73417-2

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NO. 73417-2-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
SEATTLE

DANA IMORI AND DANIEL IMORI

Appellants,

vs.

MARINATION, LLC

Respondent.

APPELLANTS OPENING BRIEF AND CERTIFICATE OF SERVICE

Peter J. Nichols
WSBA No. 16633
Attorneys for Appellants

Peter J. Nichols
Law Office of Peter J. Nichols, P.S.
2611 N.E. 113th Street., Suite. 300
Seattle, WA. 98125
206-440-0879
peternichols@msn.com

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COURT RULES

I. ASSIGNMENTS OF ERROR

A. Summary Judgment. Whether the Court erred in granting summary judgment when in the light most favorable to the non-moving party there are specific facts stated by Dana Imori, showing that the Respondent had actual notice of a greasy spill, did not properly remove nor properly warn Imori of the dangerous condition. Marination knew of the danger of the greasy floor, left it wet, did not dry it and did not place the warning sign in a position that would warn customers of the dangerous condition.

B. Summary Judgment. Whether the Court erred in granting summary judgment when there was a genuine issue of fact as to whether the Marination restaurant followed its own posted clean up procedures.

II. STATEMENT OF THE CASE

On or about November 29, 2013, appellant Dana Imori, hereinafter referred to as "IMORI" went to respondent Marination Ma Ka, restaurant, hereinafter referred to as "Marination" to order take out lunch. She placed her order with the cashier and paid the amount due. While she was waiting for her order she decided to use the restroom. As she walked toward the restroom she slipped on a greasy liquid that was on the floor and fell and fractured her knee cap. See Dec. of Dana Imori, CP 67 -74.

As Dana was laying on the floor in pain, her pants were soaking up the greasy liquid that was left on the floor. She took a cell phone photograph of an A- frame type warning sign that was faced in the opposite direction of her travel path toward the bathroom. See Ex. "A" , to the Dec. of Dana Imori. CP 69 -71. She also took photographs of the greasy liquid on the floor. See Ex. "B" and "C" to the Dec. of Dana Imori. CP 71-74. She did not see the liquid on the floor nor the A frame sign prior to her fall. See Dec. of Dana Imori, CP 67 - 68.

Prior to Dana's arrival at Marination, the respondent's employees were alerted by a customer that there had been a greasy spill near the bathroom. Marination's employee Alex Smith was asked to clean up the greasy spill. See Witness Statement dated 12/10/13 attached as Ex "A" to Dec.of Peter J. Nichols, CP 99-102. Smith had mopped the floor "in front of the bathroom door and outside the bathroom area" See Smith Dep. Transcript Page 27, Lines 14 - 20, attached to the Dec. of Peter J. Nichols. CP 115. Smith took about a minute to mop up the greasy spill with the cleaning solution. Smith Transcript Page21, Lines 14 - 19. CP 113 -114. He did not dry the floor. Smith Transcript Page 20, Lines 19 - 21. CP 113 - 114. He then placed a single A frame warning barricade sign

underneath the fire extinguisher next to the bathroom door and went back in the kitchen. Smith Transcript Page 29, Lines 2 - 5. CP 115.

There is a factual dispute in the testimony of Imori and Smith on the placement of the warning sign and the amount of greasy liquid left on the floor.

Smith did not follow the cleaning solution manufacturer's instructions, which require the area mopped to also be rinsed and dried. Smith did not place enough A frame warning barricades around the spill. See Dec. of William Christenson. CP 58.

III. ARGUMENT

A. Standard of Review.

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn..2d 29, 34, 1 P.3d 1124 (2000). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom in the light most favorably toward the

non-moving party. Id at 34, quoting Weyerhauser Co., v Aetna Cas. & Sur. Co., 123 Wn. 2d 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a mater of law. Id at 34, quoting Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) and CR56 (c).

In the context of a negligence action, plaintiff must prove the elements of (1) existence of a duty, (2) breach of that duty (3) resulting injury and (4) causation. Tincani v. Inland Empire Zoological Society, 124 Wn.2d 121, 127-128, 875 P.2d 621 (1994).

