

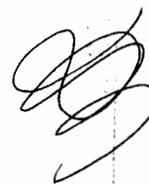
NO. 36019-5-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Marilyn Niebauer, Appellant,

v.

Swain's General Store, Respondent.



REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

LORI MCCURDY
J. MICHAEL KOCH
Attorneys for Marilyn Niebauer, Appellant

Lori McCurdy, WSBA No. 29801
J. Michael Koch, WSBA No. 4249
J. Michael Koch & Associates, P.S., Inc.
10049 Kitsap Mall Boulevard, Suite 201
P.O. Box 638
Silverdale, WA 98383
(360) 692-5551

ORIGINAL

TABLE OF CONTENTS

I. Argument in Response to the Issues Raised by the Respondent’s Brief 1

II. Response to the Cross Appeal 5

A. Counter Statement of the Issue Raised On Cross-Appeal
 5

B. Counter Statement of the Case 5

C. Argument 7

 1. Ms. Niebauer Did Not Need to Show Swain’s Had Actual
 or Constructive Notice of the Hazard Under the *Pimentel*
 Exception 7

 2. Ms. Niebauer’s Evidence Satisfied the Requirements
 Under *Pimentel* and Subsequent Case Law Limiting the
 Pimentel Exception 9

III. Conclusion 11

I. Argument in Response to the Issues raised by the Respondent's Brief

Contrary to what Swain's asserts, Washington case law does not limit "spoliation" to circumstances in which evidence has been intentionally destroyed.¹ Rather, bad faith or conscious disregard of the importance of the evidence can be sufficient to warrant a sanction by the court.² This Court has expressly stated:

By noting that disregard can be sufficient to deserve a sanction, the *Henderson* opinion suggests that spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith.³

Clearly the destruction of evidence need not be intentional or even done in bad faith to deserve a sanction. Conscious disregard or a careless loss of evidence should not go without penalty if the evidence is important to the litigation and its non-production creates an unfair advantage to the non-producing party, as in this case.

Swain's also incorrectly asserts that there was no evidence in the record that the incident report contained information in addition to, or

¹See, Respondent's Brief at 4, citing Black's Law Dictionary definition quoted in *Henderson v. Tyrrell*, 80 Wn.App 592 (1996).

²*Henderson v. Tyrrell*, 80 Wn.App. at 609-610, explaining how to apply the 2-part test for determining whether a rebuttable presumption of wrongful spoliation should apply.

³*Homeworks Construction, Inc. V. Wells et al.*, 133 Wn.App 892 at 900, 138 P.3d 654 (2006)

different than, the evidence presented by the witnesses who testified at trial.⁴ On the contrary, the evidence shows that the incident report contained each witness' and/or employee's account of the events **as they had witnessed them and described them that same day.**⁵ Based on the numerous discrepancies in the witnesses' testimony at trial it is obvious that the memory of the events of Ms. Niebauer's fall was not accurate in each witness' mind at the time of trial, even on such basic facts such as which employees were present on the scene.⁶

The most obvious and crucial discrepancy that could have been clarified with the production of the incident report was whether Swain's employee Tim Gronseth was the first to assist Ms. Niebauer and whether he saw and picked up numerous plastic hooks of the type Ms. Niebauer slipped on from the surrounding area. Ms. Niebauer recalled these facts clearly and testified as much.⁷ The incident report could have provided confirmation of Tim Gronseth's presence, and the details he witnessed. Instead, at the time of trial the witnesses disagreed on whether Tim Gronseth was even working that day, and whether there may have been

⁴ Respondent's Brief at 5.

⁵ RP 57

⁶ See, Appellant's Brief at 12-19

⁷ RP 143-144

any hooks on the floor.⁸ These discrepancies created a huge advantage for Swain's defense, as they created questions regarding Ms. Niebauer's credibility that would not have been present had the report been produced.

The two factors under *Henderson v. Tyrrell* that the court should have considered in making its ruling weigh in favor of sanctions for Swain's spoliation of the evidence. The first factor is the potential importance or relevance of the missing evidence, and whether it resulted in an investigative advantage for one party over the other.⁹ Here, the absence of the report created a strategic advantage for Swain's at trial by creating unanswerable discrepancies in witness testimony that unnecessarily cast doubts on Ms. Niebauer's version of events and her credibility. The importance of Ms. Niebauer's credibility cannot be understated and this factor weighs in favor of a sanction for Swain's.

