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DIVISION II

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STATE OF WASHINGTON
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NO. 42720-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

H. CRAIG SCHWEIKART, individually, and as Personal Representative
of the ESTATE OF HELENA M. SCHWEIKART;
and KIRK SCHWEIKART, individually, and as Personal Representative
of the Estate of H. CLINE SCHWEIKART,

Appellants,

v.

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

Respondent,

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

Defendants.

BRIEF OF RESPONDENT

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I. SUMMARY

Premises liability. By granting FHS's motion for judgment as a matter of law and giving WPI (Civ.) 120.06.02, the trial court correctly required the Schweikarts to prove that "the spill" of water they contend Helena Schweikart slipped on at St. Joseph Medical Center had been on the elevator vestibule floor for a sufficient length of time beforehand for FHS to have discovered it and mopped it up. A plaintiff who cannot show that a floor had been wet for sufficient time for the owner to discover and mop it, may not recover under an alternative theory that it was "reasonably foreseeable" that a slippery condition would exist at some point in time.

Spoliation. The jury was instructed that it could *infer* notice of a wet floor if it found spoliation. FHS denied that spoliation occurred. The jury found there had been no spoliation. The Court should reject the Schweikarts' spoliation instruction arguments because: they have not complied with RAP 10.3(g) and did not comply with CR 51(f) in excepting to the court's failure to give their Instruction No. 27, CP 279; their "presumption" instruction argumentatively presumed "the spill"; there is no basis for the Schweikarts' contention that the trial court should have weighed disputed evidence of alleged spoliation and decided whether bad-faith spoliation occurred, particularly since a jury, weighing the same evidence, found no spoliation at all.

II. COUNTERSTATEMENT OF THE ISSUES

1. Was the law applicable to this slip-and-fall case reflected in the trial court's oral ruling granting FHS's motion for judgment as a matter of law and the court's premises liability duty instruction?

2. Did the Schweikarts preserve for review a claim of error in the trial court's refusal to give their proposed "spoliation presumption" instruction?

3. Did the trial court err in failing to (a) weigh the spoliation testimony, (b) find bad-faith spoliation, and (c) draft and give a rebuttable presumption jury instruction based on the finding?

III. COUNTERSTATEMENT OF THE CASE

A. Slip and Fall – Undisputed Facts.

FHS operates St. Joseph Medical Center in Tacoma. Shortly after noon on April 28, 2005, Helena Schweikart, age 83, was visiting St. Joseph Medical Center, where her husband Cline was a patient. She fell in an elevator vestibule area in the hospital's south pavilion. *Ex. 5*; RP 9/13 at 62-63; RP 9/14 at 16. An emergency room technician, John Gastelum, and others helped Mrs. Schweikart into a wheelchair and took her to the hospital's emergency room area. *Ex. 5*; RP 9/13 at 32-33, 36, 60.

As Mrs. Schweikart was being helped into the wheelchair, private security guard Matthew Dunne arrived at the scene. RP 9/13 at 5-6, 8-9,

25-26, 32, 34. Dunne had been dispatched from the hospital's security operations center and was charged with obtaining statements from any witnesses and writing an incident report. RP 9/13 at 18, 25, 28-30, 37, 73. Upon arrival, Dunne spoke to Gastelum and a bystander. *Ex. 5*. Dunne then returned to the security center and started to prepare an incident report. RP 9/13 at 38-40, 43, 48-49, 94-95. Dunne later went into the hospital's emergency room area and spoke to Mrs. Schweikart who, although in pain, told him she had slipped "on water or something on the floor." RP 9/13 at 40, 50-51, 87. The incident report Dunne ultimately prepared was admitted at trial as Exhibit 5.

According to Exhibit 5, Mrs. Schweikart told Dunne that she had felt her foot slip and fell on her right side as she approached an elevator. According to Exhibit 5, Dunne inspected the area, "found no safety hazards," and "took a verbal statement from ER Tech John." John, Exhibit 5 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 [Gastelum] 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.

Mrs. Schweikart was treated for a shoulder dislocation and discharged from the emergency room, from which she went to one of her sons' homes. RP 9/14 at 49, 52. She was found unconscious the next morning. RP 9/14 at 18-19. Mrs. Schweikart died on May 3, five days later; the Medical Examiner, without an autopsy, attributed her death to a natural cause, an intracranial bleed. *Ex. 6.* Plaintiffs maintain the bleed was a result of the fall on April 28, 2005. *See* RP 9/14 at 53-54.

Dunne told one of Mrs. Schweikart's sons to contact Mike Hill, FHS's regional security manager, to obtain a copy of his report. RP 9/13 at 57-58 and 116. When asked for the report the next day, Hill followed standard hospital policy and referred the Schweikarts to FHS Risk Management. RP 9/13 at 120, 129. Risk Management declined to give the Schweikarts a copy of the report. FHS produced the report after the Schweikarts filed suit.

The jury heard no testimony from anyone who saw Mrs. Schweikart fall or who claimed to have seen water on the floor before or after she fell. There is no evidence that the bystander to whom Dunne spoke saw water on the floor. There is no evidence of how long a time the bystander had spent in the elevator vestibule before Mrs. Schweikart fell. The bystander's name is unknown. FHS did not admit that Mrs. Schweikart fell because she slipped, or slipped because the floor was wet.

B. The Area in which and Flooring on which Mrs. Schweikart Fell.

The elevator vestibule where Mrs. Schweikart fell serves four visitor elevators and is about 60 to 70 feet from the nearest exterior hospital doors, RP 9/15 at 20, 24. “Walk-off” mats are set into the floor inside the hospital’s exterior doorways to absorb water tracked in by people entering the hospital. RP 9/13 at 27. No measurable precipitation fell outdoors on April 28, 2005. RP 9/13 at 165. The flooring is Armstrong Vinyl Composite Tile, a common flooring, RP 9/13 at 177-78, that is slip-resistant when dry but that can be quite slippery when wet. RP 9/15 at 211-14. The Schweikarts’ human factors expert, Gary Sloan, testified that a spot of water 1.5 inches wide would have been big enough to cause Mrs. Schweikart to slip. RP 9/13 at 150, 215; RP 9/14 at 9-10.

Michael Anderson, the hospital’s Facilities Director since 1992, testified that visitor-traffic corridors are not among areas in the hospital where there is water on floors on a regular basis, RP 9/15 at 3, 28, and that he was not aware of complaints about water buildup in the south pavilion elevator area. RP 9/15 at 41.¹ As the Schweikarts’ expert Sloan acknowledged, hospitals must consider bacteria, among other issues, when deciding what type of flooring to install. RP 9/14 at 33. Armstrong VCT

¹ No evidence of record quantifies the frequency of slip-and-falls at St. Joseph Medical Center due to wet floors. See RP 9/13 at 107-08, 117.

flooring is very durable and cleanable, and the hospital seeks not to promote the spread of infection. RP 9/15 at 33.

C. This Lawsuit.

As personal representatives of Helena and Cline Schweikart's estates, respectively, Craig and Kirk Schweikart ("the Schweikarts") sued FHS for negligence under a premises liability theory and sued FHS, the emergency room physician and his employer for professional negligence in failing to diagnose and treat the subdural hemorrhage. CP 1-8; CP 255; CP 609-10. Just prior to trial the Schweikarts, having arranged to arbitrate with the ER physician and group, CP 611-13, dropped their medical negligence claim against FHS, leaving only the premises liability claim against FHS for trial, *see* CP 254.

D. Jury Trial.

1. Issue of Dunne's status as FHS agent.

The case was tried to a jury in September 2011. The trial court permitted the Schweikarts to elicit testimony and argue that, although Dunne and Robinson were employed by Cognisa Security, RP 9/13 at 8-9 and 72-73, they had been agents or apparent agents of FHS. *See* CP 342-43. The jury found that Dunne acted as FHS's agent. CP 353.