DUTY

B. Marination owes a duty to Imori as she was a business invitee.

As a purchaser of food at the restaurant Imori was a business invitee.

The Court in Tincani, at 138(quoting Restatement (Second) of Torts Section 343, (1965)) held that a possessor of land is liable to invitees for injury causing conditions if he or she:

a.) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

b.) should expect that they will not discover or realize the danger, or will

fail to protect themselves against it, and

c.) fails to exercise reasonable care to protect them against the danger.

The Court in Tincani, stated "an invitee "is...entitled to expect that the possessor of land will exercise reasonable care to make the land safe for his [or her] entry" Restatement. (Second) of Torts Section 343 cmt.b. Reasonable care requires the landowner to inspect for dangerous conditions "followed by such repair, safeguards, or warning as may be reasonably necessary for the [the invitee's] protection under the circumstances." Restatement (Second) of Torts Section 343 cmt. b.

Marination owed a duty to Imori to inspect the greasy spill and to make a reasonable effort to clean up the greasy spill and warn Imori of the dangerous condition. Marination breached that duty.

BREACH

C. Marination breached its duty to Imori by not removing the danger and not reasonably warning her of the danger.

There is evidence that Marination had notice of the dangerous condition as it sent out Alex Smith to clean up a greasy spill. See Smith Statement on December 10, 2013, CP 102.

Smith testified he took a minute to mop the floor. CP 113. He left

it wet and damp. CP. Smith testified in his 12/10/13 statement that he mopped a "5ft area in front of the bathroom". CP 102. In his 1-22-14 statement he testified "I mopped in front of the bathroom and outside the bathroom area. The area was about six feet in diameter. It was a spot mop". CP 104-106. During his deposition when asked about how big the spill was he testified "Oh, probably no more - - the spill itself was no more than eight inches in diameter, and I mopped an area that was like two or three feet in diameter. It was a spot mop." CP 113.

When asked if the floor was still wet he testified "Yeah. It was a bit damp". CP 112-114.

This testimony conflicts with Dana Imori's that she did not see the clear greasy liquid on the floor when she slipped and fell her pants got soaked from the greasy liquid that was left on the floor. For summary judgment purposes reasonable minds can differ on whether in one minute of time Smith cleaned up the clear greasy spill or made it worse by spreading the greasy liquid over a larger area and not removing the grease.

Smith further testified that he put up a yellow A- Frame warning sign under the fire extinguisher next to the bathroom door. CP 115. The location of the greasy spill was in front of the bathroom door. CP 115.

Contradicting Smith's testimony is the Imori photograph of the A-Frame warning sign, which is facing away from the vision of foot traffic approaching the bathroom. CP 71. Imori testified she did not see the sign prior to falling.

These are material facts, which are for the jury to decide whether Marination took reasonable steps to remove the danger and warn its customers of the danger.

In the light most favorable to Imori, Marination breached its duty by leaving the greasy liquid on the floor and not warning her of greasy liquid in front of the bathroom door.

CAUSATION

D. Proximate cause is a jury question.

The issue of proximate cause is generally a question of fact for the jury and not subject to determination at summary judgment as a matter of law. Ruff v. County of King, 125 Wn.2d 697, 703-4, 887 P.2d 886 (1995). Because the question of proximate cause is for the jury, "it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a

question for the Court." Bernethv v/ Walt's Failor's Inc, 97 Wn.2d 929, 935, P.2d 280 (1982).

Here Dana Imori did not see the greasy liquid on the floor before she fell. The warning sign was not facing her as she approached the bathroom. Alex Smith only spent a minute attempting to cleanup the greasy spill and placed the warning sign in a place that did not warn customers of the danger.

Reasonable minds can differ based upon the evidence before the court. There is no question that the Respondent had notice of the greasy spill. There is factual issue of whether the Respondent removed the danger and reasonably warned Imori under the circumstances, which is a question for the jury to decide.

