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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
BY [Signature]
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Representative of the ESTATE OF HELENA M. SCHWEIKART;
and DARIC M. SCHWEIKART, individually, and as the Attorney-
in-Fact for H. CLINE SCHWEIKART,

Respondents/Plaintiffs,

v.

FRANCISCAN HEALTH SYSTEM-WEST, d/b/a ST. JOSEPH
MEDICAL CENTER, a Washington non-profit corporation,

Petitioner/Defendant,

NORTHWEST EMERGENCY PHYSICIANS OF TEAMHEALTH,
a Washington corporation; RANDALL KAHNG, M.D., a
Washington licensed physician; and JOHN DOES 1-10,

Defendants.

BRIEF OF PETITIONER/DEFENDANT FRANCISCAN HEALTH
SYSTEM-WEST, d/b/a ST. JOSEPH MEDICAL CENTER

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I. SUMMARY

Helena Schweikart, 83, fell near an elevator while visiting St. Joseph Medical Center. She was treated and discharged. Found unconscious the next day, she died four days later of a head injury. Her sons sued. They allege that Franciscan Health System (FHS), which operates the hospital, negligently allowed a slippery substance to remain on the floor. The trial court first dismissed the slip-and-fall claim, then reinstated it, then certified its rulings for review under RAP 2.3(b)(4).

The parties need this Court to decide whether the Schweikarts' slip-and-fall claim is governed by Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 869 P.2d 1014 (1994), such that it must be dismissed unless they present evidence that FHS had actual or constructive notice of a wet elevator-lobby floor before Mrs. Schweikart fell, or whether some exception to the Ingersoll rule applies instead. If this Court agrees with FHS that Ingersoll controls, a second issue is whether FHS may be *charged* with constructive notice of a wet floor, as a sanction for "spoliation" of evidence, because a security guard employed by an independent contractor failed to obtain the name of a witness to Mrs. Schweikart's fall. FHS maintains that the a failure to *obtain* evidence is not spoliation, and that it is not responsible for the security guard's lapse of judgment in any event. The slip-and-fall claim should be re-dismissed.

II. ASSIGNMENT OF ERROR

The superior court erred when it reversed its August 10, 2007, order dismissing the Schweikarts' premises liability (slip-and-fall) claim against Franciscan Health System (FHS), and reinstated that claim.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. May the Schweikarts prevail on their premises liability claim in the absence of any evidence that the hospital elevator lobby floor where Helena Schweikart fell on April 28, 2005, not only was wet and slippery, but that the wet condition had existed for enough time to have afforded the FHS sufficient opportunity to become aware that the floor was wet and eliminate the slippery condition, and thus had constructive notice of the wet spot on the elevator lobby floor?

2. Is FHS responsible for "spoliation" of evidence due to a failure by a security guard employed by an independent contractor to obtain and record the name of a person who saw Helena Schweikart fall?

3. Is FHS collaterally estopped from seeking the summary dismissal of the Schweikarts' premises liability claim because a different judge denied a motion by FHS to dismiss a different slip-and-fall lawsuit filed by a different plaintiff based on an accident that occurred at a different location within the hospital in a different year?

IV. STATEMENT OF THE CASE

A. Factual Background.

1. The Accident and Mrs. Schweikart's Death Five Days Later.

Shortly after noon on April 28, 2005, Helena Schweikart, age 83, went to visit her husband, who was a patient at St. Joseph Medical Center. As she approached an elevator in the hospital's South Pavilion, she fell. CP 55, 86-88. Ms. Schweikart was taken to the hospital's emergency room, where Dr. Ronald Kahng examined her and provided treatment for a dislocated shoulder before discharging her. CP 55-56, 88. Mrs. Schweikart was found unconscious at home the next day; she died of a brain hematoma on May 3, 2005. CP 56.

2. Evidence Bearing on What Made Mrs. Schweikart Fall.

After Mrs. Schweikart fell, Matthew Dunne was dispatched to investigate. CP 88. According to the Security Incident Report that Dunne later filled out, CP 86-88, Mrs. Schweikart told Dunne that she had felt her foot slip and fell on her right side as she approached an elevator. CP 88. Dunne inspected the area and "found no safety hazards." CP 88. The Report says Dunne then "took a verbal statement from ER Tech John." CP 88. John, the Report says,

. . . was coming back from the cafeteria. As he turned the corner to the South Pavilion elevators, he saw a woman sitting on the floor, and a bystander next to her in front of

the middle elevator. He got a three-person assist to get her into a wheelchair and the injured woman said she had hurt her arm. ERT John then stated the bystander told him that Mrs. Schweikart was running to catch the elevator and fell. After putting Mrs. Schweikart into the wheelchair, ERT John brought her to ER waiting to be triaged.

CP 88. The Report does not say what interaction Dunne had with the “bystander.” The bystander is not named or referred to as a witness in the Report. CP 86. No last name is noted for “ER tech John,” either.

B. This Litigation.

In 2006, Mrs. Schweikart’s sons Craig and Daric, representing her estate and husband, sued FHS, Dr. Kahng, and his employer, Northwest Emergency Physicians of TeamHealth, for wrongful death. CP 1-8. In their complaint as amended, CP 9-16, the Schweikarts assert claims against FHS based premises liability, CP 12-13 (¶¶ 4.1-4.3, 4.6, 5.1), and for malpractice in providing nursing care to Mrs. Schweikart. CP 12 (¶ 4.4); CP 55-56. The Schweikarts allege that FHS is liable for her fall because it negligently allowed a “slippery substance” to remain on the floor. CP 10 (¶ 1.1), CP 12-13 (¶¶ 4.1-4.3, 4.6, 5.1).¹

¹ Although it is not explicitly alleged in the amended complaint, the Schweikarts also contend that “the hospital staff and [emergency room] physician” were advised of certain information based on which possible head trauma should have been investigated. CP 56. They evidently contend that a more thorough evaluation for head trauma would have led to treatment that likely would have saved Mrs. Schweikart’s life. CP 13.

