

No. 295737

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

ELIZABETH DONOHOE,

Appellant,

v.

BEST BUY STORES, L.P., a foreign corporation; **TECHNIBILT,
LTD.**, a foreign corporation; **CARI-ALL, INC.**, an alien corporation,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant, Elizabeth Donohoe, suffered serious injuries when she tripped and fell over a dangerous shopping cart in Spokane Valley, Washington. Respondent, Best Buy Stores, L.P. (“Best Buy”) provided the subject dangerous shopping carts for use by customers on its premises, and the dangerous carts were manufactured by Respondent, Technibilt, Ltd. (“Technibilt”).

This appeal follows the trial court’s erroneous dismissal of Ms. Donohoe’s claims based on Defendants’ Motion for Summary Judgment asserting lack of evidence linking the dangers presented by the upper basket of the cart and Ms. Donohoe’s injury. Defendants’ motion only addressed claims concerning the upper basket of the shopping cart. Thus, claims where liability is predicated on the dangers of the lower base of the shopping cart were not affected. Additional, direct and circumstantial evidence create a genuine issue of material fact as to whether the upper basket of the cart contributed to cause Ms. Donohoe’s trip and fall.

Ms. Donohoe requests that this Court reinstate her claims for injury and damages caused by the dangers of the lower base of the cart, as well as the upper basket of the cart.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting a complete dismissal of Ms. Donohoe's **premises liability claims** despite the limited nature of Defendant's Motion for Summary Judgment.
2. The trial court erred by granting a complete dismissal of Ms. Donohoe's **product liability claims** despite the limited nature of Defendant's Motion for Summary Judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Ms. Donohoe's claims for injury caused by the lower base of the dangerous shopping cart should be reinstated because Defendants did not meet their burden of proof when they only put forth evidence and argument regarding the visual impairment dangers associated with the upper basket of the cart? (*Assignments of Error 1 and 2.*)
2. A genuine issue of material fact requires a jury determine that Best Buy's negligent failure to protect Ms. Donohoe against the trip and fall dangers of the shopping cart was a proximate cause of Ms. Donohoe's trip and fall injury? (*Assignment of Error 1.*)
3. A genuine issue of material fact requires a jury determine that the lower base of the Technibilt shopping cart was a proximate cause of Ms. Donohoe's trip and fall injury? (*Assignment of Error 2.*)

4. A genuine issue of material fact requires a jury to weigh the expert testimony and draw reasonable inference to determine that the upper basket of the cart was a proximate cause of Ms. Donohoe's trip and fall injury.

IV. STATEMENT OF THE CASE

A. Facts Regarding Ms. Donohoe's Trip and Fall Injury.

On December 13, 2006, Ms. Donohoe entered the Best Buy store in Spokane Valley, Washington, with her daughter, Janice Whitney. (CP 173.) Ms. Donohoe selected a movie to purchase as a gift for her grandson and proceeded to the checkout line. (*Id.*) As she was waiting in the checkout line, she felt a bump against her right foot and ankle; it was the lower base of a shopping cart being operated by the lady customer in line behind her. (CP 174-77.) When Ms. Donohoe attempted to step out of the way of the cart, her foot was caught underneath the lower base of the cart; she lost her balance and fell on the concrete floor. (*Id.*; CP 147-48.) During the trip and fall incident, a stanchion support post also fell and landed on Ms. Donohoe's leg. (CP 174-77.)

Ms. Donohoe recounted how the incident occurred in her deposition, stating: **"The basket hit my heel, my foot got caught in the basket, and I fell over onto the floor."** (CP 176.) **"It caused my foot**

to be stuck underneath the basket. [...] Then I lost my balance.” (CP 174.) Defense counsel clarified the “basket” she was referring to was in fact the lower base of the cart and not the upper basket of the cart. (*Id.*)

Ms. Donohoe suffered injuries to her low back, right hip, and lower leg. (CP 177-80.) She was taken out of the store in a wheelchair and transported to the emergency room at Valley Hospital and Medical Center for treatment of her injuries. (*Id.*; CP 147-48.) Among other things, Ms. Donohoe was diagnosed with a hematoma to her right leg that developed into an eschar and necrotic wound, requiring surgical debridement, skin graft surgery, and hospitalizations. (CP 177-80.)

