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NO. 69409-0-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CINDY and MATTHEW HOLTUM, husband and wife,  
and the marital community composed thereof,

Appellants,

vs.

ROSS STORES INC.,  
a foreign corporation licensed to do business  
in the State of Washington;  
and ROSS DRESS FOR LESS, INC.,  
a Washington corporation,

Respondents.

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APPEAL FROM THE  
SUPERIOR COURT FOR SNOHOMISH COUNTY  
THE HONORABLE GEORGE F. APPEL

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BRIEF OF APPELLANTS

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## **I. INTRODUCTION**

An owner of premises owes its business invitees a duty of reasonable care to protect their safety. That duty is breached when the owner violates its own policies and procedures in ways which make the premises unsafe, or when the owner has actual or constructive notice of a dangerous condition and does nothing to cure it, or warn its invitees.

If a party intentionally destroys material evidence soon after receiving actual notice that a claim is likely, it cannot then prevail in a later motion for summary judgment which seeks to capitalize on the destruction of such evidence. In defense of such a motion, the plaintiff may provide the testimony of an expert whose opinions, while lacking in personal knowledge, are based on an explanatory theory generally recognized in the scientific community and helpful to the trier of fact.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in entering its Order Granting Defendant's Motion for Summary Judgment, including the granting of Defendant's Motion to Strike Inadmissible Evidence. (CP 6-8) (Appendix A)

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. What are the burdens of the moving party in a motion for summary judgment and the appellate standard of review?

B. Was Cindy Holttum a business invitee to whom Ross owed a duty of reasonable care?

C. Was Ross negligent in enforcing its own policies and procedures? And if it was, is this a material fact which should have precluded summary judgment?

D. Should Ross employees have known of the likelihood of grapes on the floor when a child in plain view slowly wandered through the checkout area, eating grapes from a zip-lock bag and dropping at least one of them?

E. Was the video recording of Cindy Holttum's fall material evidence in proving that the defendant's employees knew or should have known of the likelihood that a grape was on the floor?

F. Was the destruction of the video recording by Ross intentional?

G. Was the trial court obliged to deny the defendant's motion for summary judgment as a sanction for its intentional destruction of material evidence favorable to the plaintiff?

H. Was the declaration testimony of the plaintiffs' expert, Jolene Gill, "conclusory" or "lacking in factual basis" or "speculative" or "junk science" thus warranting its exclusion?

#### **IV. STATEMENT OF THE CASE**

The Appellants herein were the plaintiffs in the trial court below, Cindy and Matthew Holttum. The Respondent is Ross Stores, Inc., which also does business as "Ross Dress for Less."

The basic facts of this case taken from the testimony of the witnesses are generally undisputed, despite disagreement about nearly everything else. These facts are recited in the first twenty-four pages of the plaintiff's Opposition to Defendant's Motion for Summary Judgment (CP 83 – 105), which includes eighty-four (84) citations to the record in the trial court. The same deposition transcripts from the trial court record are included in the record on appeal. They include transcripts from the deposition of Cindy Holttum (CP 154-156 and CP 182-201); her friend Kelli Lanager (CP 158-160 and CP 234-239); store employee Matt Kubeck (CP 111-120 and 215-232); assistant store manager Sarah Gartland (CP 148-152 and 224-230); and store manager Dan Brevig (CP 122-146 and 203-213).

### **A. Cindy Holttum's Fall**

On the evening of March 11, 2011, Cindy Holttum and a friend were shopping at a Ross store near the Alderwood Mall in Lynnwood. Cindy has worked as an interior designer for the last 23 years and lived in Snohomish County all of her life. She was in very good health then, regularly worked out at the gym, and had never sustained a serious injury. Her husband, Matt Holttum, manages the Phillips Ultrasound manufacturing plant in Bothell, where he supervises nearly 250 employees.

After selecting items that they wished to purchase, the women pushed a shopping cart to the front of the store to pay for their merchandise. In the checkout area, Cindy removed the contents of the shopping cart and placed them on the counter. She then returned the shopping cart to an area just a few steps away from the checkout counter.

As she turned to go back to the counter, one of Cindy's feet suddenly went out from under her. She fell hard to the linoleum floor on her left shoulder and knew that she was hurt. Her friend helped to her feet and store personnel came to her aid as well.

