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No. 69409-0-1

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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

Plaintiffs/Appellants

v.

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/Respondents

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ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT

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**BRIEF OF RESPONDENTS ROSS STORES, INC. AND  
ROSS DRESS FOR LESS, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. COUNTER-STATEMENT OF THE ISSUES .....	2
III. COUNTER-STATEMENT OF THE CASE .....	4
A. Ross’ Ongoing Inspections of the Premises.....	4
B. Plaintiff Shops at Ross .....	5
C. Ross Inspects the Area Before Holttum Allegedly Fell .....	5
D. Holttum Appears to Have Slipped and Fallen on a Grape – A Product Holttum Admits Ross Does Not Sell .....	6
E. Holttum First Gives Notice of a Claim Nearly a Month Later .....	8
F. Based on These Undisputed Facts, the Trial Court Grants Ross’ Motion for Summary Judgment, Rejecting Holttum’s Spoliation Argument and Striking her Inadmissible “Expert” Declaration .....	9
IV. ARGUMENT .....	10
A. Holttum’s Statement of the Case Should Be Disregarded .....	10
B. Standard of Review.....	11
C. Applying Well-Established Washington Premises Law to the Undisputed Facts, Holttum’s Case Fails as a Matter of Law .....	13
D. Holttum Fails, as a Matter of Law, to Show Cause in Fact or Legal Causation .....	22

E.	The Trial Court Did Not Abuse Its Discretion when Rejecting Holttum’s Spoliation Argument .....	24
F.	The Trial Court Correctly Excluded Holttum’s Expert Declaration .....	28
G.	Holttum Does Not Challenge the Trial Court’s Grant of Summary Judgment on Mr. Holttum’s Loss of Consortium Claim .....	35
V.	CONCLUSION.....	35

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>CASES</u>	
<u>Albright v. State,</u> 65 Wn. App. 763, 829 P.2d 1114 (1992).....	29
<u>Anderson Hay &amp; Grain Co., Inc. v. United Dominion Industries, Inc.,</u> 119 Wn. App. 249, 76 P.3d 1205 (Div. 3 2003).....	33
<u>Arment v. Kmart Corp.,</u> 79 Wn. App. 694, 902 P.2d 1254 (1995).....	passim
<u>Balise v. Underwood,</u> 62 Wn.2d 195, 381 P.2d 966 (1963) (Op. Br., p. 10) .....	12, 13
<u>Bellevue Plaza, Inc. v. City of Bellevue,</u> 121 Wn.2d 397, 851 P.2d 662 (1993).....	32
<u>Brant v. Market Basket Stores, Inc.,</u> 72 Wn.2d 446, 433 P.2d 863 (1967).....	15
<u>Carlyle v. Safeway Stores, Inc.,</u> 78 Wn. App. 272, 896 P.2d 750 (1995).....	12, 18, 19, 21
<u>Coleman v. Ernst Home Center,</u> 70 Wn. App. 213, 853 P.2d 473 (1993) .....	1, 19, 28
<u>Daubert v. Merrill Dow Pharm., Inc.,</u> 509 U.S. 579 (1993).....	30
<u>Fenimore v. Drake Constr. Co.,</u> 87 Wn.2d 85, 549 P.2d 483 (1976).....	30
<u>Fernandez v. State,</u> 49 Wn. App. 28, 741 P.2d 1010 (1987).....	12, 15
<u>Frye v. United States,</u> 293 F. 1013 (D.C. Cir. 1923).....	30

<u>Greater Harbor 2000 v. City of Seattle,</u> 132 Wn.2d 267, 937 P.2d 1082 (1997).....	11
<u>Grimwood v. Univ. of Puget Sound, Inc.,</u> 110 Wn.2d 355, 753 P.2d 517 (1988).....	29, 30
<u>Griswold v. Kilpatrick,</u> 107 Wn. App. 757, 27 P.3d 246 (2001).....	34
<u>Hartley v. State,</u> 103 Wn.2d 768, 698 P.2d 77 (1985).....	22, 23
<u>Henderson v. Tyrrell,</u> 80 Wn. App. 592, 910 P.2d 522 (1996).....	25, 26, 28
<u>Hertog v. Seattle,</u> 138 Wn.2d 265, 979 P.2d 400 (1999).....	23
<u>Hiskey v. Seattle,</u> 44 Wn. App. 110, 720 P.2d 867, <u>rev. denied</u> , 107 Wn.2d 1001 (1986).....	31
<u>Homeworks Const., Inc. v. Wells,</u> 133 Wn. App. 892, 138 P.3d 654 (2006).....	passim
<u>Ingersoll v. DeBartolo, Inc.,</u> 123 Wn.2d 649, 869 P.2d 1014 (1994).....	12, 16, 18, 21
<u>Jones v. Allstate Ins. Co.,</u> 146 Wn.2d 291, 45 P.3d 1068 (2002).....	11
<u>Marshall v. Bally's Pacwest, Inc.,</u> 94 Wn. App. 372, 972 P.2d 475 (1999).....	25
<u>Miller v. Likins,</u> 109 Wn. App. 140, 34 P.3d 835 (2001).....	32
<u>Orion Co. v. State,</u> 103 Wn.2d 441, 693 P.2d 1369 (1985).....	31
<u>Pier 67, Inc. v. King County,</u> 89 Wn.2d 379, 385, 573 P.2d 2 (1977).....	26

<u>Pimentel v. Roundup Co.</u> , 100 Wn.2d 39, 666 P.2d 888 (1983).....	17, 18, 19, 21
<u>Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha</u> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	32
<u>Reese v. Stroh</u> , 74 Wn. App. 550, 874 P.2d 200 (1994), <u>aff'd</u> , 128 Wn.2d 300 (1995).....	30
<u>Riccobono v. Pierce County</u> , 94 Wn. App. 254, 966 P.2d 327 (1998).....	32
<u>Rice v. Offshore Systems, Inc.</u> , 167 Wn. App. 77, 272 P.3d 865 (2012).....	10
<u>Ruff v. County of King</u> , 125 Wn.2d 697, 887 P.2d 886 (1995) (Op. Br., p. 10) .....	13
<u>Safeco Ins. v. McGrath</u> , 63 Wn. App. 170, 817 P.2d 861 (1991), <u>rev. denied</u> , 118 Wn.2d 1010 (1992).....	31
<u>Seven Gables Corp. v. MGM/UA Entm't Co.</u> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	11
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	30
<u>State v. Greene</u> , 139 Wn.2d 64, 984 P.2d 1024 (1999), <u>cert. denied</u> , 529 U.S. 1090 (2000).....	30
<u>State v. Jones</u> , 130 Wn.2d 302, 922 P.2d 806 (1996).....	30
<u>State v. Maule</u> , 35 Wn. App. 287, 667 P.2d 96 (1983).....	31
<u>Stenger v. State</u> , 104 Wn. App. 393, 16 P.3d 655, <u>rev. denied</u> , 144 Wn.2d 1006 (2001).....	31

