

No. 69819-2-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ANN P. GORES, an individual,

Appellant,

v.

SAEFWAY, INC., a Delaware corporation,

Respondent.

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

This appeal challenges the trial court's serious misapplication of Washington's law on premises liability in its order dismissing Appellant Ann P. Gores ("Appellant" or "Ms. Gores") claim for negligence against Respondent Safeway Inc. ("Respondent" or "Safeway"). On December 2, 2010, Ms. Gores was seriously injured when she slipped on egg whites on the floor of Safeway's self-service dairy aisle and fell hard on both of her knees, tearing the meniscus in each of them.

Under Washington law, in order to be liable for negligence, a storeowner must have actual or constructive notice of the unsafe condition on the land that causes the injuries to a business invitee.<sup>1</sup> However, a plaintiff does not need to prove that the storeowner had notice when, as here, the injury occurs in a self-service area of the store where, due to the mode of operation, the risk is an inherent, reasonably foreseeable hazard.<sup>2</sup> Id. Washington courts have relieved plaintiffs of the obligation to prove notice in cases involving injuries caused by falls on produce in produce departments or on items dropped by customers in the checkout area of grocery stores.<sup>3</sup>

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<sup>1</sup> See Pimentel v. Roundup Co., 100 Wn. 2d 39, 666 P.2d 888 (1983).

<sup>2</sup> Id.

<sup>3</sup> See O'Donnell v. Zupan Enterprises, Inc., 107 Wn. App. 854, 28 P.3d 799 (2001); Wiltse v. Albertson's, Inc., 116 Wn. 2d 452, 805 P.2d 793 (1991).

In applying the exception to proving actual or constructive notice, courts look to the specific hazard and location where the injury occurred in determining whether the risk is an ongoing, foreseeable hazard inherent in the operation of that area of the store.<sup>4</sup> Here, when Ms. Gores was injured slipping in egg-whites in the self-service dairy aisle, where customers commonly open egg cartons to inspect eggs, whether Safeway was on notice of the risks of ongoing, foreseeable hazards in the dairy aisle is a genuine issue of material fact precluding summary judgment. The trial court erred in granting summary judgment for Safeway under the facts of this case.

Moreover, Safeway destroyed and “lost” highly relevant evidence in this case relating to the issue of notice, including all surveillance camera footage and all of the store’s handwritten “sweep logs” from the store on the day of Ms. Gores’ accident. Under Washington’s law on spoliation, the only inference that can be drawn from these facts is that the evidence would have been unfavorable to Safeway.<sup>5</sup> The trial court abused its discretion when it improperly failed to deny Safeway’s motion

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<sup>4</sup> See O’Donnell v. Zupan, 107 Wn. App. 854; Wiltse v. Albertson’s, 116 Wn. 2d 452.

<sup>5</sup> See Pier 67, Inc. v. King County, 89 Wn. 2d 379, 385-86, 573 P.2d 2 (1977).

for summary judgment as a sanction for its spoliation of this relevant evidence.

For all of the reasons discussed herein, this Court should reverse the Order Granting Summary Judgment and remand the case for further proceedings in the trial court.

## **II. ASSIGNMENTS OF ERROR**

Appellant assigns the following errors:

1. The trial court erred in granting Respondent Safeway's Motion for Order Granting Summary Judgment.

2. The trial court erred in striking the Declaration of Tom Baird, Appellant's safety and premises liability expert.

3. The trial court erred in denying Appellant's Motion to Strike the Second Declaration of [Safeway's store manager] Patricia Johnson in Support of Defendant's Motion for Summary Judgment.

4. The trial court erred in granting Safeway's Motion for Protective Order to preclude the deposition of Safeway employee, risk management representative, Debbie Getz.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether it is reasonably foreseeable that unsafe conditions may exist in Safeway's self-service dairy aisle, when customers routinely open egg cartons to inspect for broken eggs, such that Safeway is placed

on notice of potential hazards in that area of the store, is a genuine issue of material fact precluding summary judgment.

2. Whether Safeway had actual or constructive notice of the dangerous condition on the floor of Safeway's dairy aisle that caused Ms. Gores to fall is a genuine issue of material fact precluding summary judgment.

3. Whether Safeway's inspections and housekeeping practices of the dairy aisle were adequate because the risk of hazards from eggs in the self-service dairy aisle required greater vigilance relates to the issue of Safeway's constructive notice of the unsafe conditions that caused Ms. Gores' injuries and is a genuine issue of material fact precluding summary judgment.

4. Whether the trial court abused its discretion in striking the Declaration of Tom Baird, Ms. Gores' safety and premises liability expert, when Mr. Baird's testimony would be helpful to the trier of fact in determining whether Safeway's dairy aisle is a self-service area of the store where potential hazards might exist, including those resulting from customers' inspection and opening of egg cartons, thereby putting Safeway on notice of the existence of unsafe conditions in the dairy aisle.

5. Whether the trial court abused its discretion in failing to deny Safeway's motion for summary judgment as a sanction for

Safeway's spoliation of highly relevant evidence of all surveillance camera footage of its store from the day that Ms. Gores was injured.

6. Whether the trial court abused its discretion in failing to deny Safeway's motion for summary judgment as a sanction for Safeway's spoliation of highly relevant evidence of its handwritten "sweep sheets" from the day of Ms. Gores' accident which employees are required to sign after each "inspection" of the store.

7. Whether the trial court abused its discretion in denying Appellant's motion to strike the Second Declaration of Patricia Johnson, submitted with Safeway's Reply in Support of Motion for Summary Judgment, when it injected new substantive facts into the case regarding Safeway's spoliated evidence, to which Appellant had no opportunity to respond, and which was not in strict reply contrary to King County Civil Local Rule 7(b)(4).

8. Whether the trial court abused its discretion in granting Safeway's motion for protective order to preclude the deposition of Debbie Getz, Safeway's risk management representative, when Ms. Getz had discoverable and highly relevant dealings with Ms. Gores during which Ms. Getz stated that Safeway's surveillance camera footage showed that the store had swept the dairy aisle before the accident and that Safeway therefore was not responsible for her injuries, and the court held

that Ms. Getz's statements to Ms. Gores were privileged work product.

