

NO. 35347-4-II

(Pierce County Superior Court No. 05-2—8504-1)

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COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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STEVE COTTRELL,

Appellant,

v.

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

Respondents.

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BRIEF OF RESPONDENTS

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Steven L. Thorsrud, WSBA No. 12861  
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## I. RESPONDENT'S COUNTER-STATEMENT OF CASE

### A. Introduction.

This appeal arises from the trial of a slip and fall at a convenience store.

Appellant Cottrell was, and is, a frequent store customer. *RP II, p. 201.* He shops at Respondent Shahr vini's 7-Eleven store because, he says, "It's always clean, tidy . . . . It's just a clean store to go into." *RP II, p. 186.* In his "hundreds" of visits to the store, Cottrell always found it "clean, well maintained . . . ." *Id. at 188.*

On the day of his fall, Cottrell went to the store to buy a newspaper. *Id. at 189.* He entered the store after store personnel wet mopped and dry mopped the front area (the area near the entrance) of the store, and while wet floor "caution" signs were displayed in the front area of, and throughout, the store. *Ex. 1, RP II 233-36, 239-40.* He walked by wet floor "caution" signs and grabbed a copy of the Seattle PI. *RP II, pp. 189, 204.* He then backtracked towards the front of the store and fell on his way to the cash register. *Ex. 1.*

The store's video system captured much of Cottrell's activity in the store, including his fall. *Ex. 1.* Shahr vini preserved several minutes of the video, including the entire time Cottrell was in the store. *Ex. 1, RP II, p. 254.* Cottrell claims Shahr vini should have kept some additional, unstated

amount of video.

The case was tried to a jury. The jury returned a defense verdict. Cottrell has appealed raising issues limited to his “spoliation” claim regarding video that was not preserved.

**B. Statement of Facts.**

**1. Respondent Shahrkini’s operation of the store.**

Shahrkini became a 7-Eleven franchisee in August 2002 (about two and a half years before Cottrell’s fall). *RP II, p. 225*. Before becoming a 7-Eleven franchisee, Shahrkini was, for a number of years, a practicing engineer, and for a time, an investment banker. *Id. at 224-25*. His dream, however, was to own his own business. *Id. at 225*. He accomplished this dream when he took over the 7-Eleven franchise at issue here. *Id.*

To understand the facts of the case, it is helpful to understand the store’s floor plan. Immediately inside the front door, in addition to a large floor mat, is the main aisle, which is located at approximately a 30° angle to the left as one enters the front door. *Ex. 28 (store floor plan); Pltf’s Ex. 1*. The main aisle is perpendicular to the food aisles. *Id.* To the immediate right (as one enters the front door) is the so-called newspaper aisle. *Ex. 28. See, generally, Ex. 6, 27, and 10, below at 5-6.*

Shortly after taking over the store, Shahrkini noticed the white tile

floor showed dirt. *Id. at 232.* So, the store frequently needed mopping. *Id.* Store personnel wet mopped the floor 10 to 12 times during a 24-hour period. *Id. at 234.* As a result of frequent wet mopping and the store's foot traffic, the white tile floor often showed footprints. *Id. at 232-33; RP I, p. 37.* To remedy this situation, and for customer safety, Shahrkini started a policy of wet mopping followed immediately by dry mopping.<sup>1</sup> *Id.* Dry mopping dried the floors more quickly and resulted in fewer footprints on the white tile floor. *Id.*

This procedure, wet mopping an area, immediately followed by dry mopping the same area, was used consistently whether one store clerk was present or two. *Id. at 232; RP I, pp. 56, 57; RP II, pp. 127-138, 139.* In other words, if there were two store clerks available to mop one would wet mop and the other would follow behind and dry mop. *Id.* If there was only one clerk available, that clerk wet mopped an area and then immediately dry mopped the same area. *RP II, p. 232.*

The wet mop and dry mop heads were replaced each week. *Id. at 232.* Shahrkini contracted with Cintas for this service. *Id.* Each week the existing one wet mop and two dry mops were exchanged for new mops. *Id.* The one wet mop and two dry mops remained the same throughout the week: a wet mop remained a wet mop for the entire week until it was

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<sup>1</sup> A dry mop means the mop head is dry.

changed out for a new mop and the dry mop remained a dry mop. *Id.*

The frequent wet mopping and dry mopping lead to one additional policy instituted by Shahrivini: the continuous use of store's six "caution" wet floor signs. *Id. at 234.* The frequent wet mopping and dry mopping (and rain) meant frequent use of the "caution" wet floor signs. Shahrivini decided it made sense to leave the signs up all the time, instead of taking the chance store employees might forget to put them in place when mopping. *RP II, p. 234.* These signs were occasionally moved, *e.g.*, during mopping (and then put back into place), or if there was a spill (where several wet floor signs were used around the area of the spill). But the rest of the time the signs were in use – continuously – on the floor and at the same places around the store. *Id., pp. 136, 234; pp. 251-52; RP I 61.*

One of the signs was placed inside the front door near the floor mat. *Pltf's Ex. 1; Defs. Exs. 6-9.* Others were placed further inside the store in the main aisle. *Id.* Also, one was placed in the newspaper aisle. *RP II, pp. 233, 235.*<sup>2</sup>

## **2. The "coffee rush."**

On weekday mornings from approximately 5:30 a.m. to 8:30-9:00 a.m. and sometimes later, the store is usually busy with customers buying,

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<sup>2</sup> One was also placed in the "beer aisle."

among other things, coffee. *RP II, p. 231, CP 114.* The busiest time is 6:00 a.m. to 7:30-8:00 a.m. *Id.* When customer traffic starts to taper off – usually around 8:30-9:00 a.m. – store personnel wet mop and dry mop the front area and the main aisle of the store. *Id.; RP II, p. 126.* This post “coffee rush” wet mopping and dry mopping occurs everyday, not just the day the 7-Eleven Field Consultant visits the store. *Id. at 232.*