<u>Theonnes v. Hazen</u> , 37. Wn. App. 644, 649, 681 P.2d 1284 (1984).....	32
<u>Washington State Physicians Ins. Exch. v. Fisons</u> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	31
<u>Whitchurch v. McBride</u> , 63 Wn. App. 272, 818 P.2d 622 (1991), <u>rev. denied</u> , 118 Wn.2d 1029, 828 P.2d 564.....	22
<u>Wilson v. Frye</u> , 2008 WL 4561505 (Wn. App. 2008).....	27, 30
<u>Wiltse v. Albertson's, Inc.</u> , 116 Wn.2d 452, 805 P.2d 793 (1991).....	14, 16, 21
<u>Young v. Key Pharms., Inc.</u> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	11

RULES AND STATUTES

Civil Rule 56(e).....	3, 29
ER 104 .....	30
ER 702 .....	3, 30, 31, 32
ER 703 .....	32
RAP 10.3(a)(5).....	2, 4, 10, 27

OTHER AUTHORITIES

Restatement (Second) of Torts § 343 (1965).....	13, 14
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## I. INTRODUCTION

This is a straightforward slip-and-fall case. Appellant Cindy Holttum's claim is that she slipped and fell on a grape while shopping at a Ross store.<sup>1</sup> The undisputed facts and well-settled precedent justify the trial court's grant of summary judgment as a matter of law for at least four reasons: **(1)** Defendants Ross owed no duty of care because Ross does not sell grapes and Ross lacked actual or constructive notice of an errant "grape" brought in to the store by a customer; **(2)** An errant grape (brought in by a customer) on the floor is not a foreseeably dangerous condition; **(3)** Ross met any purported duty because it is undisputed Ross inspected the premises *hourly* before the incident. Coleman v. Ernst Home Center, 70 Wn. App. 213, 222-23, 853 P.2d 473 (1993) (Slip and fall--summary judgment granted: Premises owner met duty as matter of law because it inspected premises "*once a day*[.]"); and **(4)** Ross was not the cause in fact or legal cause of the incident.

The following facts are undisputed:

- Ross does not sell grapes or other produce.
- On the day of the incident, store inspections occurred once every hour throughout store hours. Two Ross employees

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<sup>1</sup> Holttum and her husband both brought claims, but the Plaintiffs will be referred to in the singular for purposes of this brief.

inspected the area of the incident moments before and observed no grape or any hazard.

- Ross posts a no food and drink policy conspicuously at the store entrance, and enforces this policy.
- Ross did not observe any customer with grapes, or any grapes on the floor *before the incident*. Plaintiff saw no grapes before her fall and does not know how long the grape had been on the ground before she fell.

The trial court properly granted Ross' motion for summary judgment.

The trial court also properly rejected Holttum's spoliation argument because she failed to show that Ross intentionally destroyed surveillance video of the area or that the video was indispensable to Holttum's case, given the undisputed facts here. Finally, the trial court properly excluded Holttum's expert, who lacked personal knowledge of this case and offered unsupported conclusions based on her theory that retail store floors are slippery. To accept this theory would redraw Washington's well-established rules on premises liability. The trial court's rulings should be affirmed.

## **II. COUNTER-STATEMENT OF THE ISSUES**

A. Whether Holttum's Statement of the Case should be disregarded for failing to comply with the record citation requirements of RAP 10.3(a)(5)?

B. Whether summary judgment should be affirmed where Holttum has no evidence that Ross had actual or constructive knowledge of the grape on the store floor prior to the incident?

C. Whether summary judgment should be affirmed where Holttum has no evidence that the grape on the floor was a “continuous or reasonably foreseeable risk,” given Ross’ mode of operation, i.e., that it does not sell grapes?

D. Whether summary judgment should be affirmed where Holttum fails, as a matter of law, to show that Ross was the cause in fact or legal cause?

E. Whether, applying the abuse of discretion standard, the trial court’s rejection of Holttum’s spoliation argument should be affirmed?

F. Whether Holttum’s “expert” declaration should be disregarded where it fails to meet the standards for expert declarations under Civil Rule 56(e) and ER 702?

G. Whether the trial court’s grant of summary judgment on Mr. Holttum’s loss of consortium claim should be affirmed where the ruling goes unchallenged on appeal?

### III. COUNTER-STATEMENT OF THE CASE<sup>2</sup>

#### A. Ross' Ongoing Inspections of the Premises.

Ross is a discount clothing and housewares retailer. It is undisputed that Ross does not sell grapes or other produce. (CP 191) Deposition of Cynthia Leigh Holttum ("Holttum Dep.") at 92:20-21 ("They do not sell grapes.").

As part of its commitment to customer and employee safety, Ross undertakes efforts to keep its stores clean so as to prevent slips, trips, and falls. See, e.g., (CP 212) Deposition of Daniel Brevig ("Brevig Dep.") at 58:16-23. For example, the store protection specialist ("SPS") and the manager on duty ("MOD") each conduct separate inspection walks of the store once every hour. See (CP 23) Deposition of Matthew Kubek ("Kubek Dep.") at 23:13-20. Each associate is instructed to pick up and clean up any debris or potential hazards. (CP 212) Brevig Dep. at 58:16-20. Ross has daily rally meetings where safety is discussed and also has frequent store safety meetings. (CP 210) Brevig Dep. at 28:2-10.

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<sup>2</sup> As discussed further below, Holttum's Statement of the Case lacks citation to the record in violation of RAP 10.3(a)(5) and should be disregarded. See Section IV.A. To be clear, however, Ross' Counter-Statement of the Case does not raise any disputed facts, but rather clarifies the undisputed facts with citation to the record before the trial court and on appeal.

In addition to its frequent inspection of the premises, Ross posts a no food and drink policy conspicuously at the store entrance. (CP 221) Kubek Dep. at 29:11-15; (CP 209) Brevig Dep. 21:20-25. When Ross employees actually observe a customer violating this policy, associates are trained to enforce that policy by asking customers to dispose of any food or beverage. (CP 221) Kubek Dep. at 29:22-25; (CP 208) Brevig Dep. 20:7-15. Testimony confirms Ross has a record of enforcing the policy. (CP 221) Kubek Dep. at 29:22-25; (CP 208) Brevig Dep. at 20:20-25 (Customer carrying drink asked to abide by policy threw his drink in an employee's face.)