During discovery, Matthew Dunne was deposed at length about what he did and did not do after being dispatched to investigate Mrs. Schweikart's fall. His testimony was as follows.

Dunne was employed not by FHS but by a company under contract to provide security services to the hospital. CP 349. He had been a security guard for six months. CP 155 (Dep. 17). He had not previously done an injury investigation that involved interviewing witnesses. CP 164 (Dep. 53). Upon being sent to investigate, he went to the South Pavilion elevator area; Mrs. Schweikart was being put in a wheelchair; "ER Tech John" pointed out the bystander and told Dunne she had seen the fall; Dunne spoke to the bystander and "recorded what she had told me," on his notepad. CP 165 (Dep. 54-55). Dunne looked for hazards but does "not recollect seeing any hazards at the time, such as water"; he then went to report to his supervisor what he had learned. CP 165 (Dep. 55).

Dunne's supervisor "chastised" him for failing to get the bystander's name and sent him back to the elevator area to see if she was still there; she was not. CP 165 (Dep. 55). Dunne went to the ER and took Mrs. Schweikart's statement, then went back to the elevator area "to see if there was any water on the ground" because Mrs. Schweikart told him she had slipped on some liquid. CP 165 (Dep. 56). Dunne then spoke with ER Tech John "to see if the bystander had told him the same thing

that she had told me, and that is why ER tech John's statement is in the report and not the bystander's." CP 165 (Dep. 57).

Dunne neglected to obtain the bystander's name or other identifying information"[b]ecause I was nervous and this was my first accident report." CP 164-165 (Dep. 52-54). The bystander said nothing to Dunne about the floor being wet; she said Mrs. Schweikart was trying to catch an elevator when she fell. CP 168 (Dep. 67-68).

Dunne's supervisor told him not to include what the bystander had told him in his written incident report because he had failed to get her name. CP 164-165 (Dep. 52-55).² The substance of the bystander's statement nonetheless is in the report "because she had told John, the tech in ER, pretty much what she told me." CP 162 (Dep. 44).

Dunne testified that he would have the notes he took at home, CP 164 (Dep. 51), but when re-deposed he was unable to produce any substantive notes and testified that he had since recalled not having his notebook with him when he spoke to witnesses while investigating Mrs. Schweikart's fall, CP 292-293, 296-297.

² The Schweikarts' attorney pressed Dunne to admit that he had taken down the bystander's name in his notes but omitted it from his report; Dunne denied it. CP 164-165 (Dep. 53-54); see also CP 170 (Dep. 77), CP 171 (Dep. 81). The Schweikarts' attorney pressed Dunne to admit that his supervisor had "coached" him to omit from his report a statement by the bystander that Mrs. Schweikart had slipped on liquid; Dunne denied that, too. CP 171 (Dep. at 80-81).

ER tech John is John Gastelum; he also has been deposed. CP 90.

C. Grant of Summary Judgment for FHS on the Premises Liability Claim.

In July 2007, FHS moved for summary judgment. CP 21-51. Relying on Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 869 P.2d 1014 (1994), FHS contended that, even if one could infer that the floor where Mrs. Schweikart fell was wet, FHS is not liable for her fall because there is no evidence that the floor had been wet “for such time as would have afforded [the hospital] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection . . . and . . . removed the liquid that allegedly made the floor slippery,” CP 44 (quoting Ingersoll, 123 Wn.2d at 652). The Schweikarts’ coefficient-of-friction expert admits that the floor surface was slip resistant when dry. CP 28, 31. The expert believes the floor must have been wet, though, CP 26-27, 31, and opines that the wet spot would have had to be at least 1½ inches in diameter to be slippery, CP 33, but admits he cannot say for how long a wet condition existed before Mrs. Schweikart slipped. CP 31.

The Schweikarts made three main arguments in response to FHS’s summary judgment motion. First, they argued that FHS had been on notice “since at least July 2003” that St. Joseph Medical Center had “defective flooring” that became dangerously slippery when wet. CP 61-

62 and 64 (citing CP 76-78, 135, and 140-147). Second, they argued that FHS is collaterally estopped to argue lack of notice, because of “findings of fact” that the judge in another Pierce County slip-and-fall lawsuit had “made” in an order denying FHS’s motion for summary judgment in that case. CP 63-64 (citing CP 83-84).

Third, the Schweikarts argued that FHS is responsible for “spoliation” of evidence because Matthew Dunne “conveniently failed to record and preserve the name, contact information, and statement of” the bystander who said she had seen Mrs. Schweikart fall. CP 70. The Schweikarts asked for an inference that the bystander’s testimony would be unfavorable to FHS in a way they did not specify, but that would make summary judgment for FHS inappropriate. CP 68-70.

