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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON BY 
DEPUTY

H. CRAIG SCHWEIKART, individually and as Personal
Representative of the ESTATE OF HELENA M. SCHWEIKART, and
KIRK SCHWEIKART, individually and as Personal Representative of the
ESTATE OF H. CLINE SCHWEIKART,

Appellants,

vs.

FRANCISCAN HEALTH SYSTEM-WEST, d/b/a ST. JOSEPH
MEDICAL CENTER, a Washington non-profit corporation,

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Craig and Kirk Schweikart (collectively “the Schweikarts”) brought this lawsuit in 2005 on behalf of their parents, Cline and Helena Schweikart. When Mrs. Schweikart was 83 years old, she went to visit her husband Cline after he underwent surgery at Franciscan Health System’s (“FHS”) St. Joseph’s Hospital. While approaching the elevator vestibule inside the hospital’s south pavilion, Mrs. Schweikart slipped on water and violently struck her head on the hard vinyl flooring. Very soon thereafter, she died from complications stemming from a subdural hematoma.

FHS moved for summary judgment, arguing that the Schweikarts’ lawsuit should be dismissed because they lacked evidence that FHS had actual or constructive notice of the spill. The Schweikarts responded by arguing that a jury could infer such notice because FHS spoliated crucial evidence. The trial court ultimately denied summary judgment, and FHS appealed.

In 2009, this court upheld the trial court’s denial of summary judgment because issues of material fact remained. *Schweikart v. Franciscan Health System-West*, No. 36805-6-II, 149 Wn. App. 1038 (March 31, 2009) (Not Reported). This court held that a jury could infer constructive notice if it determined FHS spoliated evidence.

After this court remanded the case, the Schweikarts were finally able to have their day in court. Given the complexity of the Schweikarts' claims and legal theories, however, the trial court had a huge task in sorting out not only facts but also the relevant law.

Most of the legal arguments focused on two areas of law: premise liability and spoliation. The premise liability arguments culminated in the trial court (1) granting FHS judgment as a matter of law after the Schweikarts rested and (2) refusing to give certain premise liability instructions. The spoliation arguments culminated in the trial court refusing to give a rebuttable presumption instruction. These two areas, premise liability law and spoliation, are the subjects of this appeal.

The Schweikarts ask this court to reverse and remand for a new trial because the trial court's decisions caused unfair prejudice. The trial court erroneously granted FHS's motion for judgment as a matter of law and erroneously refused to allow the Schweikarts to have jury instructions that supported their legal theories. The Schweikarts should be allowed the opportunity to present a case according to their cognizable legal theories, and this court should reverse and remand.

II. ASSIGNMENTS OF ERROR

Assignments of Error

- No. 1: The trial court erred in granting FHS's motion for a judgment as a matter of law.
- No. 2: The trial court erred in instructing the jury on premise liability law.
- No. 3: The trial court erred in instructing the jury on spoliation law.

Issues Pertaining to Assignments of Error

- No. 1: Did the trial court err by granting FHS's motion for a judgment as a matter of law where Restatement § 343 controls, and the Schweikarts had ample evidence that FHS knew that St. Joseph's vinyl flooring was dangerous yet failed to exercise reasonable care in keeping invitees safe? (*Assignment of Error No. 1*).
- No. 2: Did the trial court err by granting FHS's motion for a judgment as a matter of law where it was reasonably foreseeable that the vinyl flooring in St. Joseph's elevator vestibules would be wet and dangerous? (*Assignment of Error No. 1*).
- No. 3: Did the trial court err by refusing to give the Schweikarts' proposed instructions number 13 when the instruction was necessary to properly state the duty that FHS owed to invitees? (*Assignment of Error No. 2*).