2. Issue of whether” notice” evidence was “spoliated.”

Based on inconsistent deposition testimony Dunne had given in 2006 on certain points, *see* RP 9/13 at 39-40, 43-44, 52-53, 66-68, 89-92, 96-97, the Schweikarts contended that Dunne had taken, at the scene of Mrs. Schweikart’s fall, notes of what he was told by the bystander and had noted the bystander’s name, but that Dunne and/or Hill had then lost or destroyed that evidence and omitted it from Dunne’s incident report, suppressing evidence that FHS had actual or constructive notice of “the spill” that the Schweikarts maintained explains Mrs. Schweikart’s fall. RP 9/19 at 12-14. The trial court permitted the Schweikarts to pursue their “inference-of-notice-from-spoliation” theory at trial. *See* CP 15, 17 and 354 (Questions 4-9). On liability, what the bystander told Dunne, and whether Dunne got the bystander’s name, thus became pivotal issues of fact for the jury to decide based on its assessment of Dunne’s and other witnesses’ credibility.

3. Dunne’s testimony.

When he was dispatched to the scene of Mrs. Schweikart’s fall on April 28, 2005, Dunne had never before investigated or filled out an incident report for a fall incident, had conducted no more than one prior witness interview, and was nervous. RP 9/13 at 73-74. Dunne had been told in training in late 2004 to take either a notebook or witness statement

forms to investigations of injury incidents, and he knew on April 28, 2005 that he was expected to do so. RP 9/13 at 11-14, 3. Dunne nonetheless neglected to take a notebook or witness statement forms with him to the scene of Mrs. Schweikart's fall, and failed to obtain or record the bystander's name or contact information, RP 9/13 at 37-40, 44. Dunne testified that he did not fail to get the bystander's name intentionally, RP 9/13 at 74, and was not told to destroy any statement, RP 9/13 at 17.²

Dunne testified that, upon returning to the security center from the scene of Mrs. Schweikart's fall he began drafting an incident report by hand from memory because he had taken no notes, RP 9/13 at 33, 37-39, and that his supervisor, Curtis Robinson, also a Cognisa employee, RP 9/13 at 72-73, told him to omit from the incident report what the bystander had told him because Dunne had neglected to obtain the bystander's name or contact information, RP 9/13 at 44, 47, 75, and chastised him for the failure and sent him back to try to find the bystander, which Dunne was unable to do, RP 9/13 at 76.³

² FHS refers to the bystander in gender-neutral language, because the bystander was referred to as female by Dunne, who testified he was made aware of no male bystander, RP 9/13 at 33-34, 59-60, and because Gastelum apparently related what a male bystander said to him, *see* RP 9/7 at 15; RP 9/13 at 34. The record does not indicate what, if any, deposition testimony by Gastelum was presented to the jury.

³ Dunne testified at trial that he had seen no substance on the floor while he was at the scene initially, but looked again upon returning to look for the bystander and saw none. RP 9/13 at 40, 76.

Plaintiffs' counsel impeached Dunne at trial with November 2006 deposition testimony (which Dunne had corrected in December 2006, CP 468-70⁴, that he *had* made notes during his initial visit to the scene of Mrs. Schweikart's fall, including the bystander's "statement." CP 412, 423, 425⁵; RP 9/13 at 33, 66-68. Dunne insisted at trial, as he had in both depositions, CP 409⁶ and CP 468-70⁷, that he neglected to obtain the bystander's name or contact information, RP 9/13 at 44, 47, 74, 76. Dunne testified at trial, as in deposition (CP 414⁸), that his report indirectly related what the bystander told him by stating that a bystander told Gastelum that Mrs. Schweikart had been "running" to catch an elevator and fell, *Ex. 5*, because, Dunne testified, that was what the bystander he spoke to told him Dunne. RP 9/13 at 75.⁹

4. Oral ruling granting FHS motion for partial judgment as matter of law.

When the Schweikarts rested their case in chief, FHS orally made, RP 9/19 at 3-4, and the trial court orally granted, RP 9/19 at 22-23, a motion for judgment as a matter of law with respect to any premises

⁴ 12/20/06 Dep. at 101-04.

⁵ 11/2/06 Dep. at 55, 66, 68.

⁶ 11/2/06 Dep. at 52.

⁷ 12/20/06 Dep. at 101-04.

⁸ 11/2/06 Dep. at 57.

⁹ Dunne testified that the narrative incident report he began to hand-write from memory on April 28, 2005 had disappeared by the next morning and that he then typed the narrative on page 2 of Exhibit 5. RP 9/13 at 43-46, 64.

liability theory that did not require proof of actual or constructive notice of a slippery condition on the floor where Mrs. Schweikart fell. That ruling precluded the Schweikarts from establishing liability unless the jury found spoliation of evidence and inferred, from that finding of spoliation, that Mrs. Schweikart slipped because of a temporary slippery condition of which FHS had had actual or constructive notice. RP 9/21 at 5-6 and 34-35; CP 17; CP 354 (Directions following space for answering Question 5).

5. Jury Instructions.

The trial court gave two pattern instructions on premises liability. Not at issue on appeal is Court's Instruction No. 14, CP 335, a pattern instruction (WPI (Civ.) 120.05) defining the term "business invitee," which FHS admits Mrs. Schweikart was. The premises liability instruction that the Schweikarts argue the trial court erred in giving is Court's Instruction No. 16, CP 337, which is WPI (Civ.) 120.06.02 (Duty to Invitee or Customer – Notice of Temporary Unsafe Condition Not Caused by Owner or Occupier). It states:

An owner of premises has a duty to correct a temporary unsafe condition of the premises that was not created by the owner, and that was not caused by negligence on the part of the owner, if the condition was either brought to the actual attention of the owner or existed for a sufficient length of time and under such circumstances that the owner should have discovered it in the exercise of ordinary care.

The Schweikarts had proposed that instruction, CP 265, but ultimately excepted to the trial court giving it. RP 9/22 at 70.¹⁰

As premises liability instructions, the Schweikarts' proposed, CP 264 and 266, and excepted to the trial court's failure to give, RP 9/22 at 69, WPI (Civ.) 120.06 (Duty to Business or Public Invitee – Activities or Condition of Premises) and 120.07 (Liability to Business or Public Invitee – Condition of Premises). The Schweikarts' formal exceptions did not state their reason(s) for excepting. RP 9/22 at 69-73.

The court gave two non-pattern instructions on spoliation.¹¹ Court's Instruction No. 15, CP 336, defined spoliation and informed the jury that, if it found spoliation by FHS, it could use that finding to infer actual or constructive notice of a temporary unsafe condition as explained by Court's Instruction No. 16 (quoted at page 11 above). Court's Instruction No. 17, CP 338, told the jury that, in order to find actual or constructive notice, it had to find that FHS's agent(s) spoliated evidence and then had to decide to infer from that finding that FHS had actual or constructive notice of the temporary unsafe condition. The Schweikarts did not except to the giving of Instruction No. 17.

¹⁰ Their counsel's objection was that the pattern instruction "implies [sic, applies] in limited terms to those situations in which there is no participation on the part of the defendant."

¹¹ There are no pattern instructions for spoliation of evidence.

Three days before the court instructed the jury, there had been colloquy about whether the Schweikarts were entitled to a presumption, and not just a permissible inference, if there was spoliation. The Schweikarts did not take the position that there should be a rebuttable presumption *instruction*; they asserted that the judge should “make the determination whether there’s a rebuttable presumption or a permissible inference” of actual or constructive notice. RP 9/19 at 32. What the Schweikarts tendered by way of spoliation instructions were two “you *may* infer” spoliation instructions, CP 276, 278, and one, CP 277, that used the word “presumption.” Plaintiffs’ Instruction No. 24, CP 276, would have told the jury that “you may infer” from spoliation that lost evidence would be unfavorable to the responsible party.¹²

Plaintiffs’ Proposed Instruction No. 25, CP 277, would have told the jury that if it found FHS had destroyed, altered, or lost evidence with-

¹² The second of the Schweikarts’ “you may infer” instructions, No. 26, CP 278 (which they do not contend the trial court erred by not giving) would have told the jury that if it found that FHS had “failed to preserve, destroyed, or caused the destruction of evidence concerning [Mrs. Schweikart’s fall] without a satisfactory explanation for doing so, you may infer that such evidence would be unfavorable to [FHS].” Instruction No. 26 gave, as an example of an inference the jury could draw, that FHS “had actual or constructive notice of the pool of water that caused Helena Schweikart to slip and fall.” FHS had not admitted the presence of any water, much less a “pool” of it, on the floor. The Schweikarts’ No. 26 went on to say that, in determining whether an “explanation for destroying or failing to produce the witness statement, the report and the field notes is satisfactory,” the jury could consider, among other things, “whether the party destroying or failing to produce the evidence acted in conscious disregard of the importance of the evidence, or whether there is some innocent explanation for the destruction.” CP 278. FHS and Dunne denied destroying anything, RP 9/13 at 17 and, in Dunne’s second deposition and trial testimony he denied even taking any field notes or getting a written statement from the bystander, CP 468-70 (12/20/06 Dep. at 101-04); RP 9/13 at 33-34.

out a satisfactory explanation, “the law presumes that the . . . evidence was sufficient to prove that [FHS] had sufficient actual or constructive notice of the spill,” and that “[y]ou are bound by this presumption unless you find by a preponderance of the evidence that [FHS] did not have notice of the spill.” The Schweikarts did not propose, in their Proposed No. 25 or elsewhere, any instruction imposing on FHS the burden of proving lack of notice of “the spill.” FHS had not admitted “the spill.”

