

No. 70552-1-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ANTHONY DADVAR,

Appellant,

v.

APPLE AMERICAN GROUP, LLC,

Respondent.

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**RESPONDENT'S BRIEF**

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COURT OF APPEALS  
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## I. INTRODUCTION

This appeal arises out of a baseless premises liability action. Appellant Anthony Dadvar's ("Dadvar") claim of negligence against Apple American Group, LLC ("Applebee's"),<sup>1</sup> was properly dismissed by the trial court at the summary judgment stage, because Dadvar failed to meet his burden in proving the existence of a dangerous condition and notice of such condition, two required elements for a premises liability negligence claim under Washington law.

This action concerns an alleged slip-and-fall incident in the entryway foyer of an Applebee's restaurant located in Lynnwood, Washington, although it is undisputed that Dadvar did not actually fall. Dadvar's own sworn testimony establishes that he did not personally observe any foreign greasy or oily substance on the tile floor of the entryway prior to his slip event. As such, Dadvar has not, and cannot, offer any definitive evidence of the existence, source or origin of the alleged greasy or oily substance that he now alleges was on the entryway floor. Moreover, Dadvar failed to present any evidence sufficient to show actual or constructive notice of the greasy condition by Applebee's. Given Dadvar's failure to offer proof of these two requisite elements of a claim

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<sup>1</sup> Dadvar originally sued Apple American Group, LLC, and Applebee's Services, Inc. Applebee's Services, Inc., was dismissed with prejudice, by stipulation, on June 25, 2012. Supplemental Clerk's Papers, Order Dismissing Litigant Applebee's Services, Inc., Superior Court Docket #6.

for premises liability, Judge Eric Z. Lucas, Snohomish County Superior Court, properly granted Applebee's motion for summary judgment and denied Dadvar's motion for continuance.

Each of Dadvar's bases for appeal is either irrelevant to the Court's analysis and/or unsupported by law. Despite his best efforts, Dadvar cannot present evidence of the two basic elements of his premises liability claim. Therefore the Superior Court was correct in granting Applebee's summary judgment motion; this Court should affirm.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

Judge Eric Z. Lucas did not err in dismissing Dadvar's premises liability lawsuit at the summary judgment stage, because Dadvar failed to present evidence of the two requisite elements of his premises liability claim: the existence of an actual dangerous condition inside the Applebee's restaurant where the slip incident allegedly occurred, and notice of the alleged dangerous condition by Applebee's.

1. Dadvar wrongly asserts that there was sufficient evidence to infer a dangerous condition based on (a) his own testimony regarding a foreign slippery substance on his shoe, (b) his own self-report of slipping on an alleged foreign substance on a tile floor. Dadvar's assignment of error is based on a gross mischaracterization of his own testimony and a misstatement of the facts in the record. The Superior Court properly discounted this evidence, because it is insufficient to prove, or even infer,

the existence of a dangerous condition. In his own sworn testimony, Dadvar admitted that he did not observe any greasy or oily substance on the tile floor prior to his slip incident. In light of his own admission, none of the factors listed above supports an inference of the existence of a dangerous condition. At most, his own self-serving testimony reflects that a slip incident was reported to Applebee's staff after the fact. To make any further inference, based on these facts, in light of Dadvar's own testimony, would amount to speculation. Washington law is clear that a slip incident, on its own, is not evidence of negligence nor is it evidence of a dangerous condition.

2. Dadvar wrongly asserts that his own self-report of a slip incident, an employee's monitoring of the subject area, and his own conjecture about the placement of floor mats on the tile floor, is sufficient evidence to allow a trier of fact to determine notice or negligence. Dadvar's assignment of error is wholly unsupported by law. There is no basis in fact or law which holds the above to constitute actual or constructive notice. The Superior Court correctly concluded, as a matter of law, that Dadvar failed to establish any admissible evidence of notice.

3. Dadvar wrongly asserts that his self-serving declaration should not have been given less weight during the summary judgment hearing. The Superior Court correctly recognized Dadvar's declaration as self-serving, because it directly contradicted Dadvar's earlier sworn

testimony that he did not observe the subject tile or a slippery condition prior to his slip incident. Washington law is clear that such contradictory, self-serving testimony can be discounted.