Those in the immediate area noticed a crushed green grape on the floor and on the bottom of Cindy's shoe.

Cindy's shopping companion tried to take a photo of the checkout area with her phone just before leaving. However, a store employee assured her that it wasn't necessary because the store video system recorded everything. The women left the store with Cindy crying and her friend drove Cindy's car home that evening for her.

After the store closed a short while later, store employees watched the video of the fall and a period which preceded it. Altogether, they watched about 30 minutes of video. Before Cindy fell, they saw a small child, two or three years old, slowly wander through the checkout area alone, eating from a zip-lock bag full of grapes, and dropping at least one of them.

The store manager Dan Brevig was not in the store on the evening of the incident but his assistant manager, Sarah Gartland, and another employee, Matt Kubeck, were. Gartland and Kubeck saw the video recording the night of the incident and store manager Dan Brevig watched it the next day. Kubeck testified that

the video clip was helpful in understanding what happened because the checkout area is covered with several cameras.

Cindy, who is left-handed, eventually learned that she had suffered a torn labrum to her left shoulder. Despite a surgery to repair the tear, her left arm remains significantly impaired. She has a limited range of motion, strength and function in her left arm. When she was deposed approximately one year after her fall, she was still unable to lift more than five pounds with her left hand.

#### **B. Ross Had Actual Notice of Cindy Holttum's Fall**

The next morning, March 12, 2011, Cindy called the store manager to report the incident and her injury. Later the same day, Cindy also called a 1-800 telephone number she had been given to report her fall and her injury. She understood this to be the phone number of Ross' corporate headquarters in California. A few days later a Ross claims representative called Cindy also, coincidentally as she was being taken to a doctor. About one month after Cindy's fall, she received a letter from the claims adjustors for Ross, notifying her that it would deny any liability resulting from her fall and injury on the basis of its investigation of the incident.

### **C. The Intentional Destruction of the Video**

The Intellig video surveillance system used by Ross in the Alderwood store, is programmed to record over existing data every 17 days. Anything data that is recorded over after 17 days is, according to the store manager Dan Brevig, permanently lost and there is no way to recover it. Brevig made no effort to save the recording of Cindy's fall----even though it is easy to save a video clip by transferring it a CD. No one else at the store made an effort to save the video clip of Cindy's fall, either.

Brevig claimed to be unaware of a Ross policy which specifically required the preservation of any evidence that may be related to an injury or property loss. Brevig claimed in his deposition to have little or no recall of any events related to Cindy's fall, including his conversation with her on March 12, 2011.

Besides failing to preserve any evidence relating to Cindy's fall, the store was apparently very lax in enforcing any of its own policies and procedures. For example, store employees will not enforce the Ross rule about not eating or drinking in the store. The most store employees do to enforce this, is to gently remind customers of the rule. Assistant manager Sarah Gartland admitted

that this rule was not followed on the evening that Cindy slipped and fell on the grape.

The video would have likely revealed other violations of store policies and procedures. The child was apparently permitted to walk around the store, where other employees were present, eating food from a bag and without a parent. This could have been discovered from recordings of many other cameras in the store. Did the cashier at the counter closest to the child, see her eating grapes from the bag? Did the cashier see the child drop the grape? Was the cashier in a position where she likely saw the grape? We do not even know the identity of the cashier closest to the child when she dropped her food on the floor.

#### **D. The Testimony of Expert Jolene Gill**

The Holttums' expert provided a declaration to the court regarding the frequency of slip and falls in commercial and retail establishments; the common knowledge of small fruit hazards; and ways to prevent injuries to customers from such products. Ross filed a motion on shortened time to strike the declaration on grounds that her testimony failed to meet the Frye Test and ER 702; that her testimony was "speculative" and "lacked foundation;"

that her testimony was “junk science;” that she failed to provide a “factual basis” of her opinions; and that her testimony was “conclusory.” (CP 75-81).