At oral argument on FHS’s summary judgment motion before the Honorable Sergio Armijo on August 10, 2007, the Schweikarts tacitly conceded that they have no evidence as to how long the floor near the South Pavilion elevators had been wet before Mrs. Schweikart fell, but argued that their case falls “squarely within” an exception to Ingersoll’s requirement that a plaintiff have evidence of actual or constructive notice, citing Pimentel v. Roundup Corp., 100 Wn.2d 39, 666 P.2d 888 (1983), which, their counsel told the court, stands for the proposition that “if you have a condition which you have assisted in creating and you know about

it and it's unreasonably dangerous, your duty is to go and fix that, to remediate it." 8/10/07 RP 19.³

Judge Armijo ruled in FHS's favor and dismissed the Schweikarts' premises liability claim. 8/10/07RP 26-27; CP 210-211.⁴

D. Reconsideration and Reinstatement of the Premises Liability Claim.

The Schweikarts filed a 29-page motion for reconsideration. CP 212-237. They made a much broader and more strident "spoliation" argument, CP 215-221, 224, 227-234, but also argued that they had sufficient evidence that FHS had constructive notice of a wet condition on the South Pavilion elevator area floor because:

(1) Their coefficient-of-friction expert, Gary Sloan (who admits the flooring material in use was slip-resistant when dry, CP 27), will testify that it was excessively slippery (like ice) when wet. CP 221.

(2) FHS "knew that it was common place for liquids to be present on the hospital floors." CP 221 (citing no evidence).

³ The Schweikarts had cited Pimentel in their brief opposing summary judgment for the rule requiring proof that the owner had notice of the hazardous condition, CP 59, but offered it at oral argument as authority for an exception to that same rule. As explained later in this brief, Pimentel does not stand for the proposition for which the Schweikarts' counsel cited it at oral argument.

⁴ FHS's motion had sought dismissal of the Schweikarts' medical malpractice claim against FHS based on allegedly negligent nursing care. That claim was not dismissed and remains pending, as do the separate medical malpractice claims against Dr. Kahng and his employer.

(3) FHS “acknowledges that . . . the hospital is a high traffic area with routine spills on its flooring.” CP 222 (citing CP 324-327).

(4) Another woman, Avis Carter, was suing FHS because of a fall in the same hospital in 2003, and the judge in that case had denied FHS’s motion for summary judgment. CP 223.⁵

(5) In addition to the 2003 fall over which it had been sued, FHS “had actual notice of fifty-two (52) claims of fall related injuries between 2002 and 2007 all due to the unsafe condition of the hospital flooring.” CP 234.⁶

The Schweikarts’ motion for reconsideration relied on no recognized exception to the Ingersoll rule requiring evidence of actual or constructive prior notice of a specific dangerous condition at the site of Mrs. Schweikart’s fall. They based their argument for reconsideration entirely on (1) “spoliation” of evidence, CP 227-233, and (2) the Supreme Court plurality opinion in Iwai v. State, 78 Wn. App. 308, 884 P.2d 936 (2004), aff’d, 129 Wn.2d 84, 915 P.2d 1089 (1996), CP 234-235.⁷

⁵ The other lawsuit presumably was a reference to CP 140-147. The reference to the summary judgment ruling in the other lawsuit was an evident reference to CP 83-84, which the Schweikarts had submitted earlier, when opposing FHS’s summary judgment motion.

⁶ This was an evident reference to CP 243-246, which the Schweikarts had submitted in opposition to FHS’s summary judgment motion as CP 76-78.

⁷ The Schweikarts also complained that FHS had made it impossible to prove “that [it] had notice of any ‘liquid on the floor’,” CP 235, by not having had a

The Schweikarts argued that Dunne had “omitted the name and contact information of the only known eye-witness to the accident,” CP 218-219, had “omitted a statement taken from” the bystander, and had “destroyed” his notes, CP 219.⁸ The Schweikarts argued that Dunne spoliated evidence by “destroy[ing] the only independent witness to [the] accident,” CP 237, and that the “burden of proof of causation” should therefore be shifted to FHS. CP 234.⁹ In their reply brief, the Schweikarts argued that “the spoliation inference satisfies the constructive notice requirement.” CP 355.

Spoliation was the Schweikarts’ lead argument at oral argument on the motion for reconsideration. 8/31/07 RP 2-16, 36-38. Their counsel also argued that, under Iwai, a plaintiff “do[es] not have to show actual or

protocol under which floor inspections were conducted at least hourly, CP 222 and 235. They offered no evidence that hourly floor inspections (or even more frequent inspections) would have alerted FHS to a wet spot on the floor in time to have enabled FHS to warn Mrs. Schweikart or make the floor dry.

⁸ The Schweikarts accused FHS of trying to hide evidence because it had refused to give Grant Schweikart a copy of Dunne’s incident report later on the day of his mother’s fall, even though Dunne had told him he could pick up a copy, CP 215-218. Dunne evidently did not know that St. Joseph Medical Center, which is not a public hospital, produces its internal investigation reports only pursuant to valid discovery requests in the context of litigation, CP 349. FHS produced Dunne’s report after the Schweikarts sued and requested production of it. CP 451.

⁹ In making “spoliation” arguments, the Schweikarts have relied on no testimony by John Gastelum about his interaction with the bystander or with Dunne. The Schweikarts did offer testimony by Gastelum that he noticed that Mrs. Schweikart’s clothing and shoes were wet when he came upon her sitting on the floor near the elevators. CP 91.

constructive notice to reach a jury [i]f you can show reasonable foreseeability.” 8/31/07RP 17. Their counsel argued that FHS could reasonably have foreseen that the floor where Mrs. Schweikart fell in April 2005 fall would be wet because Avis Carter had fallen in the same hospital in 2003, because there is “evidence of 52 [other] individuals that have falled on the floor,” because there is a reference to “wet floors” in the 2002 safety memorandum, and because of testimony that it is commonplace to “transfer” liquids in the hospital. 8/31/07RP 18-21. Counsel for the Schweikarts argued that they deserve a trial because, just as a jury could find that the State’s parking lot in Iwai had been inherently dangerous when icy, FHS had been on notice of an “inherently dangerous floor,” because of Avis Carter’s fall in 2003 and because hospital employees had fallen “routinely.” 8/31/07RP 20.