#### IV. STATEMENT OF THE CASE

##### **A. Ms. Gores Was Seriously Injured In An Accident on Safeway's Premises When She Slipped on a Slippery Substance in the Dairy Aisle.**

On or about December 2, 2010, Ms. Gores entered Safeway's store located at 1645 140th Avenue Northeast, Bellevue, Washington 98005. CP 709. Intending to purchase just a few items, Ms. Gores selected a basket and proceeded to shop for groceries. (Id.) Ms. Gores walked down the store's dairy aisle to get a carton of eggs. (Id.) The aisle contained a large cooler on one side of the aisle, and large freezers on the other side. (Id.) The cooler stored various perishable products, including but not limited to eggs, yogurt and cheese. CP 709, 734-735. The freezers contained ice cream and other frozen goods. CP 734-735. There were no cones or signs in the aisle to put customers on notice that the aisle had just been mopped or warning them to be aware of any spills on the floor. CP 737-738.

Ms. Gores chose a carton of eggs from the shelf and turned to walk down the aisle. CP 709-710. She immediately slipped in a slimy substance on the floor and one foot was thrown forward. (Id.) Ms. Gores fell hard on her left knee and then on her right knee with significant impact on Safeway's floor. CP 709-710. While on the ground, Ms. Gores

saw several puddles of a clear liquid. CP 710. She struggled to pull herself up. (Id.) Edward Perry, an elderly gentleman in the aisle at the time of the accident, noticed that Ms. Gores was trying to stand from her knees and offered to help. CP 710. Ms. Gores was shocked, embarrassed and injured, but got up on her own. (Id.) She proceeded to shop for a few other items in the store. (Id.)

With difficulty, Ms. Gores headed to the checkout stand and reported her accident to the clerk, informing her that there was liquid on the floor of the dairy aisle. CP 710. The clerk offered to have Ms. Gores speak with the store's assistant manager, Casey Henrickson. (Id.) Ms. Gores told Ms. Henrickson what had happened, said she was injured and provided her with contact information at the store's request. (Id.) Ms. Gores also pointed out the gentleman who had seen her on the ground in the dairy aisle, who by that time was at the checkout stand. (Id.) She received assistance outside to her vehicle with her groceries. CP 710. (Id.)

After Ms. Gores returned home, her knees began to severely swell, throb and feel stiff. CP 753. A few days later, on December 8, 2010, Ms. Gores saw an orthopedist at Orthopedic Physicians Associates. CP 711. He recommended that MRI's be done on both of her knees. (Id.) These MRI's ultimately revealed that Ms. Gores had torn the meniscus in both of

her left and right knees. (Id.) For nearly one year thereafter, Ms. Gores followed the conservative course of treatment recommended by her physician, which included physical therapy and injections to both knees, although this regimen failed to improve her pain or mobility. On October 19, 2011, Ms. Gores underwent surgery on the meniscus in both her left and right knee to repair the damage. CP 512.

**B. Shortly After Ms. Gores Reported Her Accident, Safeway Took Photographs of the Slippery Substance on the Dairy Aisle Floor and a Misplaced Egg Carton on the Dairy Shelf.**

Ms. Gores testified at her deposition that she reported to the store manager that she “slipped and fell on liquid on the floor in front of the egg carton department[.]” CP 741. Shortly after Ms. Gores reported her fall to Safeway’s assistant manager, Safeway photographed the substance in which Ms. Gores fell and produced the photographs in discovery. CP 237-239. These photographs included a picture of an egg carton on the shelf of the cooler, which was out of place. CP 235-239, 772. Safeway then identified the substance as egg whites in its interrogatory answers. CP 200. See Section IV. C., infra.

**C. Safeway Identified the Substance Ms. Gores Fell In As Egg Whites in the Dairy Aisle, Yet the Trial Court Continued to Improperly Question This Fact in Dismissing the Claim: Under Washington Law, the Substance That Causes the Accident and its Location In the Store Relate to the Issue of Notice.**

Under Washington's premises liability law, the area of a store in which an accident occurred, as well as the product that caused the injury, has considerable significance to the issue of actual or constructive notice.<sup>6</sup> In its interrogatory answers, Safeway identified the substance Ms. Gores slipped in was egg whites. CP 772. At the hearing on Safeway's motion for summary judgment, the trial court asked counsel for Safeway if it conceded that the substance was egg whites and counsel for Safeway stated that the substance "looks like" egg whites and that Safeway "was assuming for purposes of [its] motion that" the substance was egg whites. (Verbatim Report of Proceedings Dated December 20, 2012 ("VRP") at 21.)

Despite Safeway's admission, in concluding that Safeway did not have notice of the hazard in the dairy aisle, the trial court improperly decided that "I guess I don't know that it's egg white. And, you know, if

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<sup>6</sup> See, e.g., O'Donnell v. Zupan, 107 Wn. App. 854 (lettuce on floor of check-out aisle was foreseeable hazard caused by customers unloading grocery items, relieving plaintiff of burden of proving that store had actual or constructive notice of lettuce on the floor in order to establish store's duty to her to keep area safe); cf Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 896 P.2d 750 (1995), (unsafe condition of shampoo on the floor of the coffee aisle was not reasonably foreseeable and customer was required to prove constructive notice of dangerous condition). See Section V. B. 2-4, infra.

someone—and where’s the yoke and all of that?” (VRP at 43.) However, the type of hazard and its location in the store was a genuine issue of material fact relating to Safeway’s notice of the hazards in the self-service dairy aisle.

**D. The Trial Court Wrongfully Determined As a Matter of Law that Safeway Was Not On Notice of Ongoing Risks In the Dairy Aisle, Despite Key Factual Issues.**

Washington courts have held that produce departments, where customers handle produce, and checkout stands, where customers unload groceries which can fall on the floor, are areas in which grocery store owners are on notice of foreseeable, ongoing hazards.<sup>7</sup> As discussed above, the evidence shows that Ms. Gores fell in egg whites in the dairy aisle where they are located and it is a genuine issue of material fact for the jury to consider whether Safeway was on notice of the risk of ongoing hazardous conditions in the self-service dairy aisle.

Safeway acknowledged that it would be on notice of ongoing hazards from customers inspecting fruit in the produce department because “produce has unpackaged slippery things—grapes, fruits, things that customers are handling unpackaged good themselves, they’re constantly getting -- falling on the floor.” (VRP at 18.) Like a produce

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<sup>7</sup> See O’Donnell v. Zupan, 107 Wn. App. 854; Wiltse v. Albertson’s, Inc., 116 Wn. 2d 452, 805 P.2d 793 (1991). See Section V. B. 2, infra.

department, Safeway reasonably should have known that eggs could fall out of the carton during a customer's routine inspection process and break on the floor, posing a hazard to customers. However, counsel for Safeway disingenuously argued that Safeway should not have reason to be on notice of ricks in the self-service dairy aisle, stating:

Eggs are packaged, they're not loose like produce. Perhaps customers sometimes peek in them to see whether they're cracked or not, but they don't -- there's no evidence in front of you that they typically take them out of the package or that they're regularly getting dropped on the floor and that there's debris or substances or slippery substances getting on the floor as a result of customers doing that. That's the kind of evidence that's necessary to excuse the plaintiff from proving notice. So if -- you know, if the plaintiff here has argued that, "Well, it's" -- and it's speculative --"

(VRP 20-21.)

