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Division III
State of Washington

Court of Appeals No. 308871
Benton County Superior Court Cause No. 10-2-01061-8

WASHINGTON STATE COURT OF APPEALS
DIVISION III

JERELYN BIORN,

Appellant/Petitioner,

vs.

KENNEWICK SCHOOL DISTRICT NO. 17

Appellee/Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

COMES NOW, the Appellant, Jerelyn Biorn ("Ms. Biorn"), and hereby files Reply Brief of Appellant.

II. ARGUMENT

A. RESPONDENT IMPROPERLY INFERS THAT MS. BIORN MUST SHOW "NO DOUBT" AS TO ALL THE ELEMENTS OF HER NEGLIGENCE CLAIM.

Respondent ("KSD") implies that Ms. Biorn must establish why there is "no doubt" as to all of the elements of her negligence claim. *See Brief of Respondent* at 6. KSD cites no authority to support the use or application of any such standard. Thus, the Appellate Court's review of this matter should adhere to the legal standard set forth in Civil Rule (CR) 50; rather, than the "no doubt" standard suggested by KSD.[1]

Under CR 50, a trial court has full authority to enter a judgment as a matter of law when, based on all the evidence produced at trial, a verdict cannot be supported by law. The rule states:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall

[1] As outlined in *Brief of Appellant*, denial of a judgment as a matter of law is reviewed de novo, meaning the appellate court applies the same standard of review as the trial court. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

> specify the judgment sought and the law and the facts on which the moving party is entitled to judgment.

CR 50(a). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence in the light most favorable to the non-moving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the non-moving party." *Sing,* 134 Wn.2d at 29; *Guijosa v. Wal-mart Stores, Inc.,* 144 Wn.2d 907, 915, 32 P.3d 250 (2001). "Substantial evidence" exists if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* at 915 (citing *Brown v. Superior Underwriters,* 30 Wn. App. 303, 306, 632 P.2d 887 (1980)). Thus, the question remains whether there was substantial evidence or reasonable inference to sustain a verdict on behalf of KSD. The answer is emphatically no.

B. KSD MISCONSTRUES THE LEGAL STANDARD SET FORTH IN *IWAI.*

KSD completely misconstrues the legal analysis set forth in *Iwai v. State.* 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). Although KSD's position is never clearly stated, it seems that KSD believes there are two general reasons why it owed no duty to Ms. Biorn. First, KSD contends that it had no duty because the black ice that caused Ms. Biorn's fall was hidden. *See Brief of Respondent* at 6, 8. Second, KSD contends that it

followed its snow removal policy and is therefore not liable. *See Id.* at 7-8. Neither of these arguments affects the *Iwai* analysis.

Pursuant to *Iwai,* a landowner's duty of care attaches only if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk." *Iwai,* 129 Wn.2d at 93 (citing *Restatement (Second) of Torts § 343).* This rule insures that land owners will only be liable once they have become or should have become aware of a dangerous situation. *Id.* at 96-97.

In applying the knowledge requirement, Washington law requires that a plaintiff show the landowner had actual or constructive notice of the unsafe condition. *Id.* at 96 (citing *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994)). Constructive knowledge requires a plaintiff to establish the unsafe condition existed for such time as would have afforded the defendant sufficient opportunity, in the exercise of due care, to have made a proper inspection of the premises and have removed the danger. *Id.* (citing *Pimental v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983)). The knowledge requirement focuses solely on whether a land owner has sufficient time to identify and remedy an unsafe condition.

1. <u>KSD's Duty Is Not Negated Because the Black Ice Was Hidden.</u>

KSD argues that the presence of snow over black ice negated their

duty to exercise reasonable care. *Brief of Respondent* at 8. KSD is wrong. KSD's duty attached because they had constructive knowledge.

Constructive knowledge is established if the specific unsafe condition existed for a sufficient amount of time to allow the defendant to properly inspect the premises and remove the danger. *Iwai,* 129 Wn.2d at 96. The constructive knowledge analysis is only concerned with whether a land owner had sufficient **time** to inspect the premises and remedy any unsafe condition. Accordingly, KSD's duty is only contingent upon whether a sufficient time passed to allow them to inspect and remedy the unsafe condition. KSD's duty is not affected whatsoever because the black ice may or may not have been covered by snow.