- No. 4: Did the trial court err by refusing to give the Schweikarts' proposed instruction number 15 when the instruction was necessary to properly state premise liability law and to allow the Schweikarts to argue their theories? (Assignment of Error No. 2).
- No. 5: Did the trial court err in giving instruction number 16 when the jury could infer based on spoliation that FHS caused the spill? (Assignment of Error No. 2).
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- No. 7: Did the trial court err in failing to weigh facts on the record to determine whether FHS's spoliation necessitated an inference or a rebuttable presumption instruction? (Assignment of Error No. 3).
- No. 8: Did the trial court err in refusing to give a rebuttable presumption instruction when FHS spoliated essential evidence and acted in conscious disregard? (Assignment of Error No. 3).
- No. 9: Did the trial court err in refusing to give the Schweikart's proposed instruction numbers 24, 25, 27 when a rebuttable presumption instruction was necessary and bad faith is not required in spoliation?

No. 10: Did the trial court err in giving instruction numbers 15 and 17 when they misstate the law? (Assignment of Error No. 3).

III. STATEMENT OF CASE

A. Helena Schweikart slipped and fell in an elevator vestibule at St. Joseph's Hospital.

On April 28, 2005, Helena Schweikart arrived at St. Joseph's Hospital in Tacoma to visit her husband who was there for surgery. CP at 3, 92. Mrs. Schweikart was 83 years-old at the time. CP at 3, 92.

Upon reaching the elevator vestibule in St. Joseph's south pavilion, Mrs. Schweikart slipped on water or some other slippery substance. RP (Sept. 14, 2011) at 44-45. The force of the fall dislocated her right shoulder and smashed her head against the hard floor. RP (Sept. 14, 2011) at 44-45; CP at 1-8. Less than 24 hours later, Mrs. Schweikart was unresponsive with a subdural hemorrhage. CP at 1-8, 92-93. She never regained consciousness and passed away on May 3, 2005. CP at 1-8, 92-93.

B. FHS destroyed crucial evidence of Mrs. Schweikart's slip and fall.

FHS security officer Matthew Dunne responded to Mrs. Schweikart's fall. RP (Sept. 13, 2011) at 16, 32. When Mr. Dunne arrived at the scene, ER staff was already putting Mrs. Schweikart into a

wheelchair. RP (Sept. 13, 2011) at 32. Mr. Dunne proceeded to investigate, interviewing a disinterested third party eyewitness. RP (Sept. 13, 2011) at 32.

Mr. Dunne took the eyewitness's statement and began a handwritten incident report. RP (Sept. 13, 2011) at 39-40, 43-44, 90. He also took statements from Mrs. Schweikart and John Gastelum (one of the ER technicians who helped at the scene). RP (Sept. 13, 2011) at 33-34, 40, 52, 54, 59-60. Mrs. Schweikart told Mr. Dunne that she slipped on a pool of water. RP (Sept. 13, 2011) at 51.

Shortly thereafter, the Schweikarts asked for the report and the eyewitness's contact information to thank her. RP (Sept. 13, 2011) at 93, 95. Mr. Dunne promised the Schweikarts copies of the report, statements, and contact information. RP (Sept. 13, 2011) at 93, 95.

The next day, Mrs. Schweikart's statement, the eyewitness's statement, and the handwritten report had all vanished. RP (Sept. 13, 2011) at 43-45, 52. Despite pertinent information being gone, Mr. Dunne's assistant supervisor, Curtis Robinson expressly instructed him to omit the witness statement and to type a sanitized incident report from memory. RP (Sept. 13, 2011) at 45-46, 52; CP at 97. Following this directive, Mr. Dunne wrote a report that omitted key evidence about what happened in the slip and fall. RP (Sept. 13, 2011) at 17.

The Schweikarts repeatedly requested a copy of the report, but FHS continued to stall. CP at 93-95. FHS stalled until one of its agents emailed FHS security manager Mike Hill on May 1, 2005, with news that Mrs. Schweikart was in the hospital and dying. RP (Sept. 13, 2011) at 46, 68-69, 90-92, 120, 124-25, 132. The email's subject was "Heads up on the [Incident Report]." The body of the email stated:

Mike, I know that you are already aware of the situation with Grant Schweikart wanting a copy of the [Incident Report] from his mother's trip and fall. I just want to let you know that he came in asking for it today 5-1-05 at 1347. He said that it is very important that he gets it as soon as possible. He also went on to tell me that his mother had a seizure after the fall and is now in the hospital (Good Sam's) and he said she may not make it. I was not sure if you knew that part or not. He told me that he would be stopping by tomorrow to get the IR.

