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NO: 35535-3-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

CARL CHRISTOPHER CAWLEY and DONNA CAWLEY
husband and wife,

Appellants,

v.

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

Respondent.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
JEFFERY D. BRADLEY

BRIEF OF RESPONDENT

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A. INTRODUCTION

Appellant injured himself when he pulled a large vise that was on display at a Harbor Freight Tool Store (Harbor Freight) in Lacey, Washington, down upon himself. The vise in question was mounted on a table made of three-quarters inch plywood, secured with screws. Testimony at trial stated that Plaintiff had leveraged himself up on the vise seconds before he pulled it down, and that it would take a minimum of 200lbs of force to pull the vise from the table. Appellants did not put forward any evidence that Harbor Freight had ever had a problem with how their vises were displayed before.

As part of their case, Appellants proposed an expert witness to testify that placing a heavy vise on a table was a potential hazard. This witness had no training in how to mount or display vises, could not say how the vise should have been mounted other than the way that it was, and had not even looked at the display in question in this case. The Trial Court properly excluded the witness because she did not provide any help or understanding of the case to the jury beyond their common knowledge, and the Trial Court felt that her proposed testimony would intrude into the providence of the jury. The Trial Court also excluded the witness on the basis of ER403 , finding that prejudice outweighed any probative value of

the proposed testimony. This ER 403 basis of the Trial Court's decision has not been appealed.

Further, apparently misunderstanding the limited exception to the general rule of premises liability articulated in the case *Pimentel v. Roundup Co.*, 100 Wn. 2d 39, 49, 666 P.2d 888 (1983), Appellants asked for a jury instruction based upon *Pimentel*. *Pimentel* only held that in very specific cases where there were self-service areas of stores in which customers perform tasks that clerks used to and where hazards are continuous or easily foreseeable that a plaintiff did not have to prove actual or constructive notice of the hazard related to the self-service nature of the store. However, Appellants case did not deal with a self-service area of the store, but with a display within a store. A straightforward reading of *Pimentel* and its progeny make clear that the case at hand did not fit the narrow exception outlined in *Pimentel*. The Trial Court, based upon the law and being fully aware of the evidence in this case, correctly refused to give the proposed instruction.

B. ASSIGNMENT OF ERROR

1. The Trial Court Was Correct in Excluding Appellants Proposed Display Expert Under ER 702.

2. The Trial Court Was Correct In Not Giving Appellants Requested *Pimentel* Instruction

Issues Pertaining to Assignment of Error

1. Admissibility of Expert Testimony (Assignment of Error 1)
2. The Trial Court Excluded Appellants Proposed Expert Witness On The Alternative Grounds of ER 403, and That Finding Has Not Been Appealed. (Assignment of Error 1)
3. The Court was correct in denying Appellants proposed *Pimentel* instruction because it did not it did not correctly state the law as applied to the facts of this case. (Assignment of Error 2)
4. The Court was correct in denying Appellants proposed *Pimentel* instruction because was an incorrect statement of the law. (Assignment of Error 2)
5. The Court was correct in denying Appellants proposed *Pimentel* instruction because it was confusing and misleading. (Assignment of Error 2)
6. The Court was correct in denying Appellants proposed *Pimentel* instruction because appellants could still argue their theory of the case based upon the correct instructions given by the trial court. (Assignment of Error 2)

C. STATEMENT OF THE CASE

On December 23rd, 2000, Appellant Christopher Cawley visited the Harbor Freight Store in Lacey, Washington. RP I 45-46, 129. Appellant

went to to the store to do some Christmas shopping for himself and for his son. Id. 128. Among the items Appellant was looking for was a vise for his business. Id.

As part of his shopping, Appellant made his way to a display of vises that Harbor Freight had for sale. Id. 129. Appellant was looking for a vise to replace one that he had broken at work. Id. at 128. While examining the vises on display, Appellant was seen leveraging himself up on the display table. Id. at 188. While he was leveraged up on the display table, Appellant grabbed hold of the back of the vise. Id. Within seconds, Appellant crashed to the floor, apparently pulling the vise on display down with him. Id. 189.

Charles Patchell, the manager for the Lacey Harbor Freight store responded when one of Harbor Freights employees informed him of Appellant's fall. Id. 46. He found Appellant sitting on the floor with the vise next to him. Id. Mr. Patchell and another employee helped Appellant to the break room and helped him to ice his foot. Id. at 57. After spending some time in the break room, Appellant returned to the store and bought the same type of vise as he had been looking at on the display. Id. at 156. Appellant then left the store on his own. Id.

The display table in question was made in house by Harbor Freight. RP II 324-25. They were build using two-by-fours and four-by-

fours and three-quarter inch plywood. Id. 325. The vise was mounted with wood screws through the three-quarter inch plywood. RP I 41, 49, 65. As the vise was installed, it would take a minimum of 200 lbs. of force to pull the vise off. CP 476-77, 520-537; RP II 414, 423. The tables were of such quality that when the store moved over three year later, Harbor Freight had people coming from everywhere and wanting to take the former display tables. RP I 66.

Having heard all of the evidence, the jury found that Harbor Freight was not liable for Appellants injuries. CP 625. Judgment was entered on October 20, 2006. CP 642. Appellants appeal followed. CP 648.

Appellants appeal centers on two minor issues in this case. The first was the exclusion of Appellants proposed “hazards” expert, Mary Hollins. *See generally* Pretrial Report of Proceedings (PRP) 8-34; RP I 85-101; CP 105-153, 237-262. The second was the Trial Courts refusal to give Appellants proposed jury instruction No. 16, which was based upon the limited exception to the general rule for premises liability articulated in *Pimentel v. Roundup Co.*, 100 Wn.2d. 39, 49, 666 P.2d 888 (1983). *See generally* RP II 335-42.

