

No. 35347-4-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STEVE COTTRELL,

Appellant,

v.

BAHRAM SHAHRVINI et ux.,
dba 7-ELEVEN STORE NO. 32672,

Respondents.

FILED
COURT OF APPEALS
DIVISION II
07 JUL 11 AM 10:37
STATE OF WASHINGTON
BY [Signature]
DEPUTY

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	INTRODUCTION	1
B.	ARGUMENT	1
1.	Shahrvini misstates material facts.	1
a.	Video Evidence	1
b.	Caution Signs	3
c.	Shahrvini's Mopping	4
2.	Shahrvini destroyed evidence without reasonable explanation – despite prompt notice of litigation.	4
3.	The trial court's decisions to grant Shahrvini's motion in limine regarding spoliation and to foreclose any questioning about his motive for destroying evidence constitute reversible error.	6
C.	CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>Dupea v. City of Seattle</i> , 20 Wn.2d 285, 147 P.2d 272 (1944)	8
<i>Erickson v. Barnes</i> , 6 Wn.2d 251, 107 P.2d 348 (1940)	8
<i>Henderson v. Tyrell</i> , 80 Wn. App. 592, 910 P.2d 522 (1996)	5 n.4
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 972 P.2d 475 (1999)	5 n.4
<i>Rettinger v. Bresnahan</i> , 42 Wn.2d 631, 257 P.2d 633 (1953)	9

Statutes

RCW 4.44.080	8 n.8
RCW 4.44.090	8 n.9

A. INTRODUCTION

Steve Cottrell's wrist was severely fractured when he slipped and fell in the 7-Eleven store operated by Bahram Shahrini. The trial court's erroneous rulings regarding Shahrini's spoliation of videotape evidence deprived Cottrell of a fair trial.

Cottrell replies to the Brief of Respondents, with respect to Shahrini's factual and legal allegations, as follows:

B. ARGUMENT

1. Shahrini misstates material facts.

a. Video Evidence

Shahrini mischaracterizes his description of the store's video system as undisputed fact. Br. of Resp't at 9. He states that "[n]one of the cameras show the newspaper [a]isle." *Id.* But all objective evidence about what the cameras recorded and what occurred in the store on the morning of Cottrell's accident – except a very short segment from one camera – was destroyed by Shahrini.

Shahrini is not an unsophisticated businessman. He has a master's degree in structural engineering. RP II at 224. And before becoming a 7-Eleven franchisee, he was an investment banker and financial advisor. *Id.* at 225. He is familiar with both causality and liability.

Under their franchise agreement, 7-Eleven, Inc., indemnifies Shahrkini for certain losses. CP 104. Both Shahrkini and 7-Eleven are interested parties in this matter.

Shahrkini asserts Cottrell did not ask him to preserve any videotape at the time of the accident, but he admits to being notified the very next day that Cottrell was considering a lawsuit. CP 128. Shahrkini responded by contacting 7-Eleven's hot line. CP 146.

Without providing details about his conversations with claims personnel – including whether he disclosed that his employee had mopped the store's floor just before Cottrell slipped – Shahrkini alleges he was advised to save video for “the couple minutes before and couple minutes after” Cottrell's fall. CP 114, 128. Shahrkini offers no corroboration for this allegation.¹

There is no evidence that anyone other than Shahrkini viewed what was recorded that morning by the store's surveillance system. Despite the ease of saving video images and Shahrkini's experience preserving them on other occasions, he chose to erase all but a single four-minute portion. CP 114, 233. **Shahrkini alone controlled what was saved:** “I felt this was a reasonable amount of time to keep.” CP 128.

¹ The court's statement that Shahrkini saved so little of the video “because he was told to save two minutes before and after” is incorrect. RP IV at 36.