E. Summary Judgment is not appropriate when the Respondent did not even follow its own posted clean up procedures.

On March 4, 2015, pursuant to a CR 34 visit, Imori's expert William Christenson gathered factual data for use in his opinions. He noted that:

"The manufacturer's posted instructions for the FC-2 Bio-Based floor

cleaner reportedly used to clean the floor on the day of the incident calls for the solution to be applied with a dripping wet mop. Soiled solution is to be mopped up or squeegeed to drain. Floor is then to be rinsed or damped mopped clean then dried using a dry mop or squeegee." CP 57-60.

Smith only took one minute to spot mop the floor. Smith did not apply with a dripping wet mop. Smith did not mop up or squeegee the soiled solution and he did not dry using a dry mop or squuegee.

By not following the instructions Smith increased the potential for a person to slip and fall. By not following the posted instructions a jury can infer that Marination did not reasonably remove the danger.

During the CR 34 site visit Christenson also noted during his fact finding that " Four A-frame type warning barricades and one 4-sided tower warning barricade were observed to be stored at the mop sink at time of CDR's site visit on March 4, 2015. There were at least two A-frame type warning barricades visible in the mop sink area in the photographs taken by the adjustor shortly after the accident. CP57-60.

Christenson noted that the "Standard of care is to set multiple

barricades at the outer perimeter of the hazard area to provide warning as to the location and size of the hazard area." CP 57-60.

Smith only placed one A-Frame warning sign and it was not facing the direction of oncoming foot traffic to the restaurant bathroom.

V. CONCLUSION

In the light most favorable to Imori, Marination had knowledge of a greasy spill. Alex Smith was sent out to clean up the greasy spill. Smith did not make a reasonable effort in cleaning up the greasy spill. He failed to clean up the grease and left the area outside the bathroom wet with greasy puddles.

The A-Frame warning sign Smith placed out was not facing oncoming foot traffic to the restaurant bathroom and therefore was not an effective warning of the dangerous greasy floor.

The Appellate Court should reverse the trial court's order granting summary judgment and give Imori her day in Court.

Dated this 19 day of AUGUST, 2015.

LAW OFFICE OF PETER J. NICHOLS, P.S.

Peter J. Nichols, WSBA # 16633
Attorney for Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

