

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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No. 35347-4-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STEVE COTTRELL,

Appellant,

v.

BAHRAM SHAHRVINI et ux.,
dba 7-ELEVEN STORE NO. 32672,

Respondents.

BRIEF OF APPELLANT

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Steve Cottrell brought this action to recover damages for personal injuries he sustained when he slipped and fell in a convenience store operated by Bahram Shahr vini. Cottrell appeals from the Pierce County Superior Court's rulings regarding Shahr vini's spoliation of videotape evidence.

A. ASSIGNMENTS OF ERROR

1. The trial court erred, in its order entered June 26, 2006, by denying Plaintiff Steve Cottrell's pretrial motion regarding spoliation and granting Defendant Bahram Shahr vini's motion in limine regarding spoliation.

2. The trial court erred, in its ruling on June 30, 2006, by refusing to offer Cottrell's proposed jury instructions regarding spoliation of evidence (Proposed Instruction No. 5) and the parties' burdens of proof (Proposed Instruction No. 6).

3. The trial court erred, on August 17, 2006, by entering judgment in favor of Shahr vini.

4. The trial court erred, in its order entered October 26, 2006, by denying Cottrell's motion for a new trial.

Issue Pertaining to Assignments of Error

Where the trial court prohibits cross-examination, argument, and jury instructions about the defendant's destruction of evidence, is the plaintiff deprived of a fair trial? (Assignments of Error 1-4.)

B. STATEMENT OF THE CASE

Steve Cottrell works for Olympic Panel Products in Shelton. RP II at 169.¹ He has been a forklift driver at the plywood plant for more than 30 years. RP I at 37-38; RP II at 170. And he is also a long-time basketball fan. RP II at 175.

Thursday, December 2, 2004 was a vacation day for Cottrell. RP II at 188; CP 114. The weather was dry and clear, and he had no specific plans. RP II at 188. Cottrell drove to the 7-Eleven store near his home in Puyallup to buy a newspaper. *Id.* at 174, 175, 185, 188. He wanted to read the sports page and catch up on the Sonics' game from the night before. *Id.* at 189, 190.

When Cottrell entered the store, just after 9 a.m., it did not differ noticeably from how it had appeared to him on the hundreds of previous occasions when he bought his newspapers and Slurpees for his daughters. RP II at 169, 176-77, 189; CP 233.

At trial, Cottrell gave the following account of events that morning:

I walked through the door. I went down to get the newspaper. I turned around and came back up the aisleway. My right foot left me. The next thing I know I'm on my side and my wrist is bent up like a piece of spaghetti and stuff is thrown all over the place. Everything is kind of a blur. I don't remember

¹ The Verbatim Report of Proceedings consists of four volumes: the trial transcripts for June 28, 2006 (RP I), June 29 (RP II), and June 30 (RP III), and the October 26, 2006 motion hearing transcript (RP IV).

everything totally clear when that happened But I smelled a bleachy smell, you know, what my wife might use for cleaning the toilets or something. I smelled something like that.

RP II at 189-90.

Cottrell was certain he had not tripped over anything. RP II at 190, 208. He likened the sensation to stepping onto ice: “It was that fa[s]t, just like a boom, and it was uncontrollable. I didn’t have time to react or do anything.” *Id.* at 191. He knows that his fall was caused by “[s]omething on the floor that was wet and slippery.” *Id.* at 208.

Cottrell does not clearly recall paying for his newspaper. RP II at 191. He did not examine the floor where he fell. *Id.* at 192. And he does not recall seeing a “caution” sign in the aisle.² *Id.* at 208. He does remember horrible pain. *Id.* at 192. He left the store, drove home, and asked his wife to take him to the hospital. *Id.* at 192-93.

The following week, Cottrell had to undergo surgery. RP II at 193. Thirteen screws were needed to repair his fractured wrist. *Id.* at 200; Ex 4. He missed four weeks of work. RP II at 193. Light-duty work, without opportunities to earn overtime, and months

² Six yellow “caution” signs are positioned around the store. RP II at 233; CP 117; Exs 6-13, 28. The signs remain in place all the time – whether the floor is wet or not. RP I at 61; RP II at 234. Until the day of his fall, Cottrell had never observed the floor to be wet. RP II at 213.

of physical therapy followed.³ *Id.* at 196. Cottrell has ongoing pain and problems with his hand. *Id.* at 197-200.

Bahram Shahrini became a 7-Eleven franchisee at the Puyallup store in 2002.⁴ RP II at 228; CP 127. He estimated his store serves between 950 and 1,300 customers each day. RP II at 228. Shahrini created his own, unique procedure to keep the store's white tile floor clean. *Id.* at 232.