Ms. Gores' safety and premises liability expert, Tom Baird stated in his declaration, which the trial court improperly excluded (see Section IV. E. 3, infra), that customers routinely inspect the contents of egg cartons in the dairy aisle, and that Safeway reasonably should have known that eggs could fall out of the package during this process, posing a hazard. CP 834-835. Jurors also reasonably would infer from their own knowledge and experience that customers commonly inspect the contents of egg cartons in selecting eggs at the grocery store.

Furthermore, there are genuine issues of material fact regarding whether Safeway had constructive notice of ongoing risks of dangerous conditions in the dairy aisle. For instance, Safeway employee Cynthia Ast testified that she had previously cleaned slippery cottage cheese off the floor of the dairy aisle at the Safeway store where Ms. Gores was injured. CP 825-827. This is a genuine issue of material fact related to whether Safeway had constructive notice of the risks to its customers in the self-service dairy aisle of the store.

The trial court wrongfully disregarded additional genuine issues of material fact on the issue of Safeway's notice of ongoing hazards in the dairy aisle, stating:

I am going to grant the defendant's Motion for Summary Judgment. There isn't any evidence that Safeway was on notice or had constructive notice of this situation on the floor, nor -- and I think that (a) it's really total speculation that what she fell in was egg white; and (b) if she fell in egg white, even in the dairy aisle, that that is different from either a chicken cart or soup or something where the store has set up a situation where it is known essentially that there's a transfer of liquids and they have set up that mechanism. Otherwise you would be saying, "Well, we know people drop things when they take them off the shelf, so, therefore, Pimentel<sup>8</sup> would apply in every case." And it clearly doesn't.

(VRP at 52-53) (emphasis added).

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<sup>8</sup> In Pimentel v. Roundup Co., 100 Wn. 2d 39, 666 P.2d 888 (1983), the Washington Supreme Court held that if the operating procedures of a store are such that unreasonably dangerous conditions are continuous or reasonably foreseeable, there is no need to prove actual or constructive notice of the conditions in order to establish liability for injuries caused by them. See section V. B. 2, infra.

This Court should correct the trial court's misapplication of Washington law on premises liability and allow the jury to consider these genuine issues of material fact.

**E. There Are Genuine Issues of Fact Regarding Whether Safeway Was Adequately Vigilant In Maintaining the Self-Service Dairy Aisle, Given the Risk of Ongoing Foreseeable Hazards in that Area of the Store, Which Relates to Whether Safeway Had Notice of the Unsafe Conditions That Caused Ms. Gores' Injuries.**

Washington courts have stated that a store's housekeeping practices are relevant to the issue of constructive notice, if there is evidence from which a jury could infer that the inspections were not adequate because the risk of dangerous conditions in the dairy aisle requires greater vigilance.<sup>9</sup> Here, there is such evidence, including, but not limited to, the anomalies with Safeway's "sweep logs," the missing evidence of handwritten "sign off sheets" and video, the credibility of Safeway's employee who purportedly did the inspections (see Section IV. E. 2., infra.), the thoroughness of those inspections, and the inherent risk of customers commonly handling and inspecting fragile eggs in cartons in the dairy aisle, among other key facts discussed herein.<sup>10</sup> CP 792, 833-834.

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<sup>9</sup> See Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 276, 896 P.2d 750 (1995).

<sup>10</sup> For instance, the trial court improperly failed to consider and excluded the Declaration of Tom Baird, Ms. Gores' safety and premises liability expert, who would have offered testimony on Safeway's notice of hazards in the self-service dairy aisle. (VRP 49-52).

Safeway produced documents it refers to as “sweep logs” which purport to identify when Safeway employees “inspected” the store. CP 792. Safeway concedes that a “sweep” is in fact nothing more than a cursory visual inspection of the store and that its “sweep logs” provide no evidence that any sweeping, mopping or cleaning of the store actually occurred prior to Ms. Gores being injured, as evidenced by Safeway’s Store “Sweep” Policies and Procedures.<sup>11</sup> CP 760, 763. Whether it is reasonable to merely inspect, versus mop or sweep, Safeway’s dairy aisle, which contains liquids and slippery products, including eggs, yogurt, cheese, cottage cheese, pudding and frozen goods, stored in coolers and freezers down, posing an inherent risk to customers is an issue of fact for the jury to consider relating to constructive notice. CP 719-720, 834-837.

**1. There Is A Genuine Issue of Material Fact Regarding the Accuracy of Safeway’s “Sweep Logs” and Whether the Dairy Aisle Was Ever Inspected on the Day of Ms. Gores’ Accident.**

Of critical importance in this case is that Safeway “lost” all of the handwritten “sign off sheets” that Safeway’s policy requires the manager to compare to the time clock/computerized “sweep logs” to verify if the

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<sup>11</sup> Patricia Johnson, the manager of the Bellevue Safeway location where Ms. Gores was injured, testified that there is no difference between an inspection and a “sweep” of a store, which merely refers to “viewing” the store. CP 763. Ms. Johnson testified that Safeway employees “inspect” the store every one-half hour, including the “front lobby, which includes the check stands, front doors, the aisles and the produce area.” (*Id.*) Safeway’s Bellevue store is very large and covers thousands of square feet. CP 766.

records of purported inspections are even accurate. CP 794. (See Section IV. G. 2, infra.) Safeway’s computerized “sweep log” from the grocery section of the store during the timer period when Ms. Gores was injured<sup>12</sup> includes the following entries, converted from entries in one-one hundredth increments into hours and minutes:

Date	Time Clock Entry	Converted Time	Employee
12/02/10	11.76	11:46 a.m.	Ast, Cynthia
12/02/10	12.03	12:01 p.m.	Ast, Cynthia
12/02/10	12.85	12:51 p.m.	Ast, Cynthia
12/02/10	13.00	01:00 p.m.	Bryant, Theresa
12/02/10	13.03	01:01 p.m.	Ast, Cynthia
12/02/10	13.68	01:41 p.m.	Ast, Cynthia
12/02/10	14.01	02:00 p.m.	Ast, Cynthia

CP 792.