At the conclusion of oral argument on the Schweikarts’ motion for reconsideration, Judge Armijo declared his agreement with the Schweikarts “on everything” and reversed his previous ruling dismissing their premises liability claim. 10/30/07RP 44; CP 357-358. On September 17, 2007, Judge Armijo entered an order certifying his rulings for discretionary review under RAP 2.3(b)(4). CP 411-412. FHS timely filed a Notice for Discretionary Review, CP 413-425, and then a Motion for Discretionary Review, which the Commissioner granted.

V. STANDARD OF REVIEW

The rulings at issue include one granting FHS's motion for summary judgment as to the Schweikarts' premises liability claim, and then a ruling reversing that grant of summary judgment and reinstating the claim. Appellate courts review summary judgment orders *de novo*, performing the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 853 P.2d 1373 (1993).¹⁰

Judge Armijo declared his agreement with "everything" the Schweikarts had argued. 8/31/07RP 44. Evidently, Judge Armijo agreed either with the Schweikarts's initial argument, made on August 10, that the case is "squarely within" the Pimentel exception, 8/10/07 RP 19, or with their argument on reconsideration that Iwai v. State allows them to proceed to trial even though they admittedly cannot show how long the floor where Mrs. Schweikart fell had been wet if it was wet, because it was "reasonably foreseeable" that the floor *would be* wet, CP 233-234, 8/31/07 RP 17-22. Either way, the standard of review is *de novo*. Issues of law are subject to *de novo* review. Interlake Sporting Ass'n, Inc. v.

¹⁰ To be sure, orders denying summary judgment are not customarily subject to interlocutory review, but this case is one in which the trial court already has ruled two different ways as to what the elements of the Schweikarts' premises liability claim are, and has asked the Court of Appeals for guidance by certifying its rulings for discretionary review under RAP 2.3(b)(4). It is in the courts', as well as both parties', interests that this case be tried under jury instructions that correctly state the applicable law.

Washington State Boundary Review Bd. for King County, 158 Wn.2d 545, 551, 146 P.3d 904 (2006). Whether a particular duty exists is a question of law. Hungerford v. State Dept. of Corrections, 135 Wn. App. 240, 256, 139 P.3d 1131 (2006), rev. denied, 160 Wn.2d 1013 (2007). It is the province of a court to determine and instruct the jury as to what the necessary elements of a claim are. Whether evidence is insufficient to support a finding of fact in a plaintiff's favor on a necessary element of a claim is a question of law. See Lewis v. State, Dep't of Licensing, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006) (an appellate court may not weigh evidence, but may determine whether the evidence is sufficient to persuade a fair minded person of the truth of the declared premise).

In light of Judge Armijo's statement that he agrees with the Schweikarts as to "everything," he may have agreed with them (a) that FHS "spoliated" evidence; and/or (b) that "the spoliation satisfies the constructive notice requirement," CP 355; and/or (c) that FHS is collaterally estopped to deny that it had notice that the floor where Mrs. Schweikart fell was slippery, CP 63-64. The application of collateral estoppel is reviewed *de novo*. Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock, Inc., 126 Wn. App. 536, 542, 108 P.3d 1247 (2005); Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 305-306, 96 P.3d 957 (2004). Despite a reference to abuse of discretion in

Henderson v. Tyrrell, 80 Wn. App. 592, 611, 910 P.2d 522 (1996), no Washington decision specifies the standard of review for a court's finding that a party has committed spoliation of evidence or for a trial court's choice of sanction based on a spoliation finding. What makes sense is to review a trial court's choice of a sanction for abuse of discretion, but to review as questions of law whether sanctionable spoliation has occurred, and whether a party is legally responsible for it.

FHS contends that Judge Armijo erred as a matter of law in failing to apply the Ingersoll rule and require the Schweikarts to present evidence that FHS had actual or constructive notice, before Mrs. Schweikart fell, that the elevator lobby floor was wet. To the extent that Judge Armijo based his decision not to dismiss the Schweikarts' slip-and-fall claim on "collateral estoppel" or on a conclusion that FHS is responsible for "spoliation" of evidence, his ruling on their motion for reconsideration also was erroneous as a matter of law.

VI. ARGUMENT

A. The Superior Court Has Failed to Apply the Correct Liability Test to the Schweikarts' Premises Liability Claim.

1. The general rule is that the plaintiff has to prove that the possessor of the premises had notice of the particular unsafe condition of the premises that caused the plaintiff's injury.

It is a “basic and well-established principle that for a possessor of land to be liable to a business invitee for an [injury caused by an] unsafe condition of the land, the possessor [of the land] must have actual or constructive notice of the unsafe condition.” Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (citing Smith v. Manning's, Inc., 13 Wn.2d 573, 126 P.2d 44 (1942)). Constructive notice arises where the condition “has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.” Id. (quoting Smith, 13 Wn.2d at 580). Thus, under the applicable pattern jury instruction, WPI (Civ.) 120.06.02, juries in premises liability cases are instructed that:

An [owner] [occupier] of premises has a duty to correct a temporary unsafe condition of the premises that was not created by the [owner] [occupier], [and that was not caused by negligence on the part of the [owner] [occupier],] if the condition was either brought to the actual attention of the [owner] [occupier] *or existed for a sufficient length of time* and under such circumstances that the [owner]

[occupier] should have discovered it in the exercise of ordinary care. [Emphasis added.]

