

NO. 43044-4-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WENDY L. TINSLEY and KENNETH TINSLEY,
Husband and wife and their marital community,

Appellants,

v.

TACOMA GOODWILL INDUSTRIES,
a Washington Corporation,

Respondent.

Appeal from the Pierce County Superior Court of Washington

Cause No. 10-2-12457

**REPLY BRIEF OF APPELLANT - PETITIONER'S REPLY
TO RESPONDENT'S RESPONSE BRIEF**

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TABLE OF AUTHORITIES

CASE LAW

Smith v. Acme Paving Co.

16 Wn. App. 389, 392-93, 558 P.2d 811, 814 (1976), citing Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960)

Balise v. Underwood

62 Wn.2d 195, 381 P.2d 966 (1963)

Capitol Hill Methodist Church of Seattle v. City of Seattle

52 Wn.2d 359, 324 P.2d 1113 (1958)

Reed v. Streib

65 Wn.2d 700, 399 P.2d 338 (1965)

Wood v. City of Seattle

57 Wn.2d 469, 358 P.2d 140 (1960)

Fleming v. Smith

64 Wash.2d 181, 390 P.2d 990 (1964).

Jones v. State, Dept. of Health

170 Wn.2d 338, 353, 242 P.3d 825, 833 (2010)

Pimentel v. Roundup Co.

100 Wn.2d 39, 40, 666 P.2d 888 (1983)

O'Donnell v. Zupan Enterprises, Inc.

107 Wn. App. 854, 858, 28 P.3d 799, 801 (2001)

Las v. Yellow Front Stores

66 Wn. App. 196, 197, 831 P.2d 744, 744 (1992)

OTHER AUTHORITY:

Verbatim Report of Proceedings (VRP) 9

A. INTRODUCTION

Wendy Tinsley was injured in a self-service store owned by Tacoma Goodwill Industries when a picture frame balanced on top of some mattresses fell and struck her on the neck. The store, having been recently opened was in disarray, and the shelving systems it used to safely display such items were not in place. The store had no regular inspection schedule; employees were simply told to be on alert for dangerous conditions.

Despite clear precedent establishing that inadequate precautions and violations of the store's own operating standards created a genuine issue of material fact for trial regarding Goodwill's negligence, the trial court dismissed Tinsley's action on summary judgment.

Goodwill and the trial court looked at the wrong evidence on summary judgment. Instead of focusing on Goodwill's substandard operating procedures and violations of those procedures that were in place, they focused only on whether Goodwill had actual notice of the specific dangerous condition that injured Tinsley.

Summary judgment on these facts was inappropriate. Summary judgment is not a mini-trial. It is a procedural mechanism to winnow out claims that have no evidence whatsoever. Tinsley need not offer definitive evidence of actual or constructive notice nor concrete proof of a

continuous and foreseeable dangerous condition created by Goodwill. She needed to offer sufficient evidence to persuade a reasonable juror, which she did. Summary judgment should be reversed, and this case remanded for trial.

B. REPLY ON STATEMENT OF THE CASE

Goodwill's statement of the case focuses on only the testimony it believes to undermine Tinsley's claim, rather than providing the full picture. Br. of resp. at 4-5.

Goodwill normally provided racks in which to safely store items such as large picture frames and mattresses, but those racks were not in use yet in the recently-opened store. CP 72, 99. In fact, items for sale were "stacked everywhere." CP 70-73. Even though the store was open for business, organization of those items did not take place until later. CP 70, 72. In fact, the specific kind of shelving that would have prevented *Tinsley's injury* – a vertical rack to hold mattresses and picture frames and other heavy, tall items – was not yet installed. CP 64-65.

The picture frame that injured Tinsley was placed leaning against a wall on top of a mattress that was also leaning against the wall. CP 108-09. It was balanced so precariously that it fell even though she never touched it. CP 67.

Despite being open for business without the proper organizational tools in place to safely store items for sale, Goodwill's operating policy provided for no regular inspection of the store for potentially hazardous conditions. CP 64. Instead, employees were simply told to "keep an eye out for hazards." CP 61.