4. The Superior Court did not err in denying Dadvar's request to continue the summary judgment hearing so that Dadvar's counsel could conduct further discovery. Dadvar commenced his lawsuit in 2011, regarding an incident that occurred in 2008. During this five year period, Dadvar had more than enough time and opportunities to retain counsel and conduct discovery. He did not. On this basis the Superior Court properly denied his request for continuance.

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. The Slip Incident.**

On or about November 29, 2008, Dadvar visited an Applebee's restaurant in Lynnwood, Washington. CP 134 ¶ 2.1. Upon entering the restaurant, while in the entryway vestibule or foyer, Dadvar reportedly experienced some type of slip event, the mechanics of which he was unable to fully describe. CP 67:2-68:23. At the time of his deposition, he recalled only that his foot gave way and his ankle was twisted. CP 68:2-23. Dadvar, however, admitted that he did not fall flat to the ground:

Q. It's your testimony that you did not actually fall; is that correct?

A. I did not fall on the floor completely. I went down, *but I didn't fall.*

CP 67:8-11 (emphasis added). In recovering from the slip, Dadvar reportedly twisted his ankle, but was able to prevent his body from falling flat on the ground. CP 67:15-25, 68:2-23.

Dadvar's Amended Complaint and initial discovery responses alleged that he slipped because of a wet tile from rain. CP 134 ¶¶ 2.2-2.4, CP 91. Dadvar was then presented with evidence that it did not rain the day of the incident. CP 111-117. At the time of his deposition, more than three years after the incident, Dadvar changed his story and claimed that the incident was caused by the presence of grease or oil on the entryway tile. CP 70:22-71:4. Dadvar admitted, however, that he did not actually look at the tile he slipped on:

Q. Mr. Dadvar, I'm not trying to be tricky, and I need you to listen to my question –

THE WITNESS: What am I –

MR. NOLLEY: What she's asking you is, immediately after you fell -- so before you went into the restaurant, before you went and sat down and got ice, when you were –

Q. When it happened.

MR. NOLLEY: -- in the foyer right after you fell –

THE WITNESS: No.

MR. NOLLEY: -- did you look at the floor.

A. No. I rushed to grab a stool and get some ice.

\* \* \*

Q. At any time on the day of your slip event, did you observe any foreign substance on the floor of the foyer at the Applebee's restaurant in Lynnwood?

A. After I fell?

Q. At any time that day.

A. At any time. No, I didn't.

CP 72:7-21, CP 73:5-10. Dadvar never looked at the tile floor prior to, or immediately after, his fall. Dadvar admitted he was focused not on the ground, but on the other customers entering the restaurant. CP 69:17-70:8. Dadvar did not observe any "greasy" substance on the bottom of his shoes until after he walked through the restaurant into the bar, after the incident. CP 73:13-74:2.

Dadvar admitted that he did not personally observe any foreign substance on the floor in the area where his slip occurred, but that his claim was based on an assumption:

Q. And you told him there was oil and grease because of what was on your shoe, not because you'd observed anything in the foyer firsthand?

MR. NOLLEY: Objection; asked and answered.

Q. Answer if you can, sir.

A. Well, it's because this was coming from there. I mean, I didn't bring it in from any other place.

Q. You assumed –

A. *Right.*

CP 74:14-24.

**B. Applebee's Motion for Summary Judgment.**

Following Dadvar's deposition, Applebee's filed its motion for summary judgment based on the complete absence of evidence of the existence or origin of any dangerous condition (foreign substance on its floor) or notice of such a condition. CP 118-27. In response, Dadvar's opposition brief relied solely upon a new declaration by Dadvar, which included a discussion of new facts not previously contained in his Amended Complaint or discovery responses. CP 37-43. The declaration discussed the cleanliness of his shoes and garage, the Applebee's parking lot, the placement of floor mats at Applebee's, and what he believed was standard greeting protocol for Applebee's hosts. CP 37-43.

However, nowhere in the declaration did Dadvar state that he observed the "slippery substance" on his shoe prior to his incident, or that he observed a "slippery substance," or any kind of foreign substance, on the entryway floor where he allegedly slipped. CP 37-43. Dadvar stated,

“[a]s I walked toward the inner door, my foot slipped on a slippery substance on the floor and I slipped.” CP 38 ¶ 6. Dadvar further admitted, “I do not know what the exact substance was on which I slipped, I am not speculating about the fact that I slipped violently on something slippery in the foyer.” CP 40 ¶ 10. Further, Dadvar’s declaration did not contain any assertions that Applebee’s had actual or constructive notice of the “slippery substance” prior to his incident. CP 37-43.