In excepting to instructions, RP 9/22 at 69-73, the Schweikarts’ counsel did not refer to their Proposed No. 25 by number or by wording.

6. Verdict.

The court’s special verdict form required the jury to find that Dunne and/or Robinson had acted as FHS’s agents and to find spoliation of evidence by Dunne, Robinson, and/or Hill in order to reach the question of whether FHS had been negligent. CP 353-55. The Schweikarts accepted the verdict form. RP 9/22 at 73. The jury found that Dunne acted as FHS’s agent in dealing with Mrs. Schweikart’s fall, including with regard to the incident report. CP 353-54. The jury found that neither Dunne nor Hill had spoliated evidence. CP 354. As instructed by the verdict form, CP 354, the jury answered no more questions. The court entered judgment on the verdict, awarding FHS costs of \$1,083.15. CP 356-57.

IV. ARGUMENT

A. The Schweikarts Correctly Were Required to Prove that FHS Had Notice of a Temporary Unsafe Condition That Had Existed “*For Sufficient Time*” for FHS to Have Discovered It.

1. The Schweikarts’ first six assignments of error can be addressed as a single one.

The trial court entered a written order *in limine*, CP 242, and made an oral “directed verdict” ruling, RP 9/19 at 22, that limited, and then disallowed, the legal theories under which the Schweikarts sought to avoid having to prove actual or constructive notice. The court gave two premises liability instructions the Schweikarts proposed and declined to give two others. Separate argument is unnecessary with respect to each of those rulings, because the Schweikarts assign error to no rulings excluding evidence and because the court’s judgment-as-a-matter-of-law ruling and instructional rulings are subject to the same law and analysis. If the court did not err in how it instructed the jury on premises liability law, its “directed verdict” ruling was not erroneous, either. FHS will direct its argument to the giving and refusal of premises liability instructions.

2. A slip-and-fall plaintiff must prove the owner knew of the slippery condition or that the condition had existed “*for sufficient time*” for the owner to have discovered it.

The Schweikarts lacked evidence that St. Joseph Medical Center had actual or constructive notice of a wet floor in the elevator vestibule where Mrs. Schweikart fell before she fell. Therefore (as they tacitly

acknowledge in their brief at pages 1 and 13-14), they needed legal theories under which evidence of actual or constructive notice would be unnecessary. Their counsel came up with two. FHS discusses the second – notice by *inference* due to alleged spoliation of evidence by FHS –in Part B beginning at page 37 below.

The Schweikarts' theory for avoiding having to prove notice that was *not* based on a spoliation inference is expressed in terminology that varies from page to page in their brief. The theory's underlying premise, however, is that Washington appellate courts have not really meant it when they have held, repeatedly, (1) that a slip-and-fall plaintiff must prove that the defendant had actual or constructive notice of the particular temporary slippery condition that the plaintiff encountered where the plaintiff encountered it; and (2) that what that means is that the slippery condition "must either have been brought to the actual attention of the defendant or defendant's employees or it must have existed *for a sufficient length of time* and under such circumstances that defendant or defendant's employees should have discovered it in the exercise of ordinary care." *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 462, 805 P.2d 793 (1991) (emphasis added), and the 13 other published decisions cited below on page 17.

The Schweikarts claim to have discerned in Washington slip-and-fall decisions a rule under which “length of time” is immaterial and under which a plaintiff needs only to offer evidence that a temporary slippery floor condition was reasonably foreseeable, *e.g.*, *App. Br. at 14, 18, 21-26, 31*, and/or could have been discovered with reasonably frequent inspections, *e.g.*, *App. Br. at 13-14, 20, 31*, and/or that the floor on which the plaintiff slipped was “inherently” or “huge[ly]” dangerous, *e.g.*, *App. Br. at 19, 25, 26* (*see also headings on pages 9 and 10*). After pronouncing this three-headed theory “viable,” the Schweikarts argue that the trial court should have instructed the jury under WPI (Civ.) 120.06 and 120.07 and not 120.06.02, because they offered evidence that the hospital’s were slippery when wet and because hospitals are “beehives of activity” involving many people “who might on occasion spill” liquids of various kinds. *App. Br. at 12, 26*. According to this theory, it was for the jury to decide whether FHS should be liable for Mrs. Schweikart’s fall simply because the possibility that the hospital floor would be wet *somewhere* and as *some* time that day was “reasonably foreseeable,” and a wet spot on the floor must have been something FHS would have discovered had it deployed “surveillance teams” regularly and often, and/or because the floor was “inherently” dangerous.

The law, however, just is not what the Schweikarts' opening brief claims it is. The law is what the Schweikarts' Proposed Instruction No. 14 and Court's Instruction No. 14 both told the jury it is: if a temporary slippery condition caused the fall at issue, that condition must either have been one the owner knew about or must have "existed *for a sufficient length of time* and under such circumstances that the owner should have discovered it in the exercise of ordinary care [emphasis added]." That is WPI (Civ.) 120.06.02, and it is the law applicable to indoor slip-and-fall cases according to every published Washington decision FHS's counsel have found – not only *Wiltse*, 116 Wn.2d at 462, but *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007); *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994); *Brant v. Mkt. Basket Stores, Inc.*, 72 Wn.2d 446, 452, 433 P.2d 863 (1967); *Hughey v. Winthrop Motor Co.*, 61 Wn.2d 227, 230, 377 P.2d 640 (1963); *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 673, 374 P.2d 939 (1962); *Placanica v. Riach Oldsmobile Co.*, 53 Wn.2d 171, 175, 332 P.2d 47 (1958); *Hendrickson v. Brill*, 45 Wn.2d 766, 767, 278 P.2d 315 (1954); *Mathis v. H.S. Kress Co.*, 38 Wn.2d 845, 847, 232 P.2d 921 (1951); *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942); *Kennett v. Federici*, 200 Wash. 156, 163, 93 P.2d 33 (1939); *Wiard v. Market Oper. Corp.*, 178 Wash. 265, 268, 34 P.2d 875 (1934); *Charlton v. Toys "R" Us-Delaware, Inc.*, 158

Wn. App. 906, 915, 246 P.3d 199 (2010); and *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 275, 896 P.2d 750, *rev. denied*, 128 Wn.2d 1004 (1995).¹³

There are some very narrow exceptions to the actual-or-constructive notice requirement for slip-and-fall cases. One applies when injury occurred on premises within a “self-service” establishment of a kind where the nature of the business made the occurrence of slippery conditions “reasonably foreseeable.”¹⁴ *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).¹⁵ The Schweikarts do not seek to come

¹³ The temporality requirement has been applied or acknowledged in *trip*-and-fall cases, defective walkway cases, open-hole cases, and premises liability cases involving other types of unsafe conditions of premises as well, but this list of slip-and-fall decisions makes the point adequately. The “for enough time” component of actual or constructive notice also has been applied or recognized in numerous unpublished decisions of the Court of Appeals.

¹⁴ Another exception 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); *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 have not relied on the “active negligence” exception.