#### **E. Ross’s Motion for Summary Judgment**

On September 13, 2012, the Honorable George Appel of Snohomish County Superior Court heard oral argument on the defendant’s motion for summary judgment. The Court also heard argument on the defendant’s motion on shortened time to strike the expert testimony of the plaintiff’s expert. In its order of the same date, the Court granted both of the defendant’s motions and dismissing the plaintiffs’ complaint with prejudice. (CP 2-4) (Appendix A). It is from this order which the Appellants timely filed their notice of appeal on October 5, 2012.

### **V. ARGUMENT**

#### **A. The Court should review the trial court’s grant of summary judgment under the de novo standard and first determine if the moving party has proven the absence of any material fact dispute.**

This court reviews de novo the trial court’s order granting Ross’s motion for summary judgment, dismissing the Holttums’ claims as a matter of law. Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010). The court looks at the same record considered by the trial court and determines whether

the pleadings, declarations and documentary evidence raise a material issue of fact for trial. In so doing, the court must view all evidence in a light most favorable to the non-moving party. Johnson v. Camp Automotive, Inc., 148 Wn.App. 181, 184, 199 P. 3d 491 (2007).

The moving party has the initial burden of establishing the absence of an issue of material fact. Kenney v. Read, 100 Wash.App. 467, 471, 997 P.2d 455 (2000), SAS America, Inc. v. Inada, 71 Wash. App 261, 263, 857 P.2d 1047 (1993). “The issue of negligence and proximate cause are generally not susceptible to summary judgment.” Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

Where a defendant’s compliance with the duty of reasonable care presents an issue of fact, summary judgment may not be granted; in such a case, a trial “is absolutely necessary” to resolve disputed issues of fact. Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

**B. Cindy Holtum was a business invitee to whom Ross owed a duty of reasonable care.**

The legal duty owed by a property owner to a person entering the premises depends upon whether the entrant falls

under the common law category of a trespasser, licensee, or invitee. Iwai v. State, 129 Wn.2d 84, 90- 91, 915 P. 2d 1089 (1996). For business invitees, Washington adopts the test articulated in the Restatement (Second) of Torts § 343 (1965), which provides as follows:

A possessor of land is subject to liability for physical harm caused to his [or her] invitees by a condition on the land if but only if, he [or she]

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves from it, and
- (c) fails to exercise reasonable care to protect them against the danger.

*Id.* at 93- 94.

As to the first of these elements— knowledge— the rule in Washington is that a business invitee plaintiff must show:

- 1) [T] hat an unsafe condition was caused by the proprietor or its employees or
- 2) the proprietor had actual or constructive notice of the dangerous condition. Coleman v. Ernst Home Center, Inc., 70 Wash. App. 213, 217, 853 P. 2d 473 (1993).

Constructive notice of a temporary unsafe condition exists "if the unsafe condition has been present long enough that a person exercising ordinary care would have discovered it." Wiltse v. Albertson's Inc., 116 Wn.2d. 452, 459, 805 P. 2d 793 (1991).

The child of tender years cannot be held legally accountable for her conduct in civil or criminal proceedings. See, for example, RCW 9A.04.050 (children under the age of eight years are incapable of committing crime).

**C. The negligent failure by Ross to enforce its own policies and procedures is a material fact which precludes summary judgment.**

"Internal directives, department policies, and the like may provide evidence of the standard of care, and therefore be evidence of negligence." Joyce v. Department of Corrections, 155 Wn.2d 306, 324, 119 P. 3d 825 (2005). In Joyce, the Court held that a Department of Corrections policy directive requiring community corrections officers to report violations of sentencing conditions provided evidence of the Department's breach of its duty of reasonable care. 155 Wn.2d at 323-24.

**D. Ross employees knew or should have known of the likelihood of grapes on the floor when a child in pain view wandered through the checkout area, eating and spilling grapes from a zip-lock bag.**

The undisputed facts reveal that an unescorted child two or three years of age, wandered throughout the checkout area for about 30 seconds, eating grapes from a zip-lock bag. This fact alone violated two policies of the store which were purportedly intended to protect the safety of its customers: the ban on food and beverages in the store, and the requirement that small children be escorted or accompanied by adults.

In its motion for summary judgment, Ross argues that, because it did not sell grapes, its employees could not have known one might be on the floor. This makes no sense. If store employees see customers eating and drinking in the store, shouldn't they suspect that they may well end up on the floor?