There are Supreme Court holdings on point. In Wiltse v. Albertson's, Inc., 116 Wn.2d 452, 805 P.2d 793 (1991), the court affirmed the dismissal of a claim by a grocery store customer who had slipped and fallen in water on the floor that had come through a hole in the store's roof, because customer was unable to show how long the water had been present. In Ingersoll, 123 Wn.2d 649, the court affirmed the dismissal of a claim by a shopping mall patron who allegedly had slipped on a substance in the common area outside a shoe store and who could show neither notice nor that the area where she fell was a "self-service" establishment.

The Schweikarts have no evidence as to how long the hospital floor had been wet (if it was wet), and they have tacitly so admitted. They have argued that they should be excused from having to prove constructive notice of a *particular* unsafe condition that caused Mrs. Schweikart's fall, or that FHS is collaterally estopped to deny having had constructive notice of an unsafe condition that caused the fall, or that constructive notice can be inferred because FHS "destroyed the only independent witness to [the] accident," CP 237.

Our appellate courts have recognized exceptions to the proof-of-constructive-notice requirement in premises liability cases, and the

Schweikarts have claimed or alluded to them at various points in connection with the motions below, but none of those exceptions applies to this case.

2. The so-called *Pimentel* “reasonably foreseeable” exception for “self-service” areas does not apply to this premises liability case.

The main exception to the Ingersoll rule (upon which the Schweikarts relied at oral argument on August 10, 2007, but which they did not cite at all in connection with their motion for reconsideration), originated with a decision that held that proof of actual or constructive notice is not required when the injury occurred on premises within a self-service establishment and the nature of the business made the occurrence of slippery conditions “reasonably foreseeable.” Ciminski v. Finn Corp., Inc., 13 Wn. App. 815, 537 P.2d 850, rev. denied, 86 Wn.2d 1002 (1975) (slip and fall in a cafeteria-type restaurant).

In recent years, our appellate courts have declined several requests to expand the “self-service” exception to the rule requiring proof of actual or constructive notice of the dangerous condition. In Pimentel v. Roundup Corp., 100 Wn.2d 39, 666 P.2d 888 (1983), the Supreme Court did apply the rule in a lawsuit arising from a foot injury suffered by a store customer when a two-gallon paint can fell from a shelf, but it declined to make the Ciminski rule applicable generally to self-service businesses. In Ingersoll,

the Supreme Court declared that the Pimentel self-service exception does not apply to retail stores in general, but rather applies only when there is shown to be “a relation between the hazardous condition and the self-service mode of operation of the business.” Ingersoll, 123 Wn.2d at 654.

In Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 896 P.2d 750, rev. denied, 128 Wn.2d 1004 (1995), the Court of Appeals declined to apply the Pimentel exception in a case where a grocery store customer had slipped on shampoo spilled in the coffee aisle of grocery store.

In Schmidt v. Timothy P., 135 Wn. App. 605, 145 P.3d 1216 (2006), the plaintiff sought to invoke the Pimentel exception and distinguish Carlyle by arguing that it may not be reasonably foreseeable that shampoo will be spilled in a grocery store *coffee* aisle, but that it is reasonably foreseeable that shampoo will get spilled in a store’s *shampoo* aisle as customers open bottles to check the fragrance. The Court of Appeals declined to apply the Pimentel exception, explaining that the exception “does not apply to the entire area of [a] store in which customers serve themselves[, but rather] applies if the unsafe condition causing the injury is ‘continuous or reasonably inherent in the nature of the business or mode of operation’.” Schmidt, 135 Wn. App. at 612 (quoting Ingersoll).

The Schweikarts have no evidence that the elevator area where Mrs. Schweikart fell at St. Joseph Medical Center “continuous[ly]” had slippery floors, and cannot argue that slippery floors are more “inherent in the nature” of a hospital’s operation than in the mode of operation of the shampoo aisle of a grocery store. A hospital is not a “self-service” establishment to which the Pimentel exception applies.

The Court of Appeals decision in Schmidt v. Timothy P. was recently reversed on other grounds in Schmidt v. Coogan, ___ Wn.2d ___, 173 P.3d 273 (December 13, 2007). As explained below at page 27, the Supreme Court decision confirms, once again, that Ingersoll governs slip-and-fall cases like this one.

3. Exception for dangerous conditions created by the defendant’s active negligence does not apply to this premises liability case.

A second exception to Ingersoll’s well-established “notice” requirement is available when “active negligence” on the defendant’s part *created* the specific condition on the premises that caused the plaintiff’s injury. E.g., Impero v. Whatcom County, 71 Wn.2d 438, 430 P.2d 173 (1967) (county had removed part of cover on drainage sump into which plaintiff stepped and fell at night); Russell v. City of Grandview, 39 Wn.2d 552, 236 P.2d 1061 (1951) (city knew combustible gas was in its water system pipes and advised customers to open faucets to relieve gas

pressure, and thus was responsible for explosion whether or not it knew gas included explosive methane); Batten v. South Seattle Water Co., 65 Wn.2d 547, 398 P.2d 719 (1965) (plaintiff fell upon stepping on insecurely fitted lid on water meter box that defendant had installed in pathway).

The Schweikarts relied unsuccessfully on the “active negligence” exception in opposing FHS’s motion for summary judgment, CP 60-61, but did not expressly renew an argument based on that exception when they moved for reconsideration. There is no evidence that FHS wetted the floor where Mrs. Schweikart fell.