Safeway’s “sweep logs” show that employee Cynthia Ast allegedly performed two inspections in only ten minutes between 12:51 p.m. and 1:01 p.m. CP 792. This is despite the fact that Ms. Ast testified that it took her 20 to 30 minutes to perform an inspection. CP 781. There is also a question of fact as to why Theresa Bryant allegedly inspected the store one minute before Ms. Ast’s inspection. CP 792. These anomalies call into serious question the accuracy of the sweep logs and the credibility of

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<sup>12</sup> Ms. Gores testified that she went into Respondent’s grocery store shortly after making a purchase at the Staples store right next door. CP 723. Ms. Gores’ receipt from her purchase at Staples shows that she was there at 12:51 p.m. on the day of her accident. CP 725. She went to the Safeway store next door and was injured sometime around 1:00 p.m. on December 2, 2010. CP 709.

Safeway's witnesses. CP 833-834. These are genuine issues of material fact relating to whether Safeway had notice of the dangerous condition in the dairy aisle, including how long the egg carton which Safeway photographed was misplaced on the shelf. CP 235, 238.

**2. There Are Serious Credibility Issues With Respect to the Employee Safeway Identifies as the Last Person To Clean the Dairy Aisle Prior to Ms. Gores' Accident.**

There are additional genuine and material issues of fact about Safeway's efforts to inspect the self-service dairy aisle on the day of Ms. Gores' accident. Safeway identified Cynthia Ast, a courtesy clerk, as the last employee responsible for "inspecting" the store prior to Ms. Gores' injury on December 2, 2010. CP 771. Ms. Ast testified that her duties included bagging groceries, carrying groceries out to cars, bringing carts back to the store and that during inspections she would be interrupted by customers who would "come up to you and stop what you're doing to go help them." CP 771, 781. The inference is obvious that the duration of Ast's inspections was substantially less than the 20-30 minutes she says the inspections took, bringing into question their thoroughness.

Ms. Ast also has no independent recollection of inspecting or cleaning the store on the day of Ms. Gores' accident. CP 787-790. Moreover, Safeway's attorney contacted Ms. Ast prior to her deposition

and told her that “[she] did the sweeps and signed off on them,” which further calls into serious question the credibility of Ms. Ast’s testimony. (Id.) These are issues of fact for a jury to consider in determining whether Safeway had notice of the dangerous condition in the self-service dairy aisle which caused Ms. Gores’ injuries.

**3. Ms. Gores’ Expert Would Have Offered Testimony Relating to the Issue of Notice, Which the Trial Court Improperly Excluded.**

Despite Safeway’s position that its policies make keeping the store’s floors safe a priority, its policies clearly failed to prevent the injuries sustained by Ms. Gores. Washington Administrative Code 296-800-22022 provides that it is a duty of an employer to “make sure floors are maintained in a safe condition.” CP 836. This includes, in part, making “sure floors are kept free of debris.” (Id.) Although this provision is intended to benefit employees, it creates an issue of fact as to whether Safeway adhered to the proper standard of care in this case.<sup>13</sup> (Id.)

We know that Safeway did not keep the floor clear free of debris on the day of Ms. Gores’ accident. There is a genuine issue of fact that because workplaces that invite the public onto the premises have a higher standard of care and have to maintain the floors in a safe condition. Mr.

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<sup>13</sup> See also, Afoa v. Port of Seattle, 176 Wn. 2d 460, 296 P.3d 800 (2013) (material issues of fact as to whether airport operator breached duty to maintain safe common work areas precluded grant of summary judgment to operator on employee’s common law claim for failure to maintain safe workplace.)

Baird, Ms. Gores' safety and premises liability expert, submitted a declaration on these issues, which would have been helpful to the trier of fact, and which should not have been excluded by the court. CP 831-893. Similarly, the jury could reasonably determine that, like a produce department or other self-service areas of a store, Safeway should have exercised greater vigilance in the self-service dairy aisle and placed, for instance, a rug or mat in the aisle which would absorb liquids and reduce the likelihood of a customer sustaining injuries in an accident. CP 837.

**F. The Trial Court Improperly Granted Safeway's Motion for Protective Order Precluding the Deposition of Employee Debbie Getz's Non-Privileged Statements to Ms. Gores About Highly-Relevant Evidence Which Safeway Destroyed in this Case.**

On December 6, 2010, a few days after her accident, Ms. Gores was contacted by Debbie Getz, Safeway's risk management representative. CP 425. Ms Gores testified that Ms. Getz told her that Safeway's security video showed that the store had swept the floor that day at 1:07 p.m. and that therefore, Safeway was not responsible for Ms. Gores' injuries. (Id.) Thereafter, Ms. Gores received unsolicited letters and additional phone calls from Debbie Getz. CP 426-431. What Getz said to Ms. Gores was highly relevant and discoverable.

In this litigation, Ms. Gores attempted to depose Getz about her highly relevant, non-privileged statements to Ms. Gores. CP 348-431.

However, on July 20, 2012, the trial court improperly granted Safeway's Motion for Protective Order, order which prevented Ms. Gores from deposing Getz on the grounds that Getz's statements constitute privileged work product. CP 438-441. This was an error of law,<sup>14</sup> which is underscored by the fact that Safeway destroyed all of the surveillance footage from its store on the day of Ms. Gores' accident.

**G. Safeway's Spoliation of Highly Relevant Evidence Related to Whether Safeway Had Notice of the Hazardous Condition in the Dairy Aisle that Caused Ms. Gores' Injuries.**

On January 11, 2011, James A. Smith, Jr., counsel for Ms. Gores, wrote a letter to Ms. Getz requesting that Safeway share a copy of all records it had reviewed in "investigating" Ms. Gores' accident. CP 816-817. On January 20, 2011, Mr. Smith wrote to Ms. Getz stating, *inter alia*, that Safeway should preserve all evidence. CP 818-819. Safeway obviously knew it had a duty to preserve this evidence.<sup>15</sup> However,

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<sup>14</sup> It is axiomatic that Ms. Getz's own statements to Ms. Gores cannot constitute mental impressions, opinions or privileged work product. Following the court's entry of a protective order, Ms. Gores moved for reconsideration, (CP 442-467) which was denied on September 20, 2012. CP 621-622. On October 29, 2012, Ms. Gores filed a motion for discretionary review of the trial court's Order on Defendant's Motion for Protective Order. CP 623-640. On December 20, 2012, while Ms. Gores' motion for discretionary review was pending, the trial court dismissed Ms. Gores' claim for negligence against Safeway. CP 958-960. The trial court's wrongful entry of the protective order is subsumed in this appeal.