On May 29, 2013, a hearing was held on Applebee’s summary judgment motion where Dadvar moved for a continuance pursuant to CR56(f) to permit him to conduct additional discovery. CP 18. The Superior Court granted Applebee’s motion for summary judgment and denied Dadvar’s request for a continuance. CP 16-18. The Superior Court held as follows:

The Court notes there is a difference between inference from facts and speculation; and the plaintiff’s argument is speculation. In addition, the plaintiff’s CR56 Motion is not well taken at this time. The Court indicates that this action began in 2011.

CP. 18.

**C. Dadvar’s Motion for Reconsideration.**

On June 7, 2013, Dadvar filed a motion for reconsideration pursuant to CR 59. CP 10-15. Applebee’s opposed the motion. CP 3-9.

The Superior Court denied Dadvar's motion for reconsideration on July 21, 2013. CP 1-2. This appeal followed.

#### IV. ARGUMENT

##### A. Summary Judgment Standard.

A motion for summary judgment should be granted if there is no genuine issue of material fact or if reasonable minds could reach only one conclusion based upon the evidence construed in the light most favorable to the nonmoving party. CR 56(c); Sea-Pac Co., v. United Food and Comm'l Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985). Summary judgment is properly granted if the nonmoving party fails to establish any facts which would support an essential element of his claim. Young v. Key Pharmaceuticals Corp. v. Catrett, 477 U.S. 317 (1986). In response to a summary judgment motion, the non-movant must make a prima facie case on every essential element of his claim if the movant first shows that there is an absence of evidence to support the non-movant's case. Young, 477 U.S. 317; Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988). The non-movant may not rely on speculation to defeat summary judgment. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). If the plaintiff fails to make such a showing, dismissal as a matter of law is mandated. Young, 477 U.S. 317.

The Superior Court properly adhered to these principles when it granted Applebee's motion for summary judgment and denied Dadvar's motion for reconsideration.

**B. Dadvar Offered No Evidence that a Dangerous Condition Existed at the Time of his Slip Incident or that Applebee's Had Actual or Constructive Notice of the Alleged Dangerous Condition.**

The Superior Court properly granted Applebee's motion for summary judgment and denied Dadvar's motion for continuance, because he failed to offer evidence to support any of the requisite elements of his premises liability claim against Applebee's. Dadvar's appeal fails to offer any analysis that supports reversal of the Superior Court's decision.

**1. Dadvar Incorrectly Creates and Attempts to Impute an "Extremely High Duty of Care" upon Applebee's, Which is Wholly Unsupported by Law.**

Instead of addressing the deficiencies in the elements of his claim, which warranted the Superior Court's proper granting of summary judgment, Dadvar's appeal incorrectly imputes upon Applebee's an "extremely high duty" of care owed to its customers. This artificially created "extreme" duty is wholly unsupported by law. The general rule in Washington is that property owners are not insurers against all happenings that occur on their premises. Fernandez v. State ex rel. Dept. of Highways, 49 Wn. App. 28, 741 P.2d 1010 (1967). Washington follows

the Restatement (Second) of Torts §343 with regard to a landowner's duty to invitees<sup>2</sup>:

A possessor of land is subject to liability for physical harm caused to his [or her] invitees by a condition on the land if, but only if, he [or she]

- (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 them against the danger.

Iwai v. State, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). “[A] landowner’s duty attaches only if the landowner ‘knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk . . . .’” Id. at 96 (quoting RESTATEMENT (SECOND) OF TORTS § 343(a)). Reasonable care requires the landowner to inspect the dangerous condition and repair or warn invitees of the condition. Tincani v. Inland Empire Zoological Society, 124 Wn.2d

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<sup>2</sup> “The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee.” Iwai v. State, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). “The highest of the[se] three levels of duty is owed to an invitee, who may be either a business visitor or a public invitee.” Johnson v. State, 77 Wn. App. 934, 940, 894 P.2d 1366 (1995). “A business [invitee] is [one] who is invited to enter or remain on land for [the] purpose directly or indirectly connected with business dealings with the possessor of the land.” Younce v. Ferguson, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting RESTATEMENT (SECOND) OF TORTS § 332 (1965)). Here, it is undisputed that the plaintiff was a business invitee at the time of his slip incident.

