

NO. 36019-5-II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 2

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MARILYN NIEBAUER  
Appellant

v.

SWAIN'S GENERAL STORE  
Respondent

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APPEAL FROM THE SUPERIOR COURT  
FOR JEFFERSON COUNTY

HONORABLE CRADDOCK VERSER

---

BRIEF OF RESPONDENT SWAIN'S GENERAL STORE

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Kimberly J. Cox  
WSBA No. 19955  
Attorney for Respondent Swain's General Store

Law Offices of  
Deborah A. Severson  
3315 South 23<sup>rd</sup> Street, Suite 310  
Tacoma, WA 98405  
Telephone: (253) 272-1001

STATE OF WASHINGTON  
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## **I. COUNTER STATEMENT OF THE ISSUE**

**Did the trial court correctly deny the plaintiff's request for a jury instruction directing the jury to draw a negative inference from the absence of an incident report normally kept by Swain's General Store?**

## **II. COUNTER STATEMENT OF THE CASE**

### **A. Material Facts**

At trial, the plaintiff requested the trial court provide one of two proposed instructions. *RP 298-303*. Apparently, both proposed instructions asked the jury to draw a negative inference from the absence of an internal incident report normally kept by Swain's General Store ("Swains"). The proposed instructions were denied by the trial court. *RP 298-303*. The actual proposed instructions are, however, missing and unavailable for verbatim review. *See Appellant's Brief*. At no time did the plaintiff make a motion to compel discovery in regards to the missing incident report.

**B. Procedural History**

Swain's accepts, for purposes of this appeal only, the procedural history of the case outlined in the plaintiff's appellate brief with the following additions: the plaintiff allegedly fell inside the defendant business Swains General Store in Port Townsend, Washington, on February 12, 2003; the plaintiff did not file her complaint until June 14, 2005; and there is no evidence the plaintiff ever held a CR 26(i) discovery conference with the defendant or that plaintiff ever made any discovery motions to the court relating to her proposed jury instructions.. *RP 142; CP 180-191.*

**III. ARGUMENT**

**A. The Trial Court's Denial of Plaintiff's Proposed Spoliation**

**Jury Instruction(s) was a Proper Exercise of Discretion**

The trial court denied plaintiff's request that the court provide one of two proposed instructions directing the jury to presume information in a missing incident report was adverse to the defendant. *RP 302-303.* This denial was a proper exercise of the trial court's discretion as the evidence indicated the report was not crucial and, more importantly, there was a satisfactory explanation for its absence.

On the issue of whether the trial court abused its discretion in failing to instruct the jury as requested by the plaintiff, it is universal that a “trial court’s decision whether to give a requested jury instruction is discretionary.” *Henderson v. Tyrrell*, 80 Wn. App. 592, 612, 910 P.2d 522 (1996) (citing *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985)). The trial court’s decision is reversible only upon evidence that the trial court abused its discretion. *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 177, 914 P.2d 102 (1996). Abuse of discretion occurs when the trial court’s “decision is manifestly unreasonable or based on untenable grounds.” *Homeworks Construction, Inc. v. Wells*, 133 Wn. App. 892, 898 138 P. 3d 654 (2006)(citing *State v. Parrett*, 86 Wn. App. 312, 319, 936, P.2d 426 (1997)). Also, “[I]nstructions are proper if, when read as a whole, they permits both parties to argue their theories of the case, are not misleading, and properly inform the jury of the law.” *Id.* “An instruction is required only if there is substantial evidence to support it.” *Id.*

Putting aside the fact that the actual proposed instructions are not part of the appellate record and, therefore, prevents a more fact-specific argument, there is no evidence in the record that the trial court abused its discretion in refusing to instruct the jury that absence of an incident report should equate to unfavorable evidence for the defendants. First, there is