The Holttums respectfully assert that the evidence herein is even more compelling than if Ross *did* sell grapes. A three-year old child cannot be reliably trusted not to spill food; in fact, it is quite likely the opposite. A small child will more likely drop and spill food and beverages than it will not when walking through a large store unescorted.

**E. The video recording of Cindy Holttum's fall was not only material evidence; it was the only evidence of whether the defendant's employees knew or should have known of the grape on the floor.**

There is no replacement for the destroyed video recording of Cindy Holttum's fall. Store employees testified that they saw virtually everything material to the fall: the child wandering through the checkout area eating and dropping grapes; the employees in the area and what they may or may not have done in response to seeing the child – or their inattentiveness if they did not; the grape on the floor; whether any employees saw it or should have seen it; and finally, Cindy Holttum's fall.

**F. The destruction of the video recording by Ross was intentional and deliberate.**

In Pier 67, Inc., v. King County, 89 Wash.2d 379, 573 P.2d 2 (1977), the Washington Supreme Court reaffirmed that when a party fails to produce relevant evidence without satisfactory explanation, "the only inference which the finder of fact may draw is that such evidence would be unfavorable to him". This holding has been reiterated in Henderson v. Tyrrell, 80 Wash.App. 592, 606, 910 P.2d 522 (1996), and Marshall v. Bally's PacWest, Inc., 94 Wn.App. 372, 972 P.2d 475 (1999), and Homeworks Construction, Inc. v. Wells, 133 Wa.App. 892, 138 P.3d 654 (2006).

In Henderson, a Division Three case, the plaintiff was injured in a single car accident when the vehicle left the roadway at

a high rate of speed. 80 Wash.App. at 596. The defendant Tyrrell claimed that he was a passenger in the vehicle and that Henderson was the driver. Two years after the accident, Tyrrell had the car salvaged and destroyed, even though Henderson's attorney asked Tyrrell to preserve the vehicle. Henderson then asked the trial court to sanction Tyrrell for the intentional destruction of material evidence. 80 Wash.App. at 603-604. However the trial court declined to do so because of the passage of time----two years. *Id.*

On appeal, the Henderson Court in Division Three adopted an Alaska test for determining when spoliation requires a sanction. Sweet v. Sisters of Providence, 895 P.2d 484, 491 (Alaska 1995).

Describing the test, the Homeworks Court stated:

Under this test, the trial court weighs (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. Henderson, 80 Wash.App. at 607. After weighing these two general factors, the trial court uses its discretion to craft an appropriate sanction. Henderson, 80 Wash.App. at 604, 910 P.2d 522. This division adopted the Henderson test in Marshall v. Bally's Pacwest, Inc., 94 Wash.App. 372, 381-82, 972 P. 2d 475 (1999). Homeworks, 133 Wash.App. at 899.

The Marshall case, which was cited in the Homeworks decision, involved another issue of spoliation where the passage of

time was the culprit, not the intent of the party alleged to have destroyed the evidence. Four years passed from the date of the incident until the destruction of the evidence.

Here, Dan Brevig permitted the destruction of video recording 17 days after Cindy Holttum's fall. Worse, Brevig was personally on notice of Cindy's fall and her resulting injury, as were other store employees, Ross's corporate headquarters, and its claims adjustor.

**G. The denial of the defendant's motion for summary judgment was the minimum sanction that the court should have imposed for the defendant's intentional destruction of material evidence.**

A trial court's decisions regarding sanctions for discovery violations are reviewed for abuse of discretion. Henderson v. Tyrell, 80 Wash.App. 592, 604, 910 P.2d 522 (1996). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Perrell, 86 Wash.App. 312, 319, 936 P.2d 426 (1997). Here, the trial court ignored Ross's intentional destruction of the video recording of the entire incident which is the subject matter of this action. Ross's manager failed to provide any rational or reasonable basis for his failure to save the

recording, knowing that it would be lost forever if he failed to do so. Would Ross have saved the recording if it helped them in this litigation? The answer is almost certainly “yes.” The court should therefore have sanctioned Ross by, at a minimum, denying its motion for summary judgment. Had the plaintiffs had the video recording when Ross filed its motion for summary judgment, they very likely would have had the benefit of dispositive evidence to help her defend the motion.