¹⁵ Appellate decisions have declined repeated requests to expand the “self-service” exception. In *Pimentel v. Roundup Corp.*, 100 Wn.2d 39, 666 P.2d 888 (1983), which was not a slip-and-fall case, the Supreme Court applied the exception first recognized in *Ciminski* to a store customer’s claim that a can of paint fell off a shelf onto her foot, but the *Pimentel* court expressly declined to make the *Ciminski* rule applicable to all self-service businesses. In *Ingersoll*, 123 Wn.2d at 654, the Supreme Court declared that the *Pimentel* self-service exception applies only when there is shown to be “a relation between the hazardous condition and the self-service mode of operation of the business.” In *Carlyle*, 78 Wn. App. 272, the court declined to apply the *Pimentel* exception in a case where a grocery store customer had slipped on shampoo spilled in the coffee aisle of

within the self-service establishment exception to the *Wiltse-Ingersoll-Schmidt* rule. Rather, they argue that the self-service *exception* is really a *general rule* based on “reasonable foreseeability” without regard to how long a temporarily unsafe condition, such as water on a tile floor, actually existed. *App. Br. at 22-23*. They are just wrong; the 14 published decisions cited above say so. The decisions on which the Schweikarts rely are inapposite or do not say or hold what they say they hold.

3. Any wet-floor condition in the hospital was a temporary one that FHS did not create.

To the extent various assertions in the Schweikarts’ brief are taken as arguments that WPI (Civ.) 120.06.02 did not apply, and that WPI (Civ.) 120.07 therefore should have been given, because this was not a case involving a “temporary condition not created by the owner,” such

grocery store. In *Schmidt v. Coogan*, 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 it “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 Court of Appeals held that the trial court should have granted the store owner’s motion for judgment as a matter of law at the conclusion of plaintiff’s case in chief because her evidence was insufficient to satisfy her burden of production on the issue of actual or constructive notice. *Schmidt*, 135 Wn. App. at 612-13. The Supreme Court reversed the Court of Appeals, 162 Wn.2d 488, but not for failure to apply the self-service establishment exception. The Supreme Court reversed because it considered the plaintiff’s evidence of actual or constructive notice sufficient to require submission of the case to the jury. *Id.* at 492. The Schweikarts do not argue that they had evidence of actual or constructive notice like or similar to what the plaintiff presented at trial in *Schmidt*.

arguments are incorrect. The Schweikarts neither cite nor can cite any decision holding or suggesting that a floor that is skid-resistant when dry, as the floors at St. Joseph Medical Center are, can be classified as other than temporarily unsafe in the rare instance when it becomes wet from a drip or spill. Nor do the Schweikarts cite any decision holding or suggesting that the owner of premises “creates” the unsafe condition resulting from a drip or spill on its floor even if there is no evidence that the owner or its agent was the dripper or spiller.

4. *Iwai v. State* and *Mucsi v. Graoch Associates* do not provide traction for the Schweikarts’ argument that they did not have to present evidence of notice.

The Schweikarts put great stock in *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996), pronouncing it “the controlling decision,” *App. Br. at 16*, and purporting to find in it propositions that its holding does not include, imply or support. In *Iwai* the State, which owned the partially sloped outdoor parking lot on which the plaintiff fell two days after a seven-inch snowfall, *knew* there had been a natural accumulation of snow and ice, because it had plowed the lot (or had the lot plowed). *Iwai*, 129 Wn.2d at 90. Part I of the Supreme Court’s deciding opinion, signed by five justices and concurred in by all four others, held that the State could be found liable for negligently creating the slippery condition by failing to

apply sand when removing snow it knew had fallen in the outdoor parking lot. *Iwai*, 129 Wn.2d at 95.

In Part II of *Iwai*'s deciding opinion, four justices would also have expanded the "reasonably foreseeable" exception of *Pimentel* beyond the self-service establishments to excuse Ms. Iwai – or, for that matter, *any* slip-and-fall plaintiff – from having to prove actual or constructive notice and allowing recovery if the nature of the owner's business and methods of operation were such that the existence of a slippery condition on the premises was reasonably foreseeable. *Iwai*, 129 Wn.2d at 100. Because only four justices endorsed expansion of the "reasonably foreseeable" rule to swallow the actual or constructive notice requirement, Part II of the *Iwai* decision is a not precedent for a new "inherently dangerous condition" or "reasonably foreseeable unsafe condition" route around the constructive notice requirement. *See, e.g., 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.)¹⁶

¹⁶ The Schweikarts' assertion that the narrowest ground for the holding of *Iwai* is "that a plaintiff can raise questions about whether a defendant exercised reasonable care in preventing a dangerous condition," *App. Br. at 19*, is sloppy and wrong. No decision anywhere "holds" that a party "can raise questions." The narrowest ground for the holding in *Iwai* are that a property owner cannot escape liability for an invitee's fall based on a slippery condition of which it had notice simply because the condition was due to the natural accumulation (outdoors) of snow and ice, and that trial of a slip-and-fall-on-ice-by-invitee case is necessary when there is evidence that steps the owner or

Thus *Iwai* is not a decision in which a majority of the court considered the issue to be whether the plaintiff should be excused from having to show actual or constructive notice. Nor is it a decision holding that an owner of premises can be held liable for a fall caused by a temporarily unsafe condition not created by the owner regardless of, and without any consideration of, how long a time the condition has existed.¹⁷

Mucsi v. Graoch Assocs. Ltd. P'ship No. 12, 144 Wn.2d 847, 31 P.3d 684 (2001), which the Schweikarts cite at pages 22-24 of their brief, also does not support their appeal. There, an apartment complex resident slipped and fell at a side entrance to the complex's clubhouse that the owner had not cleared of accumulated ice and snow (although the owner *had* cleared the *main* entrance). Reversing the dismissal of the plaintiff's case, the Supreme Court noted that there was evidence that the owner "had two or three days after the snow stopped to take corrective action," but

occupier of the land took to protect invitees against the risk of slipping on snow known to have fallen were inadequate. Neither of those holdings applies to this lawsuit.

¹⁷ The Schweikarts cite a federal district court decision, *Sundquist v. BRE Props. Inc.*, 2012 U.S. Dist. LEXIS 30925 (W.D. Wash., Mar. 8, 2012), for its expression of the view that the Washington Supreme Court would likely affirm *Iwai*'s approach, at least to the type of slip-and-fall claim presented there. *Sundquist* not only is not binding precedent but is distinguishable because it, like *Iwai*, arose from a fall on outdoor ice rather than a temporarily wet floor. The statement is dictum, because the *Sundquist* court also denied summary judgment specifically because there was evidence that the snow-and-ice condition "'had existed for such time' as to afford Defendants 'sufficient opportunity,'" to discover and remove it, *id.* *5, and a dispute as to whether an inspection the defendant landowner claimed to have conducted had been conducted negligently, *id.* *4. The point being that there was *evidence* in *Sundquist* that the icy condition was there to be discovered well before the plaintiff slipped. No such *evidence* exists in this case.

didn't. *Mucsi*, 144 Wn.2d at 862. Moreover, the decision concluded by holding that the tenant's knowledge of the hazardous condition . . .

. . . does not, in itself, relieve the landowner or possessor of land of that duty [citing *Iwai*]. There must be evidence of actual or constructive knowledge or foreseeability, **and a reasonable time to alleviate the situation**. *Id.* *Mucsi* has presented sufficient evidence, and . . . the case must be submitted to the jury.

Mucsi, 144 Wn.2d at 863 (emphasis supplied). *Mucsi* thus confirms that the Schweikarts' arguments wrongly seek to avoid any temporality component in the notice inquiry for slip-and-fall cases.¹⁸

5. The Supreme Court's most recent slip-and-fall decision confirms that the trial court instructed the jury correctly.

The decision by the Court of Appeals for Division I's decision in *Schmidt v. Coogan*, 135 Wn. App. 605 (cited above at page 19, fn. 15) confirms that the "reasonably foreseeable" test applies only to certain limited kinds of "self-service" establishments. Even the Supreme Court

¹⁸ As the Court of Appeals for this division 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 Part II of the Supreme Court's deciding opinion in *Iwai*, the "reasonably foreseeable" exception to the actual or constructive notice requirement otherwise applicable in all types of premises liability cases remains limited to injuries in a few, but not all, "self-service" establishments. In *Frederickson*, a coffee shop customer was injured when he sat in a wooden chair and it broke. He contended that he did not have to prove the shop owner had actual or constructive notice of the fragility of the chair, citing *Iwai*. The Court of Appeals disagreed because the *Iwai* lead opinion lacked a majority for such a holding. *Frederickson*, 131 Wn. App. at 192-193. Because the plaintiff could not show actual or constructive notice, and because the coffee shop's seating area did not qualify as a "self-service" area, the Court of Appeals affirmed the summary dismissal of his premises liability claim. *Charlton v. Toys "R" Us*, 158 Wn. App. at 918, also recognizes that *Iwai* "is not binding precedent and, so far, no other Washington court has extended *Pimentel* beyond the self-service setting."

decision in *Schmidt* that *reversed* the Court of Appeals, *Schmidt v. Coogan*, 162 Wn.2d 488, confirms that *Iwai* did not amend or change the rule requiring proof of actual or constructive notice.