no evidence that the absence of the incident report amounts to spoliation. Spoliation is “the intentional destruction of evidence.” *Henderson v. Tyrrell*, 80 Wn. App. 592, 601, 910 P.2d 522 (1996) (citing BLACK’S LAW DICTIONARY 1401 (6<sup>th</sup> ed. 1990)). The Washington State Supreme Court has firmly held that “where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.” *Pier 67, Inc. v. King County*, 89 Wn. 2d 379, 385-6, 573 P.2d 2 (1977). As such, the Washington State Supreme Court created a rebuttal presumption that missing evidence in the control of the defendant would be unfavorable to the defendant unless the party provides a “satisfactory explanation”. However, as indicated in the *Henderson* case, the Supreme Court “certainly anticipate[d] circumstances in which a party’s actions are not so serious as to require a judicial remedy.” *Henderson at 607*. The *Henderson* Court then went on to adopt two factors to be considered when deciding whether the presumption should apply: “(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.” *Henderson at 607* (citing *Sweet v. Sisters of Providence*, 895 P.2d 484, 490-1 (Alaska 1994)).

The “potential importance or relevance of the missing evidence” is determined on a case by case basis. *Id.* Additionally, the importance or relevance turns on whether the absence of the evidence “resulted in an investigative advantage for one party over the other....” *Id.* In regards to the second factor, courts “examine whether the party acted in bad faith or conscious disregard of the importance of the evidence, or whether there was some innocent explanation for the destruction.” *Henderson at 609.*

In this case, the evidence before the trial court was that an incident report created by the defendant at or near the time of the incident could not be located. *RP 59, 71.* There was no evidence in the record that the report contained information in addition to, or different than, the evidence presented by the witnesses who testified at trial and who were available to be examined and cross-examined regarding their various accounts of the claimed incident, including the location of the alleged accident as well as what the plaintiff may or may not have been wearing at the time. Furthermore, there was evidence presented at trial explaining that Swain’s General Store had split into three entities between the date of the incident and the date of the trial, resulting in some chaos with the business records. *RP 82-83, 220-221.* As such, the evidence before the trial court clearly indicated that the importance or relevance of the incident report, given the availability of the eyewitnesses to the incident during the discovery

process and at trial under oath, was negligible. Also, the evidence before the trial court clearly established an “innocent explanation” for the missing report. Finally, as the trial court noted at the time, provision of such an instruction was more likely to focus the jury inordinately on the missing report and, more importantly, the parties could still argue the meaning of the missing report to the jury without said instruction(s). *RP 302*.

Given the facts before the trial court at the time it determined not to give the plaintiff’s proposed spoliation instructions to the jury, the trial court clearly had sufficient facts and solid reason to reject said instructions. As such, there is no evidence the court abused its discretion.

**B. The Trial Court Did Not Abuse its Discretion by Refusing to Give Plaintiff’s Proposed Instruction(s) as a Discovery Sanction.**

The plaintiff appears to have two separate arguments: first that the trial court abused its discretion in refusing to instruct the jury as requested by the plaintiff and, second, the appellant argues that the trial court also abused its discretion for failing to give the requested jury instructions as a remedial discovery sanction. However, there is no evidence in the record that the plaintiff complied with CR 26(i). Failure to comply with CR 26(i) is a complete bar to discovery sanctions. *Case v. Dondom, 115 Wn. App. 199, 58 P.3d 919 (2002)*. But the plaintiff failed to raise even he issue at

the trial court level and, as such, any claim that an instruction should have been given to remedy a claimed discovery violation is not properly before this Court. *See State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993); *Van Vonno v. The Hertz Corp.*, 120 Wn.2d 416, 841 P.2d 1244 (1992); *RAP 2.5(a)*. Even if the issue were properly raised at the trial court level as a discovery violation worthy of the plaintiff's proposed sanctions, the analysis at this point returns to whether the trial court abused its inherent discretion which, for all the reasons discussed above, the trial court clearly did not. *See Associated Mortgage Investors v. G.P. Kent Construction Co.*, 15 Wn. App. 233, 229, 548 P. 2d 558 (1996).

#### **IV. ASSIGNMENT OF ERROR**

**The Trial Court Abused It's Discretion In Failing to Grant the Defendant's Motion for Summary Judgment Dismissal on The Grounds That There Was No Evidence The Defendant Had Either Actual or Constructive Notice of an Alleged Unsafe Condition**

#### **V. STATEMENT OF THE CASE**

##### **A. Material Facts**

The plaintiff alleges she slipped and fell on some small plastic hangers lying on the floor of Swain's General Store on February 13, 2003. *RP 143-144*. There is no evidence that, prior to the alleged incident, any store personnel knew, or had any reason to know, of the possible danger posed by the small plastic hangers.