C. SUMMARY OF ARGUMENT

The legal issue here is not whether Tinsley presented sufficient evidence to prove that Goodwill employees caused the hazardous condition that led to Tinsley's injury. It is whether Tinsley presented sufficient evidence to convince a fair minded juror that, given Goodwill's operation and procedures, it was reasonably foreseeable that unsafe conditions might exist on their premises.¹

Thus, the critical fact here is not whether there is evidence a Goodwill employee actually placed the picture frame precariously on top of the mattress. The critical facts are: (1) Goodwill opened its doors with inadequate shelving in place to safely store large, tall items, (2) Goodwill later installed such shelving, (3) Goodwill opened its doors with items for sale stacked everywhere, (4) Goodwill was a self-service store where customers would likely be moving items around, and (5) Goodwill had no

¹ Tinsley also argued in her opening brief that Goodwill was on constructive notice of the hazardous condition that injured her. Br. of Appellant at 2, 9-12. She incorporates those arguments on reply, but feels they have already been sufficiently addressed for this Court.

routine inspection system in place where employees were to check for such hazards.

It is irrelevant whether a customer or an employee placed the picture in its precarious position. If a store's operation makes a hazard created by customers reasonably foreseeable, and employees do not regularly inspect for such hazards, there is a genuine issue of material fact for trial regarding the store's liability.

Summary judgment should be reversed, and this case should be remanded for trial.

D. ARGUMENT

(1) Summary Judgment Is Not a "Mini-Trial" in Which Evidence May Be Weighed

As both this Court and the Washington Supreme Court have long held, summary judgment "must be employed with caution lest worthwhile causes perish short of a determination of their true merit." *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 392-93, 558 P.2d 811, 814 (1976), citing *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960). The object and function of summary judgment procedure is the avoidance of a useless trial. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). Summary judgment is properly granted if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to

any material fact, and that the moving party is entitled to judgment as a matter of law. *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 324 P.2d 1113 (1958). In ruling, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom most favorable to the nonmoving party. *Reed v. Streib*, 65 Wn.2d 700, 399 P.2d 338 (1965). If, from this evidence, reasonable persons could reach only one conclusion, the motion should be granted. *Wood v. City of Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960). It is not the function of the trial court to weigh the evidence thus to be considered and so construed, and summary judgment of dismissal must be denied if a right of recovery is indicated under any provable set of facts. *Fleming v. Smith*, 64 Wash.2d 181, 390 P.2d 990 (1964).

As our Supreme Court very recently noted, one of the perils of summary judgment is the risk of dismissing a “close case” simply because the plaintiff cannot produce direct evidence of each and every fact necessary to support a claim. *Jones v. State, Dept. of Health*, 170 Wn.2d 338, 353, 242 P.3d 825, 833 (2010). In that case, Department of Health inspectors revoked a pharmacist’s license and shut down his pharmacy based on code violations without a prior hearing, claiming that the condition of the pharmacy created an “emergency.” *Jones*, 170 Wn.2d at 347. Jones produced evidence of previous inspection scores that deviated

sharply from prior scores. Based on those prior scores, Jones argued that the inspectors had fabricated an “emergency” to allow the Board of Health to justify shutting the business down without a hearing. *Id.* at 353. The Department won summary judgment in the superior court, but the Supreme Court reversed, finding that the sharp difference in inspection scores alone was enough to allow the jury to infer that the emergency was fabricated. *Id.* at 354.

What is instructive in *Jones* is not merely the reminder that a jury is allowed to make inferences from the facts, but the distinction in analysis between the majority and the dissent. The dissent argued that Jones’ declaration was made up of “conclusory” and “self-serving” statements, such as a statement that his pharmacy was actually in better condition when his license was revoked than in previous inspections. *Jones*, 170 Wn.2d at 367-68 (Madsen, J., dissenting). The majority concluded that even conclusory or self-serving facts are still facts, and cannot be weighed, measured, or dismissed by courts simply because they find those facts unworthy of consideration. *Jones*, 170 Wn.2d at 354 n.7.

Here, like in *Jones*, *Goodwill* asks this Court to disregard declarations containing statements that *Goodwill* considers “conclusory” and therefore not worthy of credence.

This case, like Jones, is a “close case” that must go to a jury. The jury could give credence to Goodwill’s theory, that a random customer placed the picture frames precariously on top of the mattresses only moments before one frame fell and struck Tinsley. Based on the same set of facts, the jury could also conclude that Goodwill employees, lacking the appropriate racks and equipment to safely stack the frames, piled them up dangerously and then failed to inspect or cure the condition despite walking by them regularly. If both of these theories are plausible on the facts presented, then under Jones this case must go to the jury.