**3. The appearance of the store when Cottrell entered.**

As discussed above, six wet floor caution signs are in place – more or less continuously – 24 hours a day. *RP II, p. 234, pp. 251-52.* And this was true on the morning of Cottrell’s fall. *Id. at 141-143, 251, 256.* Cottrell concedes signs were present on the day of his fall. *Brief of Appellant, p. 3, n. 2.*

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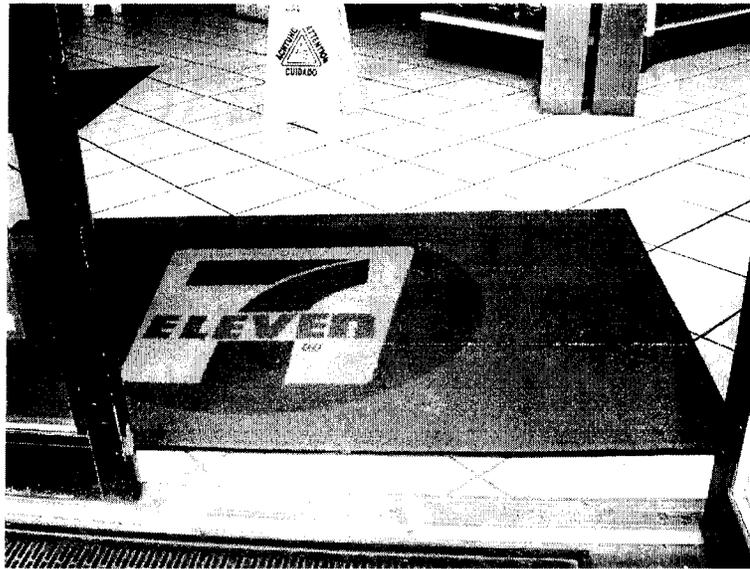
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Exhibit 6 shows Cottrell's view as he walked into the store on the morning of his fall:



Similarly, Ex. 27 shows signs placed along the main aisle as they were on the morning of Cottrell's accident:



Finally, Ex. 10 shows the newspaper aisle<sup>3</sup> and the wet floor caution sign as it was on the morning of Cottrell's fall:<sup>4</sup>



#### 4. Cottrell's fall.

On the day of his fall, Cottrell entered the store at approximately 9:15 a.m. *Ex. 1*. Shortly before he entered the store the store clerk, Beant Kaur, had finished dry mopping the front area of the store. *Id.*, *RP II*, p. 141. As can be seen on the video (*Ex. 1*) as she dry mopped she moved the "caution" wet floor sign and then put in back in place after she dry mopped and before Cottrell entered the store. *Ex. 1*; *RP II*, p. 141.

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<sup>3</sup> The newspapers themselves are located just beyond and to the right of the wet floor caution sign shown in Ex. 10. *See, also, Exs. 11 and 12.*

<sup>4</sup> This photo (and the other photos that are exhibits) was not taken the morning of Cottrell's fall. They were taken at a later date to show the position of the wet floor caution signs normally and on the morning of the accident.

Soon after Ms. Kaur finished dry mopping the front area<sup>5</sup> of the store, Cottrell entered the store and, as shown on the video, went to his immediate right into the newspaper aisle (and off camera). *Id.* He either ignored or did not see the wet floor sign Ms. Kaur placed inside the door earlier. *RP II, p. 202.* Cottrell does not deny the sign (as shown in Exs. 1, 6 and 27) was present. *Id. at 203.* He does not recall the wet floor caution sign in the newspaper aisle as shown in Ex. 10. *Id. at 208.*

After Cottrell grabbed the newspaper, Shahrini looked over at Cottrell and noticed Cottrell's head was down as though he was looking down. *RP II, p. 237.* A few moments later Cottrell comes back on-camera, on his way to the cash register, and falls.<sup>6</sup> *Ex. 1.*

Shahrini came out from behind the cash register and asked Cottrell if he would like any help. *Id. at 237.* In response, Cottrell swore at Shahrini. *Id.* A short time later Cottrell left the store. As Cottrell left the store, a 7-Eleven Field Consultant entered the store. *Ex. 1.*

Shahrini did not notice any water on the floor. *Id. at 238.* Nevertheless, Shahrini picked up a wet mop near the front of the store and mopped a black mark off the floor. *RP II, p. 237-38.*

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<sup>5</sup> Ms. Kaur did not mop in the newspaper aisle, *RP II 140*, and did not miss any areas with the dry mop that she had wet mopped. *RP II, p. 141.*

<sup>6</sup> In the video (*Ex. 1*), other customers do not seem to be having footing problems.

## 5. The store's video system.

The store has a video surveillance system. *CP 114*. The system includes six cameras. *CP 114*. One of the cameras records the front area of the store (this is the camera that captured Cottrell's entry into the store and the fall). *Ex. 1*. The other cameras show the cash registers, the back room, and the "beer aisle." *CP 114*. None of the cameras show the newspaper isle. *Id.*

On the day of Cottrell's fall, Cottrell did not ask Shahrvinini to preserve any video. *CP 128*. Similarly, when Cottrell returned the next day and threatened suit<sup>7</sup> (and mentioned his sister was an attorney), Cottrell did not ask Shahrvinini to preserve any video. *Id.* After Cottrell left the store, Shahrvinini called 7-Eleven Claims personnel (7-Eleven claims are administered by Sedgwick CMS) to discuss how much of the video he should keep.<sup>8</sup> *CP 114, 128*. Shahrvinini was advised to keep the portion of the video that showed the fall and a couple of minutes before the fall and a couple of minutes after. *CP 114, 128*.

The video system records over itself after 7 days. *CP 128*.