The issue of Ms. Hollins testimony first came before the court on Respondents’ Motion in Limine Regarding the Testimony of Mary

Hollins. CP 105-135. In its Motion, Harbor Freight argued that Ms. Hollins was not qualified to provide expert testimony regarding the display of a vise at the store. Id. 126-128. Harbor Freight further argued that Ms. Hollins was not capable of testifying as to the duty's of a retail store, as those were clearly laid out in the law. Id. 128-130. Finally, Harbor Freight argued that Ms. Hollins could not testify that the conduct of Harbor Freight violated any legal standards. Id. at 130-133.

The Trial Court gave Appellants several chances to qualify Ms. Hollins as an expert. Appellants only offered their proposed expert Mary Hollins for the limited purpose of “identify[ing] hazards, you know, what are the hazards that should have been known or were foreseeable to the store owner.” PRP 10. In other words, Appellants proposed expert was being offered for the sole purpose of telling the jury that a heavy vise on a table is a potential hazard. This would be similar to telling a jury that crossing a street is a potential hazard.

Appellants made clear during the pre-trial conference in front of the Trial Court that Ms. Hollins was not able to speak to any written standards in the industry for displays. PRP 14-16. As the Court stated, “This case is not about whether or not Harbor Freight followed its own internal policy, as far as I understand it. It is whether or not the vise ended up in a place that presented a risk to the plaintiff.” PRP 27.

As the Trial Court observed, the case came down to whether or not the vice was being properly displayed, and Appellants proposed expert could not provide any specific knowledge to help a jury understand these issues. As the court noted, her expertise as to displays was limited:

Well, I can see how that would be helpful to that employer or a retailer in trying to figure out how to set up a display, but I'm not sure it is going to be helpful to a jury in determining what did or did not happen in this case and whether or not it was reasonable for the employer to set up the display or the retailer to set up the display in the way that they did.

PRP 12. The Court felt that if Ms. Hollins started discussing how the display was constructed that “she is getting into the province of the jury. I’m not going to allow her to testify in this area.” PRP 31. During the Pre-Trial Conference the court limited Appellants’ proposed expert to only testifying “if someone needs to explain these [the manual for the vise and Harbor Freight’s Code of Safety Procedures] to the jury, I can see that she might be able to do that but not to provide any expansion on them, if you will, in terms of what, quote, ‘industry standards’ are” PRP 32. The court felt that the proposed expert could only testify “to the extent that someone needs to explain what these [the proposed exhibits] mean, not present an opinion as to whether or not they were violated but just what they mean. I

would allow her to present that testimony.” PRP 33.¹

Respondent renewed its objection to the testimony of Ms. Hollins and the court took up the issue again on the first day of trial. CP 237-62; RP I 77-101. At this point, the proposed testimony of Ms. Hollins had been preserved on video tape, and the court had access to both the videos and the transcripts to review in making its rulings. RP I, at 83-85; CP 237-62. The Court, having reviewed the transcript, noted that “it seemed to me that Ms. Hollins did not have information that would be helpful to the jury, in that her experience is based upon her advising businesses on safety practices but has nothing to do with how to mount a vise.” RP I 86. The Court noted that Ms. Hollins did not have experience in preventative measures for retail safety. Id. 87. The Court further noted that “She apparently never went to the store where the incident took place. She went to the newer store. She has no experience particularly with vises, and she has never advised a retail store in how to set up a display safely.” Id. 88. The Court noted that there was no industry standard on how to display a vise and that Ms. Hollins could not provide one. Id. 91-92. The Court noted that Ms. Hollins could not provide any useful information as to the mounting of the vise as she could not testify as to what screws should be used or what forces were involved. Id. 96. She had no

¹ These documents were later allowed into evidence without the need of Ms. Hollins testimony. See RP I 33-35; 89-90.

knowledge of the holding power of fasteners or “the forces that might or might not be placed upon a vise to bring it down.” Id. 99.

In the end, all Ms. Hollins would apparently be asked to testify about are “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.” Id. The Trial Court received full briefing on the issue of Ms. Hollins exclusion. CP 105-135, 136-153, 237-262. Having heard all of the argument of counsel, not once, but twice, and having reviewed the proposed testimony of Ms. Hollins and the briefing submitted, the court finally ruled:

I don't see relevance to it, and I also see it as confusing the jury by taking their focus off of the issue that is before them. I'm also concerned. I know that the evidence rules permit her to testify on the ultimate issue, if she is accepted as an expert; however, the substantial prejudice that would come from allowing that testimony before the jury greatly outweighs what little relevance it might have, and therefore, it would also be excludable under ER 403.

RP I 100.

Appellants' case dealt only with a vise on display at the Harbor Freight Store. Despite this, Appellants requested that the court given an instruction based upon the *Pimentel* case which articulated a narrow exception to the general rule of premises liability for certain self-service

areas of a store where customers perform tasks that clerks once used to and where hazards are continuous or easily foreseeable. *See* Argument, *Infra*.

The Trial Court was given briefing from Appellants as to why they thought the exception applied to the present case, despite the case centering on a vise display, and not an easily foreseeable or continuous hazard in a self-service area of the store. RP II 335. Toward the end of the trial, the Trial Court also heard argument from Appellants counsel in support of the instruction. *Id.* 335-342. Harbor Freights counsel also pointed out the limited nature of the *Pimentel* case and that Appellants' case centered on the correct way to mount a vise in a display, not with obvious hazards in the self service areas of the store. *Id.* 337-338. After hearing most of the evidence in the case, having read Appellants' brief in favor of giving the instruction, and having heard the argument of counsel both for and against the proposed instruction, the court decided that the narrow exception as outlined in *Pimentel* did not apply to the case at hand.

Id. 339-40. As the Court stated:

You submitted your brief, I read your brief. You argued your point. I understand your point. 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.