4. The plurality opinion in *Iwai v. State* did not result in adoption of a liability test that relieves the Schweikarts of the obligation to prove notice in this premises liability case.

In their motion for reconsideration, CP 233-234, and in their reply memorandum in support of that motion, CP 355, the Schweikarts contended that the result of the four-justice Supreme Court plurality decision in *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996), creates what amounts to a third exception to Ingersoll’s requirement of actual or constructive notice of the specific hazard, under which exception a property owner is deemed to be on notice of an “inherently dangerous” slip-and-fall hazard on the premises. Their counsel argued that FHS had been on notice that its hospital’s floors are “inherently dangerous” because

of Avis Carter's fall in 2003 and because hospital employees had fallen "routinely." 8/31/07RP 20.

The Schweikarts' reliance on Iwai was misplaced for at least three reasons: a plurality decision cannot make new law; the Schweikarts do not actually have evidence of a chronically slippery hospital floor; and post-Iwai decisions confirm that Iwai did not modify the Ingersoll rule.

a. The plurality opinion in *Iwai* did not make new law.

Iwai arose out of a slip and fall on the inclined part of a State-owned outdoor parking lot on which snow had fallen two days before, and that had been plowed but not sanded. The trial court granted summary judgment for the State. The Court of Appeals reversed on the ground that there was evidence that the State had been negligent in plowing the parking lot but not sanding the sloped area. See 78 Wn. App. at 316. The Supreme Court affirmed, but without a majority opinion.

Four justices would have extended the "reasonably foreseeable" exception of Pimentel, but decided, alternatively, that the State could be found liable for negligently creating the slippery condition. Iwai, 129 Wn.2d at 102. Justice Alexander, concurring in the result, rejected extension of the Pimentel exception. 129 Wn.2d at 103. The Iwai plurality decision is not precedent for a new "inherently dangerous condition" route around Ingersoll's constructive notice requirement. W.

R. Grace & Co. v. Dep't of Revenue, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) (absent majority agreement on the rationale for a decision, the holding is the position taken by those concurring on the narrowest grounds.)

- b. The Schweikarts did not have evidence of an “inherently dangerous” elevator lobby floor in any event.

Even if the plurality decision did offer a way around the constructive notice requirement, though, it would have been available to plaintiffs who have evidence of a kind that the Schweikarts lack.

The Schweikarts contended that a letter from L&I to their lawyers referring to 52 falls by St. Joseph Medical Center *employees* from 2002 to 2007, CP 62 (referring to CP 76-78¹¹), plus Avis Carter’s lawsuit alleging a slip and fall at St. Joseph Medical Center in July 2003, CP 61 (referring to CP 140-147), were enough to have put FHS on notice before Mrs. Schweikart’s April 2005 fall in a public elevator lobby its floors are chronically wet and slippery, and (according to the Schweikarts) that FHS admitted as much in a 2002 internal safety memorandum, CP 222 (referring to CP 325). The Schweikarts mischaracterized each of those cited items of evidence.

¹¹ As well as CP 235 (referring to CP 243-246).

-- Avis Carter alleged that a corridor floor had been *excessively waxed*, CP 142 (¶ 4.2), CP 143 (¶ 5.4), not that it had been wet.

-- Hearsay issues aside, nothing in the letter from L&I to the Schweikarts' lawyers (CP 76-78) attributes any of the referenced 52 employee falls to a wet floor.

-- The 2002 internal FHS memo says only that “[t]here has been a trend of employee’s [sic] actions being the cause of other employee’s [sic] injuries, such as wet floors, needles dropped, rushing/hurrying, and unsafe positions during patient transfers.” CP 325. The 2002 memo says nothing about *how many* employee injuries had been attributed to wet floors, or *how* the floors got wet, or what time frame and frequency constituted a “trend.” Nor does the 2002 memo indicate that “wet floors” had caused employee injuries in any *public* areas of the hospital, or in any areas with flooring material similar to what was in the elevator lobby where Mrs. Schweikart fell. The memo is not evidence acknowledging a frequent or chronic problem of wet floors anywhere in the hospital as of 2005, let alone in the area where Mrs. Schweikart fell.

Thus, the plurality opinion in Iwai does not provide a basis for denying summary judgment to FHS on the Schweikarts' premises liability claim, both because it has no precedential value and because, if it did have precedential value, the evidence upon which the Schweikarts relied for

their argument based on Iwai did not support the factual propositions for which they cited the evidence.

c. Appellate court decisions that have been issued since *Iwai* confirm that the Schweikarts have to meet the actual or constructive notice requirement of *Ingersoll*.

(1) Division II's decision in *Frederickson v. Bertolino's*.

The Supreme Court decided Iwai in 1996. As this Court noted in Frederickson v. Bertolino's Tacoma, Inc., 131 Wn. App. 183, 187 P.3d 5 (2005), rev. denied, 157 Wn.2d 1026 (2006), notwithstanding the plurality opinion in Iwai, the “reasonably foreseeable” exception to the actual or constructive notice requirement remains limited to injuries in “self-service” establishments. In Fredrickson, a coffee shop customer was injured when he sat in a wooden chair and it broke. Citing Iwai, he contended that he did not have to prove that the shop owner had had actual or constructive notice of the fragility of the chair. This Court disagreed:

[I]n the absence of a majority, the Iwai lead opinion is not binding precedent and, so far, no Washington court has extended Pimentel beyond the self-service setting.

Fredrickson, 131 Wn. App. at 192-193. Because the plaintiff could not show actual or constructive notice, or that the coffee shop's seating area qualified as a “self-service” area, this Court affirmed the summary dismissal of his premises liability claim.