During the graveyard shift, a store employee fills a bucket halfway with water, adds a capful of bleach, and uses the liquid to mop a section of the floor. RP I at 67, 77; RP II at 229; CP 85-88.

³ Cottrell asked that the jury be instructed as to his request for admissions. RP II at 162; CP 211. Plaintiff's Proposed Instruction No. 2 was not given, but counsel read the stipulated facts aloud to the jury:

"The defendant has admitted that certain facts are true. You must accept as true the following facts: On December 2nd, 2004, Steve Cottrell's right wrist was fractured when he fell at the 7-eleven store." . . . "As a result of his fall at the 7-eleven store on December 2nd, 2004, Steve Cottrell suffered an injury to his right shoulder."

"The charges set forth in Plaintiff's medical summary were reasonable in amount for similar services in the medical community. The medical care, treatment and services set forth in plaintiff's medical summary were reasonably necessary for the diagnosis and treatment of Steve Cottrell's injuries resulting from the December 2nd, 2004 incident."

RP II at 167.

⁴ Shahrini testified that he and 7-Eleven "are 50 percent partners" and that he is "an independent contractor." RP II at 228. Under the franchise agreement between Shahrini and 7-Eleven, Inc., 7-Eleven indemnifies Shahrini for certain losses. CP 104. The contract of indemnity acts to cover certain potential liabilities, but it is not insurance. *Id.* Sedgwick CMS is 7-Eleven's administrator for Cottrell's claim. CP 152.

The area is then gone over with a dry mop before the employee moves on to another section. RP I at 72-73; RP II at 229, 232. After the mopping is finished, the wet mop is washed and the bucket is filled with fresh water for the morning shift. RP I at 76-77; RP II at 230.

Three people typically work at the store during the morning rush, which ends about 10 a.m. RP I at 53-55; RP II at 127. After the rush, one employee mops the floor with water, and another follows with a dry mop to make sure the floor is dry and safe. RP I at 56-57; RP II at 232.

But the morning Cottrell was injured, Shahr vini and only one employee, Beant Kaur, were on duty. RP II at 130, 253. Kaur's tasks included making coffee, grilling food, selling gas, operating the cash register, stocking, and cleaning up. RP II at 123-24, 130-31.

It was important to clean the store earlier than usual that morning because a 7-Eleven field consultant was scheduled to visit. RP I at 66; RP II at 131, 242-45. At Shahr vini's direction, Kaur mopped the floor by herself – minutes before the consultant arrived and just before Cottrell slipped. RP II at 133-35, 247-48; CP 116.

No one witnessed Cottrell's fall. CP 146. However, there are six surveillance cameras in the 7-Eleven store. *Id.* at 114, 128.

Shahrvini testified that, at the time of the incident, most of the cameras were focused on the cash registers, but that one covered the beer aisle and another the main aisle. *Id.*

Video images from the cameras are stored on the system's hard drive for seven days before being recorded over. CP 114. Preserving images requires pushing a "save" button. *Id.* On earlier occasions, Shahrvini had saved video segments showing thefts from the cash registers. *Id.*

Shahrvini asserts that when Cottrell slipped, "the store's video system did not record activity in the newspaper aisle except on the very far end of the aisle as shown on the video, that shows Plaintiff's fall, which has been provided to Plaintiff." CP 129.

The camera directed at the front of the store did record video footage of the entire time Cottrell was in the store, as well as activity before he arrived and after he left. CP 127, 132-33.

According to Shahrvini, Cottrell returned the day after his fall and threatened a lawsuit. CP 128. Shahrvini stated he called the 7-Eleven hotline to report what had happened, and he received a call back from someone in the claims department with whom he discussed how much videotape to keep. *Id.* at 128, 146. "Based on that discussion, I kept several minutes before and several

minutes after the Plaintiff's fall. I felt this was a reasonable amount of time to keep." *Id.* at 128.

Shahrvini ultimately saved only a four-minute clip from one of the store's cameras. CP 233. He concedes that Kaur wet mopped the area depicted in the video just two or three minutes before the preserved footage begins. *Id.* at 116, 134. The preserved portion shows Cottrell falling and Shahrvini mopping up afterward. Ex 1.

The dry mop was to be used only to clean up water and spills on the floor. RP I at 63-64, 75. But the video shows Shahrvini using a dry mop on the area where Cottrell slipped just after Cottrell left the store. RP II at 237, 257. Shahrvini alleged there was a black mark on the floor. *Id.* at 238.

Video images that would have either supported or rebutted Shahrvini's claims about conditions in the store, including what mopping had been done and whether a warning sign had been placed in the newspaper aisle, were solely under Shahrvini's control. RP II at 254; CP 114, 116. Those images, as well as the tapes from the other five cameras, were erased before Cottrell had any opportunity to view them.⁵ CP 233.