Approximately a month after Cottrell's fall, his sister contacted Sedgwick personnel to discuss preservation of the video. *CP 152-53*. By

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<sup>7</sup> At trial, Shahrvinini thought Cottrell threatened suit on the day of his fall.

<sup>8</sup> This was the first time Shahrvinini made such a call. The store has 900-1200 customers a day. *RP II, p. 228*. From the time Shahrvinini took over the store until Cottrell fell, Cottrell was the only person who fell at the store. *Id. at 238*.

then, it was too late to save additional (in addition to the video that is Ex. 1) video. *CP 128*.

#### **6. Shahrkini's relationship with 7-Eleven.**

Shahrkini is a 7-Eleven franchisee. As such, he is an independent contractor. *RP II, p. 228*. 7-Eleven, Inc. provides some business assistance to its franchisees through 7-Eleven employees called Field Consultants. *RP II, p. 245*.

The 7-Eleven Field Consultant was scheduled, coincidentally, to be in the store the morning of Cottrell's fall. *Id.* Shahrkini would not have lost his 7-Eleven franchisee if the floor had not been mopped or not been clean. *RP II, p. 257*.

#### **7. Pre-trial motions.**

Both parties moved in limine concerning "spoliation." Cottrell argued that Shahrkini committed spoliation by "destroying evidence," *i.e.*, not preserving some additional unspecified amount of video. Shahrkini, on the other hand, argued that Cottrell should not be allowed to argue spoliation because there was no spoliation here. In addition, Shahrkini argued that, under CR 411, Cottrell should not be allowed to ask about insurance or indemnity.<sup>9</sup> Before trial, the judge granted Shahrkini's

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<sup>9</sup> Under the Franchisee Agreement between Shahrkini and 7-Eleven, Inc., 7-Eleven, Inc. indemnifies Shahrkini for certain losses, if any. *CP 104*. The contract of indemnity is not insurance. It does, however, act to cover certain potential liabilities. *Id.*

motions in limine concerning spoliation and exclusion of insurance, and denied Cottrell's motion in limine regarding spoliation. *CP 189*.

The parties re-visited these issues after opening statements. *RP II, p. 90-103*. Judge Pro-Tem Bobrick made a limited and specific ruling: Cottrell could not ask why Shahr vini preserved the amount of video he did because it would lead to his discussion with 7-Eleven, Inc. claims personnel which would, in turn, raise the issue of insurance or indemnity.<sup>10</sup> *Id.* Cottrell was not prohibited from asking other questions, subject to the order in limine. And Cottrell could ask what Shahr vini saw when he re-wound the video to preserve approximately four minutes of it. *Id.*

The jury returned a defense verdict. *CP 266*. After judgment was entered, Cottrell filed a motion for new trial. *CP 270*. The court denied the motion and Cottrell filed this appeal. *CP 275, 292*.

## **II. ASSIGNMENT OF ERROR**

Shahr vini makes no assignment of error.

## **III. RESPONDENT'S COUNTERSTATEMENT OF ISSUES**

1. Where, in a slip and fall case, a store proprietor preserves video of the entire time the patron (who fell) is in the store, including video of the fall, and where the proprietor owes no duty to preserve

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<sup>10</sup> Cottrell's attorney agreed that he never intended to and it was not his goal to elicit such testimony (concerning insurance or indemnity). *RP II, p. 103; RP IV, p. 29*.

additional video, and offers a satisfactory explanation concerning why he did not preserve additional video, did the trial court act within its discretion in finding spoliation had not occurred?

2. Did the trial court properly exercise its discretion in limiting cross-examination to prevent injection of insurance or indemnity into the case?

3. Where Appellant's counsel did not understand or did not otherwise take full advantage of the court's ruling concerning the scope of examination and argument allowed, did Appellant invite error?

4. Where a party's proposed jury instructions contain incorrect statements of law, were not supported by the evidence, and attempted to resolve disputed issues of fact, did the trial court properly reject the instructions?

5. Where there is overwhelming evidence to support the jury's verdict, was the court's ruling on spoliation harmless error?

6. Where the trial court found Appellant received a fair trial, did the court properly deny Appellant's motion for a new trial?

#### IV. ARGUMENT

##### A. Summary Of Argument.

1. **The trial court: (1) properly found spoliation did not occur; (2) exercised discretion in precluding examination and argument concerning insurance; (3) properly instructed the jury; and (4) committed no reversible error.**

The trial court properly found that Shahrkini did not commit spoliation. Shahrkini owed no duty to preserve the video complained of and Shahrkini's explanation concerning the amount of video preserved was satisfactory. The trial court did not abuse its discretion in finding spoliation had not occurred.

The trial court also properly prevented examination and argument concerning insurance. The court allowed examination and argument topics concerning preservation of video except questions that would elicit insurance information. The court acted within its discretion in limiting examination.

The jury was properly instructed. Cottrell's proposed instructions on spoliation were properly rejected, were improper statements of law and were attempts to resolve disputed issues of fact.

If the court committed error, it was harmless.

##### B. The Standard Of Review Is Abuse Of Discretion.

A trial court's decisions regarding admission or rejection of

evidence are discretionary, and will not be disturbed on appeal absent a showing of abuse of discretion. *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

Similarly, the number and specific language of jury instructions is a matter within the trial court's discretion. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991); *Havens v. C&D Plastics*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994). Instructions are sufficient if they permit a party to argue that party's theory of the case, are not misleading, and when read as a whole properly inform the jury about the applicable law. *Crossen v. Skagit Cy.*, 100 Wn.2d 355, 360, 669 P.2d 1244 (1983); *Havens*, 124 Wn.2d at 165.

