

67534.6

67534-6

No. 67534-6-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

---

MARIE AND ROBERT GEARY

Appellants,

v.

HOME DEPOT, USA, INC., AND GERALD & CHERYL SCOTT,

Respondents.

---

REPLY BRIEF OF APPELLANTS

---

Paul Giersch, WSBA No. 11282  
Law Office of Paul Giersch, P.S.  
Attorney for Appellants  
333 Taylor Ave. N  
Seattle, Washington 98109  
(206) 728-8050

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 DEC 13 AM 10:52

## TABLE OF CONTENTS

	Page
I ARGUMENT .....	1
<u>A. Reply to Home Depot’s Arguments</u>	
1. Home Depot’s Statement of the Case omits the facts established by Geary in opposition to Home Depot’s summary judgment motion.....	1
2. The evidence before the trial court included specific facts demonstrating both the precise manner in which Geary was injured and Home Depot’s failure to take steps, in policy and practice, to protect her and other customers from injury, leaving no room for speculation or conjecture..	2
3. The trial court used the wrong test for factual proximate causation by rejecting “but for” analysis. Home Depot both admits and endorses the error.....	7
4. Home Depot conceded in argument on summary judgment that it had a duty to take steps as a self-service store to protect customers from endangering each other.....	9
5. Home Depot had a duty to exercise care to protect Geary from the accidental or negligent harmful acts of other customers.....	10
6. Legal proximate cause attaches to the breach of duty by Home Depot .....	14
<u>B. Reply to Scotts’ Arguments</u>	
1. Appellate decisions subsequent to <u>Sidis v. Brodie Dohrmann</u> have acknowledged and accounted for the Supreme Court’s dicta regarding the tolling effect of RCW 4.16.170 as to “John Doe” defendants.....	16

2. Contrary to Scott’s assertion, the Supreme Court in <u>Sidis</u> did not “state that its ruling does not apply to unnamed fictitious defendants.” .....	17
3. A standard requiring “identification of a party with reasonable particularity” is inherently different than and distinguishable from a standard based on requirements of due diligence or excusable neglect.....	18
4. The Scotts were not prejudiced as a result of being served with Geary’s amended complaint .....	20
5. Challenge to the validity of the “Stipulation of Parties Re Amendment of Summons and Complaint for Damages” and Geary’s First Amended Complaint is not properly before the court on appeal .....	22
6. Amendment of Geary’s complaint by stipulation of the parties was in accordance with CR 15(a) .....	24
7. The trial court properly exercised its discretion in declining to grant Scotts’ motion to strike Geary’s First Amended Complaint .....	25
II. CONCLUSION.....	26

**TABLE OF AUTHORITY**

Page

TABLE OF CASES

Washington State cases

*Bresina v. Ace Paving Company*,  
89 Wn. App. 277, 948 P.2d 870 (1997) ..... 16, 17

*Doherty v. Municipality of Metropolitan Seattle*,  
83 Wn.App. 464, 921 P.2d 1098 (1996) ..... 7

*In Re Arbitration of Doyle*,  
93 Wn.App.120, 966 P.2d 1279 (1998) ..... 23

*Gardner v. Seymour*,  
27 Wn.2d 802, 180 P.2d 564 (1947) ..... 4, 5

*Hartley v. State*,  
103 Wn.2d 768, 698 P.2d 77 (1985) ..... 14, 15

*Hines v. Todd Pacific Shipyards Corp.*,  
127 Wn.App.356, 112 P.3d 522 (2005) ..... 25

*Iwai v. State*,  
76 Wn.App. 308, 88 P.2d 936 (1994) ..... 16

*Little v. Countrywood Homes, Inc.*,  
132 Wn.App.777, 133 P.2d 944 (2006) ..... 5, 6

*Marshall v. Bally's Pacwest, Inc.*,  
94 Wn.App.372, 972 P.2d 475 (1999) ..... 4, 5, 6