Any cross-examination or argument about Shahrkini's failure to preserve additional footage – particularly portions that would have revealed the floor being wet mopped shortly before Cottrell arrived – was prohibited by the trial court.²

b. Caution Signs

Shahrkini states that caution signs were displayed throughout his store. Br. of Resp't at 1. He also offers photographs, which are purported to show the locations of the signs at the time of Cottrell's accident. *Id.* at 6-7. In fact, the photos were taken at a later date. *Id.* at 7 n.4. They are proper solely for illustrative purposes. The only objective evidence of the store's appearance that morning is the short video clip, which shows one sign positioned near the entrance.³ Ex 1.

The newspaper aisle is not fully visible on the clip, and Cottrell does not recall seeing a caution sign in that aisle on the day he was hurt. RP II at 208. Shahrkini testified that signs remain in place whether the floors are wet or not. *Id.* at 234. Although Cottrell had visited the store hundreds of times before, he never

² All video footage that would either confirm or contradict the self-serving claims that Beant Kaur did not wet mop the floor in the newspaper aisle was erased. Br. of Resp't at 8 n.5. Why would Shahrkini destroy the evidence unless it was unfavorable?

³ Contrary to Shahrkini's assertion, Cottrell does *not* concede that signs – other than the one visible on the video clip – were on display when he fell. Br. of Resp't at 5.

found the floor to be wet or slippery until the day he was injured. *Id.* at 213.

c. Shahrvinis Mopping

Shahrvini states that he used a wet mop to remove a black mark from the floor after Cottrell left the store. Br. of Resp't at 8. This statement directly contradicts his trial testimony that the mop was dry. RP II at 237. The inconsistency is significant.

Before trial, Shahrvini tried unsuccessfully to exclude the portion of the video that shows him mopping, arguing it evidences a subsequent remedial measure. CP 100-101, 189.

According to store employees, dry mops were used to clean up water and spills. RP I at 63, 75. But while insisting he did not see any water on the floor, Shahrvini is shown *dry mopping* the newspaper aisle where Cottrell had just fallen. RP II at 238, 256; Ex 1. Wet mops remove scuff marks; dry mops absorb moisture.

2. Shahrvini destroyed evidence without reasonable explanation – despite prompt notice of litigation.

Shahrvini argues that potential litigants have no general duty to preserve evidence. Br. of Resp't at 15. And he contends that spoliation does not occur if there is a satisfactory explanation for missing evidence. *Id.* at 16.

In this case, however, Cottrell personally told Shahrvini that he was considering a lawsuit the day after his fall. A week later, all

evidence of whether the area where Cottrell slipped was recently wet mopped had been erased.⁴

If the newspaper aisle had not been wet mopped, it was in Shahrini's interest to document that fact. But if the area was left wet, which is supported by Cottrell's testimony that he lost his footing almost instantaneously and smelled bleach afterward, video of the wet mopping would be damaging. RP II at 189-90, 191.

The evidence that either supported or rebutted Shahrini's claims about conditions in the store was in his exclusive control. All footage before and after the four-minute portion he saved and everything recorded by the other store cameras was gone before Cottrell had any opportunity to view it.⁵

Shahrini's uncorroborated assertion that he saved so little at the direction of claims personnel – who lacked information about the particular circumstances and offered only generic advice⁶ – is a

⁴ This time frame differs dramatically from the facts of cases relied upon by Shahrini – where a treadmill was disposed of almost four years after an accident (*Marshall v. Bally's Pacwest, Inc.*) and where a wrecked car was disposed of nearly two years after an accident (*Henderson v. Tyrrell*). Br. of Resp't at 14-15 and 16-17.

⁵ As Shahrini acknowledges, the importance or relevance of missing evidence depends on the particular circumstances in a case. Br. of Resp't at 17. "An important consideration is whether the adverse party was afforded an adequate opportunity to examine the evidence." *Id.*

⁶ The court stated: "I found no evidence to suggest in the offer of proof or the briefing that 7-Eleven claims personnel and Mr. Shahrini ever discussed what was on the video in order to make a decision as to the scope of the tape to be preserved." RP IV at 34. See also Br. of Resp't at 20.

questionable justification for his choices. But the trial court sheltered Shahrkini from any inquiry by Cottrell.