<sup>15</sup> Immediately after Ms. Gores reported her fall, Safeway even photographed the substance Ms. Gores slipped in, and determined that the liquid was egg whites. CP 235-239, 772.

Safeway spoliated highly relevant evidence in this case, related to the issue of whether Safeway had notice of the hazard in the dairy aisle that caused Ms. Gores' accident. CP 234, 248-250, 709-716, 806-808. As a sanction for Safeway's spoliation of evidence, the trial court abused its discretion in failing to deny Safeway's Motion for Summary Judgment. See Section V. C., infra.

**1. Safeway Spoliated Highly Relevant Evidence of All Surveillance Camera Footage From Its Store On the Day of Ms. Gores' Accident.**

Despite Getz's statements to Ms. Gores about Safeway's video, Safeway failed to produce any video from any of its 32 surveillance cameras from the day of Ms. Gores' accident. CP 821-822. Safeway claims that it did not retain any surveillance camera footage from its store on December 2, 2010 because the camera was not pointed at the dairy aisle. CP 906. However, if there was no video why would Ms. Getz have actively made such statements to Ms. Gores within a matter of days after her accident? Ms. Getz also testified in this case that she reviewed the footage and did not save it because it would take a long time and was not relevant. CP 909-913. Safeway is not the arbiter of relevance and destroyed the evidence, despite notice of Ms. Gores' claim. CP 249-250.

The video may have shown that there were no inspections performed. It may have shown that a customer dropped an egg on the

floor which had remained there for some time. The footage may have shown that Ms. Ast did not, in fact, perform her inspections, which if conducted may have prevented Ms. Gores' accident. We will never know because Safeway allowed the footage to be destroyed. Safeway's spoliation of this highly relevant evidence would lead a jury to properly conclude that the missing evidence was unfavorable to Safeway.

**2. Safeway Also Spoliated Highly Relevant Evidence of All Handwritten "Sign Off Sheets" From the Day of Ms. Gores' Accident, Which Its Own Policy Requires It to Use to Verify the Accuracy of Its "Sweep Logs."**

With no satisfactory explanation, Safeway "lost" all evidence of its handwritten "sign-off sheets" from December 2, 2010. CP 807. This occurred despite contemporaneous notice to Safeway of the accident. CP 248, 249, 816, 818. Independent of the occurrence of the accident, Safeway's own written policies require the retention of this evidence. CP 794. Safeway's written policies state that "[c]laims arising out of alleged slip and fall accidents can result in substantial costs to the Company. Experience shows that our ability to defend and dispose of these claims is significantly enhanced when we have complete and accurate sweep log records." CP 760.

Moreover, Safeway's policies provide that the store must "[p]rint a sweep log report every morning and compare it to the previous day's sign-

off sheet for accuracy.” CP 794. As a matter of policy, Safeway cannot even verify its own “sweep logs” without first comparing them to the handwritten “sign-off sheets,” as a matter of practice. (*Id.*) Whether the “sweep logs” which Safeway relies upon are accurate is a genuine issue to be determined by the trier of fact.

**3. The Trial Court Improperly Admitted the Second Declaration of Safeway Store Manager Patricia Johnson Which Injected New Substantive Facts Into the Case, Including on Spoliated Evidence, to Which Ms. Gores Had No Ability to Respond.**

With its reply in support of its motion for summary judgment, Safeway improperly submitted the Second Declaration of Patricia Johnson, which injected new facts into the case, to which Ms. Gores had no opportunity to respond. CP 927-931. Ms. Gores moved to strike the Second Declaration (CP 932-953), and the trial court abused its discretion in admitting it. CP 961-962. (*See* also VRP 46-49). Ms. Johnson testified that Safeway failed to produce any of the handwritten sign off sheets which she compared each day to the time clock “sweep logs.” CP 803-804, 928. She stated in the Second Declaration that she looked for the handwritten “sign off sheets” in this case, and could not find them for the time period at issue. CP 928-929. Ms. Johnson went on to state that “[w]e did not destroy them or any other records for the purpose of preventing

their disclosure in this or any other lawsuit. I am simply unable to find the sweep assignment sheet at this time.” CP 929. Safeway has no satisfactory explanation for the fact that it cannot produce this critical evidence. This is spoliation. See Section V. C., infra; see also Pier 67, 89 Wn. 2d at 385-86, 573.

Furthermore, at the hearing on Safeway’s motion for summary judgment, counsel for Safeway offered additional improper argument about the Second Johnson Declaration and what the missing evidence would or would not have shown. See VRP 46-49. Furthermore, Safeway’s revisionist argument as to the purpose of the handwritten “sign-off” sheets is directly contradictory to Safeway’s own written policy, which provides that the documents are necessary to verify that the time clock “sweep logs” are even accurate. CP 794. The trial court’s failure to strike the Second Johnson Declaration on missing evidence that was never produced in this case was an abuse of discretion. Given Safeway’s spoliation of these highly relevant documents, a jury should be instructed to infer that the missing “sign off sheets” would have been unfavorable to Safeway and contradictory to what its computerized “sweep logs” show. CP 792, 794.

As discussed herein, the trial court improperly applied Washington law on premises liability despite the existence of genuine issues of

material fact precluding summary judgment on Ms. Gores' claim. This Court should correct the trial court's error and reverse the order granting summary judgment for Safeway.

## V. ARGUMENT

### A. Standard Of Review Of Trial Court's Improper Order Granting Respondent's Motion for Summary Judgment.

This Court reviews a summary judgment order de novo and engages in the same inquiry as the trial court. Millson v. City of Lynden, 298 P.3d 141, 144 (2013). Accordingly, this Court reviews the facts and all reasonable inferences from the evidence in the light most favorable to Ms. Gores as the non-moving party. Caldwell v. Yellow Cab Service, Inc., 2 Wn. App. 588, 592, 469 P.2d 218 (1970). Summary judgment is appropriate only if the moving party has shown that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Id. It should be granted only if "reasonable persons could reach but one conclusion." Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 162 Wn. 2d 59, 70, 170 P.3d 10 (2007). "[T]o successfully move for summary judgment, a party must demonstrate a lack of evidence or a material fact which cannot be rebutted." Weatherbee v. Gustafson, 64 Wn. App. 128, 132, 822 P.2d 1257 (1992). Application of the above standards to this case overwhelmingly demonstrate that the trial

court should not have granted summary judgment based upon numerous genuine issues of material fact.