B. Facts Regarding Best Buy’s Failure to Obtain the Cart Operator’s Statement or Contact Information.

The facts establish that “the store manager [...] took a report from [Ms. Donohoe] **immediately** following the incident.” (CP 107 (emphasis added).) Ms. Donohoe told the store manager that “a customer ran into her with a shopping cart.” (*Id.*) Best Buy did not obtain a statement from the lady who was operating the cart, nor did it obtain the lady’s contact information. (CP 147-48.) Despite Ms. Donohoe’s “immediate” report of the incident to Best Buy, Best Buy’s employees did not investigate the incident. (CP 109.)

C. Facts Regarding Best Buy's Dangerous Shopping Carts.

Best Buy is a large retailer of consumer goods, and Technibilt is a shopping cart manufacturing company. Sometime prior to June 2001, Best Buy requested Technibilt build a specific style of shopping cart. (CP 102-03; CP 117-18; CP 124-26.) Using Best Buy's specifications, Technibilt manufactured and provided Model 3742 shopping carts for use at Best Buy stores, completing its first shipment of carts in June of 2001. (CP 103; CP 116.)

Although the Model 3742 shopping carts were designed with and without an upper basket, both designs shared the same lower base construction that sits approximately seven inches up off of the ground and extends out several feet at that level. (CP 102-03.) On the shopping carts with an upper basket, the lower base of the cart extends two feet beyond the protection of the upper basket. (CP 90-94; CP 129.)

Ms. Donohoe's expert, Richard Gill, Ph.D., testified that the Model 3742 cart presents a highly foreseeable risk of trip and fall injuries because the lower base is only 7 inches off of the floor. (CP 90-94; CP 189-92.) Industry standards for retail floors and aisle ways establish that objects less than 24 inches from the floor create trip hazards and that retailers should exercise care to safeguard consumers from such dangers.

(*Id.*) The risk of causing a trip and fall is presented by the design of the Model 3742 carts, with or without upper baskets. (*Id.*)

Dr. Gill testified that the Model 3742 cart's design was atypical of most other shopping carts designed for use by consumers on retail floors. (CP 90-94.) Additionally, given the manner in which the carts are stored (i.e., stacked), as well as human factors, including the focus of shoppers being directed towards merchandise, Dr. Gill testified that, more probably than not, a customer would not recognize the dangers associated with the Model 3742 carts. (CP 193-94.)

As a **separate** danger and product defect, Dr. Gill testified that the upper basket of the Model 3742 cart obstructs the line of sight of the average user, including anyone less than seven feet tall. As a result, the user cannot see when the lower base is about to hit someone or something in the store. (CP 90-94; CP 190-93.) Evidence was presented that this style of design is unreasonably dangerous and presents a highly foreseeable risk of injury to Best Buy customers for this reason. (CP 90-94; CP 189-94.)

Notably, several other customers of Best Buy stores have suffered damages from trip and fall injuries while shopping at Best Buy because contact with the lower base of a Model 3742 shopping cart. (CP 110-12; CP 126-129; CP 131-32; CP 135-36; CP 141-42.) **At least six other**

incidents of trip and fall injuries involving a Model 3742 cart are known to have occurred on Best Buy premises. (*Id.*)

No safeguards were put in place and no warnings were ever given to apprise Ms. Donohoe or any other customer of the trip and fall dangers inherent in the lower base of the Model 3742 carts on the Best Buy premises. (CP 131-32; CP 135-36; CP 149-56.)

D. Trial Court Proceedings.

Ms. Donohoe's Complaint alleged liability based on premises liability and products liability arising out of Best Buy's provision and the unsafe design of the dangerous shopping carts. (CP 5-17.) The Complaint specifically identified two **separate** dangers posed by the subject carts. (CP 9-14.) The first danger alleged that the lower base of the shopping cart, in and of itself, created an unreasonable and highly foreseeable risk of trip and fall injuries. (*Id.*) The second danger alleged that a visual impairment created by the upper basket subjected customers to an unreasonable and foreseeable risk of being struck and injured by a shopping cart. (*Id.*)

Defendants filed a joint motion for summary judgment, requesting the trial court dismiss Ms. Donohoe's lawsuit. (CP 45-57.) No challenge was made to the allegations that Best Buy breached a duty of care owed to Ms. Donohoe and no challenge was made to the

allegations that the cart was unreasonably dangerous. (CP 45-57; CP 226.) Defendants only included evidence from which it was argued that there is nothing to prove whether the shopping cart was in fact pushed into Ms. Donohoe because the upper basket impaired the cart operator's line of sight. (CP 45-57.) That is, Defendants argued that Ms. Donohoe could not establish that visual impairment was a proximate cause of the incident because the cart operator is unknown and unavailable to offer testimony on this issue. (*Id.*) Defendants' motion did not address the separate dangers posed by the lower base of the cart.