RP (Sept. 13, 2011) at 124-125, 132; Ex. 30D.¹ Mr. Hill did not give the Schweikarts the incident report but rather referred them to risk management, which also refused to give them the report without a lawyer. RP (Sept. 13, 2011) at 119, 122-124; CP at 95.

Eventually, FHS produced a "report" synthesized from the information that Mr. Dunne gathered. RP (Sept. 13, 2011) at 50-51; Ex. 5.² Conspicuously missing from FHS's report is: (1) the statement and

¹ The Schweikarts will supplement the record with the email from the FHS agent to Mr. Hill, which was identified as exhibit 30D at trial.

² The Schweikarts will supplement the record with a copy of the incident "report" that FHS ultimately gave, which was identified as exhibit 5 at trial.

contact information of the disinterested third party eyewitness, (2) the statements that Mrs. Schweikart made immediately after the incident, (3) the names of the two officers who Mr. Gastelum said first responded to the incident, and (4) Mr. Dunne's notes regarding the incident. RP (Sept. 13, 2011) at 51-54, 59-60, 67-68; CP at 90-116.

In addition to essential evidence vanishing, part of the Schweikart's difficulty in this lawsuit were the FHS witness inconsistencies. RP (Sept. 13, 2011) at 66-70; CP at 97-98. For example, Mr. Dunne originally claimed that he recorded the eyewitness's statement in his field notebook, but later, he claimed to have never taken the eyewitness statement because he forgot to bring his notebook to the incident scene. RP (Sept. 13, 2011) at 67-68. Despite modifying his testimony to forgetting the notebook, Mr. Dunne once again contradicted himself by agreeing that the statement existed and was jettisoned:

Q: But let's drill down more. Because you told us earlier in November of 2006 that you did write the statement down for the eyewitness bystander exactly what she said she saw, right?

A: Correct.

Q: And you filled out the complete incident report, handwritten, just like was Franciscan's policy to do, right?

A: Correct.

Q: And you're telling us that both of those items were jettisoned by somebody, and you don't know who did it, is that correct?

A: Correct.

Q: That information is what could tell us today about what happened to Helena Schweikart and why it happened, isn't that true?

A: Correct.

RP (Sept. 13, 2011) at 44-45.

Mr. Dunne had motive to write a sanitized report and to cover his tracks. In fact, FHS policy required security guards to be careful in drafting reports that exposed the hospital to liability. RP (Sept. 13, 2011) at 16, 20, 122. Particularly if someone was injured in a slip and fall, Mr. Dunne knew that FHS security director Rick Nelson and risk management would review his report. RP (Sept. 13, 2011) at 18-19. Mr. Dunne knew that accurate, signed witness statements were important for situations where a question arose about whether the slip and fall was the hospital's responsibility. RP (Sept. 13, 2011) at 15, 54. He also knew that the hospital could be liable if it had done something wrong that resulted in a slip and fall. RP (Sept. 13, 2011) at 15-16, 54. As result, Mr. Dunne was trained to anticipate how an incident report would look to others who may subsequently review it. RP (Sept. 13, 2011) at 15-16, 54.

C. St. Joseph's vinyl floors are inherently dangerous.

The Schweikarts called human factors expert Dr. Gary Sloan to provide testimony about why Mrs. Schweikart fell. Dr. Sloan studied St. Joseph's vinyl composite floors, measuring the wet and dry "coefficient-of-friction" of the floor where Mrs. Schweikart slipped. RP (Sept. 13,

2011) at 169-73. The coefficient-of-friction is a number that denotes how much force is necessary to move weight on a floor. For example, if a 10 pound weight takes 5 pounds of force to move, then the coefficient-of-friction is 0.5. RP (Sept. 13, 2011) at 169-170. When a floor is wet or contaminated with a slippery substance, a 0.5 coefficient-of-friction is considered slip-resistant. RP (Sept. 13, 2011) at 179.