As I understand the theory of the case and the evidence in this case, it's that the defendant improperly set up the display, did not adequately attach the vise to the display table, and, therefore, it is a standard negligence case, as far as I can tell, and the question is whether or not the display was created in such a way to create an unreasonable risk of harm to the customers, and I don't see that the *Pimentel* instruction is helpful here, because it deals with a situation where the customer has created the danger, and that is not the evidence in this case, and that is not the theory in this case. So for that reason, I'm going to decline to give the *Pimentel* instruction.

Id.

Appellants proceeded to argue their case to the jury, based upon the general rule of premises liability. RP II 392-421, 442-457.

D. ARGUMENT

1. The Trial Court Was Correct in Excluding Appellants Proposed Display Expert Under ER 702 and ER 403.

a. Standard for Review

The Trial Court's determination of whether or not an expert will be allowed to testify is reviewed for abuse of discretion. "The trial court has discretion as to the admissibility of expert testimony. *State v. Fagundes*, 26 Wn. App. 477, 483, 614 P.2d 198, 625 P.2d 179, review denied, 94 Wn.2d 1014 (1980). 'If the reasons for admitting or excluding the opinion evidence are 'fairly debatable', the trial court's exercise of discretion will

not be reversed on appeal.’ *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979).” *Group Health Coop v. Dep’t of Revenue*, 106 Wn.2d. 391, 398, 722 P.2d 787 (1986).

b. Admissibility of Expert Testimony Under ER 702

The Admissibility of Expert Testimony at Trial is governed by ER 702. ER 702 states:

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.

“A trial court has the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence.” *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975). “[E]xpert testimony is admissible under ER 702 if the witness qualifies as an expert and if the expert testimony would be helpful to the trier of fact.” *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994); *See Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923).

“No special skill, experience, knowledge or education is required to formulate an opinion upon a matter that can be judged by people of ordinary experience and knowledge. In such situations, the jury does not

need the assistance of an expert, and the courts tend to exclude expert testimony as overkill.” Tegland, Washington Practice, Evidence Law and Practice, Vol. 5B §702.16, p70, (2007 Edition). This is because if the matter is within the common knowledge of the jury, “the opinion does not offer the jurors any insight that they would not otherwise have.” Id. at 70-71; *See also United States v. Barker*, 553 F.2d 1013 (6th Cir 1977) (In determining whether a witness is qualified, the court is primarily concerned with whether the witness’s “knowledge of the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth.”).

As the Supreme Court of Washington noted in a similar case upholding a trial court’s decision to exclude a proposed expert’s testimony that it is unsafe to have an escalator’s moving handrail near metal tracks projecting from a wall:

The subject under inquiry was not so difficult as to require the admission of expert testimony. The actual mechanism of the escalator was not in issue. The key point was whether defendant was negligent in permitting the projecting metal track to be in such close proximity to the moving handrail. The jury did not require the assistance of expert opinion to make this determination in view of the patent and obvious construction of the mechanism.

Ward v. J.C. Penney Co., 67 Wn.2d 858, 861, 410 P.2d 614 (1966).

Appellants only offered their proposed expert Mary Hollins for the limited purpose of “identify[ing] hazards, you know, what are the hazards that should have been known or were foreseeable to the store owner.” Pretrial Report of Proceedings (PRP) at 10. In other words, Appellants proposed expert was being offered for the sole purpose of telling the jury that a heavy vise on a table is a potential hazard. This is well within the common knowledge of a jury.

As Appellants made clear during the pre-trial conference in front of the Trial Court, Ms. Hollins was not able to speak to any written standards in the industry for displays. PRP 14-16. The only written standards that Appellants proposed expert was going to testify to were the Code of Safe Procedures by Harbor Freight Tools and the manual for end users for permanent installation in a work environment that came with the vice in question. PRP 17-18. As the Code of Safe Procedures only applied to Harbor Freight employees, the court initially denied allowing it in to evidence. PRP 23. As the Court stated, “This case is not about whether or not Harbor Freight followed its own internal policy, as far as I understand it. It is whether or not the vise ended up in a place that presented a risk to the plaintiff.” PRP 27. The Trial Court further noted that there was nothing in the proposed exhibit that discussed how a vice should be displayed. PRP 29.

As the Trial Court observed, the case came down to whether or not the vice was being properly displayed, and Appellants proposed expert could not provide any specific knowledge to help a jury understand these issues. As the court noted, her expertise as to displays was limited:

Well, I can see how that would be helpful to that employer or a retailer in trying to figure out how to set up a display, but I'm not sure it is going to be helpful to a jury in determining what did or did not happen in this case and whether or not it was reasonable for the employer to set up the display or the retailer to set up the display in the way that they did.

PRP at 12; *See also* CP 105-135.. The Court felt that if Ms. Hollins started discussing how the display was constructed that “she is getting into the province of the jury. I’m not going to allow her to testify in this area.” PRP 31. During the Pre-Trial Conference the court limited Appellants proposed expert to only testifying “if someone needs to explain these [the vice manual and proposed Code of Safety Procedures] to the jury, I can see that she might be able to do that but not to provide any expansion on them, if you will, in terms of what, quote, ‘industry standards’ are” PRP 32. The court felt that the proposed expert could only testify “to the extent that someone needs to explain what these [the proposed exhibits] mean, not present an opinion as to whether or not they were violated but just

what they mean. I would allow her to present that testimony.” PRP 33.²

Respondents renewed their objection to the testimony of Ms. Hollins and the court took up the issue again on the first day of trial. CP 237-262; RP I 77-101. At this point, the proposed testimony of Ms. Hollins had been preserved on video tape, and the court had access to both the videos and the transcripts to review in making its rulings. RP I 83-85; CP 237-262. The Court, having reviewed the transcript, noted that “it seemed to me that Ms. Hollins did not have information that would be helpful to the jury, in that her experience is based upon her advising businesses on safety practices but has nothing to do with how to mount a vise.” RP I 86; *see also* CP 126-128.