Ms. Donohoe responded to the summary judgment motion with expert testimony and her own testimony to support an inference that the cart operator's view was, more likely than not, obstructed. (CP 218-219.) Ms. Donohoe further responded by submitting evidence that her trip and fall was caused by the lower base of the shopping cart, as a **separate** claim which Defendants had no evidence or argument to rebut. (CP 196-220.)

At the summary judgment hearing, even though Defendants only offered evidence affecting one of the two defect claims, the trial court judge entered an order granting *complete* dismissal of all of Ms. Donohoe's claims. (CP 231.) This appeal follows the trial judge's denial of Ms. Donohoe's Motion for Reconsideration, which sought

reinstatement of her claim where liability is predicated on the dangers posed by the lower base of the shopping cart, which was not predicated on a visual impairment. (CP 239-41; CP 259-64; CP 265-68.)

V. SUMMARY OF ARGUMENT

The sole basis for Defendants' motion for dismissal is the lack of testimony from the cart operator to prove the cart operator's vision was impaired by the upper basket. Defendants did not show that the cart operator's vision was not impaired, and Defendants did not put forward any evidence or argument to show an absence of a genuine issue of material fact with regard to Plaintiff's claims that allege the lower base of the cart was a cause of Ms. Donohoe's trip and fall injuries. As a result, Defendants cannot be said to have established that no genuine issue of material fact exists relevant to these claims. The trial court erred in granting a complete dismissal.

Moreover, even if Respondents met their initial burden of proof with regard to the claims predicated on the lower base of the cart, Ms. Donohoe put forth sufficient evidence to establish that a genuine issue of material fact is presented and requires a fact finder's decision relative to Best Buy's negligent failure to warn of a known dangerous condition as a proximate cause of her trip and fall injury and that a product defect was a proximate cause of her trip and fall injury. Ms. Donohoe's claims

should be reinstated to the extent the claims assert the lower base of the shopping cart was a cause of her injuries.

Finally, the testimony of Ms. Donohoe's expert creates a genuine issue of material fact that also requires a jury weigh the expert testimony and draw reasonable inferences to determine causation with regard to the claims predicated on the dangers of the upper basket of the cart.

VI. ARGUMENT

A. **Summary Judgment Dismissal is Not Appropriate When Genuine Issues of Material Fact Exist.**

When reviewing an order of summary judgment brought under CR 56, the appellate court engages in the same inquiry as the trial court. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). Summary judgment is only appropriate:

[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). A "material fact" is one upon which the litigation depends, in whole or in part. *Young*, 112 Wn.2d at 234. The moving party carries the initial burden of proving that there is no genuine issue of material fact. *Id.* at 235. "If the moving party does not sustain that burden, summary judgment should not be entered, *irrespective of whether the*

nonmoving party has submitted affidavits or other materials.” Id. (emphasis in the original). Only after the moving party meets its burden, must the nonmoving party come forward with facts showing a material issue of fact exists. *Id.* The existence of “*any* supportable, relevant fact inconsistent with the defendant’s position will be sufficient” to create an issue of fact to avoid summary judgment. *Id.* (emphasis in the original). All facts and reasonable inferences must be interpreted in the light most favorable to the nonmoving party. *Id.* at 234.

B. Genuine Issues of Material Fact Exist as to Whether Ms. Donohoe’s Injuries were Proximately Caused by the Lower Base of the Shopping Cart.

Even if we were to assume Defendants put forth sufficient evidence to meet their initial summary judgment burden of proof with respect to claims that allege Ms. Donohoe’s injury was in part caused by the lower base of the cart, questions of material fact regarding causation preclude granting summary judgment dismissal of claims alleging the injury was in part caused by the lower base of the cart. Ms. Donohoe asserted negligence claims against Best Buy and products liability claims against Technibilt. Defendants’ motion was limited to the causation element. That is, whether Best Buy’s negligence was a proximate cause of Ms. Donohoe’s trip and fall and whether Technibilt’s unsafe product was a proximate cause of Ms. Donohoe’s injuries.