**B. Plaintiff Shops at Ross.**

On the evening of March 23, 2011, Cynthia Holttum and her friend, Kelli Langager, went dress shopping at the Ross store in Lynnwood, Washington. (CP 269) Complaint ¶ 3.1. Holttum recalls that there were other customers, including children, shopping in the store while she and her friend were shopping. (CP 186, 199) Holttum Dep. at 74:2-3, 111:11-13.

**C. Ross Inspects the Area Before Holttum Allegedly Fell.**

It is undisputed that SPS Matthew Kubek inspected the store's premises during his shift on the day of the incident. (CP 220) Kubek Dep. at 23:13-20. Mr. Kubek testified that he had conducted one such floor-

walk inspection in the checkout area in which Plaintiff fell. (CP 246) Declaration of Matthew Kubek (“Kubek Decl.”) at ¶ 6. His floor walk inspection revealed no hazards. *Id.* Ms. Gartland had also conducted an inspection of the area some time before the incident. (CP 242-43) Declaration of Sara Gartland (“Gartland Decl.”) at ¶ 3. There simply is no evidence that Ross was aware of any customer eating food in the store at the time of incident.

Floor walk inspections are the only way for Ross to visually inspect each aisle of the store. Although the store has theft surveillance camera system, this system is quite limited in coverage and does not allow the quality of inspections provided by Ross’ frequent floor walks. (CP 243) Gartland Decl. at ¶ 10. The theft video system cannot review the entire store, and is not arranged for real time monitoring. *Id.* Rather, the video captured from the theft surveillance system is reviewed typically by the Loss Prevention manager after a theft incident. *Id.*; (CP 227) Gartland Dep. 26:10-23; (CP 207) Brevig Dep. 13:12-14. Ross’ video surveillance is stored on a hard drive, and is automatically recycled and overwritten every 17 days. (CP 206, 211) Brevig Dep. 10:7-17; 32:12-14.

**D. Holttum Appears to Have Slipped and Fallen on a Grape – A Product Holttum Admits Ross Does Not Sell.**

With regard to her slip and fall on a grape, Holttum claims that she and Ms. Langager completed their shopping and walked to the checkout

area. (CP 187) Holttum Dep. at 80:4-6. Holttum began unloading the contents of the cart onto the cash register countertop. (CP 188) Id. at 81:20-25. Holttum then moved her cart to the cart corral near the front of the store. (CP 189) Id. at 83:7-17; (CP 232) Holttum Dep., Ex. 6 (Diagram of Incident). Holttum claims that as she walked back to the cash register, she fell in the check-out aisle. (CP 190) Id. at 84:21-23. After her fall, Holttum observed a flattened grape stuck to her boot. She believes this grape caused her fall. (CP 191) Id. at 92:18-25. Holttum testified that she did not see the grape before she stepped on it, nor had she seen any grapes in the area prior to the fall:

Q. So at no point prior to the fall had you seen any grapes?

A. *No.*

(CP 192) Id. at 93:15-17 (emph. added). Holttum only noticed the grape after she fell. Id. at 93:21-23.

Holttum admittedly has no idea how long the grape had been on the ground before she fell. (CP 103) Id. at 103:1-3.

Q. Did you have any idea how long the grape had been on the ground?

A. *No.*

Q. Did anyone say they had an idea of how long the grape had been on the ground?

A. *No.*

(CP 103) Id. at 103:1-6 (emph. added). Ms. Langager, standing at the cash register at the time, also admits she did not see the grape until after Holttum fell. (CP 237-38) Deposition of Kelli Langager at 31:21-25; 32:1-5. Holttum has no idea when the last store inspection occurred. (CP 200) Holttum Dep. at 148:4-7.

Following the incident, Holttum declined all offers of medical assistance. (CP 193) Holttum Dep. at 94:9-13. Instead, she finished buying the dresses she had tried on and left the store with her friends.<sup>3</sup> (CP 194, 196-97) Id. at 102:10-16; 104:24-25; 105:1-3.

**E. Holttum First Gives Notice of a Claim Nearly a Month Later.**

Holttum first indicated she was filing a claim against Ross when her attorney sent Ross a letter 27 days after the incident. (CP 241) April 19, 2011 letter from E. Bolin. Plaintiff later filed this lawsuit alleging negligence and loss of consortium on May 13, 2011. (CP 268-71) Complaint.

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<sup>3</sup> After the incident, Mr. Kubek and MOD Sara Gartland pulled the theft video surveillance video and reviewed it. The video showed a small child walking into the area where the incident occurred, possibly eating grapes. (CP 218) Kubeck Dep. at 15:4-13, 16-20. Moments later, Holttum and her friend arrived at the register. (CP 218-19) Id. at 15:22-23; 16:2-3; (CP 228-29) Deposition of Sarah Gartland (“Gartland Dep.”) at 77:14-25; 78:1-3. Mr. Kubek recalled seeing the child enter the store with her parents earlier that evening without any food or drink. (CP 219) Kubek Dep. at 16:4-11.

F. **Based on These Undisputed Facts, the Trial Court Grants Ross' Motion for Summary Judgment, Rejecting Holttum's Spoliation Argument and Striking her Inadmissible "Expert" Declaration.**

On August 15, 2012, Defendants filed their motion for summary judgment. (CP 248-59). In response, Holttum filed her opposition, claiming spoliation and submitting an "expert" declaration from Joellen Gill. (CP 161-68) Declaration of Joellen Gill ("Gill Decl.").

Defendants moved to strike the Gill Declaration as (1) failing the Frye test for admissibility of expert testimony; and (2) offering only conclusory opinions that lacked foundation and were mere speculation. (CP 75-80). The Gill Declaration failed to satisfy even the most basic requirement of the rules of evidence and CR 56: Gill admitted that the only evidence she had reviewed as pertained to this case, was Holttum's four-page Complaint. (CP 162-63) Gill Decl. at ¶¶ 7-8. Gill had not: (1) evaluated the flooring in question, (CP 165) Id. at ¶ 16 ("I have not measured the slip resistance of the subject flooring"); (2) visited the Ross store where the incident occurred, (CP 168) Id. at ¶ 27 ("I expect to visit the Ross store soon where Ms. Holttum was injured."); (3) reviewed testimony of any witnesses; or (4) reviewed any of Ross' policies or procedures. (CP 162-63) Id. at ¶¶ 7-8 (noting that she was relying solely on the allegations in Holttum's Complaint). Holttum's opposition to the motion to strike was a regurgitation of the contents of the Gill Declaration

and an attempt to distinguish a handful of the cases Ross cited in its motion. (CP 27-33).