(2) There Is Sufficient Evidence that the Newly-Opened Store, Which Lacked Proper Storage for Oversized Heavy Items or Any Inspection Protocol Created a Foreseeably Dangerous Condition

Goodwill argues that Tinsley has not met her burden of production regarding whether the Pimentel self-service exception to the general rule of evidence applies. Br. of resp. at 9. Perhaps fearing the strength of Tinsley’s argument in this regard, Goodwill rewrites the exception to re-institute the notice rule: “In other words, it is precisely because a “random customer” may create temporary unsafe conditions that Washington law requires... a showing of notice an opportunity to the store owner...” Br. of resp. at 10.

The self-service exception allows a plaintiff to prove either a showing of continuous dangers or a showing that the danger was reasonably foreseeable. The reason that the self-service exception was created is that our Supreme Court acknowledged that in self-service settings, customers are more likely to create hazardous conditions that stores must be on heightened alert to prevent. *Pimentel*, 100 Wn.2d at 40; *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn. App. 854, 858, 28 P.3d 799, 801 (2001). That is why the Supreme Court lifted the actual or constructive notice requirement: because a store cannot operate in a manner likely to result in hazardous conditions, fail to take reasonable precautions to identify and remedy such hazards, and then wash its hands of the resulting injuries. *Id.*

Goodwill's claim that notice is required under the self-service rule is utterly unsupportable under *Zupan*. In that case, a self service grocery checkout created a heightened risk that customers would drop food items on the floor, creating an inherent danger. *Zupan*, 107 Wn. App. at 859. The plaintiff slipped on one such dropped item. *Id.* at 857. It was reasonably foreseeable that customers would drop food. *Id.* Thus the plaintiff did not have proof either that (1) a store employee dropped the food, or (2) that the store was on notice of the dropped food. *Id.* at 859.

This Court noted that the plaintiff presented evidence that the store was aware of the danger, and had policies in place to prevent it. *Id.*

In finding that there was a genuine issue of fact for trial in *Zupan*, this Court observed that the self-service mode of operation “might require a proprietor to implement protections that are not necessary under other circumstances, such as installing special types of flooring or implementing housekeeping or inspection procedures that reduce the risk of harm and enable the proprietor to discover and remove hazardous conditions customers create.” *Zupan*, 107 Wn. App. at 860. Because the reasonableness of the store’s methods of protection is a question of fact, and the plaintiff presented evidence that the store’s methods were not followed or were inadequate, trial was necessary. *Id.*

Having misapprehended the self-service case law, Goodwill then asserts that Tinsley has not adduced evidence sufficient to survive summary judgment on whether Goodwill’s operation created a reasonably foreseeable dangerous condition. Goodwill claims that Tinsley’s offer of proof consists only of an assertion that it is unlikely a random customer placed the picture frame in their precarious position. *Id.* at 9-10. Goodwill also claims that there is “no testimony” that vertical racks which Goodwill normally uses to prevent such injuries, were not in place at the time Tinsley was struck by the falling frame. *Id.*

Here, as in Zupan, there is evidence in this record that it was reasonably foreseeable the recently-opened Goodwill's operations would create dangerous conditions. Items were stacked everywhere in the newly-opened store. CP 70-73. Even if store employees initially had stacked such items properly, having items strewn about means customers picking up or sifting through such items might replace them dangerously.

Specifically on the issue of vertical racks, Goodwill is playing semantic games with the evidence. Tinsley offered testimony that the frames were simply stacked on top of mattresses, rather than on shelves. CP 69-72. She also showed that Goodwill's normal practice for preventing such injuries is vertical racks. CP 64-65, 69-72. Goodwill seizes upon Tinsley's use of the word "shelves" rather than "racks," suggesting that it is a concession that the vertical racks were in fact in place and being properly utilized at the time of Tinsley's injury. Br. of resp. at 12 ("Ms. Tinsley's cousin...stated only that shelving was not up.... She said nothing about the presence or absence of vertical racks").