KSD's argument on this point is illogical. KSD proposes a legal interpretation of *Iwai* that would incentivize land owners not to remove any snow from their property. Land owners would escape liability for any slip and fall on black ice simply by ignoring the ice that lies under snow. This interpretation is wholly inconsistent with *Iwai.*

2. <u>KSD's Duty is Not Negated Because it Had a Snow Removal Policy.</u>

KSD argues that its duty is somehow negated by the fact that it had a snow removal policy. *Brief of Respondent* at 8-9. As a preliminary matter, the evidence produced at trial clearly demonstrated that the staff parking lot rarely, if ever, received attention during KSD's snow removal

procedures. *See Brief of Appellant* at 2. However, the existence or non-existence of a snow removal policy is largely irrelevant to whether KSD owed a duty.

As stated above, *Iwai* places a duty upon land owners when they have actual or constructive knowledge of an unsafe condition. *Iwai,* 129 Wn.2d at 96. Constructive knowledge is established if the specific unsafe condition existed for a sufficient amount of time to allow the defendant to properly inspect the premises and remove the danger. *Id.* The attachment of a duty is based on time, not on whether a land owner has a snow removal policy.

As a practical consideration, it would be unreasonable to predicate a land owner's duty upon his/her own snow removal policy. All a land owner would have to do to circumvent liability for a slip and fall on ice in a parking lot would be to simply not include the parking lot or sidewalks in its snow removal policy, much like KSD did. In essence, KSD asks this court to allow land owners to define their own legal duties in the form of a snow removal policy.

C. KSD ADMITS TO HAVING CONSTRUCTIVE KNOWLEDGE AND THEREFORE OWED MS. BIORN A DUTY.

KSD admits that it had several hours to inspect the Canyon View staff parking lot. *See Brief of Respondent* at 8. KSD concedes that the "offending condition probably existed for no more than five or six hours."

Id. at 8. The purported five or six hour window of snow and ice that "probably" existed prior to Ms. Biorn's fall would have started at the moment KSD ground crew members initiated snow removal procedures. This window is in addition to the almost three and a half hours Mr. Adams, the Canyon View Elementary custodian, had to conduct an inspection. Thus, the question is whether five to six hours is a reasonably sufficient time period for KSD to inspect the staff parking lot for danger.

The reasonableness of having five or six hours to inspect a parking lot is almost self-evident. A full inspection of the staff parking lot would have taken twenty to thirty minutes, at most. Even a few minutes of walking in the parking lot would have alerted KSD to the black ice present under the snow. This inspection could have easily been conducted after school began at 8:30 a.m. and prior to Ms. Biorn's arrival at 10:30 a.m. There would have been ample time to remove the danger prior to Ms. Biorn's fall.

III. CONCLUSION

Based on the foregoing analysis, the trial court's denial of Ms. Biorn's Motion as a Matter of Law should be reversed. Judgment should be granted in Ms. Biorn's favor and this matter should be remanded back to the trial court for a trial on the damages. The trial court erroneous applied Washington premises liability law as delineated in *Iwai v. State.*

Alternatively, should the trial court not reverse and remand, this matter should be remanded for a new trial based on the failure to properly instruct the jury on constructive notice. Ms. Biorn was prejudiced by not being allowed to argue an essential element of her claim. The trial court abused its discretion by failing to give such instruction.

SUBMITTED THIS 20 day of March, 2013.

TELQUIST ZIOBRO McMILLEN, PLLC

By: _____

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Attorneys for Appellant, Jerelyn Biorn

I, Alicia Oney, am over the age of eighteen and am competent to testify as to the facts contained in this Declaration.

1. On March 20, 2013, I sent for filing with the Washington State Court of Appeals, Division III a Table of Contents, Table of Authorities, Reply Brief of Appellant and this Declaration of Filing and Mailing.

2. On March 20, 2013, I deposited into the U.S. Mail an envelope addressed to Brian A. Christensen, Jerry Moberg & Associates, 451 Diamond Drive, Ephrata, Washington, 98823, containing a true and correct copy of the Reply Brief of Appellant and this Declaration of Filing and Mailing.

Respectfully submitted this 20 day of March, 2013.

TELQUIST ZIOBRO McMILLEN, PLLC

By: Alicia Oney

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