The trial court granted Defendant's Motion for Summary Judgment, thus rejecting Holttum's spoliation argument, and granted Defendant's Motion to Strike Inadmissible Evidence Submitted by Plaintiffs. (CP 6-7) Order Granting Defendant's Motion for Summary Judgment. This appeal follows.

#### IV. ARGUMENT

##### A. **Holttum's Statement of the Case Should Be Disregarded.**

As a threshold matter, Holttum's Opening Brief ("Op. Br.") violates the Rules of Appellate Procedure. RAP 10.3(a)(5) requires that "[r]eference to the record must be included for every factual statement" in the statement of the case. Five of the five and a half pages of Holttum's Statement of the Case contain not a single citation to the record. This is plainly a violation of RAP 10.3(a)(5). Holttum's blanket reference to the evidence below does not satisfy RAP 10.3(a)(5). See, e.g., Rice v. Offshore Systems, Inc., 167 Wn. App. 77, 87 n.6, 272 P.3d 865 (2012) (confirming that citing to "already submitted detailed briefing" does not satisfy RAP 10.3(a)(5)). Moreover, as discussed further below, Holttum's Statement of the Case includes statements that distort the record or simply

have no evidentiary support at all. Holttum's statement of the case should be disregarded.

**B. Standard of Review**

This Court reviews the grant of summary judgment de novo, performing the same inquiry as the trial court. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). A defendant may move for summary judgment on the ground that plaintiff lacks competent evidence to support her claim. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

After the moving party submits adequate affidavits and testimony, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue of material fact exists. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). The non-moving party cannot defeat summary judgment by pointing to any dispute of material fact – the fact must be one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997) (finding no

material fact in dispute and affirming trial court's grant of summary judgment).

Washington courts routinely affirm summary judgments for premises owners in slip-and-fall cases. For example, summary judgment should be affirmed where there is an absence of evidence supporting an element essential to the plaintiff's claim. Arment v. Kmart Corp., 79 Wn. App. 694, 696, 902 P.2d 1254 (1995) (customer failed, as a matter of law, to show that soda pop in menswear department was a continuous or foreseeable risk). See also Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 654, 869 P.2d 1014 (1994) (summary judgment affirmed where plaintiff failed to show nature of the defendant's business and methods of operation were such that unsafe conditions were reasonably foreseeable); Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 278, 896 P.2d 750 (1995) (affirming summary judgment and rejecting plaintiff's argument that defendant's "housekeeping practices" were a jury question). See also Fernandez v. State, 49 Wn. App. 28, 33, 741 P.2d 1010, 1016 (1987) (affirming summary judgment on negligence claim and confirming that "[i]ssues of negligence may be decided on summary judgment where the undisputed facts do not allow reasonable differences of opinion").<sup>4</sup>

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<sup>4</sup> In her statement of the standard of review, Holttum cites Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (Op. Br., p. 10).  
(continued . . .)

As described below, Holttum cannot establish the prima facie elements of her claim and the trial court's grant of summary judgment should be affirmed.

C. **Applying Well-Established Washington Premises Law to the Undisputed Facts, Holttum's Case Fails as a Matter of Law.**

Ross agrees with Holttum that Holttum was a business invitee, and that Ross is only liable to Holttum if, *inter alia*, the “[premises owner] 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.” *Cf. Op. Br.*, pp. 10-11 *with* Defendant's Motion for Summary Judgment, (CP 254) (citing Restatement (Second) of Torts § 343

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(. . . continued)

Holttum misrepresents the issue in *Balise*. The question of fact there was not whether the defendant complied with its duty of care, but rather whether the employee-defendant was acting within the course and scope of his employment at the time of the accident at issue. *Id.* at 200. Holttum's citation to *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (*Op. Br.*, p. 10), similarly does not defeat finding for Ross as a matter of law. Our Supreme Court in *Ruff* affirmed summary judgment for the defendant on the issues of breach of duty and proximate cause. *Id.* at 699. While acknowledging that negligence and proximate cause may be questions of fact, the court in *Ruff* confirmed that “when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Id.* at 703-04 (citing *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). Following a long line of Washington premises cases, summary judgment was proper in this case.

(emphasis added), quoted and cited with approval in Wiltse v. Albertson's, Inc., 116 Wn.2d 452, 457, 805 P.2d 793, 795-96 (1991)).<sup>5</sup>

As Holttum concedes in her brief, the rule in Washington is that the plaintiff carries the burden of proving that the premises owner had the requisite knowledge by showing: (1) that an unsafe condition was caused by the proprietor or its employees; or (2) that the proprietor had actual or constructive knowledge of the dangerous condition. Op. Br., p. 11 (citing Coleman v. Ernst Home Center, Inc., 70 Wn. App. 213, 217 853 P.2d 473 (1993)). It is undisputed that neither Ross nor its employee caused the unsafe condition, i.e., dropped the grape on the floor. So the only question is whether Ross had actual or constructive knowledge of the errant grape on the ground. Given the undisputed facts in this case, the answer is an unequivocal “no.”

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<sup>5</sup> There are three grounds for liability under the test adopted in the Restatement (Second) of Torts § 343 (1965), including where the premises owner:

(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 against it, and

(c) fails to exercise reasonable care to protect against the danger. Restatement (Second) of Torts § 343 (1965). Holttum addresses only the first factor, the “knowledge” factor, in her appeal, apparently conceding that the other factors do not apply. Accordingly, Ross only addresses the “knowledge” factor in this response.

1. Holttum Cannot Prove Actual or Constructive Notice. A plaintiff in a slip and fall case may not prove negligence by the mere fact that she slipped and fell:

It is well established in the decisional law of this state that something more than a slip and fall is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control. . . .

Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 446, 433 P.2d 863 (1967) (ruling as a matter of law that there was no showing that the store’s owner or employees knew or should have known of a dangerous condition causing a slip and fall). “Something more” is needed because “owners of property are not insurers against all happenings that occur on the premises.” Fernandez v. State, 49 Wn. App. 28, 36, 741 P.2d 1010, 1016 (1987). That is why Washington courts have imposed the actual or constructive knowledge standard in premises cases.

As for actual notice, Plaintiff has no evidence that Ross had actual notice that there was a grape on the checkout aisle floor before the incident. Indeed, the employees involved all testified that they did not see the grape until after plaintiff fell. (CP 219) Kubek Dep. at 16:4-11; (CP 246) Kubek Decl. at ¶ 6; (CP 243) Gartland Decl. at ¶ 8.

Similarly, there is no evidence of constructive notice, which arises where the condition “has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have

made a proper inspection of the premises and to have removed the danger.” Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (quoting Smith v. Manning’s, Inc., 13 Wn.2d 573, 580, 126 P.2d 44 (1942)).