Washington law recognizes two parts to proximate cause in a negligence action: cause in fact, which is ordinarily a question for the trier of fact, and legal causation, which allows the court to limit liability based on justice, policy, and common sense so as to prevent liability from exceeding the underlying duty. *See Eckerson v. Ford's Prairie School Dist.*, 3 Wn.2d 475, 482-84, 101 P.2d 345 (1940); *see also Taggart v. Sandau*, 118 Wn.2d 195, 226, 882 P.2d 243 (1992) (“The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter.”).

There are two standards for satisfying proximate cause. *Id.* The first standard is commonly referred to as the “but for” test. *Id.* The test is stated in WPI 15.01:

The term “proximate cause” means a cause which in a direct sequence [unbroken by any superseding cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

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

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (5th ed.) (citing cases). The alternative standard is known as the substantial factor test and is stated in WPI 15.02:

The term “proximate cause” means a cause that was a substantial factor in bringing about the [injury] [event] even if the result would have occurred without it.

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.02 (5th ed.) (citing cases).

Regarding substantial factor, the Court in *Eckerson* stated:

The rule in such cases, as stated in Restatement of the Law of Torts, p. 1184, § 439, is that: 'If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.'

3 Wn.2d at 484 (citing cases); *see also Weaver v. McClintock-Trunkey Co.*, 8 Wn.2d 154, 160, 111 P.2d 570 (1941) (affirming bench trial verdict in motor vehicle accident case as supported by substantial evidence); *Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985) (citing W. Prosser & W. Keeton, *Torts* § 41 (5th ed. 1984) (emphasis added)).

In *Passovoy*, Division I Court of Appeals addressed whether plaintiff's injuries were caused by defendant's employees' failure to warn of a fleeing shoplifter who knocked plaintiff to the ground while the employees were chasing him. *Passovoy v. Nordstrom*, 52 Wn. App. 166, 758 P.2d 524 (1988). In addressing the defendant's causation argument, the Division I Court held:

We reject Nordstrom's argument that it was not the cause-in-fact of the injury because the suspect, and not the

detective, bumped into the customer. Assuming that Nordstrom did not meet its duty to warn the customers, both Nordstrom and the suspect would be concurrent tortfeasors, and each could be held liable for the injury caused by their negligence.

Passovoy, 52 Wn. App. at 173-74, 758 P.2d 524 (internal quotes and cites removed).

In the present case, Defendants' argument for a complete dismissal fails to recognize there may be more than one proximate cause of an injury – there may be multiple tortuous actors and/or multiple defects. Because Defendants do not challenge duty, breach of duty, or even the existence of the alleged product defects, Ms. Donohoe's own testimony establishing how she tripped and fell over the lower base of the cart is sufficient evidence to create a question for the jury about whether the lower base of the cart was at least *a* cause of her trip and fall. (CP 174-77.) Ms. Donohoe specifically testified that her foot became entangled with and caught underneath the lower base of the cart, causing her to lose her balance (i.e., trip) and fall to the concrete floor. (*Id.*)

Dr. Gill's testimony attributed Ms. Donohoe's trip and fall injury to Best Buy's negligence and the product defects. (CP 90-94.) Ms. Donohoe's testimony combined with the testimony of Dr. Gill further provides grounds for the reasonable inference that the product design and Best Buy's failures to warn are both "causes in fact" for this injury. (CP

90-94; CP 184-94). Dr. Gill testified that Ms. Donohoe's trip and fall would have been prevented had Technibilt or Best Buy properly designed the cart or properly safeguarded Ms. Donohoe from the dangers of a trip and fall posed by the lower base of the shopping cart. (*Id.*) Stated another way, "but for" Defendants' torts, Ms. Donohoe would not have tripped and fell over the lower base of the cart.

Therefore, the trial court erred when it dismissed Ms. Donohoe's claims as the evidence supports finding the lower base of the cart was a cause of Ms. Donohoe's trip and fall.

C. **Defendants Failed to Establish that no Genuine Issue of Material Fact Remains Regarding Liability Claims Predicated on the Trip and Fall Dangers of the Lower Base of the Shopping Cart.**

In the present case, Defendants' motion pertains to causation with regard to the allegation that harm was caused by the upper basket of the cart as a visual impairment. (CP 45-57.) No evidence or argument was put forward by Defendants to show the absence of an issue of material fact regarding claims where causation was predicated on the design of the lower base of the cart. (*Id.*) Defendants' brief repeatedly stated:

Plaintiff cannot prove that the customer who struck her did so **because the design of the cart impaired her view, which is essential to Plaintiff's claim.**

(CP 51.)