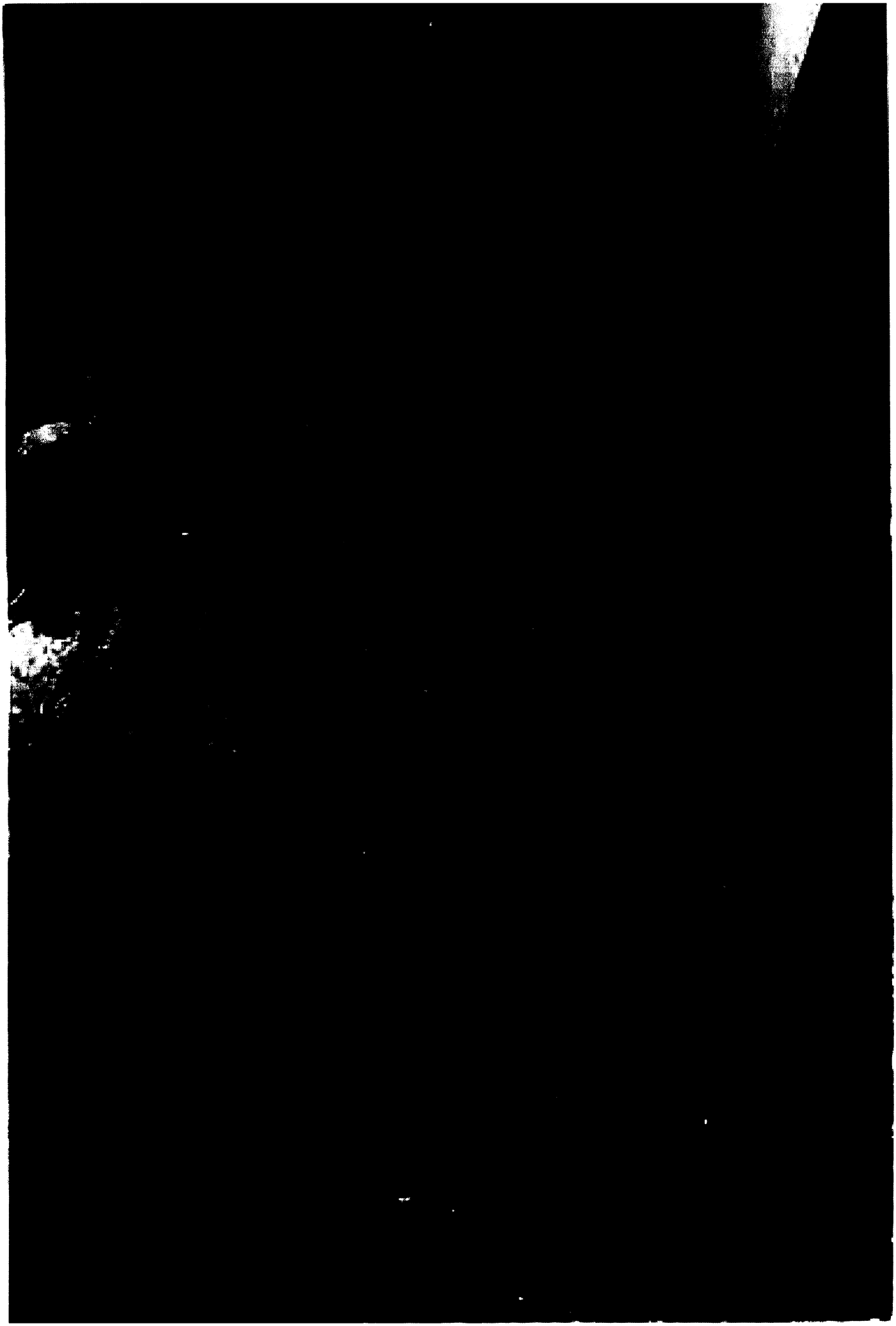
That on August 19, 2015 via hand delivery, an envelope containing a true and correct copy of the Appellant's Opening Brief addressed to:

Joanne Blackburn / Abigail Caldwell
Gordon Thomas Honeywell
600 University Street, Suite 2100
Seattle, WA 98101
jblackburn@gth-law.com
acaldwell@gth-law.com

DATED AT Seattle, Washington on this 19 day of August, 2015.

Darrek Monaco

APPENDIX



WITNESS STATEMENT

To be completed by each witness.

1. GENERAL INFORMATION

Marination Location Ma Kai | *Address* 1660 Harbor Ave SW | *Telephone Number* 206-328-9226

Guest Name

2. WITNESS INFORMATION

Name Alex Smith ☐Guest ☒Employee | *Address* [redacted] 7508 44th Ave SW, Seattle, WA 98136 | *City State/Zip* Seattle, Wa 98136

Email Address alpsnowsk@gmail.com | *Phone Number(s)* Home: ([redacted]) ___-____ Work: ( ) ___-____ Cell: (425) 457-6184

3. ACCIDENT DETAILS

Location of Incident

☐Dining Area ☐Expo Line ☐Order/Pickup
☐Restroom ☐Hot Line ☐Patio
☐Dry Storage ☐Sidewalk ☐Other (specify) _____
☐Bar Rail ☐Parking Lot

Date of Accident:

Time of Accident: ☐AM ☐PM

Description of Accident:

Denise had asked me to mop in front of the bathroom, explaining that someone had spilled something greasy. I was informed in the 5th area in front of the bathroom. I then put down a wet floor sign next to the bathroom door. 10 minutes later I was told someone had slipped. I mopped again, dried the area with a towel and put down two more wet floor signs.

Signature: Alex Smith — Witness | Date: 12/10/13