⁵ Cottrell's sister, Claudia Shannon, is an insurance defense attorney. CP 235. She contacted 7-Eleven in December 2004 regarding Cottrell's injury and "asked for a copy of any video footage from the store on the date he was

Cottrell filed a complaint for damages in Pierce County Superior Court on June 3, 2005.⁶ CP 1. In their answer, the defendants asserted that Cottrell's damages were caused by his own fault and that his damages are not recoverable because Cottrell failed to mitigate and to protect himself from avoidable consequences. CP 8.

In pretrial motions filed May 18, 2006, Cottrell sought an order finding that Shahrini had destroyed relevant evidence, and Shahrini sought both to exclude the portion of the videotape showing Shahrini mopping⁷ after Cottrell's fall and to preclude Cottrell from arguing spoliation of evidence to the jury. CP 92; CP 99-102. The court granted Shahrini's motion in limine as to spoliation. CP 189.

injured." CP 235-36. Shannon was informed that video existed, but 7-Eleven refused to provide her a copy. CP 236.

⁶ Cottrell's complaint identified the defendants as 7-Eleven Inc., a Texas corporation registered with the State of Washington, and "John Doe" Franchisee. CP 1. The caption was amended to reflect the true identity of "John Doe" Franchisee as Bahram Shahrini and "Jane Doe" Shahrini, husband and wife. CP 5. Cottrell's claims against 7-Eleven, Inc. were dismissed on stipulation of the parties. CP 10. By agreed order, the caption was amended to remove Defendant 7-Eleven, Inc. CP 148. When the verdict was delivered, the court announced the case as "Steve Cottrell, Plaintiff, versus Bahram Shahrini, et ux, dba 7-eleven Store No. 32672." RP III at 359.

⁷ Shahrini asked that the jury not be allowed to view the portion of the video that shows him dry mopping the area where Cottrell fell. CP 100-101. Shahrini denies there was water on the floor. RP II at 257. Nonetheless, he argued for exclusion on the ground that the tape showed a subsequent remedial measure. CP 100-101.

The trial came before Pierce County Superior Court Judge Pro Tempore Sandra Bobrick, sitting with a six-person jury, from June 28 through June 30, 2006. CP 4, 150, 268.

The court refused to offer Cottrell's proposed jury instructions regarding spoliation of evidence and the parties' respective burdens of proof. CP 214-15.

The jury returned a verdict in favor of Shahrkini. CP 266. Judgment was entered on August 17, 2006. CP 268. And Cottrell's appeal to this Court followed.⁸ CP 275.

Cottrell also moved for a new trial under CR 59(a), again addressing the spoliation issue:

In this case, defendant destroyed (failed to preserve) video evidence that was material to the central issues in the trial. Plaintiff was prohibited from asking why the evidence was destroyed. Plaintiff was prohibited from arguing why the evidence was destroyed. Plaintiff was prohibited from cross examining defendant as to his motive for destroying the evidence. Plaintiff was prohibited from arguing that the reason defendant did not save the video was because it was harmful to his case. As a result, plaintiff was prejudiced, was not allowed to present his theory of the case to the jury, and did not receive a fair trial.

CP 270-71. The court denied the motion. CP 292.

⁸ A copy of the Notice of Appeal is included in the Appendix.

Cottrell still shops at the 7-Eleven:

It's convenient. It's on my way to work. I like their store. It's clean. They always got my paper. It's a tidy little place to go into. I just think they made a mistake one day, that's all. You know, I have no ill feelings about that, it's just it happened. And I'm still comfortable going there, although maybe I'll look around a little more now

RP II at 201.

C. SUMMARY OF ARGUMENT

Steve Cottrell was denied a fair trial because the trial court prohibited cross-examination, argument, and jury instructions about Bahram Shahrviní's destruction of videotape evidence that documented conditions in Shahrviní's store on the morning Cottrell slipped and fell.

D. ARGUMENT

Spoliation of Evidence

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citing *Black's Law Dictionary* 1401 (6th ed. 1990)).

Historically, spoliation has been treated as an evidentiary matter:

It is a rule of evidence, as old as the law itself, applicable alike to both civil and criminal causes, that a party's fraud in the preparation or presentation of his case, such as . . . the spoliation of documents, can be shown against him as a circumstance tending to prove that his cause lacks honesty and truth.

State v. Constantine, 48 Wash. 218, 221, 93 P. 317 (1908).