<i>Nivens v. 7-11 Hoagy's Corner</i> , 133 Wn.2d 192, 943 P.2d 286 (1997) .....	10, 11, 12, 13, 15
<i>Peterson v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983) .....	10
<i>Sidis v. Brody/Dohrmann, Inc.</i> , 117 Wn.2d 325, 815 P.2d 781 (1991) .....	15, 16, 17, 18, 19, 21
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992) .....	14
<i>Wolfe v. Legg</i> , 60 Wn.App. 245, 803 P.2d 804 (1991) .....	24, 25

#### STATUTES AND RULES

RCW 4.16.170 .....	16, 17, 18, 19, 21, 22
CR 56(c) .....	25
CR 15 (a) .....	22, 23, 24, 25
CR 15 (c) .....	22
RAP 2.4 .....	22
RAP 5.1(d) .....	23

#### OTHER AUTHORITIES

Restatement (Second) of Torts, Section 315 .....	10
Restatement (Second) of Torts, Section 344 .....	11, 12

## **I. ARGUMENT**

### **A. REPLY TO HOME DEPOT'S ARGUMENTS**

#### **1. Home Depot's Statement of the Case omits the facts established by Geary in opposition to Home Depot's summary judgment motion.**

Home Depot's Statement of the Case merely describes the parties, outlines the procedural history, and offers very selective portions of the parties' responses to discovery, establishing that Geary did not see defendant Scott or his lumber cart before it struck her, and suggesting that that Scott had not encountered difficulty moving his cart or seeing over it.

Entirely omitted is any reference to the evidence presented to the trial court establishing that: (1) while shopping in Home Depot's store Marie Geary was struck and injured by a heavy and loaded lumber cart in a part of the store removed from the lumber department; (2) the lumber cart was being maneuvered by another shopper (Scott) who was unsupervised and unattended; and (3) Home Depot did not have any policies or regulations governing or restricting the use or movement of lumber carts in its store and permitted their movement to all parts of the store by shoppers without supervision. (Brief of Appellant, pp. 5-7, with references to the record).

Home Depot further disregards and omits any mention of the written statement of Home Depot employee Samuel Lowe, who personally observed a shopper (Scott) pull the lumber cart toward Marie until she was struck. Mr. Lowe's written account of his observations, in the form of an "Incident Witness Statement", was properly before the trial court. (CP148-192: Exhibit B – Hovde Dep., pp. 16-17).

**2. The evidence before the trial court included specific facts demonstrating both the precise manner in which Geary was injured and Home Depot's failure to take steps, in policy and practice, to protect her and other customers from injury, leaving no room for speculation or conjecture.**

**Injury Sequence.** Home Depot argues that the trial court properly granted its motion for summary judgment on the issue of factual proximate cause because neither Marie nor Robert Geary saw the offending shopper (Scott) or his lumber cart before Marie was struck, and because Scott couldn't confirm that he had difficulty moving his cart or that his cart was stacked to high with lumber. The implication is that these deficiencies preclude an understanding of the sequence of events leading

to Marie's injury, in turn making determination of factual proximate cause impossible without resort to speculation or conjecture.

In fact the observations of Marie and Robert Geary alone constitute strong circumstantial evidence of what happened. After she was struck, Marie was immediately approached by a man (Scott) who asked if she was all right and stated that he had not seen her. In addition, Home Depot employee Samuel Lowe observed as Scott pulled the lumber cart toward Marie until she was struck. Thus the record before the trial court contained ample evidence from which a trier of fact could determine precisely what happened between Geary and Scott.

Home Depot cites decisional authority in support of its position that the factual record is deficient and that a jury would have to resort to speculation in trying to determine whether the Home Depot's breach of duty was a factual proximate cause of Geary's injury. Examination of the cases cited by Home Depot reveals their inapplicability to the case at bar, and by contrast, the sufficiency of the evidence presented by Geary to support the element of factual proximate cause without the need for resort to speculation.