Where a plaintiff cannot prove actual notice and cannot establish how long an allegedly hazardous condition existed, summary judgment is appropriate. For example, in Wiltse, the plaintiff slipped and fell in a puddle of water. The Washington Supreme Court held that, in the absence of notice on the part of the defendant, liability did not attach. Wiltse, 116 Wn.2d at 454. Our Supreme Court noted that the constructive notice rule requires that the plaintiff establish how long the specific dangerous condition existed in order to show that the owner of the property should have discovered the condition. Id. at 458. The lack of such evidence not only precludes recovery, but provides grounds for summary judgment. Id.

Here, by her own admission, Holttum has no idea how long the grape had been on the ground. (CP 195) Holttum Dep. at 103:1-6. Any allegation that Ross had constructive notice of the grape is based purely on speculation and argumentative assertions. Holttum’s inability to demonstrate how long the alleged condition existed precludes a finding of constructive notice. Furthermore, Ross employees testified that they had inspected the area before the fall and did not see any hazards. Because

Holttum is unable to establish the requisite element of actual or constructive notice necessary to prove a claim for premises liability, the trial court's grant of summary judgment should be affirmed.

2. There is No Evidence That a Grape in the Aisle is a "Continuous or Reasonably Foreseeable Risk." Plaintiff also cannot establish duty under the Pimentel "mode of operation" rule. Pimentel v. Roundup Co., 100 Wn.2d 39, 40, 49, 666 P.2d 888 (1983). In Pimentel, the Supreme Court recognized an exception to the actual or constructive notice requirement where an injury occurs in a self-service operation, and the Plaintiff establishes that the business' operating procedures are such that unreasonably dangerous conditions are continuous and reasonably foreseeable. Washington precedent confirms that rule does not apply here.

In the strikingly similar case of Arment v. Kmart, 79 Wn. App. 694, 902 P.2d 1254 (1995), a panel of this Court affirmed summary judgment in favor of Kmart. There, plaintiff alleged she slipped and fell on liquid on the floor in the menswear department. The liquid was "some type of clear soda," and a Kmart cup was lying next to the spill. Plaintiff alleged the soda came from the in-store Kmart cafeteria. Like Holttum, the plaintiff in Arment even alleged that Kmart failed to "prevent customers from taking drinks out of the cafeteria and carrying them around the store...." Id. at 697.

Dismissing the case on appeal, the Court in Arment concluded that there was no evidence “or reasonable inferences that the specific unsafe condition, a drink spill in the retail area of the store, is a continuous or reasonably foreseeable risk created by Kmart’s operation of an in-store cafeteria.” Id. at 698.

This case is just like Arment. Plaintiff presents no evidence or reasonable inference that a grape on the floor in a Ross Store is “a continuous or reasonably foreseeable risk.” It is undisputed that Ross does not sell grapes. If Kmart, which actually sold soda in the in-store cafeteria cannot be found to owe a duty of care to Arment for soda spilled in the menswear department, then Ross certainly cannot be held liable for an errant grape (Ross never even sold) in a check-out aisle in the store.

Further, “even if the injury occurs in the self-service department of a store, this alone does not compel application of the Pimentel rule.” Carlyle v. Safeway Stores Inc., 78 Wn. App. 272, 277, 896 P.2d 750 (1995). Rather, “to invoke the Pimentel exception, a plaintiff must present some evidence that the unsafe condition in the particular location of the accident was reasonably foreseeable.” Arment, 79 Wn. App. at 698 (emphasis added). “There must be a relation between the hazardous condition and the self-service mode of operation of the business.” Ingersoll, 123 Wn.2d at 654.

Here, Plaintiff cannot raise the Pimentel exception. It is undisputed that Ross does not sell grapes. See Holttum dep. at 92:18-25. Indeed, Ross does not have a cafeteria nor does it sell *any* produce. There can be no relation between the self-service mode of operation of a store and a condition created by an item not sold in the store. Carlyle, 78 Wn. App. at 278. In Carlyle, the court found that spilled shampoo was not a reasonably foreseeable unsafe condition in a coffee aisle. Id. It is even clearer that a grape in a checkout aisle is not a reasonably foreseeable condition in a store that does not sell grapes.

3. Ross Met Any Duty Owed as a Matter of Law. It is undisputed Ross inspected the premises on the day of the incident to detect foreseeable hazardous conditions. Indeed, the undisputed testimony establishes that Ross employees inspected the store hourly. See, e.g., (CP 220) Kubek Dep. at 23:13-20. This is, as a matter of law, sufficient to satisfy any duty Ross may have had. See Coleman v. Ernst Home Center, 70 Wn. App. 213, 216, 853 P.2d 473 (1993) (a once daily inspection satisfies any duty). Therefore, to the extent the court even need consider whether Ross met any duty owed, the undisputed testimony demonstrates that it did so.

4. Holttum's Arguments for Negligence Have Been Rejected by Washington Courts. Holttum's bare "negligence" argument does not

address the applicable premises cases in Washington, and jumbles several different theories of liability not recognized by Washington law. Op. Br., pp. 12-13. Holttum first argues negligence because Ross purportedly violated its own policies about eating and having children alone in the store, citing Joyce v. Dep't of Corrections, 155 Wn.2d 306, 324, 119 P.3d 825 (2005). Op. Br., p. 12. Joyce is not a premises case. The controlling premises case is Arment, which specifically rejected the same argument Holttum makes here:

Although Arment contends on appeal that her injury was reasonably foreseeable because Kmart did not prevent customers from taking drinks out of the cafeteria and carrying them around the store, she produced absolutely no evidence of Kmart's policies or mode of operation to support this contention. Nothing in the evidence she submitted in opposition to summary judgment suggests that Kmart either allowed or encouraged customers to carry drinks purchased in the cafeteria around the store. Thus, there is no evidence of any connection between spills in the retail area and a policy or mode of operation that would make this particular unsafe condition reasonably foreseeable.

Arment, 79 Wn. App. at 697-98 (emphasis added). Moreover, the undisputed facts are that Ross had a policy against eating in the store. (CP 221) Kubek Dep. at 29:11-15; (CP 209) Brevig Dep. 21:20-25. And, although Ross may not have prevented the child from eating grapes in the store, Holttum (like Arment) has no evidence that Ross "allowed" or "encouraged" the child to do so. Indeed, the witnesses confirmed that they

did not see a child eating grapes prior to the accident. Holttum's "policy violation" argument cannot defeat summary judgment.

Holttum's remaining arguments regarding negligence are, frankly, nonsensical. Op. Br., p. 13. Again, the undisputed testimony is that no Ross employee saw a child eating grapes prior to the accident. Thus, Holttum's speculation about what employees should do when they "see customers eating and drinking in the store" is inapplicable to this case.