**B. Whether Safeway Was On Notice of the Existence of Potential Hazards from Egg Products on the Floor in its Dairy Aisle Is A Genuine Issue of Material Fact Precluding Summary Judgment.**

**1. Elements of Premises Liability.**

To establish the elements of an action for negligence, the plaintiff must show “(1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury.” Iwai v. State, 129 Wn. 2d 84, 96, 915 P.2d 1089 (1996). Store owners have a duty to exercise reasonable care to protect business invitees from harm. See O’Donnell v. Zupan, 107 Wn. App. 854. Washington courts hold that “for the professor of land to be liable to invitees for the unsafe condition of his land, he must have actual or constructive notice of that unsafe condition.” Pimentel v. Roundup Co., 100 Wn. 2d 39, 44, 666 P.2d 888 (1983). Whether Safeway had or reasonably should have had notice of the hazardous condition in the dairy aisle is an issue of fact.

**2. Whether the Dairy Aisle Is a Self-Service Area of the Store Where Safeway Had Notice of Ongoing Potential Hazards Is a Genuine Issue of Material Fact Precluding Summary Judgment.**

Under Washington law, if the operating procedures of a store are such that unreasonably dangerous conditions are continuous or reasonably

foreseeable, there is no need to prove actual or constructive notice of the conditions in order to establish liability for injuries caused by them. See Pimentel, 100 Wn. 2d 39. The Pimentel court held that “[w]here the existence of unsafe conditions is reasonably foreseeable, it will now be unnecessary to establish the length of time for which the particular unsafe condition existed.” Id. at 49 (emphasis added).

Washington courts hold that the “self-service” or “Pimentel” “exception to the notice requirement applies where a proprietor’s business incorporates a self-service mode of operation and this mode of operation inherently creates an unsafe condition that is continuous or reasonably foreseeable in the area where the injury occurred.” Zupan, 107 Wn. App. at 858 (citations omitted). Where this exception applies, the law charges the proprietor with actual knowledge of the “foreseeable risks inherent in such a mode of operation,” the proprietor must take “reasonable precautions” against the creation of hazardous conditions that this mode of service might cause. Id. at 858-59 (citing Ciminski v. Finn Corp., 13 Wn. App. 815, 819, 537 P.2d 850 (1975)).

Ms. Gores should be relieved of proving the notice element in this case. The Pimentel exception applies if: (1) the operation of the dairy aisle where eggs are stored was self-service, (2) it inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous

condition that caused the injury was within the self-service area. See Zupan, 107 Wn. App. at 859. The dairy aisle is a self-service area of the store or, at minimum, it is a genuine issue of material fact precluding summary judgment.

“A location where customers serve themselves, goods are stocked, and customers handle the grocery items, or where customers otherwise perform duties that the proprietor’s employees customarily performed, is a self-service area.” Zupan, 107 Wn. App. at 859; see also Coleman v. Ernst Home Ctr., Inc., 70 Wn. App. 213, 219, 853 P.2d 473 (1993). “Certain departments of a store, such as the produce department, are areas where hazards are apparent and therefore the proprietor is placed on notice by the activity.” Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 276, 896 P.2d 750 (1995).

Here, it is reasonably foreseeable that dangerous conditions, particularly stemming from leaking eggs, are likely to exist in a store’s self-service dairy aisle where Ms. Gores was injured. Furthermore, a jury could reasonably infer (and Ms. Gores’ expert offered testimony) that customers open egg cartons to inspect eggs. Ms. Gores therefore does not need to prove that Safeway had actual or constructive of the specific egg-whites which caused her fall. The existence of unsafe conditions in this aisle is already reasonably foreseeable. It is up to the jury to consider this

evidence.

However, the trial court wrongfully made determinations of genuine issues of material fact regarding application of the Pimentel exception to these facts. Notably, the trial court agreed that Washington cases analyzing the issue of notice are “factually specific,”<sup>16</sup> yet still failed to allow the jury to consider key factual issues as to Safeway’s notice of the hazard in its dairy aisle. (See VRP at 32.) The trial court improperly distinguished for itself on the record, the fact that soup bars and roasted chicken carts—which reasonably require vigilance given the foreseeable risk of ongoing hazards—are different from shelving storing eggs, deciding that the store “set up the situation” and therefore had notice. (VP at 43, 52.) It was wholly improper for the trial court to make these types of factual determinations of genuine factual issues on summary judgment

**3. There Are Genuine Issues of Material Fact As to Whether Safeway Had Actual or Constructive Notice of Hazards in the Dairy Aisle Which Are Reasonably Foreseeable.**

Here, even if the dairy department is not “self-service,” the Pimentel exception should apply because it is reasonably foreseeable that

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<sup>16</sup> THE COURT: Well, let me ask you this. I mean, I agree with you that the cases are kind of factually specific and it’s hard, at least for me, to kind of get a thread .... (VRP at 32) (emphasis added.)

eggs could land on the floor in the dairy aisle, creating the risk of an unsafe condition. For instance, Washington case law makes clear that the “self-service” issue is not “key” to whether the Pimentel exception applies. “Rather, the question is whether ‘the nature of the proprietor’s business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.’”<sup>17</sup> Iwai v. State, 129 Wn. 2d 84, 100, 915 P.2d 1089 (1996) (quoting Ingersoll v. DeBartolo, Inc., 123 Wn. 2d 649, 654, 869 P.2d 1014 (1994) (emphasis supplied). In Iwai, the plaintiff fell and was injured on snow or ice in a parking lot owned by the defendant. The court found that the plaintiff’s failure to establish actual or constructive notice of the specific dangerous condition should not prevent the court from hearing the case, and that a strict application of the notice requirement would unfairly allow the defendant to plead ignorance about each patch of ice causing an injury, despite its general knowledge of the situation. The court held that “[i]f the risk was foreseeable,” then the defendant “should have maintained a vigilant watch for dangerous buildups of ice and snow.” Id. at 101 (citing Wiltse, 116 Wn. 2d at 461.) Here, Ms. Gores raised factual questions

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<sup>17</sup> Evidence of prior spills at this particular Safeway location is only one among several factors to be considered by a jury in determining whether the dangerous condition posed by a self-service egg case is reasonably foreseeable. See Ingersoll, 123 Wn. 2d at 655 (historical experience of slip and fall incidents prior to the event at issue one of several relevant facts relating to the nature of defendant’s business and its method of operation).

concerning the foreseeability of the dangerous conditions in the dairy aisle. We know that Cynthia Ast previously had cleaned cottage cheese from the dairy aisle floor. Moreover, Safeway spoliated evidence that may have shown how the egg-white came to exist or how long it had been there. These issues all relate to notice and all reasonable inferences from the evidence must be drawn in Ms. Gores' favor as the non-moving party on summary judgment.