In the trial court, Ross cited and provided to the court a copy of the case Homeworks Construction, Inc. v. Wells, 133 Wa.App. 892, 138 P.3d 654 (2006). (See Ross’s reply brief at CP 39-54). In Homeworks, an insurer for a general contractor paid a homeowners’ claim for damages caused by an improperly installed synthetic stucco material known as EIFS. The general contractor then filed suit against the EIFS installer/subcontractors. The homeowners repaired the house before the defendant-subcontractors were able to inspect the house. The trial court found that the general contractor spoliated evidence and no less restrictive remedy was available and granted the defendants’ motion for summary judgment. Division II of the Court of Appeals

reversed, holding that dismissal was improper since neither the general contractor nor its insurer knew that the homeowners were going to repair the damage, and neither had any control over the premises or the homeowners. *Id.* at 894.

The Homeworks case is easily distinguishable from the case at bar. Here, Ross had exclusive possession and control of the video recording. Even more compelling, is that Ross had actual notice on multiple occasions, that a claim would likely arise from the incident that was recorded. Ross's manager Dan Brevig was unable to provide any rational explanation for his intentional destruction of the video. The trial court should therefore have applied a sanction which, at a minimum, would have precluded summary judgment for the defendant. Otherwise, defendants in other cases will surely destroy material evidence if it harmful to the defense, knowing that they will not be sanctioned by the court.

**H. The denial of the defendant's motion for summary judgment was the minimum sanction that the court should have imposed for the defendant's intentional destruction of material evidence.**

As Washington courts have previously stated in cases involving the spoliation of evidence, our state authorities on this evidentiary subject are "sparse." Although Washington courts

agree on what spoliation is, and when it is improper, no cases have adequately addressed the range or kinds of sanctions that should be levied when a wrongful spoliation occurs. At a minimum, however, the Holttums urge this Court to adopt the following rule: When a party's wrongful spoliation of evidence even arguably prevents the opposing party from fully defending a motion for summary judgment, that motion should be denied.

**I. The declaration testimony of the plaintiffs' expert, Jolene Gill, was not "conclusory" or "lacking in factual basis" or "speculative" and was therefore admissible.**

In opposition Ross's motion for summary judgment, the plaintiffs provided the eight-page declaration of their expert, Jolene Gill. Ross then filed a motion on shortened time to strike the declaration, complaining it was "conclusory" or "lacking in factual basis" or (in its reply brief) "speculation" and "without foundation." Although Gill lacked personal knowledge of the testimony of the witnesses, she was able to provide several opinions and conclusions helpful to the trier of fact, based on the bare facts evident from the complaint. The court committed error when it granted Ross's motion and excluded Gill's testimony.

On August 1, 2012, the plaintiffs notified Ross's counsel that they were retaining two experts including Jolene Gill of Spokane, a

forensic expert in human factors engineering. CP 13-14. The plaintiffs also described the scope of her involvement, which included coefficient of friction analysis, the dangers of fruit and food stuffs on floors in commercial settings, and other issues. The plaintiffs provided an eight-page declaration by Ms. Gill in opposition to the defendant's motion for summary judgment, (CP 161-171), which included her resume.

Ms. Gill's testimony concerned the hazards that small fruit items pose in commercial retail establishments like Ross department stores. According to its own website, Ross is "the largest off-price apparel and home fashion chain in the United States with 1,097 locations . . ." (This quote is taken from a page of Ross's website at:

<http://phx.corporateir.net/phoenix.zhtml?c=64847&p=irol-IRHome>).

In their opposition to Ross's motion to strike Ms. Gill's testimony, the plaintiffs asserted that:

1. Ms. Gill's curriculum vitae is attached to her declaration and the defense has not attacked her qualifications as an expert, but rather her lack of personal knowledge of the facts of this case.
2. The focus of Ms. Gill's professional work is safety and risk management. Par. 5.