In *Schmidt*, a lawyer was sued for letting the statute of limitations run on the plaintiff's claim against a grocery store where she slipped and fell on some shampoo on the store's shampoo aisle floor. The jury found in her favor, meaning it found that the lawyer's negligence had cost her a winnable slip-and-fall claim. The Court of Appeals reversed, holding that Schmidt had failed to show that the store had actual or constructive notice of the shampoo spill and that the *Pimentel* "self-service" exception would not have applied to relieve the plaintiff of having to prove actual or constructive notice. The Supreme Court did not disturb the Court of Appeals' holding that the plaintiff could not rely on the self-service store exception. The reason the Supreme Court reversed and reinstated the verdict was that 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*, 162 Wn.2d at 492. The court did so after explaining 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. (Emphases supplied). The plaintiff in *Schmidt* was able, the court concluded, to show actual or constructive notice. *Id.*

Thus, both of the appellate court decisions in *Schmidt* confirm that the *Ciminski/Pimentel* “self-service” exception remains a very narrow one that does not apply to this kind of lawsuit, and that the general rule still requires the plaintiff in a slip-and-fall case to present evidence that the unsafe slippery condition had “existed long enough so that it should have reasonably been discovered.” *Schmidt*, 162 Wn.2d at 492. The Schweikarts’ assertion that hospitals are “beehives of activity” where lots of people “might on occasion spill things,” *App. Br. at 12 and 26*, is true of myriad business premises (*e.g.*, grocery stores, sports arenas, bus stations, airports, restaurants, *etc.*), yet only self-service restaurants have ever been classified (in *Ciminski*) as businesses where proof of actual or constructive notice, including proof of how long a slippery-floor condition existed, may not be required in order to prevail on a slip-and-fall claim.¹⁹

¹⁹ *Pimentel* was not a slippery-floor-condition case. It involved a can of paint falling from a shelf onto the plaintiff’s foot.

6. Restatement § 343 and WPI (Civ.) 120.07 do not render it immaterial how long a slippery condition existed.

The Schweikarts argue, *App. Br. at 17, 19 and 28-31*, that Restatement (Second) of Torts, § 343 applies, required the trial court to give WPI (Civ.) 120.07, and gave them a “viable” way to prove negligence even though they could not prove actual or constructive notice. Nonsense; no decision they cite holds or suggests that, in a case arising from a fall due to a temporary slippery condition the owner did not create, WPI 120.07 must or may be given instead of, or in addition to, WPI 120.06.02.

The Schweikarts focus on § 343’s “knows or by the exercise of reasonable care would discover the condition” language. In their arguments based on WPI (Civ.) 120.07 they emphasize that pattern instruction’s “knows of the condition or fails to exercise ordinary care to discover the condition” language. *App. Br. at 17, 19, 28-29, 31*. The Schweikarts argue that because hospitals are “beehives of activity” where people “might on occasion spill” things, *App. Br. at 12, 26*, and based on testimony that St. Joseph Medical Center did not “regularly dispatch surveillance teams to look for spills” even though it had flooring that was slippery when wet, *App. Br. at 19-20, 25-26*, the spill that they posit (and contend Mrs. Schweikart slipped on) is one a jury could find would have been discovered by the exercise of reasonable care.

That argument, however, implicitly presumes, incorrectly, that the “for a sufficient time” requirement of actual or constructive notice somehow does not inform Restatement § 343. The Schweikarts are mistaken. *Wiltse* makes it clear that the “for a sufficient time” requirement *is a part of the notice requirement necessary for a finding of premises owner negligence* in the context, specifically, of a case subject to Restatement § 343. *Wiltse*, in other words, holds that an owner of premises can be found to have failed to exercise reasonable care to discover a spill or other slippery condition only if the owner had either actual knowledge of, or failed to discover, a spill *that had been there long enough to be discovered*. That means there must be some evidence of how long “the spill” was there. The Schweikarts assert, without citing any testimony of record, that “[if] FHS [had] acted reasonably by taking any precautionary measure, it would have discovered the slippery substance that caused Mrs. Schweikart’s death.” *App. Br. at 20*. That assertion embodies the problem with their whole case: no basis exists for it. No one can say that, if FHS had inspected the south pavilion elevator vestibule floor 60, 30, or 10 minutes – or even seconds – before Mrs. Schweikart fell, it would have discovered “the spill” on which plaintiffs maintain she slipped.

The Schweikarts’ Restatement § 343 argument fails to appreciate the distinction between cases involving *permanent or longstanding* unsafe

conditions of land or premises and cases involving *temporary* slip-risk conditions inside buildings. They cite *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 875 P.2d 621 (1994), *App. Br. at 17*, but it actually illustrates FHS's point. Giving WPI (Civ.) 120.07 in a case like *Tincani* is appropriate because the plaintiff in that case – an eighth grader visiting a zoo – fell 20 feet from a ledge on a rock outcropping onto which he had been led unwittingly by a trail and on which he got trapped. When the condition is a rock outcropping, there can be no serious fact issue as to whether the condition was there to be discovered before the plaintiff encountered it. Thus, use of WPI (Civ.) 120.07 rather than 120.06.02 is called for when a case does not involve a temporary unsafe condition the owner did not create – when the case involves, for example, the rock outcropping in *Tincani*, or a fast-flowing stream below a steep embankment near the play area in a mobile home park²⁰, or an advertising sign placed in a store aisle by the owner,²¹ or exposed bolts that protruded 1.75 inches above the surface of a dock,²² or an unimproved grass path that served as an alternative access to an apartment complex parking lot

²⁰ *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 914 P.2d 728 (1996).

²¹ *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 72 P.3d 1097 (2003).

²² *Lettingarver v. Port of Edmonds*, 40 Wn. App. 577, 699 P.2d 793 (1985).

for several days while workers repainted a footbridge,²³ or an inadequately insulated high-voltage cable.²⁴

In WPI (Civ.) 120.07, “a condition of the premises” refers to a permanent or persistent condition capable of being discovered at any time. A *temporary* unsafe condition – which WPI (Civ.) 120.06.02 is specifically concerned with – is neither permanent nor persistent, but rather is something that occurs relatively infrequently and irregularly, such that, unless the owner is to be held strictly liable for it, the owner must be afforded at least the opportunity to become aware of it. And assessment of that opportunity cannot occur absent evidence of how long the condition existed. Put another way, WPI (Civ.) 120.06 states the owner’s duty and frames the jury’s inquiry under Restatement § 343, *unless* the condition was a temporary one not created by the owner, in which case WPI (Civ.) 120.06.02 applies instead. Following *Wiltse*, 116 Wn.2d at 462, the trial court here correctly recognized this case as one for which 120.06.02 states the applicable duty and frames the jury’s inquiry properly.

²³ *Williamson v. Allied Group, Inc.*, 117 Wn. App. 451, 72 P.3d 230 (2003).

²⁴ *Hartman v. Port of Seattle*, 63 Wn.2d 879, 389 P.2d 669 (1964).

7. If there had been “debate” at trial as to whether spoliation would permit the jury to “infer . . . that FHS had actually caused the water on the floor,” the Schweikarts would not have been entitled to win that debate.

The Schweikarts assert that pre-instruction trial colloquy about jury instructions, and a “debate” over whether the court should give WPI (Civ.) 120.06.02 (as it did) or WPI (Civ.) 120.07 focused on the “not caused by the negligence of the part of the owner” language in 120.06.02 and “whether . . . it was proper where a jury could infer, based on spoliation, that FHS had actually caused the water on the floor.” *App. Br. at 29*. If the Schweikarts are asserting that a finding of spoliation would have permitted the jury to infer that *FHS put water on the elevator vestibule floor*, they are profoundly mistaken. There is no legal or logical basis for any such inference, and even the Schweikarts do not claim they made and preserved such an argument at trial. The inference they argued could be drawn from spoliation of the bystander’s “statement” was that FHS had actual or constructive knowledge of water having been spilled on the floor of the south pavilion elevator vestibule before Mrs. Schweikart arrived there. RP 9/6 at 90-91; RP 9/21 at 32, 37. If the Schweikarts had evidence that FHS affirmatively wetted the floor, they would have offered it at trial and would have cited it in their brief.