**4. Whether Safeway's Inspections of the Self-Service Dairy Aisle Were Adequate or Required Greater Vigilance Relates to the Issue of Constructive Notice and Precludes Summary Judgment.**

Washington case law makes clear that evidence regarding whether Safeway's inspections and housekeeping practices were adequate or required greater vigilance in the self-service dairy aisle relates to the issue of notice. See Carlyle v. Safeway, 78 Wn. App. at 276.

"Housekeeping practices are relevant to the issue of constructive notice" and there is a "basis for submitting the issue to a jury . . . [if] there is some evidence from which it could infer that hourly inspections (or even two or three inspections per 8- to 9-hour shift) were not adequate because the risk of spilled shampoo in the coffee aisle required greater vigilance." Id. at 278. Here there is such evidence since the egg whites that caused Ms. Gores' injuries were in front of the self-service dairy case where they are

stored, unlike a case involving shampoo spilled in a coffee aisle several aisles apart.

Furthermore, Ms. Gores' expert, Tom Baird, would have testified had he been allowed, that Safeway should have used absorbent mats in front of the dairy case to safeguard against the hazards from broken eggs. Here, there are anomalies with Safeway's "sweep logs." Safeway also conveniently "lost" the handwritten sweep sign off sheets that its own policy requires it to compare to the computerized "sweep logs" to ensure their accuracy. There are also issues with the credibility of Safeway's witness who allegedly inspected the dairy aisle on the day of the accident.

**C. The Trial Court Abused Its Discretion In Failing to Deny Summary Judgment As a Sanction for Safeway's Spoliation of Highly Relevant Evidence Related to the Issue of Safeway's Notice In this Case.**

This Court reviews the trial court's decisions regarding sanctions for discovery violations for abuse of discretion. Henderson v. Tyrrell, 80 Wn. 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. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997). The trial court's failure to deny Safeway's summary judgment motion based upon its spoliation of critical evidence was manifestly unreasonable.

As discussed herein, Safeway destroyed all surveillance camera footage from its store on December 2, 2010, the day of Ms. Gores' accident. Getz was actively soliciting contact with Ms. Gores within days of her accident and told Ms. Gores that Safeway had surveillance videos which showed the area had been mopped shortly before the accident. However, Getz testified in this case that unilaterally determined that the video did not record Ms. Gores' accident and was therefore not relevant. Safeway also inexplicably "lost" the handwritten sign off sheets which it used to compare to the computerized "sweep logs." Safeway had notice of the relevance of the evidence—its own written policy states that the handwritten "sign off sheets" must be used to verify the accuracy of the time clock records, and also acknowledges that the sweep sheets are critical in Safeway's ability to defend itself in litigation.<sup>18</sup>

Safeway claims that it did not intentionally "destroy" the handwritten sign off sheets and therefore did not spoliage the documents. However, that is not the test for spoliation, which "encompasses a broad range of acts beyond those that are purely intentional or done in bad faith." Homeworks Constr., Inc. v. Wells, 133 Wn. App. 892, 900, 138 P.3d 654 (2006). There is simply no satisfactory explanation for Safeway's failure

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<sup>18</sup> Furthermore, the trial court improperly permitted the Second Johnson Declaration to be admitted and argument argued about what the "sign off sheets" would or would not have shown and what their purpose is—which is directly contradictory from Safeway's written policy.

to produce or retain the documents in this case. Washington courts hold that:

[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Pier 67, Inc. v. King County, 89 Wn. 2d 379, 385-86, 573 P.2d 2 (1977).

Here, the court should have denied summary judgment as a sanction for Safeway's spoliation. In determining whether spoliation requires a sanction,<sup>19</sup> the trial court weighs (1) the potential importance or relevance of the missing evidence and (2) the culpability or fault of the adverse party. After weighing these two general factors, the trial court uses its discretion to craft an appropriate sanction." Homeworks, 133 at

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<sup>19</sup> In Equal Employment Opportunity Commission v. Fry's Electronics, Inc., 2012 WL 1642305 (W.D. Wash. May 10, 2012), Judge Lasnik analyzed a case in which Fry's Electronics, an employer defending claims of discrimination and retaliation, had destroyed computer hard drives, notes and other documents in its files. The court determined that Fry's had destroyed relevant evidence and rejected arguments that the information was irrelevant (notably, this is an argument which Safeway could not even advance in this case). Judge Lasnik initially allowed the plaintiffs "considerable leeway in arguing what information might have been gleaned" from the hard drives which were destroyed, "inferences that could be drawn from the absence of particular documents, and defendant's motive in destroying them." Id. at \* 5. Moreover, the court held that if, as the trial progressed, it appeared that "additional information has been 'lost' and/or that the prejudice caused by the spoliation cannot be undone, the Court may reconsider this order to provide more robust relief to plaintiffs." Id. Indeed, further instances of the defendant's destruction and loss of documents were subsequently revealed. Accordingly, Judge Lasnik ordered that dispositive sanctions against Fry's were warranted and struck several of its affirmative defenses to the plaintiff's claims. (See Order Imposing Sanctions for Discovery Abuses and Staying Case dated July 3, 2012, No. C10-1562RSL.) He also ordered significant monetary sanctions to offset the costs caused by the discovery violations. See Id.

892. Here, both factors exist as the evidence Safeway destroyed was highly relevant and it was on notice and actively investigating Ms. Gores' potential claim immediately after she fell.