Even if Plaintiff were able to establish the cart was defectively designed, which Defendants deny, she cannot establish that the alleged defective design was the cause of the incident and her injuries **since there is no evidence the unidentified customer who allegedly hit her with a cart did so because of the design.** Therefore, there is no basis for Plaintiff's claims against Defendants based on a defective shopping cart.

(CP 54; *see also* CP 224-230.)

1. Plaintiff alleged two separate bases for liability to support both her negligence claim and her product liability claim.

Our Civil Rules provide:

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds or on both.

CR 8(e)(2); *see also* CR 8(f) ("All pleadings shall be so construed as to do substantial justice.").

Ms. Donohoe's Complaint clearly alleges two **separate** causes of Ms. Donohoe's injuries to support her liability claims. The Complaint alleges:

[Cause No. 1] The base of the shopping cart is designed so that it extends approximately 24 inches beyond the upper basket at a height of approximately 7 inches tall. This presents a trip/knock down hazard to people standing or

walking near the cart. **Additionally**, [Cause No. 2] the upper basket design blocks the ordinary user's ability to see and perceive the extending base of the shopping cart when using the shopping cart in the manner for which it was designed and intended.

(CP 012 (emphasis added).) The remaining paragraphs of the Complaint further illustrate the separate nature of these alleged bases for liability.

(CP 005-018.) Although these dangers may have concurrently operated to cause Ms. Donohoe's harm, causation from either one is sufficient to establish liability for these Defendants.

Notably, there may be more than one proximate cause of an injury or event. WPI 15.04; *see, e.g., Passovoy*, 52 Wn. App. 166 (store's negligence concurred with fleeing shoplifter's negligence); *see also* RCW 4.22.005, .070. The flawed argument that there may be insufficient evidence to prove causation with regard to the claims predicated on a visual impairment has no bearing on Ms. Donohoe's liability claims for injury caused by negligent design of the lower base of the cart. Those claims do not require testimony from the cart operator or evidence of a visual impairment.

For example, even assuming the testimony of the cart operator existed to definitively prove the cart operator's vision was not impaired by the upper basket, the dangers of the lower base, as alleged, could still be found to be a proximate cause of Ms. Donohoe's trip and fall injury.

Moreover, Defendants admit in their briefing, it is highly foreseeable that carts will come into contact with customers on the premises, especially in check out lines. (CP 56 (“These are all common scenarios for people waiting in check out lines at stores.”).)

2. Defendants tried unsuccessfully to combine Plaintiff’s independent bases for liability during the deposition of Plaintiff’s expert.

In his deposition, Plaintiff’s liability expert, Richard Gill, Ph.D., clarified the existence of two independent dangers that were alleged to have caused Ms. Donohoe’s injuries:

Q: And, you know since our case is a little bit different – because it’s my understanding from our case that you believe there is a defect having to do with the small basket on top and impairing the view of the front of the cart. Is that correct?

A: **Yes and no. That certainly is a criticism that I have, but I would say, part and parcel, they’re the same type of issues and that is, what *you’ve* got is a cart that is designed and intended to be used on a retail floor, that has a very low profile, on the order of 6 to 8 inches off the floor...and what that’s going to do is create a potential trip hazard and/or bump or entrapment hazard.**

(CP 187.)

Dr. Gill further testified regarding the mechanisms of a trip and fall injury caused by the lower base of the cart:

From a safety aspect, the mechanisms are the same, as I understand it, and that is a person getting tangled up in the protruding nose that is 7 inches off the floor. That's the hazard, and whether it happens on a given aisle or a given day or somebody walking frontwards, backwards, sideways, the cart being pushed into them, **it's all the same safety hazard.**

(CP 192.)

Dr. Gill's use of the term "trip" is broad and not limited to the common perception of a trip:

Q: So, it sounds like what you're mostly talking about with respect to the design of this cart is the fact that it created a trip hazard. Is that correct, it's all about being a trip hazard?

A: Well, it depends on how you define "trip." In other words, "trip" as someone walking into it? No, it's broader than that. It's a trip hazard in the sense of someone walking into it and literally tripping or a trip hazard in terms of somebody unintentionally bumping into someone and thereby entangling their feet with the base of the cart, which I would, I guess, consider to be a trip or a knockdown. But, yes, that's the problem is the protruding front getting tangled up with people's feet.

(CP 190-91.)