The second factor to weigh in determining when spoliation requires a sanction is the culpability of the party who failed to produce the evidence, including whether it acted in bad faith or with conscious disregard for the importance of the evidence.¹⁰ The evidence before the

⁸See, Appellant's Brief at 12-19 highlighting these and other key discrepancies in the witnesses' testimony

⁹*Henderson v. Tyrrell*, 80 Wn. App. at 607

¹⁰*Henderson v. Tyrrell*, 80 Wn. App. at 609-610

trial court clearly showed *at a minimum* a conscious disregard on the part of Swain's for the importance of the incident report, and also weighs in favor of awarding a sanction against Swain's.

The only justification given for Swain's failure to produce the incident report was Mr. Reynolds' brief testimony that the company had split into three entities between the date of the incident and the date of trial.¹¹ However, the evidence also showed that all three entities and all locations of what was formerly a single entity continued to be accessible to and searchable by the Defendant.¹² Therefore, the fact that the report was never produced shows that Swain's either acted in bad faith by misplacing the incident report or acted with conscious disregard for the importance of the report.

Swain's gave no satisfactory justification for not producing the incident report that could have cleared up numerous questions of fact for the jury. This failure, combined with the importance of Ms. Niebauer's credibility to her case, gave an unfair advantage to the Defendant at trial. Ms. Niebauer's proposed jury instructions regarding the negative inference to be drawn from the missing evidence were an appropriate

¹¹RP 83

¹²See, RP 83

remedy, and the Court's failure to give the instructions was an abuse of discretion.

II. Response to the Cross-Appeal

A. Counter Statement of the Issue Raised on Cross-Appeal

Whether Swain's Motion for Summary Judgment was properly denied because the evidence showed that the hazard occurred in a self-service area of Swain's self-service store, and was clearly related to that self-service operation; therefore, Ms. Niebauer did not have to show that Swain's had actual or constructive notice of the hazard and Swain's was not entitled to judgment as a matter of law.

B. Counter Statement of the Case

Facts Before the Court at the Motion for Summary Judgment Hearing

On February 12, 2003, Marilyn Niebauer was in Swain's General Store in Port Townsend, Washington, and was walking down an aisle towards the U.S. Post Office located at the back of the store.¹³ Ms. Niebauer slipped on something in the aisle, which she determined to be a plastic hook, and fell to the ground severely injuring her left ankle.¹⁴

¹³RP 133

¹⁴RP 141-144

There were goods for sale on each side of the aisle.¹⁵ Ms. Niebauer and Defendant's employee, Brandi Hamon, testified in deposition that on one side of the aisle were racks of clothing, and on the other side were the end-caps of long display racks, with small displays of items for sale, including hats, gloves and socks.¹⁶ Ms. Hamon testified that the end-caps facing the aisle generally had seasonal items displayed for sale, hanging from the type of plastic hooks that Ms. Niebauer slipped on.¹⁷ She stated specifically that the kind of merchandise that utilized the plastic hooks was displayed in the immediate vicinity where Ms. Niebauer's fall occurred.¹⁸

The store manager, Mr. Jim Reynolds, testified in deposition that all merchandise at Swain's was available on a self-serve basis.¹⁹ Swain's employee, Ms. Hamon, also described Swain's as a self-service store, as

¹⁵ CP 297-298 (Dep. Marilyn Niebauer, p. 13:19 - 14:21, and Exhibit 1); CP 35-36 (Dep. of Brandi Hamon, p. 32:25 - 33:19).

¹⁶ CP 297-298 (Dep. of Marilyn Niebauer, p. 13:19 - 14:21); CP 35-36 (Dep. of Brandi Hamon, p. 32:25 - 33:19).

¹⁷ CP 35-36 (Dep. of Brandi Hamon, p. 32:25 - 33:19).

¹⁸ CP 36 (Dep. Of Brandi Hamon at 33: 7-10).