The first case cited by Home Depot is **Gardner v. Seymour**, 27 Wn.2d 802, 180 P.2d 564 (1947). In that case, an individual at his place of employment was found at the bottom of an elevator well with injuries which soon proved fatal. His estate sued the employer alleging wrongful death. A verdict-based judgment in favor of plaintiff's estate was reversed on appeal because plaintiff had failed to establish sufficient facts at trial from which to determine proximate cause. In its decision, the Supreme Court noted: "*As to what actually happened in this case we have no idea.*" 27 Wn.2d 802, 805. It pointed out that there were two plausible factual theories that could explain the victim's fall – one which would support the employer's liability and one which would not. The Court based its holding on the settled proposition that a jury cannot base a verdict on conjecture about how an accident happened if there is nothing more tangible to proceed upon than two or more conjectural theories, under one or more of which the defendant would be liable, and under one or more of which he would not. Id. at 809.

Home Depot also cites **Marshall v. Bally's Pacwest, Inc.**, 94 Wn.App. 372, 972 P.2d 475 (1999). There the plaintiff claimed that while using a treadmill at defendant's health club she was injured after being thrown from the machine after it started without warning. There were apparently no other witnesses to the incident. The plaintiff subsequently

conceded that she had no memory of the incident and did not know how she had been injured. Affirming the trial court's order granting summary judgment, the Court of Appeals held that the plaintiff could only offer a theory as to how she had been injured, and that mere theory or speculation could not support a verdict.

The fact patterns in **Gardner** and **Marshall** contrast starkly with the case at bar. The sequence leading to Geary's injury was witnessed in whole by a Home Depot employee and in part by Marie and Robert Geary. Their first-hand accounts were before the trial court and constituted evidence proving without question precisely what happened: another shopper struck Marie with a loaded lumber cart that was under his control. There is no room for or need to rely on theory or speculation.

The third case cited by Home Depot is **Little v. Countrywood Homes, Inc.**, 132 Wn.App. 777, 133 P.2d 944 (2006). It involved a claim for injuries sustained by a worker in an apparent fall from a ladder at a worksite. Evidence was adduced to support a contention that the defendant contractor had violated several regulatory provisions governing the use of ladders. The plaintiff had no memory of the incident and no one else had seen what happened. Summary judgment was granted in favor of the

defendant general contractor based on a lack of evidence to establish proximate cause. The Court of Appeals affirmed, concluding that in the absence of evidence as to how the injury occurred, the plaintiff could not establish that it was proximately caused by the defendant's alleged breaches of duty. The court cited **Marshall**, supra, for the proposition that *"without evidence to explain how the accident occurred, she could not establish probable cause and could not withstand summary judgment."* 132 Wn.App. 777, 782. The dissimilarity between **Little** and the case at bar is demonstrated by the court's statement: *"No one, including Little, knows how he was injured."* 132 Wn.App., at 782. In the case at bar, the evidence presented to the trial court by Geary proves in detail how she was injured.

**Home Depot's acts and omissions.** Proof of factual proximate cause in this case also requires evidence of Home Depot's act's and omissions. Geary presented undisputed evidence that Home Depot operated on a self-service basis, relying on customers to load and move lumber carts. Home Depot did not have any policies or regulations governing or restricting the use or movement of lumber carts in its store and permitted their movement to all parts of the store by shoppers without supervision. (Brief of Appellant, pp. 5-7, with references to the record).

No other facts beyond those shown are required to permit reasonable persons to conclude that ‘but for’ Home Depot’s omissions, Scott would probably not have injured Geary.

**3. The trial court used the wrong test for factual proximate cause by rejecting ‘but for’ analysis. Home Depot both admits and endorses the error.**

Home Depot concedes that “cause in fact” analysis involves a determination of whether “but for” the alleged negligence, that plaintiff’s injury would not have occurred. (Brief of Respondent Home Depot, p.8, citing **Doherty v. Municipality of Metropolitan Seattle**, 83 Wn. App. 464, 921 P.2d 1098 (1996).

Nevertheless, Home Depot argues that the trial court “*recognized that appellants were not using the proper test for proximate causation when it questioned appellants’ counsel at the July 15, 2011 summary judgment hearing.*” (Brief of Respondent Home Depot, p.14).