121, 139, 875 P.2d 621 (1994). “Knowledge” requires the plaintiff to show actual or constructive notice of the dangerous condition. Iwai, 129 Wn.2d at 96.

The duty owed by a landowner to invitees is higher than that owed to licensees or trespassers, but not “extremely high.” There is no “extremely high” level of care, and Dadvar fails to offer any case law to suggest its existence under Washington law. Rather, Applebee’s owed Dadvar a duty to exercise reasonable care to prevent or correct dangerous conditions. This duty does not relieve Dadvar of his burden to prove by admissible evidence each element of his premises liability claim. As discussed below, Dadvar failed to do so.

**2. The Mere Existence of a Duty Owed by Applebee’s Does Not Prove the Requisite Elements of Dadvar’s Premises Liability Claim.**

As the Superior Court properly held in its decision on summary judgment, Dadvar failed to offer any evidence, beyond speculation, to prove the elements of his claim. CP 18. To establish a negligent failure to maintain business premises in a reasonably safe condition, a plaintiff must show that (1) an unsafe condition existed; and (2) the property owner had actual or constructive knowledge of the condition. Pimental v. Roundup Co., 100 Wn.2d 39, 49, 666 P.2d 888 (1983). This is the proper standard before the Court, not Dadvar’s lengthy discussion of an “extreme” duty.

Dadvar's discussion on the duty of care owed, and Applebee's exercise of the duty of care on the day in question, is largely irrelevant to the Court's analysis, and is nothing more than a smoke screen for his own deficient claims. Indeed, Dadvar's argument that a "reasonable jury could find that Applebee's failed to exercise reasonable care" to discover a dangerous condition, incorrectly assumes that Dadvar has already proven that a dangerous condition actually existed on the tile floor on the day of the incident. However, Dadvar himself admitted that he never saw any foreign substance on the floor of the foyer where he slipped. CP 73:5-10. The record contains no evidence that anyone else saw any foreign substance on the floor. Incredibly, Dadvar's analysis completely ignores the actual standard applicable for proving his premises liability claim. Dadvar offers no discussion of the factual existence of such a dangerous condition on the tile floor prior to his slip incident, nor Applebee's notice of such condition, but simply makes the logical jump to duty owed.

Dadvar's failure to prove these elements was the basis for summary judgment dismissal of his claims. Nothing has changed. The Superior Court's decision should be affirmed because Dadvar did not prove any of the elements of his claim.

**3. The “Reasonably Foreseeable” Exception Does Not Apply.**

Dadvar has conceded that he cannot prove actual or constructive notice. Instead, Dadvar argues that a “reasonably foreseeable” exception to the notice requirement relieves him of the burden of proving notice of the dangerous condition.

In a premises liability action, Washington law requires the plaintiff to prove that the landowner had actual or constructive notice of the unsafe condition. Ilwai v. State, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). To prove constructive notice, a plaintiff carries the burden of showing that the specific unsafe condition existed for such time as would have afforded the defendant sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger. Id. The lack of such evidence precludes recovery. Id. at 97. A limited *exception* to this rule exists where a specific unsafe condition is foreseeably inherent in the nature of the business or mode of operation. Id. at 98. In such cases, a plaintiff need not prove notice. Id. This reasonably foreseeable exception, however, has generally been applied only in the context of “*self-service type stores.*” Id. at 99 (emphasis added).

More importantly, in the cases where the exception has been applied, the origin and identification of the dangerous condition have never been disputed. Ilwai dealt with the plaintiff’s slip and fall on

ice/snow in the defendant's parking lot. Ilwai, 129 Wn.2d at 87. There was no dispute regarding identification of the snow/ice as the "dangerous condition" or its origin. In applying the reasonably foreseeable exception, the Court noted that "a jury could certainly find that its occurrence was foreseeable during inclement weather." Id. at 101. Similarly, in Kinney v. Space Needle Corp., 121 Wn. App. 242, 250, 85 P.3d 918, 922 (2004), it was reasonably foreseeable that a slip and fall could occur on the ladders at the top of the Space Needle where the "rungs were round and painted with glossy paint and had no anti-slip surface."