The Court noted that Ms. Hollins did not have experience in preventative measures for retail safety. RP I 87; CP 124-135. The Court further noted that “She apparently never went to the store where the incident took place. She went to the newer store. She has no experience particularly with vises, and she has never advised a retail store in how to set up a display safely.” RP I 88 The Court again noted that there was no industry standard on how to display a vise and that Ms. Hollins could not provide one. *Id.* 91-92. The Court noted that Ms. Hollins could not provide any useful information as to the mounting of the vise as she could

² As stated above, these documents were later allowed into evidence without the need of Ms. Hollins testimony. *See* RP I 33-35; 89-90.

not testify as to what screws should be used or what forces were involved. Id. 96. She had no knowledge of the holding power of fasteners or “the forces that might or might not be placed upon a vise to bring it down.” Id. 99.

In the end, all Ms. Hollins would apparently be asked to testify about are “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.” Id. 99. Having heard all of the argument of counsel, not once, but twice, and having reviewed the proposed testimony of Ms. Hollins, the court finally ruled:

I don't see relevance to it, and I also see it as confusing the jury by taking their focus off of the issue that is before them. I'm also concerned. I know that the evidence rules permit her to testify on the ultimate issue, if she is accepted as an expert; however, the substantial prejudice that would come from allowing that testimony before the jury greatly outweighs what little relevance it might have, and therefore, it would also be excludable under ER 403.

Id. at 100.

To this day, Appellants have yet to articulate a single way how their proposed expert would be helpful to the jury or that her proposed testimony was outside the common knowledge of the jury. She could not testify as to how the display was constructed, as she had no training in

those issues. She could not testify as to any industry standards that had been violated by Harbor Freight in mounting the vise for the display. She had never been to the store in question, and did not see the table in question. In substance there was no foundation for the proffered testimony. “An opinion which lacks proper foundation or is not helpful to the trier of fact is not admissible under ER 701 or 702.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). Having heard all of the evidence, reviewed the proposed testimony, and heard Appellants argument, the Trial Court did not abuse its discretion by excluding Appellants proposed expert.

At no point, either before the trial court or in its briefing do Appellants claim that the trial court applied the wrong standard or otherwise abused its discretion in not allowing Appellants’ proposed expert to testify. *See Reese v. Stroh*, 128 Wn.2d. 300, 310, 907 P.2d 282 (1995) (The trial court abused its discretion by applying the wrong legal standard to the evidence.”); *State v. Russell*, at 70 (finding that in correctly analyzing the admissibility of testimony under ER 702, the court did not abuse its discretion.). Nor do Appellants challenge the Trial Courts finding to exclude Ms. Hollins on the alternative grounds of ER 403. Ms. Hollins may be very useful to stores in identifying potential hazards, but

she could not help this jury understand whether or not the vise, as displayed, was a hazard.

In the end, Ms. Hollins proposed testimony would come down to the statements that mounting a heavy vise on a table presented a hazard. She would also testify that displays are handled by customers. Both of these matters are well within the knowledge of a jury. As she did not have specialized knowledge that would assist the trier of fact to understand the evidence or to determine a fact in issue, the Trial Court was correct in excluding Appellants proposed witness, and did not abuse its discretion. As such, the Trial Court should be affirmed.

c. The Trial Court Excluded Appellants Proposed Witness Mary Hollins On The Alternative Grounds of ER 403, and That Finding Has Not Been Appealed.

ER 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Trial court did not only rely on ER 702, but also ER 403 in excluding Ms. Hollings as a witness.

I don't see relevant to it, and I also see it as confusing the jury by taking their focus off of the issue that is before them. I'm also

concerned. I know that the evidence rules permit her to testify on the ultimate issue, if she is accepted as an expert; however, the substantial prejudice that would come from allowing that testimony before the jury greatly outweighs what little relevance it might have, and therefore, it would also be excludable under ER 403.

RP I 100. “An otherwise admissible opinion may be excluded under ER 403 if it is confusing, misleading, or if the danger of unfair prejudice outweighs its probative value.” *City of Seattle v. Heatley*, at 579. Appellants have not assigned error to this alternative ground for the Trial Courts decision, nor have they provided this Court with any argument that the Trial Court was in error in excluding Ms. Hollings under ER 403.

“[W]hen an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue.” *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (clarifying the Supreme Court’s previous holding in *State v. Fortun*, 94 Wn.2d 754, 626 P.2d 504 (1980) and its progeny); *see also State v. Pam*, 101 Wn.2d 507, 680 P.2d 762 (1984); *State v. Perry*, 120 Wn.2d 200, 840 P.2d 171 (1992). “We consider those points not argued and discussed in the opening brief abandoned and not open to

consideration on their merits. *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967).

Even if the Trial Court had abused its discretion in excluding Ms. Hollins under ER 702, appellants have not challenged its exclusion of Ms. Hollins under ER 403. As the Trial Court gave alternative grounds for the exclusion of Ms. Hollins, and Appellants have chosen not to appeal the alternative grounds for the Trial Court's decisions, the Trial Court should be affirmed.