Shahrkini's spoliation of evidence allowed him to testify that there was no water in the newspaper aisle when Cottrell slipped. RP II at 257. And it allowed Shahrkini's counsel to make the following statement in closing argument: "[T]he suggestion that somehow the mopping took place all the way down the aisle but the dry mopping only started here on the edge of the display, there are simply no facts to support that." RP III at 335.

3. The trial court's decisions to grant Shahrkini's motion in limine regarding spoliation and to foreclose any questioning about his motive for destroying evidence constitute reversible error.

The trial court initially erred by granting Shahrkini's motion in limine regarding spoliation. Under that ruling, the court expressly precluded Cottrell "from arguing 'spoliation' or 'destruction of evidence' and any similar arguments or remarks in front of the jury." CP 102, 190. The court further erred by prohibiting examination of Shahrkini about why evidence was destroyed.⁷ The court's subsequent decisions regarding jury instructions and the motion for a new trial reiterate these errors.

⁷ "This is my ruling and it was the ruling and my intent in the motions in limine. The video, the four minutes or whatever we have is all you have. I would not permit you an inference of suggesting what could have been because it causes the jury to speculate and I don't think that is a wise thing for them to be asked to do, nor do I think it benefits either side." RP II at 96.

The fundamental issue in this case is whether water was left on the floor. Shahrvinii saved video footage of his employee dry mopping, but he erased all images that showed what area had been wet mopped minutes before Cottrell was injured.

Cottrell noted:

What was mopped, when it was mopped, how it was mopped, those are all things that are in dispute and are at issue. Some of it's shown on the tape; some of it's not shown on the tape. All of those things are relevant; all of those things need to be addressed.

RP II at 106.

Cottrell was entitled to challenge Shahrvinii's motive: "[W]hat he kept and what he didn't keep was a decision of somebody with an interest in the outcome of this case. . . . He viewed the videotape, made a conscious decision as to when to push the button, when to push the button again, based on what he viewed."

RP II at 101.

The trial court, however, endorsed the credibility of this key witness unconditionally: "You know, I have all good faith that [Shahrvinii] is going to testify very truthfully with regard to his observations and the premises in his testimony as to what the existence of the premises were." RP II at 99. According to the court, "there was no evidence to suggest that there was any

conscious decision to subvert the evidence for gain by the defense.” RP IV at 33.

The court also added: “I couldn’t find any indication during the offer of proof that would suggest that [Shahrkini’s] conduct was not reasonable.” RP IV at 24.

Questions of law are to be decided by the court.⁸ But questions of fact are to be decided by the jury.⁹

This case rests on the credibility of interested parties who make conflicting statements of fact. The credibility of witnesses and the weight given to their testimony are to be determined by the jury – not the judge: The credibility of witnesses, including interested witnesses, “is exclusively for the jury.” *Erickson v. Barnes*. 6 Wn.2d 251, 271, 107 P.2d 348 (1940). “Inconsistencies in the evidence are matters affecting weight and credibility, and these matters are exclusively within the province of the jury.” *Dupea v. City of Seattle*, 20 Wn.2d 285, 290, 147 P.2d 272 (1944). “It is the province of the jury to believe, or disbelieve, any witness

⁸ “All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.” RCW 4.44.080.

⁹ “All questions of fact other than those mentioned in RCW 4.44.080, shall be decided by the jury, and all evidence thereon addressed to them.” RCW 4.44.090.

whose testimony it is called upon to consider.” *Rettinger v. Bresnahan*, 42 Wn.2d 631, 633, 257 P.2d 633 (1953).

The trial court invaded the province of the jury here, and the court’s rulings materially affected the trial’s outcome.

C. CONCLUSION

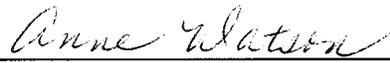
The judgment on the verdict should be reversed, and this matter should be remanded for a new trial.

DATED this 11th day of July, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on July 11, 2007, I sent a true and correct copy of the Reply

Brief of Appellant by first class mail, postage prepaid, to:

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