To account for any variance in his analysis, Dr. Sloan measured the coefficient-of-friction on vinyl composite tiles found in two separate areas of St. Joseph's Hospital as well as on new tiles of the same type. RP (Sept. 13, 2011) at 175-76. He performed 32 total measurements. RP (Sept. 13, 2011) at 176. Dr. Sloan found that when wet, the coefficient-of-friction of the vinyl composite tile where Mrs. Schweikart slipped was less than 0.2, which means only 2 pounds of force could move a 10 pound weight. RP (Sept. 13, 2011) at 211-12. Dr. Sloan testified that a coefficient-of-friction of 0.2 "**would be equivalent to slipping on ice.**" RP (Sept. 13, 2011) at 214 (emphasis added). But if the coefficient-of-friction was 0.5 or greater, Mrs. Schweikart would not have slipped. RP (Sept. 14, 2011) at 19. Dr. Sloan opined that the floor was a dangerous surface when wet.

D. FHS knows that St. Joseph's vinyl floors are inherently dangerous.

As early as 2002, the FHS Director of Environmental Services

knew that the vinyl flooring throughout St. Joseph's was slippery when wet. RP (Sept. 13, 2011) at 203; RP (Sept. 14, 2011) at 6-7. FHS agents, including Brianna Richardson and Mr. Dunne, also knew that the vinyl flooring was dangerous when wet. RP (Sept. 13, 2011) at 13, 108 Ms. Richardson testified that she knew slips routinely occurred a couple of times a week at St. Joseph's Hospital. RP (Sept. 13, 2011) at 108. It was "common knowledge" that the floors in St. Joseph's hospital were slippery when wet. RP (Sept. 15, 2011) at 22.

In 2003, FHS had additional notice that workers were routinely slipping and falling on wet floors. Ex. 31, 32.³ A total of four employees slipped in September 2003 alone. RP (Sept. 13, 2011) at 206, 209. Three of the four slipped even though signs were present. RP (Sept. 14, 2011) at 2. Slip and falls also occurred on the wet vinyl flooring in several other months. RP (Sept. 14, 2011) at 3. In response—but still years prior to Mrs. Schweikart's fall—FHS Environmental Services' internal documents reveal that it considered safety shoes for employees, mats, and other alternative measures to decrease the number of slip and falls that were occurring. RP (Sept. 13, 2011) at 205-208. Ultimately, Environmental

³ The Schweikarts will supplement the record to include copies of the incident "report" and two internal FHS environmental services safety committee meeting minutes. At trial, the Schweikarts identified the incident "report" as exhibit 5, the 2002 safety committee report as exhibit 31, and the 2003 report as exhibit 32. The trial court did not allow the safety committee meeting reports as evidence.

Services denied requests for mats and did not take any alternative measures, such as scheduled spill patrols, to address the slippery floors. RP (Sept. 13, 2011) at 207.

E. The nature St. Joseph's business as a hospital creates an extremely high risk of spills and slips.

Risk equals the likelihood of an accident occurring and the likelihood of the consequences being severe. RP (Sept. 13, 2011) at 182, 210. Hospitals are beehives of activity, with constant movement of nurses, medics, orderlies, and doctors, who might on occasion spill things. RP (Sept. 15, 2011) at 3; RP (Sept. 13, 2011) at 13-14. Just like hospital staff might spill medically-related liquids that they are transporting, visitors might also spill beverages that they consume.⁴ Naturally, liquids have a high probability of being spilt in elevator vestibules because people of all ages, genders, and disabilities naturally congregate there.⁵ RP (Sept. 13, 2011) at 183.