**B. Procedural History.**

Swain's General Store argued for a summary judgment dismissal on December 1, 2006. *CP 446-453*. The basis for the defense motion for summary judgment dismissal was the absence of evidence that the defendant knew, whether via actual or constructive knowledge, of the unsafe condition (plastic hangers lying in the aisle) alleged by the plaintiff. *CP 180-191*. The trial court denied the motion. The defendant filed a Motion for Reconsideration, which was denied on December 26, 2006. The case went to trial and, on January 12, 2007, the jury returned a verdict for the defendant.

**VI. ARGUMENT**

**A. The Trial Court Erred When it Failed to Grant the Defendant's Motion for Summary Judgment Dismissal on the**

**Issue of whether or not there was Sufficient Evidence of Notice or Constructive Notice of the Claimed Hazardous Condition inside the Store when there was no Evidence Supporting Plaintiff's Claim there was Notice or Constructive Notice.**

“An appellate court reviews a . . . summary judgment order de novo and engages in the same inquiry as the trial court.” *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn. 2d 654, 692, 15 P.3d 115 (2000).

Summary judgment dismissal is proper if the evidence, viewed in a light most favorable to the nonmoving party, shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim, *Las v. Yellow Front Stores*, 66 Wn.App. 196, 198, 831 P.2d 744 (1992). The moving party need only demonstrate that there is no genuine dispute as to any material fact. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). An issue of material fact is one upon which the outcome of the litigation depends. *Atherton Condo Ass'n v. Blume Dev.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Where the defendant is the moving party and has shown the absence of material fact, the plaintiff must come forward with competent evidence showing the existence of a genuine issue

of material fact for trial. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The plaintiff may not rest on mere allegations in her pleadings. *CR 56(e)* Facts that set forth no more than the declarant's understanding of a fact without also including the specific facts upon which the understanding is based are inadmissible. *Marks v. Benson*, 62 Wn.App. 178, 813 P.2d 180 (1991). Conclusory allegations, which are not founded on facts, cannot be considered in a summary judgment motion. *Grimwood v. Puget Sound*, 110 Wn.2d 355, 753 P.2d 517 (1988); *Orion Corporation v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985). The motion should be granted if, from all the evidence, a reasonable person could reach only one conclusion. *Young*, 112 Wn.2d at 216.

For purposes of this appeal, the Defendant concedes that Plaintiff was a public/business invitee at the time of the alleged incident. However, there is no evidence in the record establishing who placed or left the items (little plastic hangers) the plaintiff alleges were the cause of her slip and fall on the floor of Swains, or when they were placed there.

It is a well established principle that for a possessor of land to be liable to a business invitee for an unsafe condition of the land, the possessor must have actual or constructive notice of the unsafe condition, *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P. 2d 1014 (1994); *Frederickson v. Bertolino's Tacoma, Inc.*, 131 Wn.App. 183, 189, 127 P.

3d 5 (2005). In *Ingersoll v. DeBartolo, Inc.*, the plaintiff slipped and fell in a mall while walking past a shoe store. Prior to the fall, she did not notice anything on the floor. Plaintiff claimed she fell on melted ice cream. There was no evidence of a prior report of any spill or debris at the location where plaintiff fell. The trial court granted summary judgment to defendants on the grounds there was no proof of actual or constructive notice of the unsafe condition. The Court of Appeals affirmed the trial court's ruling.