"The first consequence [of spoliation] is an inference that the evidence, had it not been destroyed, would have been unfavorable to the party who destroyed it."⁹ Karl B. Tegland, 5 *Washington Practice: Evidence* § 402.6 (4th ed. 1999). *Accord Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

In the leading Washington case on spoliation,¹⁰ *Henderson v. Tyrrell*, the Court of Appeals addressed the inference as follows:

[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

80 Wn. App. 592, 606, 910 P.2d 522 (1996).

⁹ The proponent is entitled to an instruction that the adversary's conduct "may be considered generally as tending to corroborate the proponent's case and to discredit that of the adversary." Kenneth S. Broun, ed., *McCormick on Evidence* § 265 (6th ed. 2006).

¹⁰ In Washington, case law on spoliation is sparse. *Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 898, 138 P.3d 654 (2006).

“A more recent development is the application of a rebuttable presumption, shifting the burden of proof to a party who destroys, alters, or loses important evidence.” *Id.* at 605.

In deciding whether to apply a rebuttable presumption in spoliation cases, the *Henderson* court adopted a two-factor test whereby the trial court is to consider “(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.” *Id.* at 607. “[F]or a direct sanction to apply the spoliation must in some way be connected to the party against whom the sanction is directed.” *Id.* at 606.

After weighing these factors in light of the specific facts and circumstances of the case, the court is to use its discretion to craft an appropriate sanction. *Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 899, 138 P.3d 654 (2006).

In the present case, the missing footage is crucial to Cottrell’s case. Shahrvin is at fault for destroying the evidence. He was on notice of potential litigation when he viewed and failed to preserve the videotape in his control.

1. The trial court abused its discretion by denying Cottrell’s motion regarding spoliation and granting Shahrvin’s motion in limine.

Cottrell’s basic theory of the case is that Shahrvin, as the operator of the convenience store, owes a duty to his customers to

exercise ordinary care for their safety. Shahr vini breached his duty by failing to remove water that made his floor dangerously slippery after it had been mopped. And Shahr vini's breach of duty proximately caused Cottrell's injury.¹¹

Shahr vini and an employee were present in the store the morning Cottrell slipped. But there were no eyewitnesses to the incident. Shahr vini and Cottrell gave conflicting accounts of what happened. The footage from the store's cameras, which evidenced the store's condition that morning, was in Shahr vini's exclusive control. Shahr vini erased the videotapes before Cottrell was given any opportunity to examine them.

Cottrell was entitled to the inference that production of the videotapes was against Shahr vini's interest. And given the importance and relevance of the missing evidence, along with Shahr vini's responsibility for destroying it, a rebuttable presumption should have been applied to shift the burden of proof to Shahr vini.

In his pretrial motion regarding spoliation, Cottrell asked for a presumption in his favor as to what the evidence would have

¹¹ "In order to prove actionable negligence, a plaintiff must establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

shown,¹² and he sought to shift the burden to Shahrkini “to prove that the floor was not wet, slippery and a hazard to customers” on the morning Cottrell was injured. CP 92.

Shahrkini brought a motion in limine, asking that Cottrell and his counsel and witnesses “be prevented from arguing ‘spoliation’ or ‘destruction of evidence’ and any similar arguments or remarks in front of the jury.” CP 102. Shahrkini argued that Cottrell “had ample opportunity to ask at the time of his injury or a day later that the store maintain a particular length of video.”¹³ *Id.*

The court denied Cottrell’s motion and granted Shahrkini’s motion in limine. CP 189.

After the parties’ opening statements, the court revisited the spoliation issue outside the presence of the jury. RP II at 91-120.

Cottrell argued the court’s ruling allowed Shahrkini and Kaur to testify without contradiction that the newspaper aisle had not been wet mopped the morning Cottrell slipped:

¹² “The destroyed footage showed mopping that occurred the morning of the incident, among other things. Defendant’s failure to preserve that evidence creates an inference that the lost footage would have shown that the area where plaintiff fell was mopped and left wet shortly before the incident and that the caution sign was not placed where claimed by defendant.” CP 96.

¹³ Shahrkini cites *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999), in support of his argument. CP 134. The *Marshall* court rejected the plaintiff’s spoliation claim because she did not request to inspect an allegedly defective exercise treadmill for more than four years.

[B]ecause Mr. Shahrkini viewed the entire video and only chose part, I should be able to examine him and let the jury know that that's what he chose to keep. . . . That's material in this case. It goes to credibility, it goes to the weight of his testimony as to what happened before, because he will say that that area wasn't mopped. That's what Mr. Thorsrud said in opening, "That wasn't the area that was mopped," and [Shahrkini's] going to testify it wasn't wet.

RP II at 98. He added: "What [Shahrkini] kept and what he didn't keep was a decision of somebody with an interest in the outcome of this case." *Id.* at 101.