In each of these cases, the existence and origin of the dangerous condition was properly identified. In contrast, Dadvar presented no evidence of the existence of a foreign substance on the floor where he slipped prior to the incident. Dadvar assumes that the oily, slippery substance he claims to have found on his shoe after the event was on the tile floor where he slipped, but there is no evidence of that. Dadvar provided no evidence that any specific unsafe condition was foreseeably inherent in the nature or operation of Applebee's entryway foyer. The exception to the notice requirement does not apply. In response to Applebee's summary judgment motion, Dadvar produced no evidence that Applebee's knew or should have known of a dangerous condition in its foyer. The Superior Court properly dismissed the claim.

**4. The Trial Court Properly Disregarded Dadvar's Declaration Because it Contradicts His Earlier Sworn Testimony.**

Dadvar argues that it was error for the trial court to disregard his declaration as self-serving because the court cannot make determinations of credibility on summary judgment. That is incorrect. Where statements directly contradict earlier sworn testimony, a court may dismiss them as self-serving and can do so in the context of a summary judgment motion. Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 429-31, 38 P.3d 322 (2002). See also Klontz v. Puget Sound Power & Light Co., 90 Wn. App. 186, 192, 951 P.2d 280 (1998) (stating that a party may not create a genuine issue of fact with a self-serving declaration that contradicts unambiguous deposition testimony without explanation).

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

Marshall v. AC&S Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

Dadvar offers no analysis as to why his declaration does not contradict his earlier sworn testimony. He simply claims that his declaration establishes that he (1) slipped, (2) discovered a “greasy, oily material” on his shoes, (3) that the mats did not cover the pathway, (4) an Applebee’s employee admitted remembering Dadvar’s report of a “fall,”

and (5) that an Applebee's employee supposedly was responsible for monitoring the area where Dadvar slipped.

None of these statements address or explain the fact that Dadvar originally claimed that the cause of his slip incident was a wet tile from the rain. CP 134 ¶¶ 2.2-2.4, CP 91. When presented with undisputed evidence that it was not raining on the day of the incident, Dadvar contradicted his story (and counsel) and then claimed that some "oil" or "greasy" substance caused the incident. CP 73:13-74:2, CP 111-117.

Dadvar's declaration further contradicts his deposition testimony as to the source of the greasy condition. The declaration claims that a "greasy substance" did in fact exist on the subject tile, because he did not observe any such substances in his garage, his shoes, and the Applebee's parking lot. CP 37-38 ¶¶ 1-2. Dadvar claims that the "substance was certainly the cause of my slip in the foyer," and that the substance was "certainly not on my shoe when I walked into the restaurant." CP 39 ¶ 8. Dadvar further claims that "I am not speculating about that fact that I slipped violently on something slippery in the foyer as I walked through the foyer of Applebee's." CP 40 ¶ 10.

However, each of these statements is contradicted by the fact that Dadvar clearly testified at his deposition that he did not actually observe the tile he slipped on, and, thus did not observe whether the alleged grease/oil was present on the subject tile at the time of the incident. CP

72:7-21, CP 73:5-10. Given the contradictory statements in Dadvar's declaration, the Superior Court properly found the declaration wanting for the purpose of establishing the existence of a dangerous condition, and granted Applebee's motion.

**5. The Superior Court Properly Disregarded Dadvar's Declaration Because it is Based on Speculation.**

The Superior Court properly disregarded Dadvar's declaration as self-serving at the summary judgment, because it is rife with conclusions and speculation. A party's own self-serving opinions and conclusions are insufficient to defeat a motion for summary judgment. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988). Supporting affidavits must contain admissible evidence that is based on personal knowledge. Id. at 359. Dadvar's declaration, however, is not based on personal knowledge, but on speculation.

Nowhere in Dadvar's declaration does he claim that he, or anyone else, actually observed or identified a "slippery substance" present on the tile floor of the entryway prior to his incident. CP 37-41. Dadvar could not do so because he admitted at his deposition that he never observed the greasy substance on the Applebee's floor prior to his fall. CP 72:7-21, CP 73:5-10. Thus, all of the statements in Dadvar's declaration asserting, implying or assuming that the greasy condition originated from Applebee's foyer floor (facts necessary to Dadvar's claim) are not based

on personal observation but on conclusion and speculation. CP 37-41. As such, the Superior Court properly disregarded Dadvar's declaration as self-serving.