**C. The Trial Court Properly Concluded That Shahrkini Did Not Commit Spoliation.**

**1. Spoliation.**

Spoliation is the intentional destruction of evidence. *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

Spoliation does not occur absent a duty to preserve the evidence at issue:

The destruction of potential evidence is not always improper, and thus when a party is alleged to have committed spoliation, the threshold issue is whether the party had any duty to preserve the evidence in the first place. If no such duty existed, the finding of spoliation is unwarranted. *Marshall v. Baileys PacWest, Inc.*, 94 Wn.

App. 372, 972 P.2d 475 (1999) (defendant properly disposed of a treadmill four years after accident, where plaintiff never requested the treadmill be retained as evidence and never asked to inspect it).

Tegland, *Courtroom Handbook on Washington Evidence*, p. 192 (2007 Ed.).

This Court has stated that in Washington potential litigants do not have a general duty to preserve evidence. *Homeworks Const. v. Wells*, 133 Wn. App. 892, 901, 138 P.2d 654 (2006).

Here, Shahr vini did preserve the most important portion of video: Ex. 1. Exhibit 1 (a CD) shows (1) activity in the store before Cottrell arrives, (2) his activity (except when he goes off camera) while in the store, (3) his fall, (4) his exit, and (5) activity in the store after he leaves the store. Even assuming Shahr vini owed a “duty to preserve” that duty has been met and Cottrell cites no authority to the contrary.

Nevertheless, Cottrell argues that Shahr vini should have kept some additional, unstated, amount of video. Below, and in this appeal, Cottrell fails to state what additional amount of video Shahr vini should have preserved. Cottrell offers no authority or other guideline on this issue. Moreover, Cottrell fails to establish why it should have occurred to Shahr vini to preserve additional video.

In *Pier 67, Inc. v. King Cy.*, 89 Wn.2d 279, 384-85, 573 P.2d 2

(1977), a case relied upon by Cottrell, the court stated that the evidence at issue must be such that it would naturally occur to the party in control of it to preserve the evidence:

We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interest 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.

Cottrell does not explain why it would be “natural” to Shahrkini to keep some additional, unstated, amount of video. The “natural” part of the video was produced: that part showing Cottrell in the store. Cottrell fails to explain why Shahrkini should have “naturally” saved additional video. Cottrell also does not explain how Shahrkini was supposed to determine what video would be important to Cottrell months or years later.

**2. Spoliation does not occur where there is a “satisfactory” explanation for the “missing” evidence.**

Spoliation does not occur and a negative inference does not arise if there is a “satisfactory” explanation concerning the evidence at issue. *Pier 67 v. King Cy.*, 89 Wn.2d 379, 384-85, 573 P.2d 2 (1977); *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

In *Henderson*, Mr. Tyrrell’s vehicle rolled while he and several others (the Hendersons) were in the vehicle. He was badly injured. The

primary dispute in the case was who was driving, Tyrrell or one of the Hendersons. *Henderson, supra* at 597. The vehicle itself was the subject of the spoliation issue in the case. *Id. at 603*. Tyrrell disposed of the car some two years after the accident. The trial court had determined that spoliation had not occurred and that a sanction for the alleged spoliation was not appropriate.

The *Henderson* court noted the “satisfactory explanation” language of *Pier 67, supra*, contemplates that in some cases a “party’s actions are not so serious as to require a judicial remedy.” *Id. at 607*. The court took into account: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. *Henderson at 607*.

**a. Importance of the evidence.**

Whether the missing evidence is important or relevant depends on the particular circumstances in a case. *Henderson at 607*. An important consideration is whether the adverse party was afforded an adequate opportunity to examine the evidence. *Id.*

Cottrell fails to establish why, specifically, the alleged missing video is important. Cottrell repeats, several times, in his brief that it is “crucial” evidence. He fails to explain why it is “crucial.”

Cottrell does not explain exactly what he thinks it would show. He

suggests it would show, somehow, that Ms. Kaur “missed” a spot while she was dry mopping. But Shahr vini does not dispute that before the floor was dry mopped by Ms. Kaur (as shown in *Ex. 1*) it was wet mopped. Shahr vini denies Ms. Kaur missed a spot while dry mopping, but even if she did there were multiple “caution” wet floor signs in place.

Also, there was no prohibition on questioning Ms. Kaur or Shahr vini (or anyone else) on activities in the store prior to Cottrell’s entrance.<sup>11</sup> And Cottrell was allowed to question Shahr vini – without limitation – concerning what he saw when reviewing the video. *RP IV, pp. 27-29.*

Also, Cottrell was given an opportunity to ask that a certain amount of video be preserved.

As Exhibit 1 shows, after the accident and while still in the store Cottrell could have asked Shahr vini to save video. Moreover, Cottrell returned to the store a day later to, among other things, threaten suit. *CP 128.* If he was well enough to get to the store the day after the accident, he was well enough to request that Shahr vini keep a certain amount of video. He did not do so. By the time he sister wrote 7-Eleven claims personnel (Ms. Hesson) a month later (*CP 152-53*), it was too late.

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<sup>11</sup> The availability of witnesses who can testify concerning the missing evidence is a factor to consider in determining whether the evidence is “indispensable.” *Homeworks Const. v. Wells, supra*, 133 Wn. App. at 899.

Nevertheless, within a seven day window (the store video system records over itself after seven days, *CP 128*), Cottrell had the opportunity to request additional video be preserved. He failed to do so.

**b. Shahrkini's culpability.**

In determining culpability, a court may look at whether the party acted in bad faith or conscious disregard of the importance of the evidence, or whether there was some innocent explanation for the destruction. *Henderson v. Tyrrell*, at 609.

Where a party destroys evidence in bad faith,

the fact of destruction is normally admissible, on the theory that destruction suggests consciousness of potential liability or consciousness of other adverse consequences if the evidence were to be presented to a trier-of-fact. In other words, it reveals the party's own belief that he or she has a weak case.