The colloquy cited by Home Depot is as follows:

**MR. GIERSCH:** With regard to proximate causation, we have but-for causation here. But for Home Depot creating a store environment in which these things [lumber carts] can be moved around without supervision or restriction and harm other client – customers, this thing could not have happened. Clearly, we may have concurrent causation with Mr. Scott’s negligence, but without

Home Depot's policy and practices could not have happened, so there's proximate cause.

**THE COURT:** I don't think that's the test for proximate cause, though, is it? I mean but for the store existing, this wouldn't have happened.

**MR. GIERSCH:** But –

**THE COURT:** It's got to – but for Home Depot even opening its doors, it couldn't have happened.

**MR. GIERSCH:** yeah.

**THE COURT:** But that's strict liability, isn't it?

**MR. GIERSCH:** No, no, no. There's a strict nexus between a particular failure of policy as a self-service store for foreseeable risk of harm and the harm that was caused. It's immediate. Their failure to – and as I said, that their negligence can be by act or omission, and here's it's by omission. They failed to either supervise them or otherwise create conditions that made this safe to move these carts, and they didn't.

So, I think we have but-for causation and – and I mean you're right. If the sun hadn't come up that day, it might not have happened either...

(Brief of Respondent Home Depot, Appendix C, pp. 24-25).

Home Depot therefore takes contradicting positions by endorsing the trial court's rejection of "but for" analysis, while conceding that "but for" analysis is legally correct. Home Depot's position is untenable.

**4. Home Depot conceded in argument on summary judgment that it had a duty to take steps as a self-service store to protect customers from endangering each other.**

Home Depot argues on several points that it had no duty to protect Geary. Initially it claims that no duty can arise in this case because the “...*the allegations do not arise from a condition of the land.*” (Brief of Respondent Home Depot, p.19). No authority is offered in support of this broad contention. It further contends that a business owner has no duty to protect its customers from the non-criminal acts of third parties, including other customers. However, in the following exchange during argument on its summary judgment motion, Home Depot conceded that it owed Geary a duty to take reasonable steps for her safety:

THE COURT: ....And I'm frankly at the point where I think there is a duty to make sure that if you're a self-service store that the customers are not going to endanger each other. So you have to take reasonable steps, I think, to make sure that's the case. And you would acknowledge that.

MR. THATCHER: Well, I would.

THE COURT: All right.

MR. THATCHER: I would acknowledge that.

(Brief of Respondent Home Depot, Appendix C, Verbatim Report of Proceedings, p.8)

**5. Home Depot had a duty to exercise care to protect Geary from the accidental or negligent harmful acts of other customers.**

Home Depot denies this proposition, citing **Nivens v. 7-11 Hoagy's Corner**, 133 Wn.2d 192, 943 P.2d 286 (1997). It argues that **Nivens** precludes a duty to protect against the non-criminal acts of third parties. That case involved a claim that a business owner owed a duty to protect its customers from criminal acts of third parties. In reaching its decision, the Supreme Court adopted Section 344 of the Restatement (Second) Of Torts. It first reviewed the law generally and made several key holdings. First, it noted that Section 315, Restatement (Second) Of Torts had been adopted in **Peterson v. State**, 100 Wn.2d 421, 671 P.2d 230 (1983).

That section provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right of protection.

The court then explicitly held that a special relationship exists between a business and an invitee, noting that the invitee entrusts himself or herself to the control of the business over the premises and to the conduct of others on the premises. The court stated:

“...We discern no reason not to extend the duty of business owners to invitees to keep their premises reasonably free of physically dangerous conditions in which business invitees may be harmed by third persons.”

(133 Wn.2d, at 202-203).

In describing the nature of a business’s duty, the **Nivens** court expressly adopted the language of Section 344, Restatement (Second) of Torts, which reads:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for **physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons** or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, **or otherwise to protect them against it.**

(Emphasis added).

Further discussing the limits of the duty, the court pointed to and approved comments (d) and (f) of Section 344:

A ...possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such

visitors against the acts of third persons, or the acts of animals. He is, however under a duty to exercise reasonable care to give them protection. In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. **There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor...**Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of third parties are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. **If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.**

(Emphasis added).