Judge Bobrick responded as follows:

The Court's ruling is I don't want the jury to be caused to speculate. The problem is nobody knows what was on that tape other than Mr. Shahrkini. It's not that there is another witness out there who also saw the tape who can come in and impeach Mr. Shahrkini. What I don't want you to do is to leave in this jury's mind speculation that the reason we only have 4 minutes of the tape instead of 8 minutes or 15 minutes is because there was damaging information on there, because I don't find any evidence that that is the reason that only 4 minutes were preserved.

Id. at 108-109. She stated "the decision as to why only four minutes were kept is not something that I think is relevant to what happened that day." *Id.* at 113.

But the erased portion of the tape was crucial evidence. Arguably, it was dispositive as to liability. The fact that Shahrkini erased the footage should have been admissible on the merits. See *Rosenblit v. Zimmerman*, 766 A.2d 749, 166 N.J. 391 (2001).

And Cottrell should have been allowed to argue the negative inference to the jury during closing argument.¹⁴ See *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

“The granting or denial of a motion in limine is within the discretion of the trial court.” *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 286, 686 P.2d 1102 (1984). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

The trial court abused its discretion here by granting Shahrkini’s motion in limine.

2. The trial court erred by refusing to offer Cottrell’s proposed jury instructions.

The trial court should have instructed jurors they were entitled to draw a negative inference from Shahrkini’s destruction of evidence. In addition, the trial court should have applied a rebuttable presumption, shifting the burden of proof to Shahrkini. Both issues were addressed in Cottrell’s proposed instructions.

¹⁴ In closing argument, Shahrkini’s counsel stated: “[T]here is no evidence that anybody mopped back by where he’s saying his right foot started to slip, back in the vicinity of this sign. So, the suggestion that somehow the mopping took place all the way down the aisle but the dry mopping only started here on the edge of the display, there are simply no facts to support that.” RP III at 335. If there are no facts, it may be because Shahrkini erased the tape.

Cottrell proposed the following spoliation of evidence instruction, which is based on *Pier 67, Inc. v. King County*:

PLAINTIFF'S PROPOSED NO. 5

Defendant erased video evidence in this case before allowing plaintiff an opportunity to review it. As a result, you are to infer that: The destroyed video footage would have shown the area where plaintiff fell on December 2, 2004 was wet mopped that morning and the caution sign was not placed as claimed by defendant.

CP 214.

And he proposed the following burden of proof instruction, which is based on WPI 21.03:

PLAINTIFF'S PROPOSED NO. 6

The plaintiff has the burden of proving that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving both of the following propositions:

First, that the floor at his 7-Eleven store was not wet, slippery and a hazard to customers on the date of plaintiff's injury.

Second, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent[.]

Third, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

CP 215.

“Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

It is Cottrell’s theory that he slipped when Shahrvin’s employee left water on the floor. Shahrvin destroyed the evidence supporting that theory. Under these facts and circumstances, it was error for the trial court not to offer Cottrell’s proposed instructions, which were a correct statement of the law.

Cottrell’s theory of the case was not adequately presented to the jury by the court’s instructions.¹⁵ The failure to give his proposed instructions deprived Cottrell of a fair trial.

The trial court’s decisions on issues of law reflected in jury instructions are subject to de novo appeal on review; they are not simply reviewed for abuse of discretion. See *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001).

¹⁵ A copy of the Court’s Jury Instructions is included in the Appendix.

3. The trial court erred by denying Cottrell's motion for a new trial.

Shahr vini failed to preserve the video surveillance footage – except for a four-minute clip from one of six cameras in his store. And yet, at trial, Cottrell was not allowed to question him about his action. Cottrell was also precluded from arguing that Shahr vini's motive was to avoid liability.

Shahr vini claimed, in his deposition testimony and through an offer of proof at trial, that he was merely following the direction of 7-Eleven claims personnel, who he said directed him to keep only a few minutes of tape after he notified them that Cottrell had threatened a lawsuit.

Cottrell believes if additional footage had been preserved, it would have shown that the aisle where Cottrell slipped had recently been wet mopped by Shahr vini's employee – and perhaps that a caution sign had not been placed in the aisle. But Shahr vini was the only one to view the footage, and he chose to eliminate it.

Cottrell should have been allowed to challenge Shahr vini's testimony. Instead, the trial court accepted the testimony as truthful, giving the jury no opportunity to weigh Shahr vini's credibility.

Shahr vini may have destroyed evidence of negligence to protect himself. And because 7-Eleven indemnifies Shahr vini, its

personnel may have been motivated to shield the corporation from financial responsibility.