2. The Trial Court Was Correct In Not Giving Appellants Requested *Pimentel* Instruction As It Did Not Correctly State the Law For This Case, Was an Incorrect Statement of the Law, Was Confusing and Misleading, and Appellants Could Still Argue Their Theory of the Case Based Upon The Correct Instructions Given By The Trial Court.

a. Standard for Review

Jury Instructions are reviewed to determine whether they correctly state the law. *Griffin v. West RS Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001) citing *State v. Williams*, 96 Wn.2d 215, 634 P.2d 868 (1981). "Questions of law are reviewed de novo." *Id.* citing *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). "Challenged instructions are also reviewed to determine 'whether they permit the parties to argue their theories of the case, whether they are misleading, and whether when read as a whole they accurately inform the jury of the

applicable law.” *Id.* quoting *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993). “An instruction may be legally accurate yet not given because it is misleading.” *Id.* at 90. “[W]hether an instruction which accurately states the law should not be given to avoid confusion is a matter within trial court discretion, not to be disturbed absent abuse.” *Id.* at 90-91.

b. Appellant’s Case Did Not Fit the Narrow Exception to the General Rule of Premises Liability as Articulated in *Pimentel v. Roundup Co.* 100 Wn. 2d. 39, 666 P.2d 888 (1983).

The general rule governing liability for the failure to maintain premises in a reasonably safe condition is that “the unsafe condition must either be caused by the proprietor or his employees, or the proprietor must have actual or constructive notice of the unsafe condition.” *Pimentel v. Roundup Co.* 100 Wn. 2d. 39, 49, 666 P.2d 888 (1983); *see Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991); *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994); *Coleman v. Ernst Home Center Inc.*, 70 Wn. App. 213, 853 P.2d 473 (1993); *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 896 P.2d 750 (1995); *O’Donnell v. Zupan Enterprises, Inc.*, 107 Wn. App. 854, 28 P.3d 799 (2001); *Suriano v. Sears, Roebuck & Company*, 117 Wn. App. 819, 72 P.3d 1097 (2003); *Fredrickson v. Bertolino’s Tacoma, Inc.*, 131 Wn. App. 183, 127 P.3d 5 (2005).

The Supreme Court of Washington carved out a very narrow exception to the notice requirement in *Pimentel*. There, the Court held that within the self-service areas of a store that “the requirement of showing constructive notice is eliminated if ‘dangerous conditions are continuous or easily foreseeable.’” *Pimentel* at 48, quoting *Jasko v. F.W. Woolworth Co.*, 177 Colo. 418, 421, 494 P.2d 839 (1972). “The exception merely eliminates the need for establishing notice and does not shift the burden to the defendant to disprove negligence. The plaintiff must still prove that defendant failed to take reasonable care to prevent the injury.” *Id.* at 49. “Where the existence of unsafe conditions is reasonably foreseeable, it will now be unnecessary to establish the length of time for which the particular unsafe condition existed.” *Id.* “[T]he *Pimentel* exception is a limited rule for self-service operations and applies only to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation.” *Fredrickson v. Bertolino’s Tacoma, Inc.*, 131 Wn. App. 182, 191 127 P.3d 5 (2005), citing *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 276, 896 P.2d 750 (1995). Even if the *Pimentel* exception applies, a plaintiff must still “establish liability by showing the operator of the premises had failed to conduct periodic inspections with the frequency required by the

foreseeability of the risk. *Carlyle*, at 276-77, citing *Wiltse* at 461; *Pimentel*, at 49. “[T]he applicability of the *Pimentel* exception is a question of law, appropriately decided by the trial court. *Coleman*, at 218, citing *Wiltse* at 456, 461.

“The exception applies [if a plaintiff] can show that (1) the . . . operation was self-service, (2) it inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous condition that caused the injury was within the self-service area.” *O’Donnell v. Zupan Enterprises, Inc.*, 107 Wn. App. 854, 859, 28 P.3d 799 (2001) “A location where customers serve themselves, goods are stocked, and customers handle the grocery items, or where customers otherwise perform duties that the proprietor’s employees customarily performed, is a self-service area.” *Id.* (emphasis added), citing *Coleman* at 219; *Ciminski v. Finn Corp.*, 13 Wn. App. 815, 818, 820, 537 P.2d 850 (1975).

“[E]ven if the injury does occur in the self-service department of a store, this alone does not compel application of the *Pimentel* rule. Self-service has become the norm throughout many stores. However, the *Pimentel* rule does not apply to the entire area of the store in which customers serve themselves. Rather, it applies if the unsafe condition causing the injury is ‘continuous or foreseeably inherent in the nature of the business or mode of operation.’”

Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 653-54, 869 P.2d 1014 (1994), quoting *Wiltse v. Albertson's, Inc.* 116 Wn.2d 452, 461, 805 P.2d 793 (1991). “There must be a relationship between the hazardous condition and the self-service mode of operation of the business. *Id.* at 654, see *Wiltse*. If the alleged injury did not occur in the self-service area, the *Pimentel* rule does not apply. *Id.* at 653; *Coleman*. If Plaintiff cannot present evidence that “the nature of the . . . business and its methods of operating are such that the existence of unsafe conditions is reasonably foreseeable” the *Pimentel* rule does not apply. *Id.* at 655; *Wiltse*.

Appellants’ proposed instruction does not correctly state the law for the case at issue. The alleged injury did not take place in the self-service section of the store where customers performed the activities that clerks used to. Instead, it took place, as at a display section of the store. RP II 54. In fact, Appellants’ complaint only alleges that Respondent Harbor Freight “breached its duty to its customers by failing to *provide a safe product display* in its store.” CP 13 (emphasis added). As Appellants’ counsel argued in court “the issues in this case deal not just with screws or the vise, it’s with a display as a whole.” RP II 100. Yet the instruction they requested did not deal with a display, but with areas where “customers will handle, examine and replace merchandise,” like a

store shelf. CP 185. Appellants' own admissions make clear that the *Pimentel* exception to the general rule of premises liability does not apply.

“Self-service departments are areas of a store where customers service themselves. In such areas where lots of goods are stocked and customers remove and replace items, ‘hazards are apparent.’” *Coleman*, at 218-19 quoting *Wiltse* at 461. That is not the case at hand. Appellants' complaint has nothing to do with how goods are stocked and customers removing and replacing them or otherwise performing duties that clerks once performed in stores. Appellants only complaint is that Harbor Freight did not provide a safe display in its store. As such, the *Pimentel* exception does not apply.