As noted, **Nivens** involved criminal conduct by third persons, and the court's decision turned on the plaintiff's specific claim that 7-11's duty required it to provide on-premises security personnel. The Court was not willing to recognize that specific duty:

Here, given Nivens' decision to rely on a distinct duty for businesses to provide security personnel . . . , a duty we decline to recognize, the trial court correctly dismissed Nivens' action.

133 Wn.2d, at 207.

As pointed out above, the Supreme Court's wholesale adoption in **Nivens** of the cited sections of the Restatement (Second) of Torts, establish:

1. That a special relation exists between businesses and their customers which creates an exception to the common law rule of no duty to control the conduct of third persons;

2. The resulting duty of business owners to exercise reasonable care to warn or "protect" extends to risks of "accidental" and "negligent" (ie. non-criminal) harmful acts of third persons.

The applicability of the **Nivens** decision and its reliance on and approval of Comments (d) and (f) of the Restatement to the present case is clear. Paralleling the language of the Restatement comments, the character of Home Depot's business is such that Home Depot should have reasonably anticipated careless conduct on the part of third persons, either generally or at some particular time. Specifically, as part of its self-service operation, Home Depot encouraged and permitted other customers to load and move heavy lumber carts throughout its store and among other customers without

restriction or supervision. It should reasonably have anticipated that this activity would be done carelessly at times by some individuals. It therefore had a duty to exercise reasonable care to protect plaintiff against accidental or negligent harmful acts involving the careless movement by other customers of lumber carts.

**6. Legal proximate cause attaches to the breach of duty by Home Depot.**

Home Depot cites **Taggart v. State**, 118 Wn.2d 195, 226, 822 P.2d 243 (1992) for the accepted proposition that legal proximate cause involves considerations of policy and common sense as to how far a defendant's responsibility for the consequences of its actions should extend. Home Depot argues that recognizing legal proximate causation in this case would effectively make Home Depot the insurer of its customers' safety, and in turn amount to strict liability. It also contends that there can be no legal proximate cause if there is no duty to protect against the non-criminal conduct of third parties. No other legal authorities are cited.

With regard to legal proximate cause, **Taggart** in turn cited **Hartley v. State**, 103 Wn.2d 768, 698 P.2d 77 (1985) . That decision included extended discussion of legal proximate cause, noting the interplay between the negligence elements of duty and legal causation. It noted:

...Policy considerations and common sense dictate whether the connection of the [defendants] with the collision is too remote or insubstantial to impose liability. We then determine whether defendants stand in any such relation to the plaintiff [Mrs. Hartley] as to create any legally recognized obligation of conduct for her benefit.

Id., at 781.

**Hartley** spoke to premising legal causation on “some direct contact or special relationship between the defendant and the injured party.” The court continued: “...*In the case of an injury caused directly by a third party, we have attributed legal causation on the basis of the relationship between the defendant and the third party*”. 103 Wn.2d 768,784.

Both types of relationship exist in this case. Home Depot and Marie Geary stood in immediate and direct relation as business owner and invitee/customer. Home Depot’s duty to exercise care was owed directly to Geary and the class of invitee/customer of which she was a member. Moreover, as articulated by the Supreme Court in **Nivens v. 7-11 Hoagy’s Corner**, supra, and its adoption of Section 315 of the Restatement (Second) Of Torts, a relation is recognized between a business owner and third parties against whose harmful acts he must exercise care. There is therefore no attenuation or remoteness involved in Home Depot’s duty/relationship to plaintiff, and legal causation attaches to Home Depot’s breach of duty.

