the Meier & Frank department store chain, she "worked very closely with store planning, with store operations, and the display area to incorporate safety into their ongoing consideration of display, both the acquisition of display, racks and apparatuses, as well as to how the merchandise was to be displayed on them." CP 248. Heavy merchandise, such as televisions and other electronics, exercise equipment, and boxes of cookware, were displayed. *Id.* at 255. In addition, Hollins developed the curriculum for the risk management certificate program at Bellevue Community College. *Id.* at 246.

It says right here, customers like to move and handle these items, and then children or other customers cause the items to fall on them.

So, again, this is the specific item that fell. This is the specific action that we're talking about here. So by this very notice, Harbor Freight Tools knew that having this vise on this display was a hazard, and that it could cause serious harm.^[5]

CP 254.

The court's ruling to summarily reverse its pretrial decision during trial compromised Cawley's opportunity to prepare and present his case.

Moreover, Hollins would have testified that the entire display – not merely the screws in a single vise – was foreseeably unsafe:

[T]he issues in this case deal not just with screws or the vise, it's with a display as a whole. . . . [T]he display as a whole had several factors in it, that the corporation had an obligation to review the risks and hazard when they set up this display, and that they failed to do so, and that this expert is an appropriate expert and a qualified expert to talk about the analysis that should have been undertaken in the design of this display, . . . including the height of the table, the other products on the table, the distance between the vises and entire display as a whole. That was an analysis that has not been conducted by the defendant, and goes to show their negligence in this case.

RP II at 100-101.

⁵ The safety notice belies Harbor Freight Tools' claim that Cawley did not offer evidence of prior problems with vise displays. Br. of Resp't at 1.

Hollins qualifies as an expert, and her testimony would have been helpful to the trier of fact, satisfying the requirements for expert opinion under ER 702.⁶

“An expert’s opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert’s testimony is helpful to the trier of fact.” *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). On review, helpfulness to the trier of fact is broadly construed. *Id.*

The court committed prejudicial error by interpreting the helpfulness of Hollins’ testimony too narrowly.⁷

4. The trial court’s refusal to give Cawley’s *Pimentel* instruction constitutes reversible error.

Customers are expected to handle the vises and other items in Harbor Freight Tools’ display:

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,

⁶ Harbor Freight Tools argues that the trial court also relied on ER 403 in excluding Hollins as a witness. Br. of Resp’t at 19-21. This argument is without merit. Harbor Freight Tools moved to strike and exclude under ER 702: “Ms. Hollins’ testimony, taken as [a] whole, will not assist the jury and should be excluded.” CP 239. Following argument by counsel, the court ruled: “I’m going to exclude her testimony completely.” RP II at 100. The court subsequently commented that the testimony “would also be excludable under ER 403.” *Id.* Harbor Freight Tools offers no authority interpreting such an aside as a substantive ruling. Cawley properly assigned error to the court’s decision and argued the issue fully. Br. of Appellants at 1, 11-13.

⁷ “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.

because it's a swivel device; . . . they will do all kinds of things with this display vise, because [it] is a display and people handle displays.

RP II at 22.

Mary Hollins described the display area of the relocated Harbor Freight Tools store as follows:

There are a number of . . . vises affixed along the outer perimeter of two sides of [the display table]. There [is] merchandise in the middle of the table that is stacked high up.

There's merchandise around the other two sides of the table, most of which was also affixed to the table in some way. And then there's boxes of merchandise stacked up underneath the table.

Conceivably, they relate to the merchandise right above it, so if you see what's on top and you want one, that you would be able to get what you want, at least for the things around the outside.

The things in the middle were stacked high so that if you wanted one of those, you would just reach in and get it.

CP 253.

"A location where customers serve themselves, goods are stocked, and customers handle the grocery⁸ items, or where customers otherwise perform duties that the proprietor's employees customarily performed, is a self-service area." *O'Donnell v. Zupan Enters., Inc.*, 107 Wn. App. 854, 859, 28 P.3d 799 (2001).

⁸ The *O'Donnell* case concerns a customer who slipped and fell on a piece of lettuce in a grocery store check-out aisle.

Harbor Freight Tools argues that Cawley's injury did not take place in a self-service section of its store, attempting to distinguish its display area from a self-service area. Br. of Resp't at 25-28, 30-32. The display area, however, squarely meets the legal definition of a self-service area. Harbor Freight Tools created a location where customers serve themselves, merchandise is stocked, and customers handle the items.⁹

Harbor Freight Tools has a duty to exercise reasonable care to protect Cawley, a business invitee, from harm. To trigger this duty, Cawley must show that Harbor Freight Tools had actual or constructive notice of its unsafe display – unless his injury occurred in a self-service area. See *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 40, 666 P.2d 888 (1983).

The *Pimentel* exception to the notice requirement charges a store proprietor with actual knowledge of the foreseeable risks inherent in its self-service mode of operation. *Id.* at 40.

A customer would be at foreseeable risk of harm if heavy merchandise in a hands-on, self-service display were not safely secured. Harbor Freight Tools' mode of operation created an unsafe condition that was reasonably foreseeable.

⁹ Harbor Freight Tools' assertion that Cawley concedes his case "does not involve self-service areas where goods are stocked and customers remove and replace them" is entirely false. Br. of Resp't at 30.

Harbor Freight Tools' self-service display posed reasonably foreseeable hazards that caused Cawley's injuries. The *Pimentel* exception applies.¹⁰

Cawley's proposed jury instruction provides:

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.

Contrary to Harbor Freight Tools' contention, the instruction is a correct statement of the law. See Br. of Resp't at 29-34. The respondent offers no credible argument that the instruction is either misleading or confusing. *Id.* at 34-36.

Cawley should have been relieved of the burden of establishing that Harbor Freight Tools had notice of the unsafe condition that caused his injury: "[W]here the operating procedures of any store are such that unreasonably dangerous conditions are continuous or reasonably foreseeable, there is no need to prove actual or constructive notice of such conditions in order to establish liability for injuries caused by them." *Pimentel*, 100 Wn.2d at 40.

¹⁰ The *Pimentel* exception is a rule for self-service operations which applies "to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation." *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 276, 896 P.2d 750 (1995).

Without the *Pimentel* instruction, Cawley could not fully argue his theory of the case or establish Harbor Freight Tools' liability for his injuries.

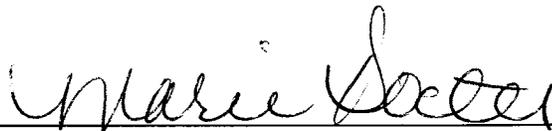
The trial court's refusal to give Cawley's proposed instruction constitutes reversible error.

C. CONCLUSION

The judgment on the verdict should be reversed, and this matter should be remanded for a new trial.

DATED this 18th day of July, 2007.

Respectfully submitted,



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BY *Cym*
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CERTIFICATE OF SERVICE

I certify that on July 18, 2007, I sent a true and correct copy of the Reply
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