Traditionally, at least, admissibility turns on a finding of bad faith; *i.e.*, destruction that is both willful and with improper motivation. A party's innocent loss or destruction of evidence carries no suggestion that the party thought he or she had a weak case.

Teglund, *Evidence Law & Practice*, § 402.6, p. 285 (2007); *accord*, *Henderson v. Tyrrell* at 609 (absent bad faith there is no basis for "the inference of consciousness of a weak case," *citing* John W. Strong, *McCormack on Evidence*, § 265 at 91).

Shahrkini did not act in bad faith or in conscious disregard of the

importance of the evidence. And the trial court acted within its discretion in so finding.

The spoliation issue was argued before trial and extensively during trial. *See RP II, p. 90-113.* The trial court considered Shahrvin's explanation concerning why he saved the amount of video he did. He explained that after Cottrell threatened suit, he (Shahrvin) called 7-Eleven claims representatives.<sup>12</sup> *CP 128.* He was advised to keep several minutes before the fall and several minutes after. *CP 128.* There is no evidence (1) the claims representative saw any video before it was saved by Shahrvin; (2) that Shahrvin and the claims representative discussed the specifics of the fall or the specifics of store activity prior to Cottrell's entrance; and (3) that Shahrvin or the claims representative decided to keep the amount of video (approximately four minutes) based on whether it was helpful or damaging to Shahrvin. Instead, the evidence is the advice given (keep several minutes before and several minutes after) was generic. The trial court found no evidence that: Shahrvin or claims personnel selectively chose portions of the tape, manipulated the tape, attempted to compromise Cottrell's claims, acted with improper motive, or that there was "misconduct" by Shahrvin. *RP II, p. 102, 106, 110 and 113.* The court specifically found no evidence that the video that was not

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<sup>12</sup> Sedgwick CMS is a claims administrator for 7-Eleven, Inc. *CP 152.*

preserved was “damaging” to Shahrkini. *Id.*, p. 109. The trial court correctly concluded there was no evidence of bad faith or similar “malicious” intent by Shahrkini or the claims representative. *RP IV*, p. 22.

Shahrkini’s explanation about preserving the video was satisfactory. The court acted within its discretion when it concluded there was no evidence to support a finding of spoliation or a sanction against Shahrkini.

**D. The Court Acted Within Its Discretion In Precluding Questioning Concerning Insurance (Or Indemnity).**

To avoid injecting insurance (or indemnity<sup>13</sup>) into the case, the trial court limited, slightly, Cottrell’s examination of Shahrkini concerning preservation of the video. The court’s decision to limit the cross examination of Shahrkini on the issue of why he preserved a certain amount of the store’s video was within the court’s discretion.

Introduction of insurance (and indemnity) into the case would have violated of ER 411. The issue of liability (including indemnity) coverage is immaterial and intentional reference to insurance in front of the jury is grounds for reversal. *Williams v. Hoffer*, 30 Wn.2d 253, 191 P.2d 306 (1948); *Kubista v. Romaine*, 14 Wn. App. 58, 65, 538 P.2d 812 (1975). It was neither unreasonable nor untenable for the court to exclude testimony

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<sup>13</sup> See note 9 below, at 10, concerning indemnification agreement between Shahrkini and 7-Eleven, Inc.

on insurance or indemnity. Moreover, excluding such evidence was correct under the court rules and case law.

Cottrell is now apparently arguing the court should have allowed him to inject insurance into the case. *Brief of Appellant*, at 19-20. But at trial Cottrell admitted it would be improper to do so:

Mr. Briggs: And what he kept and what he didn't keep was a decision of somebody with an interest in the outcome of this case. Now, we aren't going to argue about that because 7-Eleven Corporation has an indemnity agreement. The court knows that. We've talked about that. I'm not looking to open that door, but the decision of 7-Eleven Corporation, the one with the interest in the outcome of the case, flowed through the defendant.

*RP II, p. 101.*

Similarly,

The Court: This is my ruling. Asking him why he didn't keep it, we all know why he didn't keep it, it was on the advice of the insurance person. That, to me, falls within a privileged communication and a decision. I don't find it was done intentionally to manipulate the case. Ask all the questions you want about what he observed on that video, ask all the questions you want about any part of the video he observed afterwards that is not preserved, but keep away from the why.

Mr. Briggs: Just don't ask him why?

The Court: Don't him . . . I don't want the issue of he

was advised by the insurance company.

Mr. Briggs: And I never intended to look for that answer, never.

Cottrell then acknowledged the impropriety of trying to inject insurance into the case in the argument concerning the motion for a new trial:

The Court: I said you couldn't ask him a question that was going to elicit the response that the decision was made because of what the claims people told him.

Mr. Briggs: \* \* \* My intent was not to elicit insurance information. That wasn't my goal. I don't think that sells well anymore to juries.

*RP IV, p. 29.*

E. **Cottrell Failed To Understand Or Failed To Take Advantage Of The Court's Ruling On The Scope Of The Questioning Concerning Preservation Of Video.**

The trial court ruled Cottrell could not ask why Shahr vini preserved approximately four minutes of video. *RP II, p. 102.* Cottrell could not ask this question because it would elicit an answer from Shahr vini that he did so on the advice of claims personnel. *Id.* at 103. The court repeated that it wanted to keep insurance out of the case. *Id.*

The court also made it clear, however, that Cottrell could ask, without limitation, what Shahr vini saw on the tape as he played it back to locate video of the fall (to accomplish preserving a couple of minutes on

each side of the fall). *RP II*, p. 95, 97 and 105.