## **B. REPLY TO SCOTT'S ARGUMENTS**

**1. Appellate decisions subsequent to Sidis v. Brodie Dohrmann, Inc. have acknowledged and accounted for the Supreme Court's dicta regarding the tolling effect of RCW 4.16.170 as to "John Doe" defendants.**

Several decisions from the Court of Appeals have referred to the dicta contained in **Sidis v. Brodie/Dohrmann, Inc.**, 117 Wn.2d 325, 815 P.2d 781 (1991) which approved extending application of RCW 4.16.170 to "John Doe" defendants, and have applied its standard that a "John Doe" defendant must be "identified with reasonable particularity" to trigger the statute's tolling effect.

In **Iwai v. State**, 76 Wn.App. 308, 88 P.2d 936 (1994), Division III declined to extend the tolling effect of RCW 4.16.170 to unnamed "John Doe" defendants, rejecting plaintiff's argument based on **Sidis**. It nevertheless appeared to base its holding on the **Sidis** standard:

"Ms. Iwai's broad designation of John Doe Defendants allegedly "negligent and otherwise responsible" does not sufficiently identify WAM so as to justify tolling the statute here."

76 Wn.App., at 312. If the court's language is to be given any meaning at all, it must be affirmation that the statute of limitations **could have been**

tolled had Ms. Iwai identified the unnamed defendant more narrowly and precisely.

In **Bresina v. Ace Paving Co.**, 89 Wn.App. 277, 948 P.2d 870 (1997), the court directly addressed the Supreme Court's statement in **Sidis** regarding application of RCW 4.16.170 to "John Doe" defendants, stating:

"...[W]e assume that a plaintiff can toll the period for suing an unnamed defendant by timely filing and serving a named defendant – if, but only if, the plaintiff identifies the unnamed defendant with 'reasonable particularity' before the period for filing suit expires.."

89 Wn.App., at 282. The court's holding turned on a determination that **Bresina** had not identified the "John Doe" defendant with reasonable particularity.

The **Bresina** court also cited **Iwai v. State**, supra, noting that the **Iwai** court had also considered the **Sidis** dictum regarding application to "John Doe" defendants. Id., at 281.

**2. Contrary to Scott's assertion, the Supreme Court in Sidis did not "state that its ruling does not apply to unnamed fictitious defendants."**

In fact the Court said:

It has been argued that plaintiffs might attempt to evade the name requirement by naming numerous "John Doe" defendants but only serving one easy target such as the State, resulting in what arguably might be considered an abuse of process. There is no such abuse here and, therefore, a ruling on this issue can await another time. **We note, however, that is some cases, if identified with**

**reasonable particularity, “John Doe” defendants may be properly “named” for purposes of RCW 4.16.170.**

117 Wn.2d, at 331. (Emphasis added)

While the Sidis court reserved ruling on the applicability of RCW 4.16.170’s tolling effect to “John Doe” defendants until presented with an appropriate set of facts, its position on the subject was clear. The unavoidable implication is that if the issue of “John Doe” defendants had been before it, the Supreme Court would have held that the tolling effect of RCW 4.16.170 does apply if the defendant had been identified with reasonable particularity.

In light of the above, Scott’s assertion (Scott’s Brief, p. 14) that the Sidis court “specifically stated that its ruling does not apply to unnamed fictitious defendants” is, at the very least, incorrect and misleading.

**3. A standard requiring “identification of a party with reasonable particularity” is inherently different than and distinguishable from a standard based on requirements of due diligence or excusable neglect.**

The Supreme Court’s statement in Sidis regarding the applicability of RCW 4.16.170 to “John Doe” defendants did not suggest or endorse a requirement in the nature of “due diligence” or “excusable neglect”. Its

statement regarding the appropriate standard is clear: “...*in some cases, if identified with reasonable particularity, “John Doe” defendants may be appropriately ‘named’ for purposes of RCW 4.16.170.*” 117 Wn.2d, at 331. (Emphasis added). The context suggests that the Supreme Court felt that a requirement of identification with reasonable particularity would eliminate the risk (cited by the respondent) that application of a literal interpretation of RCW 4.16.170 to “John Doe” defendants would invite an abuse of process wherein plaintiffs could name numerous “John Doe” defendants. It must be presumed that the **Sidis** court intended a requirement that a plaintiff show that a particular alleged tortfeasor existed whose wrongdoing could be described, and whose identity might later be learned.