3. Ms. Gill has “analyzed hundreds of cases involving slip and falls, including falls on small fruit items.” *Id.*
4. Her work has included cases against Costco, Pire 1, K-Mart, Walmart, Rite-Aid, Shucks, Macy’s, Fred Meyer, Lowes, Sportsmen’s Warehouse, Total Video, Cash n Carry, Home Depot, and other retail establishments. Par. 6.
5. Falls are “the number one cause of accidental injuries in the hospitality industry, fast food industry, large retail stores, and grocery stores.” Par. 10.
6. Therefore, “[t]he management of fall hazards is one of the most fundamental responsibilities faced by any retail store or business establishment and its risk manager.” *Id.*
7. “The extent to which a surface can resist the slipping of a person’s foot can be determined by measuring the coefficient of friction, which technically is called the slip resistance index if the surface is contaminated.” Par. 11.
8. “The coefficient of friction is defined as the ratio of the minimum horizontal force necessary to induce motion divided by the vertical force acting on the object.” *Id.*
9. “Small fruit items such as grapes, blueberries and raspberries, are well understood to be particularly hazardous on a walking surface.” Par. 14.
10. “[S]uch fruit items are notoriously slippery; that is, they are far more slippery than water alone (i.e. based on prior test results) which leads to a more rapid slip and more violent fall (i.e. greater risk for a more severe injury).” *Id.*
11. “[T]he degree of potential injury is extreme if a user fails to detect these hidden hazards; an uncontrolled slip and fall onto rigid concrete floors can cause severe, life altering injuries.” Par. 15.

12. "Ms. Gill has "measured the slip resistance on a wide variety of walking surfaces when contaminated with grapes and other small fruit items [and] without exception, the slip resistance of such surfaces has fallen well below the generally accepted threshold for a safe walking surface." Par. 16.
13. "Typically flooring surfaces in a retail environment are smooth vinyl composition tile(VCT) or smooth ceramic tile." Par. 17.
14. "The slip resistance of such surfaces are typically very safe when dry, but fall well below the threshold for a safe walking surface when wet with water alone (i.e. typically in the 0.35 range). *Id.*
15. "A slip resistance in the range of 0.35 is generally classified as hazardous because of its propensity to induce slip-and-fall incidents." Par. 18.
16. "This would result in an extraordinarily slippery and dangerous condition." Par. 18.
17. "In order to ensure the safety of their customers and employees alike, a commercial enterprise such as the store operated by the defendant Ross, must employ some type of risk management program." Par. 21.
18. "To be effective at minimizing the potential harm to people, any risk management program must be comprised of five basic components: Hazard Analysis, Plan Development, Plan Implementation, Plan Evaluation, and documentation," *Id.*
19. "This necessarily involves the implementation of policies and procedures to accomplish these objectives. However, no matter how well-drafted and carefully designed, no policy or procedure will be effective in accomplishing these goals, if it is not enforced." *Id.*

20. “[O]ne of the most basic requirements of such risk management programs is the control of fall hazards, particularly for well-known hazardous conditions such as contaminated smooth floors.” Par. 22.

21. “Ross was, or should have been, well aware of the root causes of the hazard, namely the combination of liquid or food falling on its smooth flooring creating a dangerous slippery condition.” Par. 26.

(CP 3-5).

The plaintiffs also cited authority to support the admissibility of Ms. Gill’s testimony and distinguished each of the cases cited in the defendant’s brief, which was apparently taken from another case.

Expert testimony is admissible when the witness qualifies as an expert, the opinion is based on an explanatory theory generally recognized in the scientific community, and the testimony would help the trier of fact. State v. Phillips, 123 Wn.App. 761, 765, 98 P.3d 838 (2004), *review denied*, 154 Wn.2d 1014 (2005). ER 702 also permits admission of qualified expert testimony when scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue. Phillips, 123 Wn. App. at 765.

• A fact witness must have personal knowledge. However, an

expert need not have personal knowledge of the evidence prior to trial. See ER 703. See also Lodis v. Corbis Holdings, Inc., Docket Number 67215-1, pg. 21 (Div. I, filed 01/14/2013).

The test for whether a witness is an expert or fact witness is an expert or fact witness is whether the facts or opinions possessed by the expert were obtained for the specific purpose of preparing for litigation. Peters v. Ballard, 58 Wn.App. 921, 927, 795 P. 2d 1158 (1990).