Under the court's ruling, Cottrell could ask Shahrkini his motive concerning testimony on what Shahrkini saw or did not see while reviewing the tape. *Id.* The court did not limit what Shahrkini could be asked about his observations and motive for his answers. *Id.*

Cottrell's failure to understand the scope of the ruling is shown in the following passage:

Mr. Briggs: I asked for clarification. I asked if I understood the court's ruling. It is that I cannot ask why he destroyed the video, I cannot argue to the jury why he did it. That's what the court ruling was. I was very careful in asking for clarification at trial.

You are correct, you allowed inquiry into what he viewed on the video tape. That's true. You allowed me to inquire as to that period but it was free to say nothing.

The Court: But that's when cross examination comes in.

Mr. Briggs: Yeah, but --

The Court: Isn't it a fact that you were telling this jury what you saw or what you didn't see was just to protect your own interest.

Mr. Briggs: No. That's exactly what you prohibited me from saying, the "why" question to protect your own interests. That's the "why." I could not ask or argue why.

The Court: The "why" was "Mr. Shahrkini, why did you only save this amount of tape." His

answer was because the claims people -- it was either the insurance company -- apparently 7-Eleven is self-insured. The "claims people told me that."

*RP IV, p. 27-29.*

Cottrell's failure to understand or take advantage of the court's ruling and then complain about it in this appeal is invited error.

The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally. *State v. Recuenco*, 154 Wn.2d, 110 P.3d 188 (2005).

Under the court's ruling, Cottrell could have questioned Shahrkini about what he saw as he rolled back the video and could have questioned his motives concerning his answers. *RP IV, pp. 27-29.* To the extent he failed to do so, he should not be able to complain now about Shahrkini's motive when reviewing the video.

**F. The Jury Was Properly Instructed.**

Cottrell's proposed instructions (No. 5 and No. 6) were properly rejected. Proposed Jury Instruction No. 6 contains an incorrect statement of law, and is not supported by the evidence. Proposed Jury Instruction No. 5 is an unconstitutional attempt to resolve factual disputes.

**1. The jury was properly instructed.**

Instructions are sufficient if they permit a party to argue the party's

theory of the case, are not misleading, and when read as a whole inform the jury about the applicable law. *Crossen v. Skagit Cy.*, 100 Wn.2d 355, 360, 669 P.2d 1244 (1983).

The instructions as given allowed Cottrell to argue his theory of the case. His theory of the case was that store personnel (Ms. Kaur) “missed” a spot on the floor (because she was in a hurry to get the store ready for a visit by the field consultant) when she was dry mopping and this spot was where Cottrell fell. Cottrell was able to argue this theory of the case and did in fact argue this theory of the case to the jury. There was nothing in the jury instructions that prohibited him from doing so. In addition, the instructions as given were not misleading when read as a whole and properly informed the jury about the applicable law.

**2. Cottrell’s Proposed Jury Instruction No. 6 is an incorrect statement of the law.**

Cottrell’s Proposed Jury Instruction No. 6 (which was rejected by the trial court) is the “burden shifting” instruction. It attempted to put the burden on Shahrivini to prove the floor was not wet and slippery.

No published Washington cases have upheld the giving of such an instruction.<sup>14</sup> Indeed, in Washington the remedy for spoliation remains arguing a negative inference in closing argument:

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<sup>14</sup> In *Homeworks, supra*, the trial court granted summary judgment as a sanction for spoliation. This Court reversed finding this sanction was an abuse of discretion. *Homeworks, supra*, 133 Wn. App. at 902.

The Washington courts, however, have significantly limited the use of the [negative] inference by the party that benefits from it. First, the inference is not, by itself, substantive evidence. *Walker v. Herke*, 20 Wn.2d 239, 147 P.2d 255 (1944). Second, the jury is not instructed on the inference in a civil case. See discussion of WPI 5.01 in 6 *Washington Practice*.

As a practical matter, the only use that can be made of the inference in a civil case is to refer to the argument during argument to the jury. See *Krieger v. McLaughlin*, 50 Wn.2d 641, 313 P.2d 361 (1957).

Tegland, *supra*, at 192.

It is true that courts have considerable discretion in dealing with spoliation and remedies for spoliation. Shahrkini is not, however, aware of any published Washington cases where a trial court has been upheld in giving a burden shifting instruction such as proposed by Cottrell in this case (Instruction No. 6).

In addition, as suggested by the court in *Henderson*, more severe remedies – such as burden shifting – are typically based on a finding of “bad faith” by the person accused of the spoliation. The *Henderson* court pointed out that the more egregious the conduct the more severe the sanction:

The judicial response to the problem in other jurisdictions seem to reflect an understanding that the term [spoliation] encompasses a broad range of acts, and the severity of a particular act, in terms of the relevance or importance of the missing evidence or the culpability of the actor, determines the appropriate remedy.”

*Henderson, supra*, 80 Wn. App. at 605.

The trial court found Shahrkini did not spoliage evidence and that no sanction was warranted. *RP IV*, p. 32. Absent a spoliage finding no sanction is warranted. *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

Even if a sanction was appropriate here, the evidence does not support the giving of Cottrell's Proposed Jury Instruction No. 6. An instruction is required only if there is substantial evidence to support it. *Henderson, supra*, at 162.

Here, it can hardly be argued that Shahrkini acted in bad faith or in a manner that would support giving Cottrell's Proposed Jury Instruction No. 6. Indeed, he kept the most relevant and most important video, that of Cottrell's entire time in the store, including his fall. *Ex. 1*. Cottrell's Proposed Jury Instruction No. 6 was properly rejected under these circumstances.

Moreover, Cottrell conceded during argument on his motion for a new trial that case law does not support a burden shifting instruction:

[T]here is not enough case law to really know whether spoliage, instructions, spoliage should burden shift or summary judgment are appropriate in any given case. There really isn't.

*RP IV*, p. 32.