In addition to the likelihood of liquids being spilt, hospitals serve a population who is frequently elderly, frequently injured, frequently ill, and who are generally in danger of slipping and falling. RP (Sept. 13, 2011) at 14, 183. A significant portion of the population visiting hospitals are at

⁴ In fact, visitors could purchase such beverages at a deli only 400 feet from the elevator vestibule where Mrs. Schweikart slipped. RP (Sept. 15, 2011) at 35, 37.

⁵ Indeed, Mrs. Schweikart slipped in an elevator vestibule serving the entire south pavilion, which contains a number of floors and serves a lot of patients. RP (Sept. 15, 2011) at 14, 21.

risk of falls, which is the second most common cause of accidental death and injury. RP (Sept. 13, 2011) at 200.

F. FHS has taken no steps to improve floor safety.

FHS has never evaluated the risk of the floor and does not have a set procedure for monitoring potential spills. RP (Sept. 13, 2011) at 200, 202. Just as FHS does not have a schedule to inspect floors, it never tests the floors and disregards when the floors should be treated or refinished. RP (Sept. 13, 2011) at 202, 204. FHS does not use slip resistant tile in areas that have a high density of traffic, such as elevator vestibules. Nor has FHS used mats or floor finishes to make these areas more slip-resistant. RP (Sept. 13, 2011) at 204; RP (Sept. 15, 2011) at 19. In effect, FHS has done nothing to mitigate the potential problem of foreseeable spills and the associated danger. RP (Sept. 13, 2011) at 203.

IV. SUMMARY OF ARGUMENT

FHS's agents spoliated essential evidence collected at the scene of Mrs. Schweikart's fall, which the Schweikarts believe contained, or at the very least would have led to, evidence of actual or constructive notice of a slippery liquid on the floor. As a result, the Schweikarts continued under two theories: (1) FHS spoliated evidence to bury facts that FHS had actual or constructive notice of the spill, and (2) FHS would have discovered or

prevented the water spill if it had exercised reasonable care.

The trial court first erred when it granted FHS's motion for judgment as a matter of law. Granting the motion was error because longstanding Washington law allowed the Schweikarts to proceed under the theory that FHS would have discovered or prevented the water spill if it exercised reasonable care. Alternatively, the Schweikarts were able to proceed in the absence of actual or constructive notice where the water being on the floor and causing the dangerous situation was reasonably foreseeable. This erroneous understanding of the law also caused the trial court to reject two crucial premise liability instructions, and incorrectly give others.

The trial court next erred by instructing the jury on spoliation. The Schweikarts presented ample evidence that (1) the spoliated evidence was essential to the Schweikarts' case and (2) FHS acted in bad faith and conscious disregard for the evidence. Based on the evidence, the law required the trial court to give the Schweikarts a rebuttable presumption, whereby FHS would have the initial burden to show that the spoliated evidence did not contain evidence of actual or constructive notice. Ultimately, the spoliation instruction that the trial court gave misstated the law.

Based on the trial court's errors, the Schweikarts were prejudiced

from presenting case theories that are legally cognizable under Washington law. Therefore, the Schweikarts suffered irreparable prejudice and ask this court to reverse and remand for a new trial.

V. ARGUMENT

A. The trial court erred by granting FHS's motion for judgment as a matter of law.

1. Standard of Review

This court reviews a motion for judgment as a matter of law de novo, applying the same standard as the trial court. *Davis v. Microsoft Corp.*, 149, 530-31, 70 P.3d 126 (2003). “Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists to sustain a verdict for the nonmoving party.” *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Corey v. Pierce County*, 154 Wn. App. 752, 761, 225 P.3d 367 (2010). The trial court “must draw all favorable inferences that may be reasonably evinced in favor of the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 948 P.2d 816 (1997).

2. A jury must decide whether FHS would have discovered or prevented the water spill if it had exercised reasonable care.