**J. The defendant's negligence was the proximate cause of the Cindy Holttum's injury.**

In its motion for summary judgment, Ross claimed that it was neither "the cause-in-fact nor the legal cause of the incident." In fact, Ross was both.

**A. Proximate Cause**

To prove negligence, a plaintiff must show that the breach of duty is the proximate cause of the plaintiff's injuries. Petersen, 100 Wn.2d at 435. Proximate cause consists of two elements: cause in fact and legal causation. Taggart v. State, 118 Wn. 2d 195, 225 (1992) (citing Hartley v. State, 103 Wn.2d 768, 777 (1985)).

"Cause in fact concerns the 'but for' consequences of an act: those events the act [or omission] produced in a direct, unbroken

sequence, and which would not have resulted had the act [or omission] not occurred.” *Id.* at 226 (citing Hartley, 103 Wn.2d at 778). “Legal causation rests on considerations of policy and common sense as to how far the defendant’s responsibility for the consequences of its actions should extend.” *Id.* (citing Hartley, 103 Wn.2d at 779).

### **1. Cause in Fact**

“If an event would have occurred regardless of a defendant’s conduct, that conduct is not the [cause in fact] of the plaintiff’s injury.” Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 74 (1984). To survive summary judgment on the issue of cause in fact, a plaintiff must demonstrate that a reasonable jury might conclude that if the defendant had taken the steps plaintiff asserts were necessary to satisfy defendant’s duty, then plaintiff’s injury would not have occurred. See Taggart, 118 Wn.2d at 227.

“As a determination of what actually occurred, cause in fact is generally left to the jury . . . such questions of fact are not appropriately determined on summary judgment unless but one reasonable conclusion possible.” Hartley, 103 Wn.2d at 778. Moreover, in Petersen, the Washington Supreme Court stated that:

“We have consistently held that “the question of [cause in fact] is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.” Peterson, 100 Wn.2d at 436 (quoting Mathers v. Stephens, 22 Wn.2d 364, 370 (1945)); see Kim v. Budget Rent-a-Car, 143 Wn.2d 190, 203 (2001) (stating that “[t]he question of cause in fact is normally left to the jury, however, if reasonable minds could not differ, this factual question may be determined as a matter of law” (internal quotation marks omitted)).

## **2. Legal Causation**

Legal causation “involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on ‘mixed considerations of logic, common sense, justice policy, and precedent.’” Hartley, 103 Wn.2d at 779 (quoting King v. Seattle, 84 Wn.2d 239, 250 (1974) (overruled on other grounds by Seattle v. Blume, 134 Wn. 2d 243 (1997))). In Taggart, the Washington Supreme Court stated that “[t]he question of legal causation is so intertwined with the question

of duty that the former can be answered by addressing the latter.”  
118 Wn. 2d at 226 (citing Hartley, 103 Wn.2d at 779-80).

**B. Ross’s Negligence Is a Material Factual Dispute Which Precludes Summary Judgment**

Appellant needed to establish the elements of her negligence claim: (1) duty, (2) breach of duty, (3) resulting injury, and (4) proximate cause between the breach and the injury. Tincani v. Inland Empire Zoological Soc y, 124 Wn.2d 121, 127-28,875 P.2d 621 (1994). A property owner or the party in control of the property owes a legal duty to a person entering the property.

**VI. CONCLUSION**

The Holttums respectfully request that this Court reverse the trial court’s summary judgment and remand this case for trial.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of January, 2013.

  
\_\_\_\_\_  
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**FILED**

Civil Motions Judge  
Hearing Date: September 13, 2012  
2012 SEP 13 AM 2: 430 a.m.

SONYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH.



CL15430814

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

CINDY and MATTHEW HOLTUM,  
husband and wife, and the marital community  
composed thereof,

NO. 11-2-04886-0

Plaintiffs,

~~PROPOSED~~

v.

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

ROSS STORES INC., a foreign corporation  
licensed to do business in the State of  
Washington; and ROSS DRESS FOR LESS,  
INC., a Washington corporation,

Defendants.