In the present case, there is no evidence of actual notice to Swain's and, as such, the inquiry turns to constructive notice. Constructive notice arises where the condition has existed for such a time as would have afforded the proprietor sufficient opportunity in the exercise of ordinary care, to have made a proper inspection of the premise and to have removed the danger. *Ingersoll v. DeBartolo, Inc.*, 123 Wn. 2d 649, 652, 869 P.2d 1014 (1994). The plaintiff in a slip and fall case has traditionally had the burden of establishing that the proprietor's negligence was a cause in fact of his or her injury by showing that the proprietor had constructive notice of the specific dangerous condition. *Wiltse v. Albertsons Incorporated*, 116 Wn.2d 452,458, 805 P.2d 793 (1991). It must be shown that the condition either has been brought to the attention of the proprietor or that it was existed for such time as would have afforded him sufficient

opportunity, in the exercise of ordinary care, to have made proper inspection of the premises and to have removed the danger. *Wiltse, infra*. In *Wiltse v. Albertson's Incorporated*, the plaintiff, a customer, allegedly slipped in a grocery store on some water on the floor that came from a hole in the store roof. There was no evidence that any store employee was aware of the water on the floor prior to the customer's accident. The trial court instructed the jury that the customer had the burden of proving actual or constructive notice of the water existing at the store. The Supreme Court upheld the lower court, holding that the jury instruction given (WPI 120.06.02) was proper.

To avoid summary judgment, a plaintiff must produce sufficient evidence to create a genuine issue that (1) there existed an unreasonable risk of harm to Swains invitees, (2) the danger was brought to the attention of the store manager/employees and (3) sufficient time or opportunity existed for the store manager/employees to remedy the unsafe condition. *Las v. Yellow Front Stores, Inc.*, 66 Wn.App. 196, 831 P.2d 744 (1992). In the *Las* case, the plaintiff was injured when a stack of frying pans fell on her foot. The trial court granted defendant's motion for summary judgment. The appellate court upheld the ruling, finding that the plaintiff had failed to present evidence to show that the pans were unbalanced or

improperly stacked, and failed to produce evidence as to the defendant's practice as to stacking pans.

In this case there is absolutely no evidence that Swain's had any notice of the alleged condition, either actual or constructive. There is no evidence that the condition existed for such a length of time that Swain's knew or should have had knowledge of the condition.

Furthermore, there is no evidence that the nature of the business or method of operation made the alleged condition reasonably foreseeable. *See Pimentel v. Roundup Company, 100 Wn.2d 39, 666 P.2d 888 (1983)*. When the operating procedures of a store are such that unreasonably dangerous conditions are continuous or reasonably foreseeable, there is no need to prove actual or constructive notice of such conditions in order to establish liability for them. *Id.* In *Pimentel*, plaintiff was injured when a paint can fell on her foot while she was shopping at a self-service style store. The trial court instructed the jury that it must find actual or constructive notice of the condition and the jury returned a verdict for the defendant. Plaintiff appealed and the appellate court overruled the trial court. The Supreme Court found the issue to be whether the defendant's method of doing business established notice of risk of harm to the defendant's customers. *Pimentel v. Roundup Company, 100 Wn.2d at 45*. The Court ruled that "This does not change the general rule governing

liability for failure to maintain premises in a reasonably safe condition: the unsafe condition must either be caused by the proprietor or his employees, or the proprietor must have actual or constructive notice of the unsafe condition. Such notice need not be shown, however, when the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable. This exception merely eliminates the need for establishing notice and does not shift the burden to Swain's to disprove negligence. *The plaintiff must still prove that defendant failed to take reasonable care to prevent the injury."* *Id* at 49 (*Emphasis added*).

Subsequent cases have limited the application of *Pimentel* to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation. *Wiltse v. Albertson's Incorporated*, 116 *Wn.2d* 452, 461, 805 *P.2d* 793 (1991)(*Pimentel* does not create a "per se" rule); *Las v. Yellow Front Stores, Inc.*, 66 *Wn.App.* 196, 831 *P.2d* 744 (1992). Even if the injury does occur in the self-service department of a store, there must be a relationship between the hazardous condition and the self service mode of operation for *Pimentel* to apply. *Ingersoll v. DeBartolo, Inc.*, 123 *Wn.2d* 649, 653, 869 *P.2d* 1014 (1994). "Self-service has become the norm throughout many stores. However the *Pimentel* rule does not apply to the entire area of the store in which

customers serve themselves. Rather, it applies if the unsafe condition causing the injury is ‘continuous or foreseeably inherent in the nature of the business or mode of operation’.” *Ingersoll at 653*.