**3. Cottrell's Proposed Jury Instruction No. 5 is an unconstitutional charge attempting to resolve disputed issues of fact.**

Cottrell's Proposed Jury Instruction No. 5 contains disputed issues of fact. The giving of such an instruction would be a comment on the evidence in violation of the Washington Constitution.

Cottrell's Proposed Jury Instruction No. 5 states:

Defendants 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 Defendants.

*CP 214.*

This proposed instruction contains issues of fact.

First, Defendants raised issues of fact concerning whether Plaintiff had the opportunity to review the video. As discussed above, the video did not copy over itself until seven days after the accident. Cottrell was in the store on the day of the accident and a day later. Thus, he had an opportunity to request that Shahrvin keep additional video. In addition, he could have timely requested, but did not, to review the video.

Second, Cottrell's theory of the case was that Ms. Kaur left a wet spot which Cottrell allegedly slipped on, and that there was not a sign placed where Defendants claim the sign was placed, *i.e.*, in the newspaper

aisle. *See, generally*, *RP I*, p. 30-40. Shahrkini disputed these claims. *RP II*, p. 141-144.

Thus, Cottrell's Proposed Jury Instruction No. 5 is an attempt to instruct the jury to rule in his favor on disputed issues. This is improper.

The language cited immediately above in Proposed Jury Instruction No. 5 runs afoul of the constitutional prohibition on charging juries as to disputed facts. "Judges shall not charge juries with respect to matters of fact . . . ." *Washington Constitution* Art. IV, § 16. A jury instruction which purports to resolve a disputed issue of fact is an unconstitutional comment on the evidence. *State v. Eaker*, 113 Wn. App. 111, 117, 53 P.3d 37, *rev. denied*, 149 Wn.2d 1003 (2002). The court should reject jury instructions which purport to resolve factual disputes, to avoid constitutional error. *Martin v. Kidwiler*, 71 Wn.2d 47, 51, 426 P.2d 489 (1967); *State v. McDonald*, 70 Wn.2d 328, 330, 422 P.2d 838 (1967) (reversible error to give instruction which implied defendant had escaped when defendant contested that fact).

Here, Shahrkini disputes that Cottrell did not have the opportunity to review the video or request that additional video be preserved. The proposed instruction is a comment on the evidence and was properly rejected.

Likewise, Shahrkini disputed the claims made in Proposed Jury

Instruction No. 5 concerning the Cottrell's claim that the floor was wet and the sign was not in place as argued in Instruction 5.

The court properly rejected this instruction.

**G. The Court Did Not Error In Its Rulings. If It Did, The Error Was Harmless.**

The trial court has broad discretion whether to admit evidence. *Mason v. Bon Marche*, 64 Wn.2d 177, 178, 390 P.2d 997 (1964). This court will only reverse a trial court where it has clearly abused its discretion. *Side v. City of Cheney*, 37 Wn. App. 199, 202, 679 P.2d 403 (1984). Even where the decision to admit evidence is "fairly debatable" the trial court will not be reversed. *Martin v. Huston*, 11 Wn. App. 294, 301, 522 P.2d 192 (1974). As to the question of whether evidence is relevant or not, the trial court's decision will not be reversed unless "clearly wrong." *Dielb v. Beckman*, 7 Wn. App. 139, 156, 499 P.2d 37 (1972).

An erroneous evidentiary ruling is not grounds for reversal unless, within probabilities, it materially affected the trial's outcome. *State v. Nelson*, 131 Wn. App. 108, 117, 125 P.3d 1008 (2006). Thus, improper admission (or by analogy exclusion) of evidence is not prejudicial and constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *State v.*

*Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1121 (1997). Harmless error is error that is not prejudicial to the substantial rights of the party assigning error and does not affect the outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000); *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997).

Cottrell's burden on this appeal is to establish the trial outcome would have been different if Cottrell was allowed to cross examine Shahrkini about the discussion with the claims representative, and about his claim that the "missing" video was damaging to Shahrkini. He has not met this burden. There is absolutely no evidence this information would have caused the jury to rule in Cottrell's favor.

There were two primary issues in the case: was the floor wet<sup>15</sup> where Cottrell slipped and, if so, did the signs, and in particular the sign that is very evident on the video, adequately warned Cottrell of a potential wet floor. The entire thrust of Cottrell's appeal goes to the first issue – was the floor wet. It is possible, maybe even likely, the jury concluded the floor was wet but that, as shown on the video (and the various photographs), the store used reasonable care to warn of the wet floor by the use of the wet floor "caution" signs directly inside the front door, in the main aisle and in the newspaper aisle. Thus, any questioning about

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<sup>15</sup> Other issues include whether the floor, if wet, was a "hazard," *i.e.*, not reasonably safe. CP 247.

“motive” for “destroying” the video would have fallen on deaf ears as far as the jury was concerned. The jury may well have decided the case on the issue of the adequacy of the warning provided by the store.

Cottrell fails to describe how his rights were prejudiced and how the outcome of the case would have changed if the court would have allowed the cross examination that Cottrell now complains of. The evidence against Cottrell was so overwhelming that the exclusion of the evidence Cottrell now complains of was completely harmless.

The jury heard substantial and largely unrebutted evidence concerning the store’s use of reasonable care. Shahrini and store personnel testified at length about the wet mopping and dry mopping (and the frequent – weekly – changing of the mop heads) and the use of “caution” wet floor signs. *See* discussion above at pp. 2-8.

Further, Cottrell provided no testimony – expert or otherwise – of a breach of the standard of care.

Cottrell himself praised the store’s operation. He said the store was “clean,” “tidy” and “well maintained.” *RP II, pp. 186, 188 and 201.*

The evidence supporting the verdict is substantial. The evidence Cottrell complains of would not have changed the trial’s outcome.