THIS MATTER having come before the Court on Defendants Ross Stores, Inc., and  
Ross Dress for Less, Inc.'s Motion for Summary Judgment (the "Motion"), and the Court  
having considered the Motion, Declarations of Jacob M. Downs, Sara Gartland, and Matthew  
Kubek, and attached exhibits, Plaintiffs' Opposition to the Defendants' Motion for Summary  
Judgment, the Declaration of Eugene N. Bolin Jr. and attached exhibits 1-5, the Declaration of  
Joellen Gill, Defendants' Reply in support of Motion for Summary Judgment, the Second  
Declaration of Jacob M. Downs and the attached exhibit, Defendants' Motion to Strike  
Inadmissible Evidence Submitted by Plaintiffs, Defendants' Motion to Shorten Time to Hear  
Defendants' Motion to Strike, the Declaration of D. Michael Reilly, and the file herein, NOW,  
and Plaintiffs' opposition to the motion to strike dated September 12,  
THEREFORE,

It is hereby ORDERED ADJUDGED and DECREED that:

ORDER GRANTING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT - 1

**CLOSED**

**ORIGINAL**

113811.0034/5478052.1

LANE POWELL PC  
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206.223.7000 FAX: 206.223.7107

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 FEB - 5 PM 3:52

2012

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1 1. Defendants' Motion to Shorten Time to Hear Defendants' Motion to Strike is  
2 hereby GRANTED.

3 2. Defendants' Motion to Strike Inadmissible Evidence Submitted by Plaintiffs is  
4 GRANTED.

5 3. Defendants' Motion for Summary Judgment is GRANTED and Plaintiffs'  
6 claims and causes of action are hereby dismissed with prejudice in their entirety. Defendants'  
7 Motion for Summary Judgment is GRANTED with the following findings:-

8 a. ~~The presence of a grape in a checkout aisle at Ross's Lynwood,~~  
9 ~~Washington store on March 23, 2011 was not a foreseeable hazardous condition.~~

10 b. ~~That Ross conducted reasonable inspections of the premises of Ross's~~  
11 ~~Lynwood, Washington Store during its business hours on March 23, 2011.~~

12 c. ~~That Ross did not have constructive notice of a grape being on the floor~~  
13 ~~of a checkout aisle at its Lynwood, Washington store before Plaintiff fell on~~  
14 ~~March 23, 2011.~~

15  
16 DATED this 13<sup>th</sup> day of September, 2012.

17  
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19 JUDGE/COMMISSIONER

20 Presented by:  
21 LANE POWELL PC

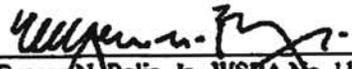
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23 By   
24 D. Michael Reilly, WSBA No. 14674  
25 Jacob M. Downs, WSBA No. 37982  
26 Attorneys for Defendants

27 ORDER GRANTING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT - 2

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1 Copy Received; Approved as to Form; Notice of  
2 Presentation Waived:

3 THE LAW OFFICES OF EUGENE N. BOLIN JR.

4 By   
5 Eugene N. Bolin, Jr., WSBA No. 11450  
6 Attorney for Plaintiffs

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ORDER GRANTING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT - 3

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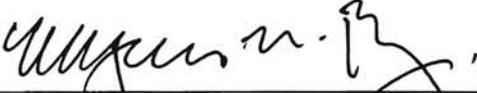
## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 31, 2013, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk	<input type="radio"/> via U.S. Mail
Court of Appeals – Division I	<input type="radio"/> via E-mail
One Union Square	<input type="radio"/> via Facsimile
600 University Street	<input type="radio"/> via Overnight Mail
Seattle, WA 98101-4170	<input type="radio"/> via Messenger
D. Michael Reilly, WSBA #14674	<input type="radio"/> via U.S. Mail
Jacob M. Downs, WSBA #37983	<input type="radio"/> via E-mail
Lane Powell, PC	<input type="radio"/> via Facsimile
1420 Fifth Avenue, Suite 4100	<input type="radio"/> via Overnight Mail
Seattle, WA 98101	<input type="radio"/> via Messenger
206-223-7000	
Email: <a href="mailto:reillym@lanepowell.com">reillym@lanepowell.com</a>	
Email: <a href="mailto:downsj@lanepowell.com">downsj@lanepowell.com</a>	

DATED this 31<sup>st</sup> day of January, 2013, at Edmonds, WA.

  
\_\_\_\_\_  
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