FHS's position in this lawsuit has been—and presumably will be on appeal—that the Schweikarts' reasonable care argument is not cognizable under Washington law. FHS is incorrect and misreads important caselaw. Under the controlling decision, *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996), a jury must decide whether a landowner exercised reasonable care where it failed to discover a dangerous condition that resulted in an invitee's death or serious injury. *Iwai*, 129 Wn.2d at 103 (Alexander, concurring) (citing Restatement § 343 (1965)). The trial court here erroneously granted FHS a directed verdict on the issue, removing a vital question from the jury.

“The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee.” *Iwai*, 129 Wn.2d at 90-91. The parties do not contest that Helena Schweikart was a business invitee. RP (Sept. 21, 2011) at 11.

“The duty owed to an invitee is that of reasonable care for the invitee's personal safety. The land possessor must exercise reasonable care with respect to conditions on the premises which pose an unreasonable risk of harm. This includes a duty to ascertain, as well as warn of, dangerous conditions.” *Johnson v. State*, 77 Wn. App. 934, 941,

894 P.2d 1366 (1995).

Our Supreme Court has adopted Restatement (Second) of Torts § 343 (1965) to define a landowner's duty to invitees, *Iwai*, 129 Wn.2d at 93-94:

A possessor of land is subject to liability for physical harm caused to his [or her] invitees by a condition on the land if, but only 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.

(Emphasis added). “Reasonable care” requires the landowner “to inspect for dangerous conditions, ‘followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee’s] protection under the circumstances.’” *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (quoting Restatement (Second) of Torts § 343 cmt. b)). In Washington, courts have interpreted knowledge as requiring evidence that the landowner had actual or constructive notice of the unsafe condition. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994).

In *Iwai*, the plaintiff slipped and fell on snow or ice covering a sloped portion of the defendant's parking lot. *Iwai*, 129 Wn.2d at 87. The issue was whether the plaintiff could proceed to a jury despite not having sufficient evidence of actual or constructive notice of the temporary dangerous condition. The lead opinion and Justice Alexander's concurrence both agreed that Restatement § 343 controlled any outcome and that the jury must decide the issue; they differed only whether to examine § 343's knowledge or reasonable care prong. *Iwai*, 129 Wn.2d at 101-03.

The lead opinion reasoned that the plaintiff had a right to submit the question to a jury because the dangerous condition was foreseeable. Not only did the defendant have "general knowledge of the situation," it also "knew the inclined section of the parking lot became a treacherous slippery slope during the winter months when covered with snow or ice." *Iwai*, 129 Wn.2d at 101.

Justice Alexander rejected the lead opinion's reasoning because he felt it expanded the "self-service" exception to the notice requirement, which would create confusion in the law. *Iwai*, 129 Wn.2d at 103. Instead, Justice Alexander held that the plaintiff raised factual questions for the jury to decide about whether the defendant exercised reasonable care in keeping the parking lot free from dangerous snow and ice. *Iwai*,

129 Wn.2d at 103.

“[W]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.” *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999). In *Iwai*, the narrowest ground holds that a plaintiff can raise questions about whether a defendant exercised reasonable care in preventing a dangerous condition. *Iwai*, 129 Wn.2d at 103 (citing Restatement § 343 (1965)). Indeed, § 343 states that a landowner is liable to business invitees if he “knows or by the exercise of reasonable care would discover the condition.” Under *Iwai*, a jury must decide whether a defendant failed to exercise reasonable care when the plaintiff presents evidence that the defendant knew about facts giving rise to a dangerous condition. *Iwai*, 129 Wn.2d at 103

Here, the Schweikarts presented more than sufficient evidence that FHS knew or should have known that its floors were inherently dangerous. They presented evidence that spills in the hospital were likely, that areas such as elevator vestibules were highly trafficked, that those using the elevators were likely infirm or otherwise at a high risk of slipping, that the vinyl floor was as slippery as ice when wet, that FHS knew the floors were very slippery, and that FHS failed to take any corrective measures. Despite this knowledge, FHS took no effort to prevent slips in highly

trafficked areas such as elevator vestibules. Mats were considered and rejected as being unsafe but other measures were either not considered or rejected without good reason. FHS refused to use vinyl tile with slip resistant coatings in elevator vestibules and refused to regularly dispatch surveillance teams to look for spills.