(2) Both appellate court decisions in *Schmidt*.

The Court of Appeals' decision in *Schmidt v. Timothy P.*, 135 Wn. App. 605 (discussed above at page ___) confirms the *Frederickson* court's conclusion that the "reasonably foreseeable" test applies only to some kinds of "self-service" establishments and that *Ingersoll* continues to govern all other slip-and-fall cases.

The Supreme Court decision in *Schmidt* that *reversed* the Court of Appeals, *Schmidt v. Coogan*, ___ Wn.2d ___, 173 P.3d 273 (December 13, 2007), further confirms the *Frederickson* court's conclusion that *Iwai* did not diminish the *Ingersoll* rule.

In *Schmidt*, the plaintiff sued her lawyer for negligently letting the statute of limitations run on her claim against a grocery store based on a slip and fall on some shampoo on the floor in the store's shampoo aisle. The jury returned a verdict in her favor (meaning it found that the lawyer's negligence had caused her harm in the form of loss of a winnable claim). The Court of Appeals reversed, holding that the *Pimentel* "self-service" exception would not have applied to the slip-and-fall claim, and that the plaintiff had failed to show that she would have been able to satisfy *Ingersoll* by proving that the store had actual or constructive notice of the shampoo spill.

The Supreme Court did not disturb the Court of Appeals' holding that the plaintiff could not rely on the Pimentel exception. The reason the Supreme Court reversed the Court of Appeals and reinstated the jury verdict was because the plaintiff had presented evidence "that the [shampoo] spill was visible to employees from the cash registers and . . . none of the store employees made any effort to clean it up." Schmidt, 173 P.3d at 275. The court did so after noting that:

In a premises liability claim, the plaintiff must establish that the defendant either caused the dangerous condition or knew or should have known of its existence in time to remedy the situation. [Citing Ingersoll]. Whether a defective condition existed long enough so that it should have reasonably been discovered is ordinarily a question of fact for the jury. [Citing Presnell v. Safeway Stores, Inc., 60 Wn.2d 671, 675, 374 P.2d 939 (1962).]

Id. Thus, the plaintiffs in Schmidt was able to show actual or constructive notice. The defendant lawyer had conceded that the jury was properly instructed on constructive notice, so the verdict had to stand. Id.

Thus, the appellate court decisions in Schmidt serve both to explain why the Pimentel exception to the Ingersoll rule remains a very narrow one that does not apply to this lawsuit, and to emphasize that the general rule requires the plaintiff in a slip-and-fall case to present evidence that the dangerous condition had "existed long enough so that it should have reasonably been discovered." Schmidt, 173 P.3d at 275.

5. The Schweikarts cannot meet *Ingersoll's* actual or constructive notice requirement, so their slip-and-fall claim should have remained dismissed on summary judgment.

Because traditional premises liability rules govern this lawsuit just as they did in Schmidt and Frederickson, the Schweikarts cannot avoid summary judgment based either on a Pimentel self-service argument or on a generalized argument that the floors at St. Joseph Medical Center had been wet and slippery before and thus were “inherently dangerous.” Pimentel does not apply in the first place, and they lack the kind of evidence that supported the jury’s finding of constructive notice in Schmidt. This Court should remand this case to trial court for re-dismissal of the Schweikarts’ premises liability claim based on the clear line of authority provided by Wiltse, Ingersoll, Frederickson, and Schmidt.

- B. FHS Is Not Collaterally Estopped to Deny Having Had Constructive Notice that the Floor on Which Mrs. Schweikart Slipped was Wet and Slippery.

The Schweikarts contended when they opposed FHS’s summary judgment motion that, because another Pierce County judge had denied FHS’s motion to dismiss a different lawsuit based on a slip and fall by someone else in a different location at St. Joseph Medical Center in a different year, FHS is collaterally estopped to challenge their allegations of constructive notice. CP 54 and 63-66. They alluded to the other

lawsuit again in their motion for reconsideration (although they did not explicitly argue collateral estoppel). CP 223-235.

If Judge Armijo meant to include the Schweikarts' "collateral estoppel" argument when he announced at the hearing on their motion for reconsideration that he was agreeing with them "on everything," 8/31/07RP 44, he plainly erred. Collateral estoppel may be invoked to preclude one's adversary from relitigating a fact previously established by final judgment in another case, but the party asserting it must show that the same fact was determined in a prior action that ended in a final judgment on the merits. Nielson v. Spanaway Gen. Med. Clinic, 135 Wn.2d 255, 262-263, 956 P.2d 312 (1998). Even if a defendant could be collaterally estopped to relitigate an issue decided in a lawsuit brought by a different plaintiff for a different injury occurring in a different year, an order denying a motion for summary judgment decides only that a factual issue exists; it does not decide any fact and is not a final judgment on the merits.¹²

¹² And, although it is not of record in this case, but as the Schweikarts presumably are aware, the other Pierce County slip-and-fall lawsuit was dismissed voluntarily with prejudice, and not pursuant to a settlement, following entry, on November 9, 2007, of a pretrial ruling that the jury would be instructed using WPI (Civil) 120.06.02 (quoted above at pages 16-17).

C. There Has Been No “Spoliation” of Evidence to “Satisfy” the Schweikarts’ Burden of Proving Constructive Notice.

To try to get past the constructive notice hurdle, the Schweikarts argued below that Matthew Dunne’s “spoliation” of evidence should give rise to an inference that the bystander’s testimony would be unfavorable to FHS: “the spoliation inference,” they argued, “satisfies the constructive notice requirement.” CP 355. As FHS has explained above, the Schweikarts are not excused from having to prove constructive notice. For several separate reasons, neither can they “satisfy” the constructive notice requirement by finding fault with Dunne’s investigation.