In *Fredrickson v. Bertolino's Tacoma, Inc, supra*, this Court already dealt with a similar case where a plaintiff wanted to extend the *Pimentel* rule outside of the self-service area of a store. In *Fredrickson*, plaintiff sued a coffee shop for negligently furnishing and maintaining its premises. Plaintiff's complaint centered on an antique chair that the coffee shop provided to customers which broke, leading to plaintiffs injuries. *Fredrickson* at 186. Plaintiff asserted that the coffee shop had constructive notices because the chairs were purchased used, there was no “system” for inspecting the chairs, and the chairs were not repaired by a trained carpenter. *Id.*, at 189-90. However, just like this case, plaintiff

could present no evidence that the chairs posed an unreasonable risk of harm or that a chair had broken before and injured a customer in the past. *Id.*, at 190. Again, like this case, plaintiff could not present any evidence that coffee shop's owner or staff knew or had reason to know that the chair at issue was dangerous. *Id.*

Just like this case, the plaintiff in *Fredrickson* attempted to fit within the narrow *Pimentel* exception because he could not prove actual or constructive notice of an unsafe condition. This Court refused to extend the *Pimentel* exception in *Fredrickson*, noting that:

Fredrickson has not shown that the seating area at Bertolino's is a self-service area. Specifically, he has not shown that customers 'serve themselves' in the Bertolino's seating area; and he has presented no evidence that customers in the seating area performed duties that a proprietor's employees would customarily perform. Further, he has not shown how any hazardous condition posed by the chairs relates to any self-service aspect of Bertolino's

Fredrickson at 193.

Just like the *Fredrickson* case, Appellants are trying to expand the narrow *Pimentel* exception because they cannot prove either actual or constructive notice. And, just like in *Fredrickson*, their attempts must fail. "*Pimentel* speaks to specific self-service operations and specific operating procedures of the store. *Pimentel* realized that certain departments of a

store, such as the produce department, were areas where hazards were apparent and therefore the owner was placed on notice by the activity.” *Wiltse v. Albertson’s Inc.* 116 Wn. 2d 452, 461, 805 P.2d 793 (1991) Appellants only complaint deals with a display, not the self-service area of the store, and Appellants have cited no evidence that customers using the display performed duties that Harbor Freight’s employees would customarily perform. This is not an area where, by its nature, a hazard is apparent. The case at hand, as Appellants define it, is clearly outside the *Pimentel* exception, and is properly covered by the general rule and the instructions given by the trial court.

Further, even if Appellants had some proof that the display at Harbor Freight fell within the self-service aspect of the store, they have provided no evidence that the danger of a vice falling off the display was continuous or foreseeably inherent in the nature of Harbor Freight doing business. *See Ingersoll*, at 653-54; *Wiltse*, at 461-62 (finding that *Pimentel* does not apply with a puddle from a leaking roof); *Fredrickson*, at 193. As the *Fredrickson* court noted, “Fredrickson has not shown that there is anything inherently dangerous about running a coffee shop equipped with used furniture. *The evidence of one broken chair is not sufficient to establish that antique chairs are inherently or foreseeably dangerous.*” *Fredrickson*, at 193 (emphasis added). This is exactly the

same case. The evidence that one vice fell off a display does not establish that the display was inherently or foreseeably dangerous.

Appellants have provided no evidence that would allow their case to fit within the narrow exception to the general rule of premises liability articulated in the *Pimentel* case and its progeny. Appellant's injury did not occur in the self-service section of the store, as it did not occur in an area where customers perform functions usually performed by clerks or where customers remove or replace stock. Further, Appellants have produced no evidence that shows that even if the vice was in the self-service area that it created a reasonably foreseeable or continuous hazardous condition. As such, the Trial Court was correct in giving the standard premises liability instruction and denying Appellants their requested *Pimentel* instruction. The Trial Court, with access to all of the evidence and after hearing full argument from each party's trial counsel, correctly applied the law to the facts of this case in making its decision. That decision should be affirmed.

c. Appellants' Requested Instruction Does Not Correctly State the Law

Even if Appellants had some evidence that would have brought their case within the exception to the notice provisions of the general rule of premises liability as outlined in *Pimentel*, *supra*, their requested

instruction does not correctly state the law and the court was correct in denying use of the proposed instruction.

Appellant's proposed instruction stated that "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. Appellants are attempting to interpret the *Pimentel* rule too broadly. *Pimentel* does not apply to areas outside of the self-service area of a store, and does not apply to a store just because there are self-service areas to the store. *Coleman*, at 218-19. "Self-service departments are areas of a store where customers serve themselves. In such areas, where lots of goods are stocked and customers remove and replace items, 'hazards are apparent.'" *Id.*, at 219. *See Wiltse* at 461 (hazards are apparent in self-service areas such as produce departments).

Appellants' instruction takes the narrow exception outlined in *Pimentel* and attempts to apply it to all areas of a store just because areas of the store are self-service. This is not a correct statement of the law. *Pimentel*, at 48-49. Plaintiffs have conceded that their case does not involve self-service areas where goods are stocked and customers remove and replace them, or where customers perform duties that employees normally do. *See O'Donnell*, at 859. Instead, Appellant's complaint deals only with a display. *See Plaintiff's Complaint* at CP 13; RP II 100 ("the

issues in this case deal not just with screws or the vise, it's with a display as a whole.") *Pimentel* is a limited exception to the general rule of premises liability, but Appellants' proposed instruction would broaden it to cover all areas of a store just because there are self-service areas in a store.