Moreover, how this case might be more compelling than if Ross did sell grapes defies logic given Washington's narrow view of liability based on mode of operation. Cf. Op. Br., p. 13 with Arment, 79 Wn. App. at 697 n.1 (unsafe condition was not reasonable as a matter of law even where premises owner sold in-store the soda that caused the accident).

The notion that a child eating grapes may drop one on the floor, does not create an issue of fact. Affirming summary judgment for the premises owner, the court in Carlyle rejected the notion that the likelihood of a slippery condition creates liability: "The mere presence of a slick or slippery substance on a floor is a condition that may arise temporarily in any public place of business. Under *Pimentel*, *Wiltse*, and *Ingersoll*, something more is needed." Carlyle, 78 Wn. App. at 277 (underscore for emphasis; italics for internal citations).

Holttum's claim fails as a matter of law for failure to show that Ross knew or should have known of the grape on the floor. Holttum's cause arguments are similarly meritless and cannot defeat summary judgment.

**D. Holttum Fails, as a Matter of Law, to Show Cause in Fact or Legal Causation.**<sup>6</sup>

The question of cause in fact is properly resolved on summary judgment. Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985) (affirming summary judgment concluding the issue of causation in fact was a question of law). The question of legal cause is directly dependent on "whether liability should attach as a matter of law given the existence of cause in fact." Id. at 779 (emphasis added). Based on these principles, our Supreme Court in Hartley reversed and remanded a Court of Appeals decision, ultimately confirming summary judgment in favor of the defendant.

Holttum carries the heavy burden of proving causation. Whitchurch v. McBride, 63 Wn. App. 272, 275, 818 P.2d 622 (1991), rev. denied, 118 Wn.2d 1029, 828 P.2d 564. For purposes of Holttum's claim, proximate cause has two elements: cause in fact and legal causation.

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<sup>6</sup> Ross is addressing Holttum's arguments slightly out of order because Holttum did not argue cause until after her arguments for spoliation and the admissibility of expert testimony.

Hartley, 103 Wn.2d at 777. Cause-in-fact is about the physical connection between an act and an injury. Id. at 778. If the injury or damage would not have occurred “but for” the defendant’s act, there is cause-in-fact. To prove proximate cause, a plaintiff must be able to show that there is some reasonable connection between the defendant’s act and the plaintiff’s injury. Id.; see also WPI 15.01. Legal causation, however, “rests on considerations of policy and common sense as to how far the defendant’s responsibility for the consequences of its actions should extend.” Hertog v. Seattle, 138 Wn.2d 265, 283, 979 P.2d 400 (1999) (citations omitted).

The cause in fact and legal causation analyses are premised on the same principles that drive the negligence analysis above, and similarly warrant affirming summary judgment. First, Ross was not the cause in fact. To succeed on this negligence claim, Plaintiff must establish that Ross had notice of the alleged dangerous condition and its failure to warn of or remedy the condition proximately caused her alleged injuries. There is no “but for” connection here. As detailed above, there is no evidence that Ross knew, or should have known, of the existence of an alleged dangerous condition. Without such evidence, Plaintiff cannot prove that, “but for” Ross’ failure to warn of or remedy the alleged hazard, she would not have been injured.

Second, Ross was not the legal cause. Legal causation in this case cannot be stretched so far as to hold Ross responsible for Plaintiff's fall when she fell on an item not even sold by the store. To impose liability for Plaintiff's fall on a grape would essentially make Ross strictly liable for any slip and fall because it would ignore the foreseeability of the hazard. Ross was not responsible for the alleged incident as there is simply no evidence that Ross failed to exercise reasonable care. It is not foreseeable that Ross, having performed inspections and not selling grapes, should anticipate a grape on the floor in the checkout aisle. Well-established Washington premises law forecloses any argument that Ross was the cause of Holttum's fall.

**E. The Trial Court Did Not Abuse Its Discretion when Rejecting Holttum's Spoliation Argument.**

This Court reviews rulings on discovery sanctions for an abuse of discretion. Homeworks Const., Inc. v. Wells, 133 Wn. App. 892, 898, 138 P.3d 654 (2006). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." Id. (citing State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997), review denied, 133 Wn.2d 1019, 948 P.2d 387 (1997) (in turn citing Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994))).

As discussed below, a spoliation analysis comes down to two main issues: (1) was the evidence destroyed intentionally or in bad faith; and

(2) was the evidence indispensable to the party's case. The trial court did not abuse its discretion in finding that Holttum did not establish these elements of spoliation.

1. There is No Evidence that Ross Intentionally Destroyed the Video or that it Acted in Bad Faith. "Spoliation" as defined by Washington courts connotes "[t]he intentional destruction of evidence." Henderson v. Tyrrell, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). Indeed, spoliation is "a term of art, referring to the legal conclusion that a party's destruction of evidence was both willful and improper." Homeworks Constr., 133 Wn. App. at 900 (emph. in original) (citing Karl B. Tegland, 5 Washington Practice: Evidence, § 402.6, at 37 (Supp. 2005)). Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 382, 972 P.2d 475 (1999). To impose spoliation, the party losing the evidence must have had a duty to preserve the evidence. Homeworks Constr., 133 Wn. App. at 900.

The trial court did not abuse its discretion concluding that the video was not destroyed intentionally or in bad faith. Holttum concedes that the destruction was not intentional. See Op. Br., p. 16 ("Dan Brevig permitted the destruction of [the] video recording." (emph. added)). There is no evidence that Brevig intentionally destroyed the video. Rather,

Brevig confirmed that the automated system simply overwrote the video after 17 days. (CP 206, 211) Brevig Dep. 10:7-17; 32:12-14 (testifying that Ross' video surveillance is stored on a hard drive, automatically recycled and overwritten every 17 days).<sup>7</sup> As the court in Henderson confirmed, there is no spoliation when the "culprit is the passage of time." 80 Wn. App. at 604 (internal quotation marks omitted).

So the question as to whether Ross acted in bad faith depends on whether it has a duty to preserve the video in the first place. As the court in Homeworks Construction recognized, Washington law "does not hold that a potential litigant owes a general duty to preserve evidence." 133 Wn. App. at 901 (emph. added) (citing Henderson, 80 Wn. App. at 610). The Pier 67, Inc. v. King County case that Holttum cites involves a situation where a lawsuit was filed before the evidence at issue was permitted to be discarded. 89 Wn.2d 379, 385, 573 P.2d 2 (1977). Here, spoliation should be rejected because there was no bad faith. Ross did not have a duty to maintain the video until Holttum's counsel sent his letter of representation, weeks after the video had been automatically records over the video. By the time Holttum's counsel issued his letter of representation, the video had been automatically overwritten. (CP 241)

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<sup>7</sup> Thus, Holttum's claim that "Brevig was unable to provide any rational explanation for his intentional destruction of the video" is contrary to the record. Op. Br., p. 18.

