

ST. JAMES COURT
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NO. 70552-1-I

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

ANTHONY DADVAR,

Appellant,

v.

APPLEBEE'S SERVICE,

Respondent.

REPLY OF APPELLANT

Emerald Law Group PLLC
JONATHAN NOLLEY, WSBA #35850
Attorneys for Appellant
Anthony Dadvar
600 University St., Suite 1928
Seattle, Washington 98101
(206) 826-5160

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Appellant Anthony Dadvar responds to arguments set forth in Applebee's brief in the following manner:

A. Applebee's confuses speculation with inference and ignores that Plaintiff is the non-moving party and entitled to have facts and inferences taken in a light most favorable to him.

Applebee's repeatedly claims that Dadvar did not see a substance on the floor before or after he slipped. In determining, however, whether a genuine issue of material fact precludes summary judgment, Washington courts construe the facts and reasonable inferences in the light most favorable to the nonmoving party. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 963, 948 P.2d 1264 (1997). The facts, as presented by Mr. Dadvar and which must be assumed true for the purpose of a summary judgment motion, establish that Mr. Dadvar walked into the entrance foyer of Applebee's, stepped across the tile floor toward the door, and felt his foot slip across something on the floor. After entering the Applebee's, Dadvar examined the bottom of his shoe and saw an oily, greasy substance covering the bottom of his shoe.

From these facts, a jury could infer quite reasonably that Dadvar slipped on an oily, greasy substance that was present on the floor of the

Applebee's foyer. While the evidence presented by Dadvar is certainly circumstantial, its circumstantial nature does not discount its weight or admissibility for the purpose of withstanding a motion for summary judgment. *Hernandez v. Western Farmers Ass'n*, 76 Wn.2d 422, 425-26, 456 P.2d 1020 (1969). "The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them." *Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 276, 373 P.2d 764 (1962).

While a plaintiff may not rely on a wholly speculative theory of liability, summary judgment is not appropriate merely because a plaintiff relies on circumstantial evidence and the jury's ability to piece together events. As the court explained in *Ewer v. Goodyear Tire & Rubber Co.*,

"[T]he evidence must present something more than a mere possibility or conjecture, [and] it is equally sound that the cause of an accident may be inferred from circumstances. A plaintiff in this character of case is not obligated to establish the material facts essential to a recovery beyond a reasonable doubt. Such a rule would amount to a denial of justice. It is sufficient if his evidence affords room for ... reasonable minds to conclude that there is a greater probability that the accident causing the injury happened in such a way as to fix liability upon the person charged with such liability, than it is that it happened in a way for which the person so charged would not be liable. 'There are very few things in human affairs, and especially in litigation involving damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another

cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause.' In other words, the plaintiff is only required to satisfy the jury, by a fair preponderance of the evidence, that the accident ... occurred in the manner he contends it did.

4 Wn. App. 152, 158-159, 480 P.2d 260 (1971)

Applebee's position in this matter is that Dadvar's claims fail simply because he did not see the exact condition of the floor at the moment he slipped. Such a position creates an unreasonable bar for any claim, no matter what circumstantial facts or inferences can be drawn. In this instance, the fact that Dadvar slipped on an oily substance on Applebees' premises is as certain as the solution to a math problem or sum of an equation. A reasonable jury could certainly determine that, more likely than not, Dadvar fell on a slippery substance that Applebee's should have known existed on the morning that Dadvar suffered his injury.

B. Applebee's ignores Dadvar's efforts to supplement his interrogatory answers and fails to identify any material contradiction between Dadvar's testimony and declaration.

Applebee's takes the position that Dadvar's declaration contradicts his earlier sworn testimony without providing any support for

this contention. In the portions of the record to which Applebee's cites, the only apparent inconsistency is a difference between the unsigned interrogatory answers provided by Dadvar's prior attorney and Dadvar's deposition testimony regarding an oily substance.

Applebee's conveniently omits to mention that Dadvar's counsel supplemented his interrogatory answers on February 27, 2013 by letter to Applebee's counsel. (CP 34-36). In this letter, counsel explained that the information supplied by Dadvar's first attorney was incorrect and that Plaintiff slipped on an oily, greasy substance – the same substance that Dadvar described in his deposition and in his declaration. It is mysterious that Applebee's considers these to be contradictory statements, particularly when the only statements provided by Dadvar under oath or penalty of perjury are wholly consistent.

