

**INTENTIONAL TORTS****Assault and Battery—False Imprisonment—Negligence—Negligent Hiring****Suspected shoplifter claimed he was kicked and punched****VERDICT****Defense****CASE**James A. Cusato v. Home Depot U.S.A. Inc.,
David Bousquet, Tim Carvalho, Sean McSweeney
and Danny Alegre, No. 1-03-CV-003043**COURT**Superior Court of Santa Clara County,
Santa Clara, CA**JUDGE**

John F. Herlihy

DATE**09/23/2005****PLAINTIFF****ATTORNEY(S)**

Todd E. Jones, Sunnyvale, CA

DEFENSE**ATTORNEY(S)**

Paul Caleo, Burnham & Brown, Oakland, CA

FACTS & ALLEGATIONS On Aug. 13, 2002, plaintiff James A. Cusato, 72, visited a Home Depot in Campbell. He alleged that when he resisted the efforts of four Home Depot employees who were attempting to detain him on suspicion of shoplifting because there was no basis for their suspicion, they tackled him to the floor, beat, kicked and punched him without provocation and painfully restrained him until the local police arrived.

The police arrested Cusato on charges of shoplifting, he later pled guilty to a lesser charge of disturbing the peace.

Cusato sued Home Depot U.S.A. Inc. and the four employees David Bousquet, Tim Carvalho, Sean McSweeney and Danny Alegre, for assault and battery, false imprisonment, intentional infliction of emotional distress, and negligence.

Cusato's counsel argued that Allegre, the employee who first approached him, was unfit for his job. He submitted evidence of Alegre's subsequent termination for misconduct similar to that what Cusato was alleging, and claimed that Alegre had a history of false arrests and altercations with customers. Cusato called a witness, Ricky Deal, who testified that he had been falsely arrested because of Allegre, as a result of which he was unlawfully confined for 10 months.

The defendants disputed Cusato's version of the incident and argued that their actions were protected by California Penal Code 490.5, aka the "merchant's privilege" (a guard has the right to detain a suspected shoplifter for a reasonable time to request the return of the merchant's property that he has reasonable cause to believe the person has unlawfully taken).

Defense claimed that Alegre, a loss-prevention agent, observed Cusato remove telephone wires from a box containing a cordless telephone and conceal them in his clothing as well as in the cardboard packaging of an

item he had placed in his shopping cart. The agent continued to watch Cusato till he approached the cashier and paid for the item in his shopping cart but did not reveal or pay for the wires he had concealed. Alegre and McSweeney then stopped Cusato as he exited the store and asked him to return inside so that they could discuss the items for which he did not pay. Cusato went with them voluntarily to a room at the back of the store. They alleged that while questioning him there, he became agitated and aggressive, throwing a box at Alegre and rushing towards him with his fists raised. At least one of the other employees intervened before a member of the Campbell Police Department arrived and arrested Cusato for shoplifting. Allegre denied ever physically touching Cusato during the struggle. Defendants claimed that their actions were protected by California Penal Code section 490.5 (the Merchant's Privilege).

On cross-examination of Cusato, defense counsel elicited testimony that within one year from the incident at Home Depot, he was stopped by a loss prevention officer at a Kmart and, without provocation, tried to punch the agent.

INJURIES/DAMAGES Cusato, who suffers from Alzheimer's dementia, claimed he sustained contusions to the right side of his body and abrasions on his left cheek. He presented himself to the emergency room several hours after the incident and was treated, but for unknown reasons he left without getting an X-ray that the doctor had requested. He also alleged to have suffered a horizontal fracture of tooth number 12, which was discovered by his dentist when Cusato went to him complaining of pain about eight months after the incident.

Cusato sought to recover his medical expenses but did not specify what they were. He made an overall claim for \$1 million, including pain and suffering and punitive damages.

Home Depot contended the the fractured tooth did not result from the incident in question, and moved for nonsuit with respect to the claim for punitive damages, which Judge John Herlihy granted.

VERDICT INFORMATION The jury returned a defense verdict on liability.

PLAINTIFF**EXPERT(S)**Gregory Whitley M.D., Emergency Medicine,
Los Gatos, CAStephen Glazier D.D.S., Dentistry/Odontology,
Penn Valley, CA**DEFENSE****EXPERT(S)**Alan Gluskin D.D.S., Dentistry/Odontology,
San Francisco, CA