Based on this evidence, a jury, not the trial court, should have decided whether the defendant acted reasonably when it failed to take any measure to ameliorate, prevent, discover, or otherwise manage spills in the hospital's highly trafficked areas. If FHS acted reasonably by taking any precautionary measure, it would have discovered the slippery substance that caused Mrs. Schweikart's death. By granting FHS a directed verdict on the issue, the trial court took improperly stripped vital questions from the jury.

3. Alternatively, a jury must decide whether water being on the floor and causing the dangerous situation was reasonably foreseeable.

As explained above, the general rule is that a landowner can be liable for a dangerous condition if he has actual or constructive notice of the condition. The exception is that a plaintiff need not present such evidence where the defendant should have foreseen the slippery substance. *Mucsi v. Graoch Assocs. Ltd. Partnership No. 12*, 144 Wn.2d 847, 863, 31 P.3d 684 (2001); *Iwai*, 129 Wn.2d at 100; *Ingersoll*, 123 Wn.2d at 652;

Wiltse v. Albertson's Inc., 116 Wn.2d 452, 461, 805 P.2d 793 (1991); *Pimentel v. Roundup Co.*, 100 Wn. 2d 39, 49, 666 P.2d 888 (1983). Here, the trial court erred in granting FHS a directed verdict because the Schweikarts presented sufficient evidence for the jury to decide whether the slippery substance was reasonably foreseeable.

Our Supreme Court first recognized the exception to the general notice rule in *Pimentel*. There, the plaintiff stopped at a magazine rack in Fred Meyer to peruse when a paint can fell on her foot. *Pimentel*, 100 Wn.2d at 40-41. The trial court instructed the jury that it must find actual or constructive notice of the dangerous condition to find the defendant liable. *Pimentel*, 100 Wn.2d at 42. On appeal, the issue was whether “defendant’s method of doing business establishes notice of risk of harm to defendant’s customers.” *Pimentel*, 100 Wn.2d at 45. The *Pimentel* Court turned to other jurisdictions and adopted the rule that actual or constructive notice “need not be shown . . . 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.” *Pimentel*, 100 Wn.2d at 49. Based on this rule, *Pimentel* held that the trial court erred in failing to instruct the jury that it could return a plaintiff verdict where the existence of unsafe conditions was reasonably foreseeable. *Pimentel*, 100 Wn.2d at 50.

After *Pimentel*, opinions often bundled the foreseeability aspect of the exception with discussions about whether store was “self-service.” See, e.g., *Wiltse*, 116 Wn.2d at 454; *Arment v. Kmart Corp*, 79 Wn. App. 694, 698, 902 P.2d 1254 (1995); *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 896 P.2d 750 (1995); *Coleman v. Ernst Home Center, Inc.*, 70 Wn. App. 213, 217-18, 853 P.2d 473 (1993); *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 199, 831 P.2d 744 (1992). However, the controlling authority never made “self-service” a prerequisite to the exception.

As the lead opinion in *Iwai* recognized, the so-called *Pimentel* exception is not limited to “self-service” areas, but rather, the exception to the general notice rule has always been grounded in foreseeability. *Iwai*, 129 Wn.2d at 99-100. “[I]f a specific unsafe condition is ‘foreseeably inherent in the nature of the business or mode of operation,’ plaintiffs need not prove notice for liability to be imposed.” *Iwai*, 129 Wn.2d at 98 (quoting *Wiltse*, 116 Wn.2d at 461). Washington law does not arbitrarily shackle the so-called *Pimentel* exception to whether the area was “self-service” but instead focuses on whether the condition was “reasonably foreseeable.” *Mucsi*, 144 Wn.2d at 863; *Iwai*, 129 Wn.2d at 99-100; *Ingersoll*, 123 Wn.2d at 654; *Wiltse*, 116 Wn.2d at 461; *Pimentel*, 100 Wn.2d at 49-50.