Recently, in *Frederickson v. Bertolino's Tacoma, Inc.*, 131 Wn.App. 183, 127 P.3d 5 (2005), Division Two of the Court of Appeals discussed the *Pimentel* exception. In *Frederickson* plaintiff filed suit against a coffee shop after he was injured when a chair he sat in broke. The trial court granted defendant’s motion for summary judgment because plaintiff presented no evidence that defendant had actual or constructive notice the chair was defective. The Court of Appeals affirmed the trial court ruling, stating that plaintiff failed to present evidence of actual or constructive notice of any problem with the chair, that plaintiff failed to show that the business was “self service” and failed to present evidence that the danger of breaking chairs was continuous or foreseeably inherent in the nature of plaintiff’s business.

Respondent submits to the Court that actual or constructive notice of the alleged dangerous condition is similarly absent in the present case. There is no evidence to prove that Swain’s had actual or constructive notice of the condition of the premises as alleged by the plaintiff and there is no evidence that the nature of Swain’s business operation made the condition foreseeable, or that Swain’s failed to take reasonable steps to

prevent the condition. As such, Swain's respectfully submits that, in the absence of such evidence, it was entitled to summary judgment dismissal and it was error for the trial court to deny Swain's motion for summary judgment dismissal.

#### **VII. FEES AND COSTS**

Pursuant to RAP 18.1, Swain's General Store respectfully requests an award of attorney's fees incurred on appeal.

#### **VIII. CONCLUSION**

The trial court did not abuse its discretion in refusing to instruct the jury that the absence of an incident report was spoliation meriting a presumption that the contents of the report would be adverse to Swain's. The trial court did not abuse its discretion because the possible importance of the report was minimized by the presence of the witnesses who testified at trial and were subject to examination about their observations of the alleged incident and were also subject to examination as to the reasons for the absence of the report—that it was apparently lost when Swain's split into three entities after the alleged incident and well before trial.

Furthermore, any argument by the plaintiff that provision of their requested instruction(s) (which are, ironically, missing as well) was a required remedy for a discovery violation by Swain's is not properly before this Court as it was not properly raised, argued or decided by the trial court. Finally, the trial court did err in failing to grant Swain's motion for summary judgment dismissal when there was no genuine issue of material fact regarding the fact that no one at Swain's had no actual or constructive notice of the condition the plaintiff alleges caused her slip and fall inside the store. As such, Swain's General Store respectfully requests the Court deny the plaintiff's appeal and grant Swain's cross appeal.

RESPECTFULLY SUBMITTED THIS 17<sup>th</sup> day of August, 2007.

LAW OFFICES

By:

 WSBA # 35603  
Kimberly J. Cox, WSBA No. 19955  
Attorney for Swain's General Store

NO. 36019-5-II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 2

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MARILYN NIEBAUER  
v.  
SWAIN'S GENERAL STORE

07 AUG 17 PM 1:17  
STATE OF WASHINGTON  
BY [Signature]  
COURT OF APPEALS  
DIVISION 2

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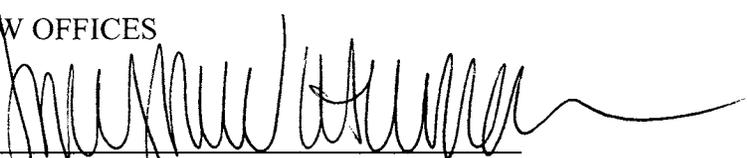
CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the laws of the state of Washington that on this date, the undersigned has caused the foregoing documents to be served upon the counsel of record in the above-captioned lawsuit via the method of service noted below.

DATED this 17<sup>th</sup> day of August, 2007.

LAW OFFICES

By:

  
\_\_\_\_\_  
Jody M. Waterman, Litigation Assistant

**DOCUMENTS SERVED:** Respondent's Brief

**COUNSEL OF RECORD:** J. Michael Koch  
J. Michael Koch & Associates  
10049 Kitsap Mall Boulevard, Suite 201  
Silverdale, WA 98383-0368  
Counsel for Marilyn Niebauer  
Service via ABC Legal Messenger