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COURT OF APPEALS
DIVISION II

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NO. 36805-6-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

H. CRAIG SCHWEIKART, individually, and as Personal
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.

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

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I. ARGUMENT IN REPLY.

A. Liability Standard.

Repetition does not a valid argument make. The hospital did not have “notice” merely because of the word’s mantra-like use in respondents’ brief.

The hospital floors are slip-*resistant* unless wet. CP 28, 31.

Even if one assumes for purposes of summary judgment that Mrs. Schweikart slipped because the floor was wet, there is no evidence that the wet condition had existed for more than a second. Thus, any failure of the hospital to make periodic “inspections” of the floor for wet spots is not an inferable but-for cause of the fall.

This is not a lawsuit over the burning of a barn on adjoining property due to sparks from a locomotive igniting dried grass in a railroad right-of-way the negligent maintenance of which was shown by prior similar fires.¹ It is not a lawsuit arising from injuries suffered in a rowdy tavern during a fight.² It is not a lawsuit by a dance hall patron who broke a leg stepping in a floor crack that the evidence established had existed for

¹ See Slaton v. Chicago, Minneapolis & St. Paul R. Co., 97 Wash. 441, 166 P. 644 (1917), cited and offered as pertinent authority at Resp. Br. 16-17 and 19-20.

² See Miller v. Staton, Wn.2d 879, 365 P.2d 333 (1961), cited and offered as pertinent authority at Resp. Br. 17.

several weeks.³ It is not a lawsuit over the adequacy of devices installed at a railroad grade crossing to warn of approaching trains.⁴ It is not a lawsuit arising from injuries suffered by a trespassing motorcyclist who, at 20 miles per hour, encountered a cable slung neck-high across a dirt road.⁵ Nor is this a product liability case.⁶ It is an ordinary premises liability/slip-and-fall case involving allegations that a *transient* wet condition existed.

It is nonsense to say that hearsay allegations in Avis Carter's complaint about a 2003 fall in an unspecified hospital corridor was evidence that the hospital had "notice" of a wet-floor condition on April 28, 2005, in the elevator lobby where Mrs. Schweikart fell. As noted at page 24 of the hospital's opening brief, Ms. Carter alleged that a corridor floor had been *excessively waxed*, CP 142 (¶ 4.2), CP 143 (¶ 5.4), not that it had been wet. Similarly, it is nonsense to say that the 2002 safety committee minutes, CP 325, are evidence that the hospital knew the

³ See Toftoy v. Ocean Shores Properties, Inc., 71 Wn.2d 833, 431 P.2d 212 (1967), cited and offered as pertinent authority at Resp. Br. 17.

⁴ See O'Dell v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 6 Wn. App. 817, 496 P.2d 519 (1972), cited and offered as pertinent authority at Resp. Br. 17.

⁵ See Evans v. Miller, 8 Wn. App. 364, 507 P.2d 887, *rev. denied*, 82 Wn.2d 1005 (1973), cited and offered as pertinent authority at Resp. Br. 17-18.

⁶ See Seay v. Chrysler Corp., 93 Wn.2d 319, 609 P.2d 1382 (1980), and Davis v. Globe Machine Mfg. Co., 102 Wn.2d 68, 684 P.2d 692 (1984), cited and offered as pertinent authority at Resp. Br. 18.

elevator lobby floor where Mrs. Schweikart fell would be wet on April 28, 2005. As noted at page 24 of the hospital's opening brief:

The memo 2002 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.

Other than to assert that the memo *is* evidence of "notice," respondents have no response. Respondents contend, in effect, that any "evidence" that *a* fall or *some* falls occurred in a hospital puts the hospital on notice, for all time, of a wet condition that explains all subsequent falls. They cite no authority for such an argument, nor is there any. Slip and fall liability is not strict.

B. "Spoliation" of Evidence.

Just as "notice" did not exist simply because of the frequency of the word's use in respondents' brief, neither did "spoliation" of evidence occur because they use that word as another mantra.

At page 27 of their brief, respondents acknowledge the key point: Mr. Dunne failed to record the name and contact information for the bystander. That is not "spoliation" of evidence, and respondents cite no authority that it is. (Compare the out-of-state decisions cited at pages 31-

32 of the hospital's opening brief.) Even if Dunne "destroyed" something, what he destroyed was not material or even admissible evidence. His real sin was in not *obtaining* evidence, which was not "spoliation" by the hospital, even if one accepts the incorrect proposition that the hospital was responsible *to the Schweikarts* for Dunne's investigation.

Even if one accepts respondents' arguments that Dunne's testimony, as believed and disbelieved as they propose, permits an inference that he wrote down *what* the bystander told him but not *who* the bystander *is*, and then "destroyed" his notes, what Dunne "destroyed" was hearsay that would have been useless to either party whether it favored a "dry floor" theory or a "wet floor" theory. Furthermore, nothing at all in Dunne's or John Gastelum's testimony suggests that the bystander could have shed any light on the issue of for *how long a time* the floor had been wet, even if we assume the bystander would be able to testify that Mrs. Schweikart fell on a wet spot on the floor, and we really have no basis for that assumption to start with. Thus, "spoliation" does not supply respondents with a substitute for evidence of constructive notice.

II. CONCLUSION

Respondents' arguments seek to stretch everything – evidence, logic, and rules of law – further than any of them can go. The Schweikarts have to prove that the hospital had actual or constructive notice of a wet

condition on the floor where and when the fall occurred. Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994); WPI (Civ.) 120.06.02. There is no evidence of actual notice. “Spoliation” does not supply evidence of constructive notice. This Court should reverse the order granting the Schweikarts’ motion for reconsideration and remand for re-entry of the order dismissing their premises liability claim against FHS.

RESPECTFULLY SUBMITTED this 22nd day of May, 2008.

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CERTIFICATE OF SERVICE

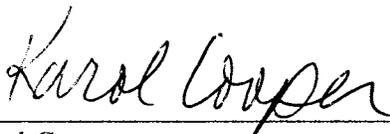
I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 20th day of May, 2008, I caused a true and correct copy of the foregoing document, "Reply Brief of Petitioner/Defendant Franciscan Health System-West, d/b/a St. Joseph Medical Center," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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DATED this 20th day of May, 2008, at Seattle, Washington.



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