Furthermore, Dr. Gill explained: "[Ms. Donohoe] was unable to regain her balance, in part due to her entanglement/tripping over the low protruding nose of the cart." (CP 92.)

In short, Defendants did not meet their initial CR 56 burden with regard to Ms. Donohoe's claims alleging the injury was caused by the trip and fall dangers of the lower base of the cart. The claims were clearly alleged and can stand separately from the claims based on the visual impairment claims. Because Defendants did not put forth any argument or evidence to show the absence of a material fact with regard to these claims, Ms. Donohoe was not required to come forward with any evidence, beyond the allegations of the Complaint. Thus, the trial court erred when it granted a complete dismissal because the claims alleging harm caused by the lower base of the cart were never put at issue by Defendants.

D. Genuine Issues of Material Fact Require a Jury Weigh the Expert Testimony and Draw Reasonable Inferences to Determine that the Upper Basket was a Proximate Cause of Ms. Donohoe's Trip and Fall Injury.

“An inference is a ‘process of reasoning by which a fact or proposition sought to be established is deduced as a *logical sequence* from other facts, or a state of facts, already proven or admitted.’” *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 853, 751 P.2d 854 (1988) (quoting *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986) (emphasis in original)).

In this case, Defendants admit that the unknown cart operator did not intentionally contact Ms. Donohoe with the low-level, protruding base of the Model 3742 cart. (CP 109.) Defendants also admit that Ms. Donohoe was not negligent. (CP 119.) Ms. Donohoe testified that cart was being pushed by a lady coming into the line behind her prior to the incident. (CP 173-76.) Dr. Gill testified that in order for any cart operator to have an unobstructed view of the protruding base of the Model 3742 cart, the cart operator would have to be more than seven feet tall. (CP 191; CP 90-94.) Based on his investigation, Dr. Gill, a qualified human factors expert, testified that the visual impairment defect, on a more probable than not basis, contributed to cause Ms. Donohoe's trip and fall injury. (CP 90-94; CP 191-94.) This testimony supports several inferences which must be interpreted in favor of Ms. Donohoe on this motion as **Defendants failed to show that the cart operator's view was not impaired by the upper basket; Defendants only showed that the cart operator is not available to testify.**

The testimony of Dr. Gill and the facts establishing how Ms. Donohoe was tripped requires that a jury weigh the expert testimony and draw reasonable inferences to determine that the upper basket was a cause of Ms. Donohoe's injury. There is sufficient evidence, both direct and circumstantial, for a reasonable jury to conclude that the design of

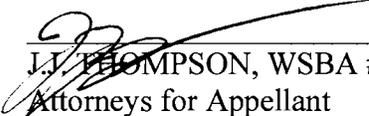
the upper basket contributed to caused Ms. Donohoe's trip and fall. Thus, the trial court erred in dismissing Ms. Donohoe's claim predicated on the upper basket as a genuine issue of material fact exists which cannot be resolved on summary judgment.

VII. CONCLUSION

For the foregoing reasons, Ms. Donohoe respectfully requests this Court overturn the trial court's complete dismissal and reinstate her liability claims that allege her injury was caused by the trip and fall dangers inherent in the lower base of the shopping cart. Defendants failed to meet their initial summary judgment burden to support a complete dismissal as genuine issues of material fact require a jury determine that the lower base of the cart was a cause of Ms. Donohoe's trip and fall. Additionally, Ms. Donohoe requests that the Court reinstate her claims predicated on the upper basket, as direct and circumstantial evidence create a genuine issue of material fact to be decided by the jury.

DATED this 14th day of March, 2011.

LAYMAN, LAYMAN & ROBINSON, PLLP

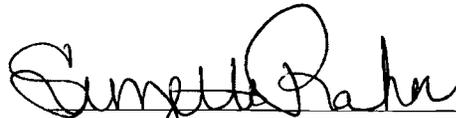


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March 2011, I served a true and correct copy of the foregoing BRIEF OF APPELLANT by delivering the same to the following attorneys of record, by the method indicated below, addressed as follows:

<input type="checkbox"/>	U.S. Mail, postage prepaid	Kathleen M. Thompson, Esq. Gardner Bond Trabolsi PLLC 2200 Sixth Ave., Suite 600 Seattle, WA 98121 Attorney for Defendants
<input checked="" type="checkbox"/>	ABC Legal Messengers	
<input type="checkbox"/>	Overnight Mail	
<input type="checkbox"/>	Facsimile	



SUZETTE L. RAHN