**H. The Denial Of Cottrell’s Motion For New Trial Was Correct.**

Cottrell moved for a new trial complaining that “substantial justice

had not been done.” *CP 270*. Cottrell argued that he should have been allowed to ask Shahrkini (and argue to the jury) that the reason the video was “destroyed” was because it was “harmful” to Shahrkini. *Id.* 271. Cottrell claimed that his inability to ask this question and make this argument resulted in prejudice to him and, accordingly, denial of a fair trial. *Id.*

### **1. Cottrell’s burden on Motion for New Trial.**

The grant or denial of a motion for a new trial is within the trial court discretion and will not be disturbed on appeal absent a showing of manifest abuse of that discretion. *Kohfeld v. United Pacific Ins.*, 85 Wn. App. 34, 931 P.2d 911 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

The burden on a party moving for a new trial is substantial. Cottrell had to demonstrate that, when viewed in a light most favorable to Shahrkini, there was “no evidence or a reasonable inference” to support the verdict in favor Shahrkini’s favor:

The grant of a motion for a new trial is appropriate if, viewing the evidence in the light most favorable to the non-moving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain the verdict of the non-moving party. [Citations omitted.] The requirement of substantial evidence necessitates that the evidence be such that it would

convince an unprejudiced, thinking mind of the truth of the declared premise. [Citations omitted.] Our Supreme Court has cautioned that the “granting of new trials for lack of substantial justice should be relatively rare, especially since [CR 59(a)] gives 8 other broad grounds for granting new trials. [Citations omitted.]

*Kohfeld, supra*, at 41.

Cottrell’s evidence during the motion for new trial, like his evidence here, failed to meet the standard for the granting of a new trial.

First, the trial court found there was no general duty to preserve evidence or any evidence to suggest “that a spoliation issue was present that required a sanction against the defendant.” *RP IV*, p. 32. The court further discussed the basis for its decision:

I found no evidence to suggest in the offer of proof or briefing that 7-Eleven claims personnel and Mr. Shahrvini ever discussed what was on the video in order to make a decision as to the scope of the tape to be preserved.

I found no evidence to suggest that other cameras in the shop, perhaps based on different days or whatever, would have shown what was going on in the newspaper aisle or the motor oil aisle, which I understand are pretty much the same.

*Id. at 34.*

Further, the court found:

The fact of the matter is, there was no foundation in order to build an inference of motive with regard to any decisions of that video. There was no evidence to suggest the content was disclosed. There was no evidence to suggest that there was a different policy in place with respect to preservation

of a video and all of a sudden a liability situation they changed to.

What if there was a theft in the store? Is there a different process or policy? Anything that would have suggested that there was an irregularity here and the decision that was made with respect to this video, and there wasn't. Mr. Shahrivini's testimony stood alone, Mr. Briggs, that the reason the decision was made was because he was told to save two minutes before and after.

*Id. at 35-36.*

In short, the court reasonably concluded, based on the evidence presented at trial and in pre-trial motions, there was no basis for a finding of spoliation and no reason to impose a sanction for spoliation.

Also, the court clearly explained the extent of its ruling on the spoliation issue:

The limitation of my ruling was that I didn't want you to interject insurance into it, and I wasn't going to give you a presumption on spoliation. I did not interfere with your cross examination as to what he saw.

\* \* \*

The Court: I believe that I gave you scope on cross examination. I just said that I didn't want the issue of insurance interjected in this trial. If your purpose of him on the stand was to ask him why, he didn't save the video and you're only going to get an answer that he was told by the claims people, then I wouldn't allow it. That was the scope of my ruling.

*Id. at 34-35.*

Finally, the court found Cottrell did receive a fair trial and that there was substantial evidence to support the verdict:

I find that Plaintiff had a very fair trial, and the jury found that essentially there was substantial evidence based on Mr. Cottrell's testimony that these people ran a very nice operation and . . .

Mr. Briggs: Your Honor . . .

The court: - - fulfilled their duty of ordinary care.

\* \* \*

The Court: My mind is setting there listening to this case. There was sufficient evidence and substantial evidence to support a defense verdict. On that basis, your Motion for a New Trial is denied.

*Id. at 38.*

Based on the foregoing, the court clearly exercised reasonable and tenable judgment and discretion in denying the Motion for a New Trial.

#### IV. CONCLUSION

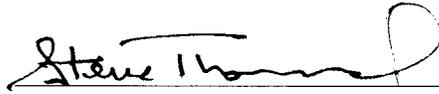
Cottrell had a fair trial. He was allowed to, and did, argue his theory of the case.

The trial court's decisions regarding spoliation are within the court's discretion. Finally, to the extent there was error, it was harmless.

Shahr vini requests that this Court affirm the trial court and allow the jury verdict in this case to stand.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June, 2007.

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

A handwritten signature in black ink, appearing to read "Steve Thorsrud", written over a horizontal line.

Steven L. Thorsrud, WSBA #12861  
Attorney for Respondents

NO. 35347-4-II

(Pierce County Superior Court No. 05-2—8504-1)

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COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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STEVE COTTRELL,

Appellant,

v.

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

Respondents.

FILED  
COURT OF APPEALS  
DIVISION II  
07 JUN 11 PM 4:19  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
IDENTITY

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CERTIFICATE OF SERVICE

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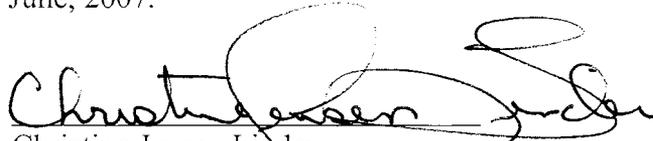
I, Christine Jensen Linder, hereby certify that a true and correct copy of the following document filed in the above matter was served via ABC Messengers on June 11, 2007:

DOCUMENTS: Brief of Respondents; Certificate of Service

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Dated this 11<sup>th</sup> day of June, 2007.

  
Christine Jensen Linder

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