The **Sidis** court neither stated nor implied that application of RCW 4.16.170 to “John Doe” defendants should depend on the nature and extent of efforts undertaken to discover their true identities. It neither equated “identification with reasonable particularity” with due diligence/ absence of inexcusable neglect, nor suggested that the latter was a prerequisite of the former.

Logically, a hypothetical plaintiff could identify an unnamed defendant with reasonable particularity, by supplying enough information to describe his role and distinguish him from all other persons, without regard

to whether his efforts at discovery rose to some particular level. Conversely, a plaintiff could fail to identify an unnamed defendant with reasonable particularity, by failing to describe his role or otherwise distinguish him from all others, despite heroic efforts to discover his identity.

**4. The Scotts were not prejudiced as a result of being served with Geary's amended complaint.**

The Scotts argue that they were prejudiced as a result of being served with process on February 13, 2011, specifically contending that because they were not named in the original complaint (filed on June 7, 2010) they did not have an opportunity to search court files to learn that there was an action pending against them. Gerard Scott has declared that during the summer of 2010, he received a telephone call from Home Depot's attorney, who asked if Scott remembered the June 15, 2007 incident at Home Depot. He replied that he "did not remember the exact incident." Scott further declared that the brief conversation did not lead him to believe that a lawsuit had been filed. (CP 57-58). It is therefore highly improbable that he would have searched court records for evidence of an action based on an incident that he did not recall.

Otherwise, and for all intents and purposes, the Scotts' situation is the same as if they had been correctly named in the original complaint and Geary had opted to serve only Home Depot. Unless and until the underlying action was dismissed, or service was compelled by case scheduling requirements, Geary had the option to delay serving the Scotts pursuant to CR 4.16.170. In no way did the amendment of plaintiffs' complaint and subsequent service on the Scotts change or appreciably affect their right to be free from defending against stale claims.

The Scotts argue that the delay in service precluded Gerald's opportunity to preserve his memory or contact witnesses. The Supreme Court addressed such concerns in a general way in **Sidis v. Brodie/Dohrmann, Inc.**, supra. Referring to the lower appellate court's concern that allowing literal application of the tolling provision of RCW 4.16.170 would run counter to notions of fairness and negate the protection against stale claims embodied in the statute of limitations, the court noted that the fairness of such statutory provisions was properly a legislative determination. It further commented:

Moreover, the question of fairness raised by the Court of Appeals is a 2-edged sword. It is arguably unfair to require a plaintiff to serve all defendants within a set limitations period when it may be difficult or

impossible to determine the actual location of some defendants before discovery is underway.

117 Wn.2d, at 331.

The Scotts' complaint of prejudice or unfairness arising from delayed service is therefore properly directed to the legislature, which deemed it appropriate to permit delayed service on one or more defendants as long as one named defendant was served within the time requirements set forth in RCW 4.16.170.

**5. Challenge to the validity of the “Stipulation of Parties Re Amendment of Summons and Complaint for Damages” and Geary’s First Amended Complaint is not properly before the court on appeal.**

The Scotts moved, as part of their summary judgment motion, for an order striking Geary’s First Amended Complaint, contending that the amendment was in violation of CR 15(a) and therefore void. They argued that the amendment required the permission of the trial court and could not be properly accomplished by stipulation of the parties. While the trial court granted summary judgment in favor of the Scotts, it declined to rule that the stipulation or amended complaint were void. The Scotts are now

asking this court to review the trial court's decision to leave Geary's First Amended Complaint undisturbed.

RAP 2.4 addresses the scope of review of trial court decisions, stating in pertinent part:

...The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal..., or (2) if demanded by the necessities of the case.

RAP 5.1(d) requires that *“a party seeking cross review must file a notice of appeal, or a notice for discretionary review within the time provided by rule 5.2.”*

The Scotts did not file a notice of appeal seeking review of the trial court's failure to grant their motion to strike Geary's First Amended Complaint. Thus, while they may argue the issue in support of affirmance of the trial court's order granting summary judgment, they may not seek affirmative relief on the issue from the appellate court. **In Re Arbitration of Doyle**, 93 Wn.App.120, 127, 966 P.2d 1279 (1998).