April 19, 2011 letter from E. Bolin.<sup>8</sup> The trial court did not abuse its discretion in rejecting Holttum's spoliation argument.

2. The Video is Not Indispensable to Holttum's Case. The evidence in the video is not indispensable and the information is available from other sources, thus there is no basis for a spoliation presumption. Homeworks Construction, 133 Wn. App. at 899. In Homeworks, the court rejected a spoliation presumption in part because the court noted that several alternative sources existed that could establish the information lost when the evidence was destroyed, including testimony at trial of those familiar with the evidence. Id.; see also Wilson v. Frye, 2008 WL 4561505 (Wn. App. 2008) (Spoliation due to missing security video denied: "[Plaintiffs] had alternative sources to establish the information they asserted was contained on the missing security footage. And the trial

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<sup>8</sup> Holttum claims that she notified Ross' corporate office and/or claims adjusters of the incident. Op. Br., 6, 16. There is no evidence in the record before the trial court or this Court – and thus no citation to the record – supporting this claim. Thus, Holttum's claim that Ross had "actual notice on multiple occasions" of Holttum's lawsuit, Op. Br., p. 18, has no evidentiary basis.

Holttum also claims, without any citation to the record, that Sarah Gartland told Kelli Langager not to take a photo of the area "because the store video recorded everything." Op. Br., p. 5. Looking at Holttum's testimony, she made no mention of Gartland referring to the video. (CP 196) Holttum Dep. 104:7-10. Holttum also confirmed that no one told Ms. Langager not to take any pictures. (CP 196) Holttum Dep. 104:15-23. Given these instances of wholly unsupported statements, Holttum's Statement of the Case, with no record citations, should be disregarded. RAP 10.3(a)(5).

court did not prohibit the parties from questioning witnesses about the activities in the Restaurant's bar prior to and after the fight occurred.”)

Here, as argued before the trial court, the video is neither important nor indispensable for three reasons. First, it is undisputed that Ross sells no grapes and that a customer created the condition. Second, Plaintiff may be allowed to question (and already has) questioned witnesses about the activities depicted and occurring in the store before the incident. Third, Ross conducted hourly inspections, which is sufficient as a matter of law to defeat Holttum's claim. Coleman, 70 Wn. App. at 216. Given these undisputed facts, the video has little or no importance. Nothing in the video would change the fact that the grape was an unforeseeable hazard in a store that does not sell grapes or produce. See Arment, supra. The trial court did not abuse its discretion in rejecting Holttum's spoliation argument.<sup>9</sup>

**F. The Trial Court Correctly Excluded Holttum's Expert Declaration.**

As discussed in the Counter-Statement of the Case, Holttum submitted the declaration of Joellen Gill to support her negligence claim. Gill's theories boil down to the following: (1) the floors of retail stores

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<sup>9</sup> Holttum asks the Court to adopt a new rule for spoliation. Op. Br., p. 19. Granting Holttum's request would require the Court to reject the holdings of both Henderson and Homeworks and is unwarranted in these circumstances.

are inherently slippery; and (2) grapes can be slippery. (CP 161-68). In short, Gill opines that Ross is liable because Ross should have known these things. See, e.g., (CP 167) Gill Decl. at ¶ 26. But that is not the test for foreseeability in premises cases in Washington. See generally, Op. Br., pp. 11-12; Section IV.C above (citing cases). Gill cannot rewrite Washington premises law. Moreover, Gill and Holttum both concede that Gill's conclusions in this case are based only on Gill's review of Holttum's Complaint. Op. Br., p. 19 (Gill's opinion is "based on the bare facts evident from the complaint"); (CP 162-63) Gill Decl. at ¶¶ 7-8. The trial court properly granted Ross' Motion to Strike. (CP 6-7).

1. Holttum Must Show Specific Admissible Facts to Defeat Summary Judgment. Only admissible evidence should be considered when deciding a motion for summary judgment. Albright v. State, 65 Wn. App. 763, 769, 829 P.2d 1114 (1992). Civil Rule 56(e) requires that declarations be made on personal knowledge, setting forth facts as would be admissible in evidence. The Washington Supreme Court outlined the exact nature of the evidence required by CR 56(e):

A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. The "facts" required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature.

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Speculation and "conclusions and opinions as to the

significance of the facts” do not meet this standard set forth in CR 56(e). Grimwood, 110 Wn.2d at 360. Gill admits she has read no deposition, examined no flooring, and knows nothing about Ross. The declaration contains conclusions and speculation and should be excluded.

2. Expert Testimony Must Meet The Frye Test and ER 702.

Under ER 104, the court must preliminarily determine the admissibility of expert testimony as a matter of law. See Fenimore v. Drake Constr. Co., 87 Wn.2d 85, 89-91, 549 P.2d 483 (1976). Expert testimony is properly excluded where the expert lacks the appropriate “scientific, technical or other specialized knowledge.” Washington courts apply the test set out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). See State v. Jones, 130 Wn.2d 302, 307, 922 P.2d 806 (1996). The Frye test is stricter on the admissibility of expert testimony than the so-called “Daubert” test. Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 587 n.5 (1993). The trial court acts as a “gatekeeper” to assess the reliability and relevance of all expert testimony. Reese v. Stroh, 74 Wn. App. 550, 559, 874 P.2d 200 (1994), aff’d, 128 Wn.2d 300 (1995).

In fulfilling this “gatekeeping” role, Washington courts must determine: (a) if the scientific theory or principle upon which the evidence is based has gained general scientific acceptance; and (b) whether application of the theory or principle will produce reliable results. State v. Copeland, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996); State v. Greene, 139 Wn.2d 64, 70, 78, 984 P.2d 1024 (1999), cert. denied, 529 U.S. 1090

(2000); State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983) (opinions excluded because it was not shown to be supported by accepted medical or scientific opinion). Here, Gill's opinion that grapes and berries can make a smooth, hard surface floor slippery is hardly "expert." ER 702; (CP 164) Gill Decl. at ¶ 14.

It is error for the court to consider legal opinions expressed in declarations. Washington State Physicians Ins. Exch. v. Fisons, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993); Safeco Ins. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), rev. denied, 118 Wn.2d 1010 (1992). See also Hiskey v. Seattle, 44 Wn. App. 110, 113, 720 P.2d 867, rev. denied, 107 Wn.2d 1001 (1986) (experts may not state opinions of law or mixed fact and law); Orion Co. v. State, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985) (disregarding legal conclusions in experts' affidavit).

