DOUG CULLINS, JENNIFER ANDERSON, AND KENNETH MOSKOW ACHIEVED A SIGNIFICANT TRIAL COURT AND APPELLATE VICTORY IN A PREMISES LIABILITY CASE

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Shafer v. Walgreen – JSH attorneys Doug Cullins, Jennifer Anderson, and Kenneth Moskow achieved a significant trial court and appellate victory in a premises liability case where the plaintiff invoked the "mode-of-operation rule" and "*res ipsa loquitur*" doctrine.

Kathleen Shafer alleged that while shopping at a Walgreen store, she removed a glass air freshener refill from a shelf and the product fell from its packaging. The glass refill landed on Shafer's foot, lacerating her left big toe. Shafer did not notice anything wrong with the refill's packaging when she picked it up. No other store customers had ever been injured by a product falling from its packaging.

Shafer sued Walgreen for negligence and sought more than $3 million in damages. Walgreen moved for summary judgment on the ground there was no evidence its employees: (1) created the allegedly dangerous condition; or (2) had actual or constructive knowledge of it. Shafer argued in response that she was not required to prove notice under the "mode-of-operation rule." This rule excuses the "notice" requirement of a premises liability claim against a business only where the business could reasonably anticipate that under its particular mode of operation, hazardous conditions would "regularly occur."

Shafer also argued she was excused from proving notice under the *res ipsa loquitur* doctrine. The first element of this doctrine requires the plaintiff to prove the accident at issue is a type that ordinarily does not occur in the absence of negligence. After the trial court rejected Shafer's arguments and granted summary judgment to Walgreen, Shafer appealed.

Following oral argument, the Arizona Court of Appeals affirmed in a memorandum decision filed on June 5, 2018. The appellate court agreed with Walgreen that the store could not reasonably anticipate the regular occurrence of a hazardous condition where no customers had ever been injured by falling products before. The mode-of-operation rule therefore did not excuse Shafer from having to prove Walgreen's actual or constructive knowledge of a dangerous condition. The court also affirmed the trial court's rejection of *res ipsa loquitur* because Shafer presented no evidence to support the first element of that

doctrine. Summary judgment for Walgreen was therefore appropriate.

Doug joined Jones, Skelton & Hochuli in 2003 and became a partner in 2011. He practices in the areas of medical malpractice, nursing home and pharmacy defense, and commercial litigation.

Jennifer handles federal and state appeals concerning a wide range of issues, including commercial law, torts, insurance, governmental liability, employment, workers' compensation and family law.

Ken focuses his practice on medical malpractice and nursing home defense, section 1983 defense, wrongful death and personal injury defense, premises liability defense and transportation defense.

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