**6. Amendment of Geary's complaint by stipulation of the parties was in accordance with CR 15(a).**

CR 15(a) provides for amendment of pleadings, in pertinent part as follows: “...*Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...*”

Literal reading of the rule supports the course pursued in amending plaintiffs' original pleadings with “written consent” and by stipulation. After Home Depot's consent was secured, leave of court to amend was not required.

The Scotts cites **Wolfe v. Legg**, 60 Wn. App. 245 (1991), which held that CR 15(a) requires permission of the court for the filing of an amended pleading once the matter is set for trial. In **Wolfe**, the trial court had denied a motion to amend to add a counterclaim, made eleven days before scheduled trial and resisted by the opposing party. In affirming, the Court of Appeals analyzed CR 15(a) in the context of the applicable facts and concluded that “proper interpretation” of the rule was that once a matter is set for trial, leave of court is required for the filing of an amended pleading. 60 Wn.App 245, 251. The court appeared to focus on

and emphasize that part of CR 15(a) which addresses amendment limits in situations in which no responsive pleading is permitted and the action has not been scheduled for trial. The court's decision is obviously context-heavy and does not address situations in which the adverse party consents to an amendment.

Moreover, cases filed in King County are now governed by a case schedule, and trial is set at the time an action is filed. Strict application of the rule in **Wolfe v. Legg** would entirely abrogate that part of CR 15(a) which approves amendments based on written consent of the parties in King County and any other Superior Courts in which trial is set upon commencement of suit.

**7. The trial court properly exercised its discretion in declining to grant Scotts' motion to strike Geary's First Amended Complaint.**

It is settled law that the amendment of pleadings is left to the discretion of the trial court and that the trial court's determination will be overturned on review only for manifest abuse of discretion. **Hines v. Todd Pacific Shipyards Corp.**, 127 Wn.App.356, 373-374, 112 P.3d 522 (2005). In the case at bar, the Scotts moved, as part of their summary judgment motion, for an order striking Geary's First Amended Complaint.

The trial court declined to grant that particular relief (CP 145-147), and clearly had discretion to do so. Moreover, the trial court's decision to leave the amended complaint undisturbed did not impair Scott's ability to seek summary judgment on the substantive issue involving the statute of limitations (on which Scott prevailed below).

#### **V. CONCLUSION**

For the foregoing reasons, Appellants request that this court reverse the trial court, vacate the judgments in favor of Scott and Home Depot, and remand for trial on all issues.

DATED: December 12, 2011.

  
\_\_\_\_\_

Paul Giersch, WSBA #11282

Attorney for Appellants

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

MARIE GEARY and ROBERT GEARY,  
husband and wife,  
Appellants,

v.

HOME DEPOT U.S.A., Inc.,  
a foreign corporation,

GERALD T. SCOTT and CHERYL SCOTT,  
Respondents.

NO. 67534-6-I

CERTIFICATE OF SERVICE OF  
REPLY BRIEF OF APPELLANTS

I certify that on December 12, 2011, I arranged for service of the Reply Brief Of Appellants by legal messenger on the parties in this matter as follows:

Dennis Woods, attorney for respondent Home Depot, U.S.A., Inc., at:  
Scheer & Zehnder, LLP  
701 Pike Street, Suite 2200  
Seattle, WA 98101

David B. Jensen, attorney for respondents Scott, at:  
Merrick, Hofstedt & Lindsey, P.S.  
3101 Western Avenue , Suite 200  
Seattle, WA 98121

DATED AT Seattle, Washington, this 12th day of December, 2011.

  
Paul Giersch, WSBA #11282  
Attorney for Appellants

LAW OFFICE OF PAUL GIERSCH, P.S.  
333 Taylor Avenue North  
Seattle, WA 98109  
Tel (206) 728-8050  
Fax (206) 728-8051

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 DEC 13 AM 10:51