

NO. 73417-2-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
SEATTLE

DANA IMORI AND DANIEL IMORI

Appellants,

vs.

MARINATION, LLC

Respondent.

APPELLANTS REPLY BRIEF
AND CERTIFICATE OF SERVICE

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I. ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

A.) Duty/Dangerous Condition: Marination owes a duty to Imori as she was a business invitee, breached the duty and failed to properly warn.

Respondent asserts that it owes no duty to Imori. Respondent's argument fails as Marination owes a duty to all of its customers. Tincani v. Inland Empire Zoological Society, 124 Wn.2d 121, 127-128, 875 P.2d 621 (1994). Is controlling on this point. The Court in Tincani, at 138(quoting Restatement (Second) of Torts Section 343, (1965)) held that a possessor of land is liable to invitees for injury causing conditions 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.

The Court in Tincani, stated "an invitee "is...entitled to expect that the possessor of land will exercise reasonable care to make the land safe for

his [or her] entry” Restatement. (Second) of Torts Section 343 cmt.b.

Reasonable care requires the landowner to inspect for dangerous conditions “followed by such repair, safeguards, or warning as may be reasonably necessary for the [the invitee’s] protection under the circumstances.” Restatement (Second) of Torts Section 343 cmt. b.

Marination’s actions of sending Alex Smith out to attempt to clean up the greasy spill is an acknowledgment of the duty. Marination’s action of attempting to warn customers with the misplaced yellow A-frame sign is an acknowledgment of the dangerous condition.

Marination breached that duty and the Imori photograph of the misplaced A-frame sign taken immediately after the fall is reliable and un-rebutted physical evidence that Marination failed to reasonably warn Imori and all of its customers of the dangerous condition. See Ex. “A” to Dec. of Dana Imori, CP 69-71 Marination asserts that water on the floor is not a dangerous condition. In the light most favorable to Imori there was grease on the floor. Even though Alex Smith later recanted his testimony (with the help of an adjustor), for summary judgment purposes the liquid on the floor was grease. See Ex. “A” to Dec. of Peter J. Nichols, CP 99-102. It is a question for

the jury to decide whether they believe Alex Smith and his changing story.

Marination relies on Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 433 P.2d 863 (1967), to support its position that there was no dangerous condition as a result of the greasy spill. Brant, involved snow being tracked in by customers and the fall occurred in the entrance area of the store. Brant, was dismissed at the end of the plaintiff's case at trial after the plaintiff had a full hearing. Brant, is easily distinguished from this case as Marination had knowledge of a greasy spill and sent Alex Smith to clean it up. Imori fell in front of the unisex bathroom not at the main entrance. Marination's had full knowledge of the greasy spill and failed to clean it up.

B. Marination's argument that it had no reason to expect that Imori would not see the warning sign underscores the issue of fact that there was an improperly posted A-Frame sign and the failure to properly position the sign is a failure to exercise reasonable care.

Marination's position is that all they have to do is put out a yellow A-frame sign and it does not matter which way it is pointing. With this argument Marination concedes that the A-frame sign was not pointed properly.

Marination's reply does not rebut nor address the only authenticated

physical evidence before the Court, which are the photographs taken by Imori as she was laying on the floor after she fell. See Dec. of Dana Imori Ex. B & C., CP 71-74.

The photograph taken by Marination was after Imori was taken from the scene by paramedics. Marination set up the A-frame sign as it should have been displayed not how it was displayed before the accident. The sign in the Imori photographs is pointed away from the view of people approaching the restroom. Reasonable care dictates that the sign face oncoming pedestrian traffic. Marination did not exercise reasonable care.

The Imori photographs are the only physical evidence of the spill. They clearly show much more than what Alex Smith testified as a “damp wet” floor that he left behind.

C. Marination’s assertion that Imori conceded the Trial Court’s denial of reconsideration is without merit.

The Trial Court’s ruling on reconsideration was “Plaintiff’s Motion for Reconsideration is DENIED...This Court’s ruling issued March 27, 2015, stands and all of plaintiff’s claims against Marination, LLC are

DISMISSED with prejudice. There are no findings or conclusions just a denial of the Motion for reconsideration and a ruling that its previous Order stands. In Folsom v. Burger King, 135 Wn. 2d 658, 958 P.2d 501, the Court stated at 663:

An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, Lamon, 91 Wash.2d at 349, 588 P.2d 1346 (citing Morris, 83 Wash.2d at 494-95, 519 P.2d 7), and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court. Mountain Park Homeowners Ass'n, 125 Wash.2d at 341, 883 P.2d 1383.

Therefore, this Court has to perform a review of the March 27, 2015, Order, which is a de novo review under Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

II. CONCLUSION

In the light most favorable to Imori, Marination had knowledge of a greasy spill. Alex Smith was sent out to clean up the greasy spill. Smith did not make a reasonable effort in cleaning up the greasy spill. He failed to clean up the grease and left the area outside the bathroom wet with

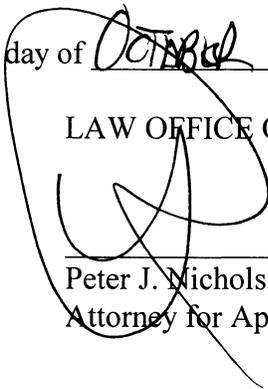
greasy puddles that are visible in the Imori photographs.

The A-Frame warning sign Smith set up was not facing oncoming foot traffic to the restaurant bathroom as shown in the Imori photographs and therefore was not a warning of the dangerous greasy floor.

The Appellate Court should reverse the trial court's order granting summary judgment and the order denying reconsideration and give Imori her day in Court.

Dated this 15 day of October, 2015.

LAW OFFICE OF PETER J. NICHOLS, P.S.



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III. 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:

That on October 15, 2015 via hand delivery, an envelope containing a true and correct copy of the Appellant's Reply Brief addressed to:

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DATED AT Seattle, Washington on this 15 day of
October, 2015.



Darrek Monaco