In Stenger v. State, 104 Wn. App. 393, 407, 16 P.3d 655, rev. denied, 144 Wn.2d 1006 (2001), a case involving disability law, the trial court appropriately struck "expert" deposition testimony that offered inadmissible legal conclusions on the defendant's legal obligations and on disability law. The court in Stenger ruled that an "expert may not offer opinions of law in the guise of expert testimony" and that such testimony "cannot by its very nature create an issue of material fact on summary judgment." Id. at 409.

3. Gill's Conclusory Opinions Should be Excluded for Lack of Foundation and Speculation. "The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based

on an assumption is not evidence which will take a case to the jury. The opinions of expert witnesses are of no weight unless founded upon facts in the case. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation.” Theonnes v. Hazen, 37. Wn. App. 644, 649, 681 P.2d 1284 (1984) (affirming summary judgment and excluding expert testimony). “[C]onclusory or speculative expert opinions lacking an adequate foundation will not be admitted.” Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). ER 703 requires that the facts and data upon which an expert bases an opinion be of a type reasonably relied upon by experts in his or her field of expertise. An expert may not rely upon assumptions lacking a factual basis. ER 702; Riccobono v. Pierce County, 94 Wn. App. 254, 269, 966 P.2d 327 (1998). As the trial court agreed, Ms. Gill’s declaration defines junk science and should be excluded for several reasons.

(a) Ms. Gill’s opinions are junk science. Gill’s opinions lack *any* foundation and unsupported conclusions cannot be considered at summary judgment. Queen City Farms, Inc. v. Central Nat’l Ins. Co. of Omaha, 126 Wn.2d 50, 103, 882 P.2d 703 (1994) (“Where there is no basis for the expert opinion other than *theoretical speculation*, the expert testimony should be excluded.” (emphasis added)). Expert opinion based upon unsubstantiated assumptions should be excluded. Bellevue Plaza, Inc. v. City of Bellevue, 121 Wn.2d 397, 418, 851 P.2d 662 (1993).

Here, Gill admits she has never examined the Ross Store, never reviewed Ross risk management practices, never reviewed Ross Store policies, never read the sworn testimony of witnesses, which highlight Ross practices and hourly floor inspections, and never “measured the clip resistance of the subject flooring[.]” (CP 162-63) Gill Decl. at ¶¶ 2, 5. All she did was read the Complaint, which fails to provide *any* facts to support her remarkably conclusory and speculative assertions.

(b) Ms. Gill’s Opinions Fail to Explain the Factual Basis, Which Requires Exclusion. Gill’s declaration should be excluded because, at summary judgment, the factual basis for that opinion must also be explained in the declaration. If it is not, the expert’s opinion will not be considered. Anderson Hay & Grain Co., Inc. v. United Dominion Industries, Inc., 119 Wn. App. 249, 76 P.3d 1205 (Div. 3 2003).

(c) Gill’s Opinions Should be Excluded Because They are Conclusory. Gill opines, without ever examining the Ross floor, that “Ross failed to ...install[] a safer floor.” Of course, Gill has never even examined the Ross floor. (CP 162) Gill Decl. at ¶ 5. Gill fails to specify how the Ross store was not reasonably safe and reasonably slip resistant, nor can she because she has not examined the floor. She fails to state what a “safer” floor is and fails to establish that a “safer” floor would have prevented this incident. It should be excluded.

Next, Ms. Gill opines Ross failed to “remov[e] the source of the risk.” (CP 167) Gill Decl. at ¶ 26. This shows that Ms. Gill’s opinion lacks foundation and has no basis in fact. The “source of the risk” in this

case was a customer bringing a grape into the store, unbeknownst to Ross. Gill's opinions make no sense in light of the undisputed facts (she apparently never was given to review) that Ross did not know a customer had brought in grapes until after the incident.

Next, Gill opines that Ross should "increas[e] the frequency/thoroughness of investigations." (CP 167) Gill Decl. at ¶ 26. This conclusory opinion lacks any basis in fact and should be excluded. Gill's opinion is based solely on review of the complaint, which includes no discussion about Ross risk management policies, hourly inspections and practices. Gill was never informed that Ross performs hourly inspections. Gill does not know the thoroughness of the investigations. Gill fails to state what frequency of investigation would be reasonable. Gill fails to inform the court how more frequent inspections could have changed the outcome in this case. Gill presents no facts in her declaration that support her conclusions that Ross' hourly inspections were not frequent or thorough enough. Given the "source of the risk" was a customer's errant "grape", and that Ross has never before had a slip and fall caused by a grape brought in by a customer, the undisputed facts require the Court to reject these conclusory, speculative and unsubstantiated opinions. The declaration lacks a sufficient basis, amounts to little more than speculation, and is insufficient to resist a motion for summary judgment. Griswold v. Kilpatrick, 107 Wn. App. 757, 27 P.3d 246 (2001).

Moreover, if Gill's opinions are accepted, it would turn long-established Washington premises law on foreseeability and duty, including that inspections only need occur once daily, on its head. Certainly Gill's unsupported, conclusory opinions cannot change the face of premises law, which would otherwise mandate the grant of summary judgment for Ross. The trial court properly excluded Gill's declaration.

**G. Holttum Does Not Challenge the Trial Court's Grant of Summary Judgment on Mr. Holttum's Loss of Consortium Claim.**

Holttum appears to have abandoned any challenge to the grant of summary judgment on Mr. Holttum's loss of consortium claim. The Court should affirm the trial court's grant of summary judgment on this claim.

**V. CONCLUSION**

The trial court's grant of summary judgment (including rejection of Holttum's spoliation argument) and grant of the motion to strike should be affirmed.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of March,  
2013.

LANE POWELL PC

By Laura T. Morse

De Michael Reilly, WSBA No. 14675

Laura T. Morse, WSBA No. 34532

Attorneys Respondents

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury and the laws of the United States and the State of Washington that on March 4, 2013, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

Eugene N. Bolin Jr., WSBA No. 11450 Law Offices of Eugene N. Bolin, Jr. 144 Railroad Avenue, Suite 308 Edmonds, WA 98020 Telephone: (206)527- 2701/(425)582-8165 Facsimile: (888)527-2710 Email: <a href="mailto:eugenebolin@gmail.com">eugenebolin@gmail.com</a> Attorneys for Plaintiffs	<input type="checkbox"/> by <b>CM/ECF</b> <input checked="" type="checkbox"/> by <b>Electronic Mail</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input checked="" type="checkbox"/> by <b>First Class Mail</b> <input type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>
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s/Cheryl Seelhoff  
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Cheryl Seelhoff