¹⁹ CP 347 (Dep. of Jim Reynolds, p.36:9-10)

customers would come in to the store, pick-up what they wanted, and would take that merchandise up to the register to purchase it.²⁰

The store manager, Mr. Reynolds, testified that he had seen hooks on the floor of Swain's, on both the carpeted areas and the tile flooring.²¹ According to Mr. Reynolds, hooks had a way of showing up all over the store.²² Ms. Hamon testified that she saw hooks like the type Ms. Niebauer fell on on the floor of Swain's all the time.²³ Ms. Hamon had witnessed customers dropping the hooks on the floor, the hooks falling as customers attempted to put merchandise back, and kids yanking the hooks off of merchandise.²⁴ Ms. Hamon herself had previously slipped on a hook on the store floor.²⁵

C. Argument

1. Actual or Constructive Notice of a Hazard is Not Required for Premises Liability Under the *Pimentel* Exception

²⁰ CP 34-35 (Dep. of Brandi Hamon, p. 31:25-32:9).

²¹ CP 347 (Dep. of Jim Reynolds, p.35:10-20).

²² CP 347 (Dep. of Jim Reynolds, p. 35: 21-25; 36:2-3).

²³ CP 35, 55, 61, 65 (Dep. of Brandi Hamon, p.32:10-12, 52:15-20; 58:11-15; 62:6-10).

²⁴ CP 36, 65 (Dep. of Brandi Hamon, p.33:13-19 62:6-10).

²⁵ CP 60 (Dep. of Brandi Hamon, p.57:15-22).

Generally, a possessor of land is not liable to a business invitee for an unsafe condition caused by another, unless the possessor either knew or should have known of the unsafe condition.²⁶ However, the Supreme Court of Washington created an exception to this rule, holding that actual or constructive knowledge of the hazard is not necessary if the existence of the hazard was reasonably foreseeable.²⁷ This “*Pimentel*” exception to the notice requirement applies where a proprietor’s business incorporates a self-service mode of operation, and this mode of operation inherently creates an unsafe condition that is continuous or reasonably foreseeable.²⁸ In such cases, the store is considered to be on constant notice that hazards will occur in the normal course of business.²⁹

A self-service area has been defined as any location where customers serve themselves, goods are stocked, and customers handle the items.³⁰ Examples of areas that courts have found to be self-serve areas

²⁶ *Ingersol v. DeBartolo, Inc.*, 123 Wn.2d 649, 654 (1994).

²⁷ *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983).

²⁸ *Pimentel*, 100 Wn.2d at 40; *Ingersoll*, 123 Wn.2d at 653.

²⁹ *Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991) (emphasis added).

³⁰ *O’Donnell v. Zupan*, 107 Wn.App. 854, 860, 28 P.3d 799 (2001).

include the check-out aisle, a magazine display, and the produce department.³¹

2. Ms. Niebauer's Evidence Satisfied The Requirements Under *Pimentel* and Subsequent Case Law Limiting the *Pimentel* Exception

The *Pimentel* exception has been narrowly interpreted and limited in subsequent cases. Courts have found that it does not necessarily apply to all areas of a self-service business, but only to those areas where risk of injury is foreseeable.³² That is to say, only areas of the store that are actually self-service areas. For example, in *Coleman v. Ernst*, the Court found that even though Ernst was a self-service store, the carpeting in the entryway where the hazard was located was not part of Ernst's self-service area, and therefore *Pimentel* did not apply.³³

Courts have also limited *Pimentel* in holding that there must be a relation between the hazardous condition and the self-service mode of operation of the business.³⁴ For example, in *Wiltse v. Albertsons*, the plaintiff slipped in water that had dripped from a leak in the roof. The

³¹ See, e.g., *O'Donnell*, 107 Wn.App 854, *Pimentel*, 100 Wn.2d 39, *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991).

³² *Coleman v. Ernst*, 70 Wn.App 213, 853 P.2d 473 (1993); *Ingersoll*, 123 Wn.2d at 653.

³³ *Coleman v. Ernst*, 70 Wn.App 213

³⁴ *Wiltse*, 116 Wn.2d at 461; *Carlyle v. Safeway*, 78 Wn.App 272, 277 (1995).