The court's ruling to prohibit any cross-examination, impeachment, or argument as to why Shahr vini did not preserve the evidence is contrary to our adversary system and outside the exercise of sound discretion. Cottrell and the jury were required to simply accept Shahr vini's testimony on its face. The court endorsed the credibility of this key witness – preempting a determination by the jury and improperly commenting on the evidence: "I couldn't find any indication during the offer of proof that would suggest that his conduct was not reasonable." RP IV at 24.

Generally, decisions on CR 59 motions for a new trial are reviewed for abuse of discretion. *Ma'ele v. Arrington*, 111 Wn. App. 557, 561, 45 P.3d 557 (2002). But if the trial court's decision was predicated on an issue of law, "then the appellate court reviews the record for error in application of the law rather than for abuse of discretion." *Cox v. Gen. Motors Corp.*, 64 Wn. App. 823, 826, 827 P.2d 1052 (1992).

In sum, the trial court erred (1) by denying Cottrell's pretrial motion regarding spoliation and granting Shahr vini's motion in limine; (2) by refusing to offer Cottrell's proposed jury instructions; and (3) by denying his motion for a new trial.

As a result of the court's erroneous rulings, Cottrell's ability to argue his theory of the case was compromised, and he was deprived of a fair trial.

E. CONCLUSION

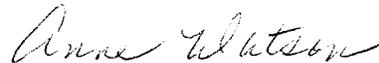
The Court should reverse the judgment on the verdict and remand this matter for a new trial.

DATED this 11th day of April, 2007.

Respectfully submitted,



Shawn B. Briggs, WSBA #16162
Law Offices of Briggs & Briggs
10222 Gravelly Lake Drive SW
Tacoma, Washington 98499
(253) 588-6696



Anne Watson, WSBA #30541
Law Office of Anne Watson, PLLC
3025 Limited Lane NW
Olympia, Washington 98502
(360) 943-7614

Attorneys for Appellant Steve Cottrell

Appendix



05-2-08504-1 28148159 NACA 09-15-08

IN COUNTY CLERK'S OFFICE
FILED
A.M. SEP 14 2006 P.M.
PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, County Clerk DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR PIERCE COUNTY

STEVE COTTRELL,

Plaintiff,

vs.

BAHRAM SHAHRVINI, et ux,

Defendants.

NO. 05 2 08504 1

NOTICE OF APPEAL TO
COURT OF APPEALS

STEVE COTTRELL, plaintiff, seeks review by the designated appellate court of the Judgment entered on August 17, 2006, including but not limited to the Order on Defendants' Motions in Limine.

Copies of the Judgment and Order on Defendant's Motion in Limine are attached to this notice.

Dated this 14th day of September, 2006.

SHAWN B. BRIGGS of
BRIGGS & BRIGGS
Attorneys for plaintiff
WSB# 16162

NOTICE OF APPEAL - 1

ORIGINAL

Law Offices of
BRIGGS & BRIGGS
10222 GRAVELLY LAKE DRIVE S.W.
TACOMA, WASHINGTON 98499
(253) 588-6696
FAX (253) 584-6238

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Attorney for plaintiff/appellant:

Shawn B. Briggs
10222 Gravelly Lake Drive SW
Tacoma, WA 98499
(253) 588-6696
WSB# 16162

Attorney for defendant/respondent:

Steven L. Thorsrud
800 Fifth Avenue #4141
Seattle, WA 98104
(206) 623-8861
WSB# 12841

CERTIFICATE OF SERVICE

The undersigned states under penalty of jury that on the 14th day of September, 2006, I mailed a true and correct copy of this Notice by first class mail, postage prepaid, to Steven L. Thorsrud, attorney for defendant/respondent at 800 Fifth Avenue #4141, Seattle, WA 98104.

Dated 9/14/06 at Tacoma, Washington.


Debera S. Ellis

NOTICE OF APPEAL - 2

Law Offices of
BRIGGS & BRIGGS
10222 GRAVELLY LAKE DRIVE S.W.
TACOMA, WASHINGTON 98499
(253) 588-6696
FAX (253) 584-6238

THE HONORABLE SANDRA BOBRICK
JUDGE PRO TEM

FILED
IN COUNTY CLERK'S OFFICE

A.M. AUG 17 2006 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STEVE COTTRELL,

Plaintiff,

v.

BAHRAM SHAHRVINI and "JANE DOE"
SHAHRVINI, husband and wife, dba 7-
Eleven Store Number 32672,

Defendants.