The *Coleman* case is directly on point. In *Coleman*, Plaintiff claimed that an entry rug made out of used tires came within the *Pimentel* exception because of the store's self-service operation. Plaintiff argued "that, but for Ernst's large sales volume, low overhead and minimum number of employees, Ernst would not have a linoleum floor and a tire-tread entryway carpeting." *Coleman* at 218. As stated above, the *Coleman* court found that the *Pimentel* exception did not apply. *Coleman*, at 219 ("Here the entryway carpeting was not part of Ernst's self-service area or department.") As the court noted "heavy rubber carpeting is often found in the entryways of schools, hotels, hospitals and businesses that have a large volume of pedestrian traffic. This does not make these premises "self-service." *Id.* ("In sum, the trial court ruled correctly in finding that the *Pimentel* exception did not apply.")

The present case involves a similar fact pattern to *Coleman*. While Harbor Freight has self-service sections, Appellants' claim does not revolve around an area of the store where stock is kept and removed and

replaced by customers or where customers perform activities traditionally done by store employees. Similarly, there are displays in all kinds of businesses, not just self-service businesses. As such, because the proposed instruction is not correctly limited to the minor exception articulated in *Pimentel*, it is not a correct statement of the law, and the trial court should be affirmed in denying the instruction.

Further, “The *Pimentel* exception is a limited rule for self-service operations which applies only to specific unsafe conditions that are *continuous or foreseeably inherent in the nature of the business or mode of operation.*” *Carlyle*, at 276. “The *Pimentel* rule does not apply to the entire area of a store in which customers serve themselves, however; there must be a relation between the hazardous condition and the self-service mode of operation of the business. *Carlyle*, at 277, *citing Ingersoll*, at 653-54.

Plaintiff’s proposed instruction would make any hazard in any area of a store where there are self-service operations fall within the *Pimentel* exception. This is not a correct statement of the law. “If a customer had knocked over merchandise in the aisle and the next customer had immediately tripped over the merchandise, certainly the store owner should not be responsible without being placed on notice of the hazard.” *Wiltse* at 462. Similarly, in this case, Appellants want to say, without any

facts to support them, that just because one accident happened, it must have been a continuous or foreseeable hazard. This is not the case.

The *Carlyle* case makes it clear that the *Pimentel* rule should not be read that broadly. *Carlyle*, at 276. In *Carlyle*, plaintiff slipped on shampoo leaking from a bottle on the floor in the coffee aisle. *Id.*, at 274. Plaintiff argued that the presence of a leaking shampoo bottle was reasonably foreseeable and fell within the *Pimentel* exception. *Id.*, at 276. The Court of Appeals held that the *Pimentel* exception did not apply:

The *Pimentel* exception is a limited rule for self-service operations which applies only to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation. Certain departments of a store, such as the produce department, are areas where hazards are apparent and therefore the proprietor is placed on notice by the activity. The plaintiff can then establish liability by showing the operator of the premises had failed to conduct periodic inspections with the frequency required by the foreseeability of the risk. The *Pimentel* rule does not apply to the entire area of a store in which customers serve themselves, however; *there must be a relation between the hazardous condition and the self-service mode of operation of the business.*

Id., at 276-77 (emphasis added).

Appellants' proposed instruction similarly does not require the relation between the hazardous condition alleged by Appellants, the display table, and the self-service mode of the operation of the business.

Displays are common to all types of businesses, not just stores that have self-service areas. Appellants have made no showing that there was a continuous or foreseeably inherent unsafe condition in the display at hand, more or less that there was a relation between any such continuous and foreseeably inherent unsafe condition and the self-service mode of operation of Harbor Freight. Appellants' proposed instruction is not properly limited to the narrow exception articulated in *Pimentel*, and as such does not correctly state the law. As proposed, Appellants' instruction would alleviate them of most of their burden of proof because Harbor Freight has self-service areas. That is not a correct statement of the law, and the Trial Court was correct in denying the instruction. As Appellants proposed instruction was not a correct statement of the law, the Trial Court should be affirmed.

d. The Trial Court Did Not Abuse Its Discretion In Refusing to Give Appellants' Proposed Instruction Because It Was Misleading or Confusing.

Even if this Court finds that Appellants' proposed instruction was a correct statement of the law, the Trial Court did not abuse its discretion in refusing to give Appellants' proposed instruction No. 16 because it is misleading or confusing. "An instruction may be legally accurate yet not given because it is misleading." *Griffin*, at 90. "[W]hether an instruction which accurately states the law should not be given to avoid confusion is a

matter within trial court discretion, not to be disturbed absent abuse.” *Id.* at 90-91.

“Because *Pimentel* is a limited rule for self-service operations, not a per se rule, the rule should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operations.” *Wiltse*, at 461. Appellants’ proposed instruction is confusing or misleading because it does not properly articulate that any claimed hazard, beyond occurring in a self-service setting, must also be continuous or foreseeably inherent in the nature of the business or mode of operations. Appellants’ proposed instruction could mislead or confuse a jury to think that just because an injury occurred in a self-service area that the risk of such an injury was foreseeable.

Further, Appellants’ proposed instruction could mislead or confuse a jury into believing that just because merchandise is handled or examined that there is no need for a defendant to be on notice of a potential hazard for liability to apply. This is beyond the limited nature of the *Pimentel* exception. *See Wiltse* at 462; *Carlyle* at 276-277 (holding that a leaking bottle of shampoo on the floor in the coffee aisle did not fall within the *Pimentel* exception).

Lastly, Appellants’ proposed instruction could mislead or confuse a jury into believing that simply because a store has self-service areas, that

all areas of the store are subject to the exception in *Pimentel*. Even if Appellants' proposed instruction is legally correct as far as it goes, without defining what a "self-service" area is, and limiting the proposed instruction to only these areas, the proposed instruction could easily mislead or confuse the jury.