Applebee's similarly invents a contradiction between Dadvar's declaration and deposition testimony regarding the substance. In his declaration, Dadvar was very clear that he did not know what the substance was, only that it was greasy, oily and that he was certain he did not track it from his home or car and that he is certain, based on the fact he later found an oily, greasy substance on the bottom of his shoe, was the cause of his slip in the foyer. Dadvar has never claimed to have

directly observed the substance while it was on the tile because he a) immediately sought out a place to sit down after he slipped and b) the tiled area was cleaned by Applebee's employees shortly after the incident and after Dadvar reported that he slipped on a substance in the foyer. (CP 38-39).

As a substantive matter, Dadvar certainly did not rely on contradictory declarations or testimony to create a material issue of fact. The cases cited by Applebee's, including Overton and Marshall involve situations in which a party made admissions or statements that eliminated any factual dispute or issue upon which the party could resist summary judgment, but later tried to create issues of fact by offering contradicting statements or testimony. In this instance, however, the issues of material fact revolve around what can and cannot be inferred from the facts that Dadvar has presented regarding the substance on his shoe and whether sufficient facts exist to show that Applebee's should have known of the condition.

C. Applebee's misrepresents Dadvar's motion under CR 56(f).

Dadvar's counsel moved for a continuance of the hearing on motion for summary judgment after the trial court refused to consider Dadvar's declaration because it was self-serving (e.g. lacked sufficient

credibility). Given his recent retention of new counsel, a short continuance of the hearing was requested in order to allow time for additional discovery and to provide affidavits in support of Dadvar's position, a necessity if the court refused to consider Dadvar's own declaration.

As the court in *Coggle v. Snow* stated, "in considering the application of CR 56(f), we note that the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case." *Coggle* 56 Wn. App 499; 784 P.2d 554 (1990), citing *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 895-96, 639 P. d 732 (1982). In *Coggle*, the court noted that the first consideration should be justice and that a client should not be penalized by the dilatory conduct of prior counsel. *Id*, citing *Simonson v. Fendell*, 34 Wash.App. 324, 330-32, 662 P.2d 54 (1983), reversed on other grounds, 101 Wn.2d 88, 675 P.2d 1218 (1984). The court further noted that the opposing party had not argued, nor could show, that it would be prejudiced by a delay.

In *Coggle*, an attorney appeared shortly after a motion for summary judgment was filed and was unable to obtain sufficient affidavits without a continuance. Dadvar's counsel was in a similar position having only recently appeared and in the process of receiving

Mr. Dadvar's voluminous file and medical records when Applebee's filed its motion for summary judgment. While Applebee's decries the volume of Dadvar's file as a "red herring," anyone who has practiced personal injury law would understand that taking over a case for a client with extensive medical treatment, such as Dadvar, requires a great deal of work to organize and understand the injuries and that this process is not instant.

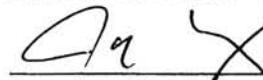
The court abused its discretion in refusing a short continuance and after refusing to consider Dadvar's declaration. Dadvar's counsel requested the opportunity to conduct additional discovery and should not have had to rely solely on the discovery and work accomplished by a prior attorney.

D. Conclusion

For the reasons discussed herein, the Court should reverse the trial Court's granting of summary judgment and remand this matter to Superior Court.

DATED this 14th day of November, 2013.

EMERALD LAW GROUP PLLC



Jonathan R. Noltey, WSBA #35666
Of Attorneys for Appellant

PROOF OF SERVICE

I, Jonathan Nolley, hereby declare that I am and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not a party nor interested in the above-entitled action, and am competent to be a witness herein.

On this day, I filed with the State of Washington Court of Appeals the following document:

REPLY BRIEF OF APPELLANT

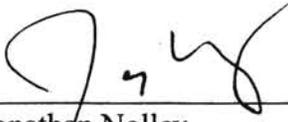
And served the same document via legal messenger to the party below:

Ramona N. Hunter
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, WA 98101

I hereby declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of November, 2013.

EMERALD LAW GROUP PLLC



Jonathan Nolley