“Whether the missing evidence is important or relevant obviously depends on the particular circumstances of the case. Another important consideration is whether the loss or destruction of the evidence has resulted in an investigative advantage for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence.” Henderson, 80 Wn. App. at 607. Ms. Gores has been prejudiced by Safeway's spoliation of the documents which go to the heart of Safeway's defense in this case. The video from December 2, 2010, particularly to the extent it captured the circumstances involving Ms. Gores' accident and recorded the steps, if any, undertaken by Safeway to protect its customers through maintenance of the area, would have been vital evidence to the trier of fact. See Henderson, 80 Wn. App. 592 (noting that the “common remedy is an inference ‘that the adversary's conduct may be considered generally as tending to corroborate the proponent's case and to discredit that of the adversary’” (quoting McCormick on Evidence §265 at 192 (4th ed. 1992)). It was an abuse of discretion for the

trial court to grant summary judgment for Safeway under these circumstances.<sup>20</sup>

**D. The Trial Court Abused Its Discretion in Striking the Declaration of Ms. Gores' Safety and Premises Liability Expert.**

Here, the trial court abused its discretion in failing to admit the testimony of Ms. Gores safety and premises liability expert, Tom Baird. ER 702 permits testimony by a qualified expert where “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Courts generally “interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.” Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (2001). Mr. Baird’s testimony would be particularly helpful to the trier of fact with respect to whether Safeway reasonably should have had notice of the risk of hazards in the self-service dairy aisle, based upon customers’ common practice of inspecting eggs in their cartons when removing them from the shelf. CP 831-838. Furthermore, Mr. Baird would testify about Safeway’s housekeeping practices and whether they should have exercised a higher degree of vigilance in the self-service dairy

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<sup>20</sup> The trial court’s decision should be reversed and Ms. Gores should be allowed to request at trial that the jury be instructed that the only inference to be drawn from Safeway’s spoliation is that the evidence (both the video and the handwritten “sign-off” sheets which Safeway compares to its “sweep logs”) would have been unfavorable to Safeway.

aisle, given the risk of ongoing hazards posed by eggs and other liquids stored in the aisle. (Id.) This Court should reverse the trial court's decision to exclude Mr. Baird's expert opinion.

**E. The Trial Court Abused Its Discretion in Denying Ms. Gores' Motion to Strike the Second Declaration of Patricia Johnson, Which Injected New Substantive Facts Into the Case, to Which Ms. Gores Had No Ability to Respond.**

The trial court abused its discretion in permitting Safeway store manager Patricia Johnson to submit a second declaration with Safeway's reply in support of its motion for summary judgment, in which Safeway improperly inserted new substantive facts into the case, to which Ms. Gores had no opportunity to respond. It is well-settled law in Washington that "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn. 2d 371, 858 P.2d 245 (1993) (citing Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).) Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. White v. Kent Medical Center, Inc., P.S., 61 Wash. App. 163, 168, 810 P.2d 4 (1991).

Johnson testified about the missing handwritten sweep "sign off sheets," and about what the records would or would not have shown. CP

927-931. However, Ms. Gores never had a chance to review any of these records and Safeway failed to produce them with no satisfactory explanation. The Second Johnson Declaration was also not in strict reply, in violation of King County Local Rule (“KCLR”) 7(b)(4)(E). Safeway’s new testimony is highly prejudicial to Ms. Gores, and it was wholly improper for the court to consider it, which it did at great length,<sup>21</sup> without giving Ms. Gores an opportunity to respond. See Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996). This Court should overturn the trial court’s decision and strike the Second Jonson Declaration. It also should deny Safeway’s motion for summary judgment as a sanction for its spoliation of evidence.

**F. The Trial Court Abused Its Discretion in Granting Safeway’s Motion for Protective Order Which Precluded Ms. Gores from Deposing Debbie Getz About Her Highly Relevant, Non-Privileged Dealings With Ms. Gores.**

The trial court also abused its discretion in this case when it granted Safeway a protective order that prohibits Ms. Gores from deposing Debbie Getz, on the grounds that Getz’s highly relevant direct dealings with Ann Gores are “mental impressions and opinions [and] privileged work product.”<sup>22</sup> CP 438-441, 621-622. As discussed herein,

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<sup>21</sup> See VRP 46-49.

<sup>22</sup> Even assuming, for purposes of argument, that Getz’s communications with Ms. Gores are somehow privileged—which they are not—Getz undeniably waived any such privilege by choosing to communicate with and freely disclose such information to Ms.

Getz actively contacted Ms. Gores after her accident and made statements directly to her about evidence in Safeway's possession, which it destroyed. See Section IV. F-G., infra. Under the circumstances, it was manifestly unreasonable and prejudicial to prevent Ms. Gores from deposing Ms. Getz about her statements. See, e.g., In re Detention of West, 171 Wn.2d 383, 403, 256 P.3d 302 (2011) (Broad access to discovery is the centerpiece of a fair trial, and mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation).

Furthermore, it was an error of law for the trial court to conclude that Getz's communications to Ms. Gores constitute privileged work product. All of the elements for reversal based upon the court's abuse of discretion exist. The court's factual findings on privileged mental impressions are unsupported by the record and the court failed to properly apply the standard for privileged work product and mental impressions;<sup>23</sup> in light of these problems, the court's decision was outside the range of acceptable choices. See State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing 1 Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed. 1993)). This Court should

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Gores. If Safeway permitted Getz to contact Ms. Gores, it should have been prepared to have Getz deposed in the event of litigation.

<sup>23</sup> It cannot be reasonably said that Getz's free and voluntary communications to Ms. Gores about the evidence in this case constituted "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." CR 26(b)(4).

correct the trial court's error and reverse the protective order to permit Ms. Gores to depose Safeway's witness on these issues.

## VI. CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court (1) reverse the order granting summary judgment for Respondent and remand the case for further proceedings in the trial court; (2) reverse the order granting summary judgment as a sanction for Safeway's spoliation of highly relevant evidence in this case; (3) admit the expert testimony of Tom Baird in support of Ms. Gores' opposition to Safeway's motion for summary judgment; (4) strike the Second Declaration of Safeway store manager Patricia Johnson on spoliated evidence; and (5) reverse the order granting Safeway's motion for protective order to allow Ms. Gores to depose Safeway employee Debbie Getz regarding her highly relevant, non-privileged dealings with Ms. Gores.

Respectfully submitted this 6th day of June, 2013.

SMITH & HENNESSEY, PLLC



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No. 69819-2-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

ANN P. GORES,

Appellant,

vs.

SAFEWAY, INC., a Delaware  
Corporation,

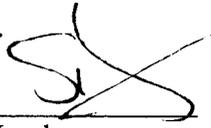
Respondent.

CERTIFICATE OF SERVICE

I, Sydney Henderson, hereby certify that I am over the age of eighteen, employed by Smith & Hennessey, PLLC and not a party to this action. On June 6, 2013, I caused to be served the Appellant's Opening Brief, via electronic mail and U.S Mail, first class, postage prepaid to counsel for Respondent listed below:

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Dated this 6<sup>th</sup> day of June, 2013.

  
\_\_\_\_\_  
Sydney Henderson

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COURT OF APPEALS  
STATE OF WASHINGTON