No. 05-2-08504-1

JUDGMENT

(CLERK'S ACTION REQUIRED)

The above entitled cause came on regularly for trial on June 28, 2006 before the Court sitting with a 6-person jury, the Plaintiff appearing by Shawn Briggs of Briggs & Briggs; and Defendants Shahrvini appearing by Steven L. Thorsrud of Keating, Bucklin & McCormack, Inc., P.S., and evidence both oral and documentary having been introduced, the case argued, the jury instructed by the Court, and the cause submitted to the jury for its verdict, and the jury having thereupon rendered a verdict on June 30, 2006, in favor of Defendants Shahrvini;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Judgment is entered in favor of Defendants Shahrvini and against Plaintiff on the claims against Defendants Shahrvini.

IT IS FURTHER ORDERED that Defendants Shahrvini shall have and recover \$200 in statutory attorney fees (RCW 4.84.080).

JUDGMENT - 1

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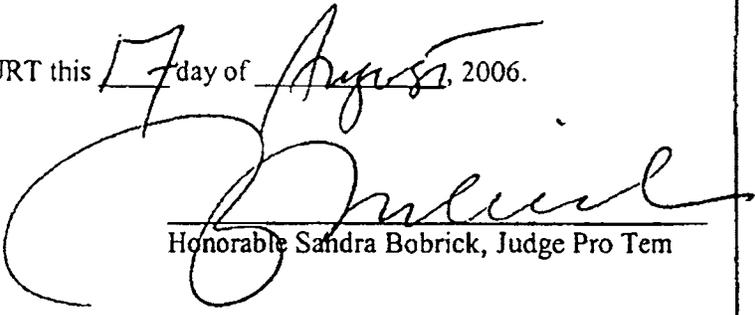
KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 823-8881
FAX: (206) 223-9422

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon payment of \$200 in attorney's fees by the Plaintiff Steve Cottrell into the registry of this Court this judgment shall be satisfied by the clerk, and the clerk thereof shall hold such sum subject to further order of this Court.

DONE IN OPEN COURT this 7 day of August, 2006.



Honorable Sandra Bobrick, Judge Pro Tem

Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

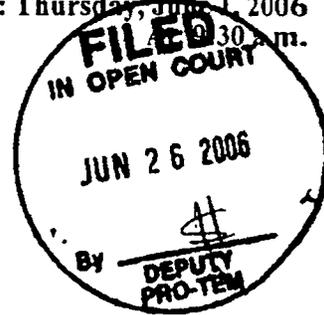

Steven L. Thorsrud, WSBA #12861
Attorneys for Defendants

Approved as to Form; Presentation Waived:

LAW OFFICES OF BRIGGS & BRIGGS


Shawn B. Briggs, WSBA #16162
Attorneys for Plaintiff

THE HONORABLE VICKI L. HOGAN
Noted For: Thursday, June 1, 2006



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STEVE COTTRELL,

Plaintiff,

v.

7-ELEVEN, INC., a Texas corporation
registered with the State of Washington; and
BAHRAM SHAHRVINI and "JANE DOE"
SHAHRVINI, husband and wife,

Defendants.

No. 05-2-08504-1

[PROPOSED] ORDER ON
DEFENDANTS' MOTIONS IN
LIMINE

THIS MATTER having come on for hearing before this Court upon the Defendants
Motions in Limine; Defendants appearing by and through their attorney of record, Steven L.
Thorsrud and Keating, Bucklin & McCormack, and Plaintiff appearing by and through his
attorney of record, Shawn B. Briggs and Briggs & Briggs,. The Court, having considered the
files, records, and pleadings submitted by counsel, and having heard argument, NOW,
THEREFORE, ORDERS:

- 1. Motion in Limine Re: Exclusion of portion of video tape from 7-11 store.

Granted Denied Reserved

Comments:

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
500 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 825-8861
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2. Motion in Limine Re: Spoilation.

Granted Denied Reserved

Comments:

3. Motion in Limine Re: ^{1/24} No testimony regarding hardware in Plaintiff's wrist being removed.

Granted Denied Reserved

Comments:

4. Motion in Limine Re: No mention of criminal convictions of Sunnie Stokes.

Granted Denied Reserved

Comments:

5. Motion in Limine Re: Insurance coverage and indemnification.

Granted Denied Reserved

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6. Motion in Limine Re: Offers of settlement or settlement negotiations.

Granted Denied Reserved

Comments:

7. Motion in Limine Re: Undisclosed evidence by Plaintiff.

Granted Denied Reserved

Comments:

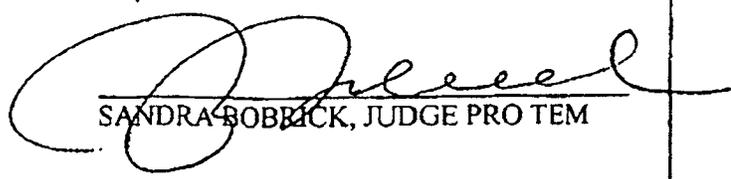
8. Motion in Limine Re: Reference to the Motions in Limine.