Goodwill's "shelves v. racks" argument is disingenuous semantics. Goodwill employees may find some critical distinction in the term "shelf" versus the term "rack," but also, there is other evidence that vertical racks of the type Goodwill describes were not in place at the time. The store floor plan, CP 72, contains an illustration of the racks and has been

marked with the words “not there” by Tinsley. This is a direct conflict in evidence between Tinsley and Goodwill that illustrates why a trial is needed.

Finally, unlike in *Zupan*, Goodwill did not have a regular inspection protocol to prevent such dangerous conditions. Instead, Goodwill merely told employees to be on alert for dangers. CP 61. Thus, there is evidence that Goodwill’s protocol for dealing with self-service customer-created hazards was inadequate, and a reasonable jury could so find.

Goodwill’s reliance upon *Las v. Yellow Front Stores*, 66 Wn. App. 196, 197, 831 P.2d 744, 744 (1992) is misplaced. Br. of resp. at 14. In *Las*, the plaintiff was reaching for an iron frying pan on a shelf. *Id.* at 197. The shelf above the pans blocked plaintiff’s view of the items behind the pans. *Id.* As she removed the frying pan, five or six skillets fell on the floor, and at least one of them struck her foot. *Id.* In opposition to summary judgment, the plaintiff expressed a “belief that the pans “must have been unbalanced or precariously stacked.” *Id.* at 198. Given that she did not actually see them since her view of the shelf was obstructed, the court held that the plaintiff could not testify as to how the pans were stacked. *Id.* Without actual evidence of any dangerous condition, the court upheld summary judgment. *Id.* at 201. Also, this Court in *Las* noted that

the dangerous condition complained of – pans stacked on a shelf – was not particular to the self-service nature of the operation. *Id.*

Las is easily distinguishable from this case, and frankly its outcome would have been the same regardless of whether the self-service exception applied or not. There was no evidence of a hazardous condition in *Las*. If there is no evidence of a hazardous condition, then there is nothing for which the store can be held liable. It would be akin to a customer coming into a store, picking up a hammer, hitting himself in the head with it, and then filing a claim.

Here, the trial court found a hazardous condition, which already takes this case out of the realm of *Las*. VRP 9 (“So there is evidence that the picture was above the floor in a dangerous setting”). The trial court nevertheless granted summary judgment, arguing that there was no notice to the store, and no evidence that the “operating methods of the defendant create[d] continuous and foreseeable dangerous conditions.” *Id.* However, the trial court claimed that the only relevant evidence Tinsley presented of hazardous operating methods is “a picture on top of a mattress.” VRP 9.

The problem with the trial court’s reasoning is that despite claiming to apply the self-service test of hazardous operations, it still focused only on whether Goodwill caused or knew of the specific hazard

that injured Tinsley. *Id.* This is precisely what the self-service exception informs the courts is irrelevant to the analysis. *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 40, 666 P.2d 888 (1983).

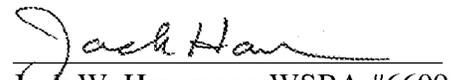
Goodwill misreads the case law on self-service stores. Zupan is controlling here. The issue with respect to the self-service exception is not whether Goodwill had actual or constructive notice of the specific dangerous condition, or caused it. The issue is whether there is sufficient evidence that Goodwill's operation created foreseeable hazards that Goodwill failed to remedy. Such evidence is present here, or can be reasonably inferred by the jury. Summary judgment is inappropriate.

E. CONCLUSION

Summary judgment on these facts was improper. Tinsley presented sufficient evidence both of constructive notice to Goodwill, and of the inherently dangerous nature of Goodwill's self-service operation that Goodwill failed to take steps to prevent. Summary judgment should be reversed, and this case should be remanded for trial.

Dated: October 18, 2012

JACK W. HANEMANN, P.S.



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IN THE COURT OF APPEALS

STATE OF WASHINGTON DIVISION II

WENDY LOUISE TINSLEY, a married individual, and WENDY LOUISE TINSLEY and KENNETH TINSLEY, a married couple,

Appellant,

vs.

TACOMA GOODWILL INDUSTRIES, a Washington Corporation,

Respondent.

Court of Appeals Case No. 43044-4-II

CERTIFICATE OF SERVICE

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The undersigned certifies that on October 18, 2012, she caused a copy of the Reply Brief Of Appellant – Petitioner’s Reply To Respondent’s Response Brief to be served on the parties listed below by the method indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed October 18, 2012, at Olympia, Washington.



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