1. Failing to *obtain* evidence is not “*spoliation*” of evidence.

Spoliation is the loss or destruction of relevant and important evidence, either intentionally or without good excuse, by someone who has a duty to preserve it; it is not a failure in the first place to learn something that might (or might not) prove to be material evidence. The law of spoliation in Washington was summarized in a 2007 as follows:

[S]poliation is “a term of art, referring to the legal conclusion that a party’s destruction of evidence was both willful and improper.” Karl B. Tegland, 5 Wash. Practice: Evidence § 402.6, at 37 (Supp. 2005). The Henderson court acknowledged that many courts examine whether a party acted in bad faith or with “conscious disregard” for the importance of evidence. Henderson [v. Tyrrell], 80 Wn. App. [592] at 609, 910 P.2d 522 [1996]. 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 a*re purely

intentional or done in bad faith. Henderson, 80 Wn. App. at 605, 910 P.2d 522.

It is possible, therefore, that a party may be responsible for spoliation without a finding of bad faith. But even under this theory, the party must do more than disregard the importance of the evidence; the party must also have a duty to preserve the evidence. A party's actions are "improper" and constitute spoliation where the party has a duty to preserve the evidence in the first place. Teglund, § 402.6, at 37; Henderson, 80 Wn. App. at 610, 910 P.2d 522.

Homeworks Const., Inc. v. Wells, 133 Wn. App. 892, 900, 138 P.3d 654, (2006). There is no evidence that Dunne chose, intentionally or in bad faith, not to obtain the name of the bystander who saw Mrs. Schweikart fall.¹³ FHS did not have a legal duty to Mrs. Schweikart or her family to obtain the bystander's name or even to investigate her fall. If Dunne had obtained the bystander's name and recorded it, FHS arguably would have had a duty to preserve that evidence, but that did not happen.

No spoliation occurred because a failure to obtain evidence is not the same as destroying evidence one has. Courts in two other jurisdictions have reached that sensible conclusion. Carroll v. City of New York, 730 N.Y.S.2d 548 (2001) ("A sanction for spoliation may be applied where key physical evidence is lost or destroyed by a party [but] not where a party neglects to obtain evidence in the first place"); Hodge v. Wal-Mart

¹³ The Schweikarts deposed Gastelum, but notably have not cited any testimony by Gastelum that the bystander told him the floor was wet.

Stores, Inc., 360 F.3d 446, 450-451 and n.1 (4th Cir. 2004) (rejecting argument by plaintiff, who had been injured by falling mirrors in a store, that the assistant manager had spoliated evidence by declining to get the name and statement of an eyewitness, because the manager had “never *possessed* the witness’ contact information or account, and . . . could not have forced the witness to tell her anything, [and thus] did not have control of that information [italics by the court],” and because the manager’s opportunity to obtain the information had been “under sufficiently hurried conditions and for a sufficiently brief time as to take it outside of the spoliation rule’s ambit”).

2. FHS is not responsible for Dunne’s negligent failure to get the bystander’s name.

Dunne was the employee of an independent contractor, not of FHS. CP 192. Even if his failure to obtain the bystander’s name could constitute “spoliation” of evidence, a principal (here, FHS) is generally not liable for tortious conduct of its independent contractor. See Hickle v. Whitney Farms, Inc., 148 Wn.2d 911, 924, 64 P.3d 1244 (2003). The Schweikarts are not entitled to use “spoliation” by Dunne against FHS to obtain an inference as to what the bystander’s would say if we knew who she was.

3. “Spoliation” would, at most, allow the court to infer that Mrs. Schweikart fell because the floor was wet, not that the floor had been wet long enough to put FHS on constructive notice before she fell that it was wet.

The Schweikarts have to prove not only that the elevator lobby floor was wet and caused the fall, but also that the floor had been wet on April 28, 2005, for a time long enough to have put FHS on constructive notice that it was wet. Ingersoll, 123 Wn.2d at 652; Schmidt, 173 P.3d at 275. Dunne saw the bystander with Mrs. Schweikart when he arrived at the scene soon after she fell, see CP 165 (Dep. 54-55), so there is, arguably, circumstantial evidence that the bystander had been in a position to see what made her fall. There is no basis at all, however, for supposing that the bystander, even if able to say the floor was wet, would also be able to say for how long a time it had been wet. Thus, even if Dunne “spoliated” evidence, and even if FHS is responsible for that, the Schweikarts still cannot get over the constructive notice hurdle.

Because the traditional premises liability rules apply, because those rules require the Schweikarts to prove constructive notice, and because “spoliation” does not “satisfy” the constructive notice requirement, Judge Armijo’s August 10, 2007, summary judgment ruling, CP 210-211, was the correct one. It should be reinstated.

VII. CONCLUSION

For the reasons explained above, the Court of Appeals should reverse the superior court's order granting the Schweikarts' motion for reconsideration and should remand for re-entry of the order of summary judgment dismissing their premises liability claim against FHS.

RESPECTFULLY SUBMITTED this 6th day of February, 2008.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 6th day of February, 2008, I caused a true and correct copy of the foregoing document, "Brief of Petitioner/Defendant Franciscan Health System-West, d/b/a St. Joseph Medical Center," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

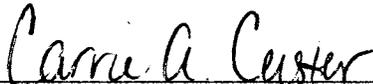
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