Granted Denied Reserved

Comments:

Counsel are directed to inform all witnesses they call of the existence of this order and the matters contained therein.

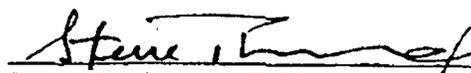
DONE IN OPEN COURT this 28th day of June, 2006.


SANDRA BOBRICK, JUDGE PRO TEM

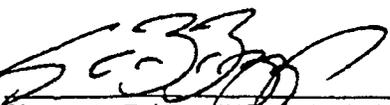
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Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.


Steven L. Thorsrud, WSBA # 128417
Attorneys for Defendants

LAW OFFICES OF BRIGGS & BRIGGS


Shawn B. Briggs, WSBA #16162
Attorneys for Plaintiff

KEATING, BUCKLIN & McCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 423-6801
FAX: (206) 223-0423



SUPERIOR COURT OF PIERCE COUNTY
IN AND FOR THE STATE OF WASHINGTON

STEVE COTTRELL,

Plaintiff,

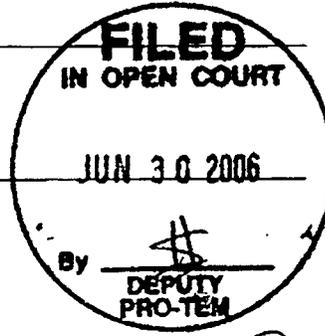
NO. 05-2-08504-1

and

BAHRAM SHAHRVINI et us, dba
7-ELEVEN STORE NUMBER 32672,

Defendant.

COURT'S
JURY INSTRUCTIONS



[Handwritten Signature]
THE HONORABLE SANDRA BOBRICK,
PRO TEM JUDGE

June 30, 2006

NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the

things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

NO. 2

The parties to this action are Steve Cottrell and Bahram Shahrivini and "Jane Doe"
Shahrivini. 7-Eleven, Inc. is not a party to this action. In carrying out your deliberations in this
case, you shall not consider 7-Eleven, Inc.

NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

NO. 4

The fact that a witness has talked with a party, lawyer, or party's representative does not, of itself, reflect adversely on the testimony of the witness. A party, lawyer, or representative of a party has a right to interview a witness to learn what testimony the witness will give.

NO. 5

(1) The plaintiff claims that the defendant was negligent by failing to maintain the floors in his 7-Eleven store in a reasonably safe condition, creating a hazard, and failing to adequately protect customers from the danger. The plaintiff claims that defendant's conduct was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims.

(2) In addition, the defendant claims as an affirmative defense that the plaintiff was contributorily negligent in one or more of the following respects: failing to use reasonable care, inattentiveness, and failure to see what would reasonably be seen. The defendant claims that plaintiff's conduct was a proximate cause of plaintiff's own injuries and damage. The plaintiff denies these claims.

(3) The defendant further denies the extent of the claimed injuries and damages.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid in understanding in issues.

NO. 6

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

NO.

7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

NO. 8

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

NO. 9

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

NO. 10

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

NO. 11

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

NO. 12

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

NO. 13

The operator of a convenience store owes to a person who has an express or implied invitation to come upon the premises in connection with that business a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that such person is expressly or impliedly invited to use or might reasonably be expected to use.

NO. 14

Beant Kaur was the employee of the defendant, Bahram Shahrini dba 7-Eleven Store Number 32672. Therefore, any act or omission of the employee was the act or omission of the defendant, Bahram Shahrini dba 7-Eleven Store Number 32672.

NO. 15

According to mortality tables, the average expectancy of life of a male aged 58 years is 19.97 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

NO. 14

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence.

If you find for the plaintiff, your verdict must include \$30,363.30 for medical care, treatment and services required to the present time.

In addition, you should consider the following past economic damages elements:

- The reasonable value of earnings lost to the present time.

In addition you should consider the following noneconomic damages elements:

- The nature and extent of the injuries
- The disability, disfigurement, and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.
- The pain and suffering, both mental and physical, and inconvenience experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NO. 17

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the court clerk. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

In order to answer any question on the special verdict form, five jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as five jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the court clerk that the jury has reached a verdict, and the court clerk will bring you back into court where your verdict will be announced.

COURT OF APPEALS
WASHINGTON

07 APR 11 PM 2:15

STATE OF WASHINGTON
BY E
DEPUTY

CERTIFICATE OF SERVICE

I certify that on April 11, 2007, I sent a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, to:

Steven L. Thorsrud
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104-3175

Dated: April 11, 2007

Anne Watson
Anne Watson, WSBA #30541