**6. The Retention of New Counsel Does Not Warrant A 56(f) Continuance Where Dadvar Has Had Five Years and Multiple Counsel to Litigate His Claim.**

At the outset, Dadvar's appeal offers no applicable case law which holds that a trial court should grant a CR 56(f) continuance simply because new counsel had only six weeks to prepare before the filing of Applebee's motion for summary judgment. None of the cases cited supports this reasoning. In Coggle v. Snow, 56 Wn. App. 499, 504, 784 P.2d 554 (1990), new counsel was retained one week after the filing of summary judgment. Neither Doe v. Abington Friends Sch., 480 F.3d 252, 257 (3d Cir. 2007) nor Miller v. Wolpoff & Abrhamson, L.L.P., 321 F.3d 292 (2d Cir. 2003)<sup>3</sup> even deal with the retention of new counsel.

Dadvar's argument ignores the fact that this litigation has been ongoing since 2011, regarding an incident that occurred in 2008. During this five year period, Dadvar has had more than enough time and numerous opportunities to retain counsel and conduct discovery in this matter. Dadvar however, even with counsel, conducted little to no

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<sup>3</sup> Additionally, Doe and Miller are federal court of appeals cases applying federal law, and thus not binding.

discovery during this time.<sup>4</sup> Dadvar chose not to conduct depositions. Dadvar did not interview witnesses. He sought no objective evidence to support his claims. Any harm or prejudice from the delay can only be pointed at Dadvar himself.

Dadvar's counsel's retention, six weeks before the filing of Applebee's motion for summary judgment, does not excuse the lack of discovery taken by Dadvar or his multiple counsel. Further, Dadvar's offered excuse regarding his counsel's review of his supposedly voluminous medical records is a red herring, as it relates to damages, not liability. Applebee's motion for summary judgment was based solely on the issue of liability, and the medical records cited to were not necessary to respond to Applebee's motion.

The retention of new counsel is irrelevant. Dadvar has not offered any case law that justifies a CR 56(f) continuance simply based on the retention of new counsel. Further, Dadvar has offered no case law to justify a CR 56(f) continuance despite having five years to litigate his claim. Dadvar's argument is without basis in law.

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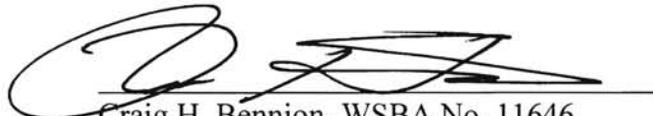
<sup>4</sup> Dadvar's characterization of the circumstances resulting in the delay of his deposition is incorrect. Dadvar engaged in repeated acts to avoid his deposition (including refusing to provide current contact information) and otherwise delay discovery, thus necessitating a motion to compel. Only after the issuance of a Court Order did he finally agree to his deposition. These acts are conveniently ignored in his appellant's brief.

V. CONCLUSION

Washington law requires a premises liability plaintiff to establish that (1) an unsafe condition existed that caused the injury, and (2) the property owner had actual or constructive notice of the unsafe condition. In the summary judgment motion, Dadvar presented evidence of neither, instead relying on assumption and speculation. The Superior Court property granted summary judgment and dismissed the matter and did so without error. The Court of Appeals should affirm.

Respectfully submitted this <sup>au</sup> 7 day of October, 2013.

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Craig H. Bennion, WSBA No. 11646  
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Attorneys for Respondent Apple American  
Group, LLC

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington, over the age of eighteen, and not a party in the above-entitled action.

That on this October 9, 2013, I caused to be filed the foregoing RESPONDENTS' BRIEF by sending the original and one copy via ABC LEGAL Messengers to Division I of the Court of Appeals for the State of Washington. I also served a copy of said document on the following party as indicated below:

<b>Parties Served</b>	<b>Manner of Service</b>
<p><b><i>Counsel for Appellant:</i></b> Jonathan R. Nolley, WSBA #35850 Michael Gustafson, WSBA # Emerald Law Group 600 University Street, Suite 1928 Seattle, WA 98101 <a href="mailto:jonathan@emeraldawgroup.com">jonathan@emeraldawgroup.com</a> <a href="mailto:Michael@emeraldawgroup.com">Michael@emeraldawgroup.com</a></p>	<p><input checked="" type="checkbox"/> ABC LEGAL <input type="checkbox"/> Electronic Filing <input type="checkbox"/> Email <input type="checkbox"/> U.S. Mail <input type="checkbox"/> UPS Express Courier</p>

Executed at Seattle, Washington, this 9<sup>th</sup> day of October, 2013.

  
Diane M. Finafrock  
Legal Assistant to Craig H. Bennion