If the Schweikarts' statement about FHS causing water to be on the floor is meant as an argument that WPI (Civ.) 120.06.02 did not apply because the jury could find that FHS "caused" the slippery condition by using flooring that gets slippery when wet and not inspecting for spills often enough, they once again make an argument that deliberately ignores the "for a sufficient time" requirement for notice under slip-and-fall premises liability law that *Schmidt* and even *Mucsi* expressly confirm continues to exist undisturbed by *Iwai*.

8. Neither *Pearce* nor *Huston* required the trial court to give WPI 120.07 and/or 120.06 instead of WPI 120.06.02.

The Schweikarts cite *Huston v. First Church of God, of Vancouver, Washington*, 46 Wn. App. 740, 732 P.2d 173 (1987), and *Pearce v. Motel 6*, 28 Wn. App. 474, as support for an argument that they were entitled to have the jury instructed under WPI (Civ.) 120.06 and 120.07. *App. Br. at 30*. Neither decision, however, involved temporary slippery conditions the owner had not caused. In *Huston*, the plaintiff slipped on linoleum tile in a church hallway while walking to a bathroom to change back into his street clothes after undergoing full immersion baptism and after the pastor had warned him to be careful walking because water would drip from his clothes and make the floor wet, which it did. The church's appeal from a judgment for the plaintiff based on a jury verdict

was based on claims of instructional error, but the issues had nothing to do with actual or constructive notice. The issues were whether the court's instructions had properly framed the issue of whether the pastor failed to exercise reasonable care by routing the dripping baptisee to the bathroom over a carpeted route instead of via the tiled hallway, and the issue of how the plaintiff's expressed awareness of the risk of slipping on the tiled hallway floor affected the negligence inquiry. The case did not involve a temporarily wet condition on the premises that the church had not caused, so WPI (Civ.) 120.06.02 was not the applicable instruction.

In *Pearce*, the plaintiff slipped on the fiberglass floor of a motel shower stall. On appeal from a plaintiff's verdict, the court of appeals reversed and remanded. It approved, however, of the trial court's refusal to give WPI (Civ.) 120.06.02, explaining that it "pertains only where there is evidence of a temporary condition of the premises, created by someone other than the possessor or its agents." *Pearce*, 28 Wn. App. at 482. The plaintiff obviously had expected the shower stall floor to be *wet* (because it was, after all, a shower stall) and she had turned on the water and waited until the water became the right temperature before stepping into the stall. *Id.*, at 475. The claim in *Pearce* was that the motel owner knew or should have known that the shower stall floor was *too* slippery even for a shower stall floor but had not taken reasonable care – such as providing mats or

installing handrails – to protect guests like the plaintiff. The Schweikarts might be able to argue, based on *Pearce*, that WPI (Civ.) 120.06.02 did not apply if they had shown that Mrs. Schweikart expected the elevator vestibule floor to be wet but not slippery, but they did not.

9. *Wiltse* confirms that the Ninth Circuit decision, *Kangley v. United States*, correctly applied Washington law to a fall-in-a-hospital case.

Correct application of the proof requirements to a case involving a slip and fall is illustrated by the analysis of *Kangley v. United States*, 788 F.2d 533 (9th Cir. 1986), which the Washington Supreme Court would quote from at length and cite with approval five years later in *Wiltse*, 116 Wn.2d 459-60. *Kangley*, which arose out of a fall by a visitor to a hospital, was an appeal from a judgment for \$145,885 in favor of the plaintiff after trial to the court. The Ninth Circuit reversed, explaining:

The general rule in Washington for injuries caused by a transitory unsafe condition on property is that the owner or occupier of a building is liable for the injuries if it or its employees caused the unsafe condition or if it has actual or constructive knowledge that an unsafe condition exists. *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888, 893 (1983); *Hemmen v. Clark's Restaurant*, 72 Wn. 2d 690, 692, 434 P.2d 729, 732 (1967). ***Constructive knowledge exists if the unsafe condition has been present long enough that a person exercising ordinary care would have discovered it.*** *Pimentel*, 100 Wn. 2d at 44, 666 P.2d at 893; *Hemmen*, 72 Wn. 2d at 692, 434 P.2d at 732. The plaintiff has the burden of proving that the defendant had actual or constructive knowledge of the unsafe condition. [Emphasis supplied.]

* * *

There is some evidence in the record to indicate that the government might have been aware that the floor where Kangley slipped would be dangerous *if it got wet*. However, our search of the record has not revealed any evidence that would support a finding that the government knew or should have known that the floor *was wet*, and Kangley has not directed us to any such evidence either in her brief or at oral argument. The only evidence we have been shown in support of this finding is that there was a rug affixed to the floor inside the door where Kangley fell and that there was snow and ice on the ground outside. [Emphases supplied.]

The existence of a rug inside a door alone is not enough to establish that an owner or occupier knows the floor might be dangerous. See *Kalinowski v. YWCA*, 17 Wn.2d 380, 394-95, 135 P.2d 852, 859 (1943). The same is true of the fact that it is wet outside. If we were to hold that a person who slips inside a door where a mat has been placed on a day when it is wet outside may recover for injuries sustained without showing anything more, we would place an intolerable burden on businesses in area like Tacoma where it is often wet outside. We are convinced that this is not the law in the state of Washington.

In *Wiltse*, 116 Wn.2d 452, the Washington Supreme Court's signature fall-on-a-wet-floor decision, the court affirmed the dismissal of a claim by a customer who had slipped and fallen in water that had come through a hole in a grocery store's roof because customer could not show how long the water had been present. As noted in *Kangley* and expressly approved in *Wiltse*, dispensing with the requirement of proof that a slippery condition had existed for a sufficient length of time to be discovered and removed would be bad law.

Like the plaintiffs in *Kangley* and *Wiltse*, the Schweikarts had at least some circumstantial evidence that something wet was on the floor in the south pavilion elevator vestibule at St. Joseph Medical Center just after noon on April 28, 2005. That was because the trial court admitted testimony that Mrs. Schweikart had told Dunne that she slipped on some water. FHS was unable, of course, to cross-examine Mrs. Schweikart to test the basis for that belief, and nobody reported actually seeing a wet spot on the floor where she fell. Like the plaintiffs in *Kangley* and *Wiltse*, however, the Schweikarts did not have any evidence as to *how long* any wet condition had existed before Mrs. Schweikart encountered it.

A trial court's jury instructions need only inform the jury of the applicable law, be not misleading, and permit a party to argue its case. *Tiderman v. Fleetwood Homes of Wash.*, 102 Wn.2d 334, 337-38, 684 P.2d 1302 (1984). The instructions the trial court gave met those tests. They accurately stated the *applicable* premises liability law principles. They were not misleading. They allowed the Schweikarts to argue a viable theory of liability under *applicable* premises liability law, *i.e.*, that FHS had actual or constructive notice of a slippery condition by inference because of spoliation of notice evidence that would have consisted of the

bystander's "statement."²⁵ Moreover, WPI (Civ.) 120.06 and 120.07 do not, despite what the Schweikarts argue, allow imposition of liability based merely on "reasonable foreseeability," and giving one or both of inapplicable pattern instructions would have confused the jury, since the Schweikarts' counsel intended to base an invalid "mere foreseeability" argument on them.

For the reasons discussed above, the trial court correctly instructed the jury that:

An owner of premises has a duty to correct a temporary unsafe condition of the premises that was not created by the owner, and that was not caused by negligence on the part of the owner, if the condition was either brought to the actual attention of the owner *or existed for a sufficient length of time* and under such circumstances that the owner should have discovered it in the exercise of ordinary care. [Emphasis added.]

WPI (Civ.) 120.06.02; CP 337. This Court should decline the Schweikarts' invitation to create an inference of notice from the fact of injury alone²⁶ and to declare hospitals "inherently unsafe" and strictly liable for visitors' falls.