Court found that even though the plaintiff was in a self-service area, the hazard was in no way related to the store's self-service operation, it was not foreseeable as a result of the self-service operation, and therefore *Pimentel* did not apply.³⁵

In *O'Donnell v. Zupan*, a Division II case decided in 2001, the Court created a three-part test stating that the *Pimentel* exception applies if the plaintiff can show that (1) the area was self-service, (2) it inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous condition that caused the injury was within the self-service area.³⁶

At the motion for summary judgment hearing Ms. Niebauer's evidence met the requirements of all of the cases limiting the *Pimentel* exception.³⁷ The evidence showed she was within a self-service area where customers handle goods.³⁸ It also showed that the hazard causing her injuries, the hooks used to hang merchandise from self-service display

³⁵ *Wiltse*, 116 Wn.2d at 461.

³⁶ *O'Donnell v. Zupan*, 107 Wn.App. 854 at 856, 28 P.3d 799 (2001)

³⁷ *See*, Response to Defendant's Motion for Summary Judgment, and Accompanying Declaration of Melissa Timmerman, CP 286-355.

³⁸ *See*, CP 297-298 (Dep. of Marilyn Niebauer, p. 13:19 - 14:21); CP 35-36 (Dep. of Brandi Hamon, p. 32:25 - 33:19); CP 347 (Dep. of Jim Reynolds, p.36:9-10)

shelves, was related to that particular self-service operation.³⁹ And, store employees testified that they saw the hooks on the floor of the store frequently as a result of customers handling the goods.⁴⁰ In sum, the evidence showed that the self-service operation inherently created a reasonably foreseeable condition.

III. Conclusion

Owners are charged with knowledge of reasonably foreseeable risks that are inherent to a self-service mode of operation. In response to Swain's Motion for Summary Judgment Ms. Niebauer demonstrated that the hook on which she fell was within a self-service area where customers handled merchandise hanging by such hooks themselves, and was directly related to that specific self-serve operation. Additional issues of material fact remained including whether Swain's took adequate precautions to prevent injuries to customers in light of the foreseeable hazard. Therefore, summary judgment was properly denied.

Ms. Niebauer's credibility was crucial to her case at trial. The incident report created immediately after Ms. Niebauer's fall would have cleared up numerous discrepancies in the trial witnesses' testimony on

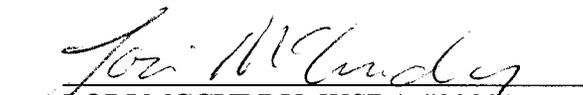
³⁹CP 35, 36, 55, 61, 65 (Dep. of Brandi Hamon, p.32:10-12, 33:13-19, 52:15-20; 58:11-15; 62:6-10).

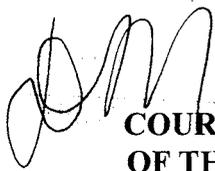
⁴⁰*Id.*

important disputed facts - discrepancies which cast an unnecessary shadow on Ms. Niebauer's credibility and gave an unfair advantage to Swain's. Swain's excuse for not producing the report was not satisfactory and showed a conscious disregard for the importance of the evidence. Under the two-part test of *Henderson v. Tyrrell*, the trial judge should have leveled the playing field by granting Ms. Niebauer's proposed instructions on spoliation and the negative inference to be drawn therefrom. The trial court's decision denying the proposed instructions was an abuse of discretion, and the jury verdict should be reversed.

Dated this 30th day of August, 2007.

Respectfully submitted,


LORI MCCURDY, WSBA #29801
J. MICHAEL KOCH, WSBA #4249
J. Michael Koch & Associates, P.S., Inc.
Attorneys for Appellants

FILED
BY: 

NO. 36019-5-II

**COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

Marilyn Niebauer,

Appellant,

v.

Swain's General Store, Inc.,
a Washington Corporation,

Respondents.

CERTIFICATE OF SERVICE

I certify that on the 30th day of August, 2007, I caused the original of the following:

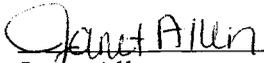
- Reply Brief of Appellant/Cross Respondent to be filed with the Court of Appeals, Division II and a true and correct copy of the same served on the following in the above-captioned case to:

Deborah Severson
3315 S. 23rd St., Ste. 310
Tacoma, WA 98405
Attorney for Defendant

US Mail postage pre-paid
 facsimile
 messenger service

I declare, under penalty of perjury under the laws to the State of Washington, that the foregoing is true and correct and that this certificate of service was executed on this 30^h day of August, 2007, at Silverdale, Washington.

DATED: August 30, 2007


Janet Allen

ORIGINAL