For all the above stated reasons, the Trial Court did not abuse its discretion in not using Appellants proposed *Pimentel* instruction because the instruction would have confused or mislead the jury. As such, the Trial Court's decision should be affirmed.

e. The Trial Court's Instructions Allowed Appellants to Adequately Argue Their Theory of the Case.

The general rule governing liability for the failure to maintain premises in a reasonably safe condition is that "the unsafe condition must either be caused by the proprietor or his employees, or the proprietor must have actual or constructive notice of the unsafe condition." *Pimentel v. Roundup Co.* 100 Wn. 2d. 39, 49, 666 P.2d 888 (1983); *see Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991); *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994); *Coleman v. Ernst Home Center Inc.* 70 Wn. App. 213, 853 P.2d 473 (1993); *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 896 P.2d 750 (1995); *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn. App. 854, 28 P.3d 799 (2001);

Fredrickson v. Bertolino's Tacoma, Inc. 131 Wn. App. 183, 127 P.3d 5 (2005).

The Trial Court gave the following instruction:

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. *See* WPI 120.06. This is the correct statement of the law given that Plaintiffs' complaint deals with a display in a store, not with limited exception to the general rule that *Pimentel* articulates for self-service areas of the store. A correctly stated *Pimentel* instruction only applies if the unsafe condition causing the injury is 'continuous or foreseeably inherent in the nature of the business or mode of operation.'" *Ingersoll v. DeBartolo, Inc.* 123 Wn.2d 649, 653-54, 869 P.2d 1014 (1994), *quoting* *Wiltse v. Albertson's, Inc.* 116 Wn.2d 452, 461, 805 P.2d 793 (1991). "There must be a relationship between the hazardous condition and the self-service mode of operation of the business. *Id.* at 654, *see* *Wiltse*.

Appellants have shown no relationship between the claimed hazardous condition and the self-service mode of operation of the business. Further, they were not able to show that their claimed unsafe condition, a display table, was a continuous or foreseeably inherent danger related to nature of a business like Harbor Freight or its mode of operation. As *Pimentel* does not apply, the instruction given by the court correctly directed the jury as to how to apply the law.

Even if the *Pimentel* exception applied, the instructions provided by the court still allowed Appellants to argue their theory of the case. Appellants' proposed instruction was confusing and did not properly state the law. *See* sections c and d, *supra*. But even without a correctly worded *Pimentel* instruction, given the limited nature of the *Pimentel* exception, Appellants could still argue their theory of the case based upon the instructions the Trial Court did give. *See* CP 628-641, RP II 392-421, 442-457.

“The exception merely eliminates the need for establishing notice and does not shift the burden to the defendant to disprove negligence. The plaintiff must still prove that defendant failed to take reasonable care to prevent the injury.” *Pimentel* at 49. “Where the existence of unsafe conditions is reasonably foreseeable, it will now be unnecessary to establish the length of time for which the particular unsafe condition

existed.” *Id.* There is little difference between the evidence needed to establish that an unsafe condition was reasonably foreseeable and the evidence necessary to establish at what point a party, using reasonable care, knew or should have known of a possibly unsafe condition. If Appellants had been able to show that *Pimentel* applied, at least from the aspect of the claimed unsafe condition being “continuous or reasonably foreseeable,” they should have been able to prove constructive knowledge of the unsafe condition. Since, as applied to the facts of this case, Appellants could properly argue their theory of the case with the instructions that the Trial Court gave, the Trial Court should be affirmed in its decision to deny Appellants their *Pimentel* instruction.

E. CONCLUSION

As the trial court noted several times, Appellants’ case was a rather simple case about whether or not the Harbor Freight Tool Store in Lacey was negligent in the way the vise was mounted and. Appellants’ proposed expert Mary Hollins did not offer any evidence or insight into these issues, and as such, the Trial Court was correct in excluding her under both ER 702. Further, Appellants have not even challenged the Trial Court’s finding that the testimony of Ms. Hollins, to the extent it had any relevance, would be far more prejudicial than probative under ER 403.

Appellants' case had nothing to do with the self-service sections of Harbor Freight, but only with a display and how the vise was mounted to that display. Nor is the mounting of a vise on a table, in and of itself, a continuous or easily foreseeable hazard, no more so than an automobile sitting in a show room would be. Nothing about this case, as presented by Appellants, fits the limited exception to the general rule of premises liability in *Pimentel*. Because this case does not fit that narrow exception, the Trial Court was correct in denying Appellants proposed and poorly worded *Pimentel* instruction.

The Trial Court gave Appellants several chances to try to show that their proposed witness qualified under ER 702, but after carefully listening to the argument of Appellants' counsel, reviewing the transcript and video of her testimony, and being fully informed of Appellants' position, did not abuse its discretion in excluding Ms. Hollins. Further, the Trial Court also excluded Ms. Hollins testimony under ER 403, a determination that has not been appealed. Finally, the Trial Court was fully briefed, had heard most of the evidence in this case and carefully listened to Appellants' argument in favor of the *Pimentel* instruction. Having been fully advised of the situation and the law, and having heard

the evidence, the Trial Court did not, as a matter of law, err when it decided not to give the proposed instruction.

For the above reasons, the Trial Court should be affirmed.

RESPECTFULLY SUBMITTED this 18 day of June
2007.

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STATE OF WASHINGTON
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DEPUTY

CARL CHRISTOPHER CAWLEY and DONNA CAWLEY,
husband and wife,

Appellants,

v.

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

Respondent.

CERTIFICATE OF SERVICE

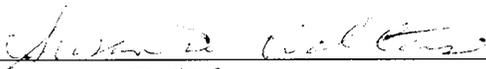
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On this day, the undersigned served all parties with copies of the following documents and filed the originals with the Court of Appeals, Division II, Tacoma, Washington:

1. Brief of Respondent;
2. Certificate of Service

by delivering to their Attorneys of Record via ABC Legal Services, Inc. I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington this 13th day of June, 2007.

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