²⁵ FHS objected below and continues to object to any notion that it would have been permissible to infer, from spoliation, that Mrs. Schweikart not only slipped on liquid, but that the liquid had been there for sufficient time for FHS to have discovered it. The jury's no-spoliation finding, however, makes the issue moot.

²⁶ See *Brant v. Mkt. Basket Stores, Inc.*, 72 Wn.2d. 446, 448, 433 P.2d 863 (1967) ("something more than a slip and a fall is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control of the floor").

B. The Schweikarts' Arguments Concerning Spoliation Instructions Were Not Preserved for Review and Are Without Merit.

1. The Schweikarts' proposed "rebuttable presumption" instruction need not be addressed because of noncompliance with CR 51(f) and RAP 10.3(g), and because their proposed instruction argumentatively assumed a disputed proposition as fact.

The Schweikarts' assignments of error to, and arguments about, the trial court's and their proposed spoliation instructions are confusing. RAP 10.3(g) requires a separate assignment of error for each instruction a party was improperly given or refused, with reference by number. The Schweikarts' brief does not comply with that rule. Their issues statement, *App. Br. at ii*, refers, in Issue No. 8, to "a[n unspecified] rebuttable presumption instruction" and, in Issue No. 9, asserts that the trial court erred by refusing to give their proposed "instruction numbers 24, 25, and 27 when a rebuttable presumption instruction was necessary and bad faith is not required in spoliation." That all requires some sorting out. First, "rebuttable presumption," then "bad faith."

- a. Rebuttable presumption

The Schweikarts argue that the trial court erred by giving Court's Instructions No. 15 and 17, *App. Br. at ii, 42-43*, and by not giving their "rebuttable presumption" instruction instead. They took no exception to Court's Instruction No. 15 or 17. RP 9/22 at 69-73.

At pages 39-40 of their brief, the Schweikarts characterize their proposed Instructions No. 24, 25 and 27 as “rebuttable presumption instruction[s].” But their No. 24, CP 276, was a “you may infer” instruction, not a “rebuttable presumption” instruction. No. 27, CP 279, was neither an inference instruction nor a presumption instruction.

The Schweikarts did propose one instruction that used the word “presumption”: their Proposed No. 25, CP 277. But they did not except to the court’s failure to give their No. 25, even though CR 51(f) required them to “state distinctly the matter to which [they] object[ed] and the grounds of [their] objection . . . specifying the number, paragraph, or particular part of the instruction to . . . refused and to which objection [was] made.” The Schweikarts’ claim of error in the court’s refusal to give their “spoliation presumption” thus was not preserved for appeal.²⁷

The Schweikarts’ proposed “presumption” instruction was argumentative as well. It would have told the jury that, if it found FHS had destroyed, altered, or lost evidence without a satisfactory explanation, “the law presumes that the . . . evidence was sufficient to prove that [FHS] had sufficient actual or constructive notice of *the spill*,” and that “[y]ou are

²⁷ The Schweikarts assert that the court rejected that instruction “without explanation,” *App. Br. at 33*, but they cite to a discussion of jury instructions three days before the trial court advised the parties of the instructions it intended to give and gave each side the opportunity to take formal exceptions. The Schweikarts also offer no authority for their implied contention that a court must explain itself when it declines to give a party’s proposed jury instruction.

bound by this presumption unless you find by a preponderance of the evidence that [FHS] did not have notice of *the spill*.” CP 277 (emphases supplied). That there had *been* a spill was in controversy. The Schweikarts argued there had been a spill; FHS did not admit there had been one. Because the Schweikarts’ spoliation “presumption” instruction assumed “the spill,” it was argumentatively slanted in their favor on a disputed issue of fact. A trial court need not give a requested instruction that is erroneous in any respect, *Crossen v. Skagit County*, 100 Wn.2d 355, 360, 669 P.2d 1244 (1983), or that is argumentative or slanted, *Duplanty v. Matson Navigation Co.* 53 Wn.2d 434, 437-38, 333 P.2d 1092 (1959).²⁸

Not only was the Schweikarts’ proposed No. 25 (CP 277) argumentative with respect to “the [disputed] spill” but, if one were to accept their characterization of it as a “rebuttable presumption” instruction, No. 25 conflicted with their No. 24 (CP 276), which they argue it *also* was error for the trial court not to give. The Schweikarts’ No. 24 permitted an

²⁸ That the trial court did not state that it was refusing to give the instruction because it was argumentative is immaterial because an appellate court may affirm on any ground supported by the record. *E.g., Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). Nor would it have been the trial court’s obligation to edit the Schweikarts’ instruction to make it nonargumentative. *See Russell v. Quigg*, 2 Wn. App. 294, 303, 467 P.2d 618, *rev. denied*, 778 Wn.2d 993 (1970) (party, not the trial court, has duty to draft jury instructions). The Schweikarts’ proposed “presumption” instruction, No. 25, CP 277, also was incomplete and defective as a *rebuttable* presumption instruction because neither it nor any other of their proposed instructions informed the jury which party had the *burden* of rebutting any presumption of notice due to a finding of spoliation. *See Simmons v. Koeteuw*, 5 Wn. App. 572, 575, 489 P.2d 364 (1971) (no error in refusing to give instruction that failed to assign burden of proof); *Hinzman v. Palmanteer*, 81 Wn.2d 327, 336, 501 P.2d 327 (1972) (not error to refuse to give proposed instruction that was incomplete as a statement of the law the jury had to apply).

inference of notice from a finding of spoliation (“you may infer that such evidence would be unfavorable”); their No. 25 *presumed* notice from spoliation. The court could not have given both, so the Schweikarts’ argument that it erred by refusing to do so is self-defeating.

b. Bad faith.

The Schweikarts’ ninth issue, *App. Br. at ii*, asserts that it was error for the trial court not to give their Proposed Instructions No. 24 and 27, CP 276 and 279, as well as their No. 25, discussed above. At page 43 of their brief, the Schweikarts argue that the court erred by failing to give their No. 27 because it provided that “bad faith was not a necessary prerequisite to spoliation.” In fact, however, the Schweikarts’ No. 27, CP 276, which stated that “[a] party may be responsible for spoliation of evidence without acting in bad faith,” was not inconsistent with Court’s Instruction No. 15, CP 336, to which the Schweikarts took no exception. Court’s No. 15 permitted the jury, if it found spoliation of evidence, to weigh the culpability or fault of the spoliating party, considering, among other things, “that party’s . . . good or bad faith . . .” CP 336. Thus, the court did not instruct the jury, or even imply to the jury, that bad faith *is* a “prerequisite” to a finding that spoliation occurred. Court’s No. 15 instructed the jury that it could find spoliation even if it found that the spoliating party had acted in *good* faith. Even if the Schweikarts had excepted adequately to

the court's failure to give their No. 27 on bad faith, giving their No. 27 would have done nothing that Court's No. 15 did not do. It would have allowed a finding of spoliation but not of bad faith as did Court's No. 15, but using different phrasing. A party is not entitled to any particular phraseology in jury instructions. *Shea v. Spokane*, 17 Wn. App. 236, 245, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43 (1978).²⁹

Thus, because the Schweikarts did not adequately make a record and tendered instructions with flawed wording and/or that conflicted with each other, their third assignment of error may be rejected even without regard to the law of spoliation.

2. The Schweikarts' "bad faith spoliation" arguments are wrong on the merits.

The Schweikarts' spoliation arguments are substantively wrong and would deserve to be rejected even if they had written and proposed non-argumentative and clear spoliation instructions and had complied with both CR 51(f) and RAP 10.3(g).

²⁹ See also *Harvey v. Tacoma Ry. & Power Co.*, 64 Wash. 143, 146, 116 P. 644 (1911) ("the trial court cannot be compelled to give instructions in any particular form of words: [and] if the principle involved in the instruction which is asked for is given by the court, that is sufficient").

- a. The Schweikarts do not explain how the trial court erred by not finding bad-faith spoliation even though the jury found no spoliation at all based on the same evidence.

The jury found no spoliation at all, CP 354, under an instruction that did not require it to find bad faith in order to find spoliation. CP 336 (Court's Instruction No. 15). Not only are the Schweikarts wrong in arguing that the court ought to have determined that FHS acted in bad faith in not preserving evidence FHS maintains it never had; it simply makes no sense for the Schweikarts to argue that the trial court erred by failing to make a judicial finding of *bad-faith* spoliation when the jury, having weighed the same evidence the court had, found there had been *no spoliation at all* even under a lesser standard of culpability than bad faith.

- b. The issue of whether spoliation of evidence occurred at all turned on a credibility issue for the jury, not the trial judge, to decide.

It was disputed whether FHS ever had the evidence the Schweikarts claim it spoliated. Dunne testified that he neglected to obtain the name or contact information for the bystander he spoke to after Mrs. Schweikart fell. RP 9/13 at 37-40, 44, 74. The Schweikarts' counsel was free to argue that Dunne's testimony on that point lacked credibility because his deposition testimony had been inconsistent in other respects, and to urge the jury to infer that Dunne thus *had* obtained the bystander's name but that he or FHS suppressed it. The jury, however, was entitled to

find credible any witness' testimony, including Dunne's.³⁰ CP 250 ("You are the sole judges of the credibility . . . value and weight to be given to the testimony of each witness"). Thus, whether any spoliation occurred *at all* – not just how culpable the spoliator was – was a matter in dispute and an issue of fact. The finder of fact for this lawsuit was a jury.

The Schweikarts argue, *App. Br. at 32-43*, that they should have a new trial because the trial court did not give the jury a rebuttable presumption instruction based on a *judicial* finding of bad-faith. The Schweikarts cite no authority for the proposition that a dispute over whether spoliation of evidence occurred at all is for the court to decide when trial is by jury. An appellate court need not consider an argument for which no authority is cited. *E.g., Satomi Owners Ass'n v. Satomi LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009).³¹ Aside from the problems already discussed with the only "presumption" instruction the Schweikarts proposed, not one of the decisions they cite holds or even suggests that, in a case tried to a jury where it is disputed whether spoliation occurred at

³⁰ The Schweikarts assert, *App. Br. at 36*, that "Dunne told [them] that they could get the eyewitness's contact information in his report." They provide no citation to the record as support even for that self-serving assertion.

³¹ The Schweikarts' substantive spoliation arguments lack coherence. They assert that spoliation is "the intentional destruction of evidence," *App. Br. at 32*, but within a page treat spoliation of evidence as something that may be the result of losing evidence rather than destroying it, *App. Br. at 33*.

all, *the court* may – much less must – decide whether spoliation not only occurred in fact but whether the spoliating party acted in bad faith.

What the published decisions stand for is the proposition that a court must weigh *the importance* of the evidence, and whether the party that destroyed or lost evidence acted in bad faith or innocently, in deciding what, if any, sanction to impose *when the fact of loss or destruction of “the missing evidence” is established or undisputed*:

In deciding whether to apply a rebuttable presumption in spoliation cases, two factors control: “(1) the potential importance or relevance of *the missing evidence*; and (2) the culpability or fault of the adverse party.” *Henderson*, 80 Wn. App. at 607 (citations omitted). In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. *Henderson*, 80 Wn. App. at 609. Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction.

Marshall v. Bally’s Pacwest, Inc., 94 Wn. App. 372, 381-82, 972 P.2d 475 (1999) (emphasis applied).

The Schweikarts cite four decisions that address spoliation issues: *Pier 67, Inc. v. King County*, 89 Wn.2d 379-385-86, 5573 P.2d 2 (1977); *Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 138 P.3d 654 (2006); *Marshall*, 94 Wn. App. 372; and *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996). There was no spoliation in *Homeworks*, so that decision hardly supports any argument the Schweikarts make. In

Henderson and *Marshall* are likewise uninformative, because, they held there had been no sanctionable spoliation, because the evidence the defendants destroyed – in *Henderson*, the wrecked car in which the plaintiff had been injured; in *Marshall*, the health-club treadmill from which the plaintiff had fallen – was lost after the plaintiffs had waited years before asking to inspect it. The court in *Pier 67* did impose a rebuttable presumption because of spoliation, but that case was tried to the court and the *fact* of loss of evidence – a county assessor’s valuation technique records – was not in dispute.³² None of the Washington decisions makes the trial judge the arbiter of whether spoliation actually *occurred* when that fact is disputed and trial is to a jury.

Cases from other jurisdictions that are on point stand uniformly for the proposition that when the issue is whether allegedly spoliated evidence ever existed, the question of whom to believe is for the jury. *Krin v. Lenox Hill Hosp.*, 931 N.Y.S.2d 65 (2011) (the issue as to whether any spoliation of evidence actually occurred should be presented to the jury, along with the inferences to be drawn therefrom . . . Defendants will then be permitted to argue to the jury that the document either never existed in

³² The Schweikarts assert, *App. Br. at 1*, that in its unreported decision on discretionary review in this case in 2009, the Court of Appeals “held that a jury could infer constructive notice if it determined FHS spoliated evidence.” That is essentially correct. At page 43 of their brief, the Schweikarts assert that the Court of Appeals “directed the [trial] court to impose spoliation sanctions [on FHS].” That is untrue and conflicts with what the Schweikarts said about the Court of Appeals decision on page 1.

his file, is irrelevant to the issue of this case, that other documents cover the same information, or . . . that no adverse inference is warranted”); *Marcano v. Calvary Hosp.*, 786 N.Y.S.2d 49, 50 (2004) (jury question as to “whether any spoliation of evidence actually occurred,” where hospital maintained that erased video security camera tape did not cover location where plaintiff deliveryman fell from hospital’s loading dock); *Mead v. Papa Razzi*, 899 A.2d 437, 444 (R.I. 2006) (whether restaurant employees prepared incident report after plaintiff fell on premises or neglected to do so, as defendant claimed, presented issue of fact for jury).³³

Even if the trial court could have weighed the spoliation testimony and made a finding that Dunne spoliated the bystander’s name and/or “statement,” imposition of a rebuttable presumption of notice of a slippery spot on the south pavilion elevator vestibule floor shortly after noon on April 28, 2005 would not have been warranted. In deciding whether to impose *any* sanction for spoliation of evidence, “an important consideration is whether the loss or destruction of the evidence has resulted in an

³³ Similarly, whether spoliation shown to have occurred was the result of bad faith on the spoliating party’s part is for the jury in a jury-tried case. *N.H. Ball Bearings, Inc. v. Jackson*, 969 A.2d 35, 363 (N.H. 2009) (when a question of fact as to any of the three spoliation factors exists, spoliation “is a matter for the jury, not the judge”); (*Woodard v. Wal-Mart Stores E., LP*, 801 F. Supp.2d 1363, 1375 (M.D. Ga. 2011) (“Given that a question of fact remains as to whether Wal-Mart lost or destroyed the videotape in bad faith, the appropriate sanction in this case is a jury instruction on spoliation [in which the jury is] instructed that if it finds that Wal-Mart lost or destroyed the videotape in bad faith, then the loss of the videotape gives rise to a rebuttable presumption that it contained evidence harmful to Wal-Mart on the issue of whether Wal-Mart had actual or constructive knowledge of the [trip-and-fall] hazard”)

investigative advantage for one party over another.” *Henderson*, 80 Wn. App. at 607. The Schweikarts claim spoliation “impaired [their] ability to prove . . . duty and breach.” *App. Br. at 36*. To the contrary, it is implausible that the bystander had lingered in the elevator vestibule of a “beehive”-like hospital for sufficient time to be able to say how long the floor had *been* wet even if it *was* wet. Dunne’s failure to get the bystander’s name enabled the Schweikarts to fashion a “spoliation” argument, depriving FHS of summary judgment at an early stage of this case.

V. CONCLUSION

For the foregoing reasons, there is no merit to the Schweikarts’ claim that the jury’s defense verdict was tainted by the trial court’s legal rulings on premises liability law that were reflected in its jury instructions. The judgment dismissing their complaint should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of August, 2012.

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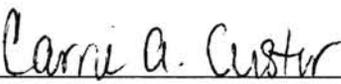
I hereby certify under penalty of perjury that under the laws of the
State of Washington that on the 16th day of August, 2012, I caused a true
and correct copy of the foregoing document, "Brief of Respondent," to be
delivered in the manner indicated below to the following counsel of
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DATED this 16th day of August, 2012, at Seattle, Washington.



Carrie A. Custer, Legal Assistant