The Pimentel exception simply “arose in the context of customer injuries in self-service stores” and is not confined to self-service stores. *Iwai*, 129 Wn.2d at 98 (citing *Pimentel*, 100 Wn.2d 39) (emphasis added). The distinction is important and is something that our Supreme Court has recognized on several occasions.

For example, in *Wiltse*, the court held that if a dangerous condition is shown to be ongoing or reasonably foreseeable, “[t]he plaintiff can establish liability by showing that the operator of the premises had failed to conduct periodic inspections with the frequency required by the foreseeability of risk.” *Wiltse*, 116 Wn.2d at 461, 805 P.2d 793 (citing *Pimentel*, 100 Wn.2d at 49). Similarly, in *Mucsi*, the court held that a landowner owes an invitee duty with respect to conditions on land when there is “evidence of actual or constructive notice or foreseeability.” *Mucsi*, 144 Wn.2d at 863; *see also Sundquist v. BRE Properties, Inc.*, 2012 WL 750537 (W. Dist. Ct. 2012) (because *Mucsi* held that “‘actual or constructive notice or *foreseeability*’ of the unsafe condition will suffice to support a landowner negligence claim . . . this Court believes that, if confronted with the issue in the future, the Washington Supreme Court would most likely affirm Iwai’s liberal treatment of the notice requirement with respect to landowner negligence claims.”) (emphasis added).

Even the *Pimentel* Court held that actual or constructive notice is

not necessary “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.” *Pimentel*, 100 Wn.2d at 49. “The reasonably foreseeable exception to the notice requirement should be applied to any situation, whether or not the mode of business involves self-service, where ‘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.’” *Iwai*, 129 Wn.2d at 100 (quoting *Ingersoll*, 123 Wn.2d at 654). Thus, although the *Pimentel* exception arose in the “self-service” context, the exception is by no means limited to “self-service” areas. The question is instead whether the unsafe condition is foreseeably inherent given the nature of the business or mode of operation. *See also Ingersoll*, 123 Wn.2d at 654 (the question is whether “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.”).

When the exception to the general notice rule applies (as opposed to the reasonable care component of the Restatement, discussed *supra*), the inquiry must necessarily focus on whether the dangerous condition was foreseeable. *Mucsi*, 144 Wn.2d at 863; *Wiltse*, 116 Wn.2d at 461; *Pimentel*, 100 Wn.2d at 49. *Iwai*’s lead opinion demonstrates how to

apply the foreseeability analysis. There, the court found that the exception applied because the defendant had “general knowledge of the situation” and “knew the inclined section of the parking lot became a treacherous slippery slope during the winter months when covered with snow or ice.” *Iwai*, 129 Wn.2d at 101.

Like the plaintiffs in *Iwai*, the Schweikarts presented sufficient evidence to show that FHS had general knowledge of the dangerous floors and knew that the floor was slippery when wet. As early as 2002, the director of environmental services knew that the vinyl flooring throughout St. Joseph’s was slippery when wet. RP (Sept. 13, 2011) at 203; RP (Sept. 14, 2011) at 6-7. Four workers had slipped in September 2002 alone. Signs were present at three of the incidents, which demonstrates (1) that the floors are so slick that people slip while being cautious and (2) that the signs are insufficient to warn of the huge danger. In response to these falls, FHS environmental services considered safety measures but ultimately denied requests and refused to implement policies to better monitor slippery floors.

FHS agents also knew that the floor was slippery when wet and that slips routinely occurred during the week. It was “common knowledge” that the floors in St. Joseph’s hospital were slippery when wet. RP (Sept. 15, 2011) at 22.

In addition to FHS having actual knowledge of the vinyl floors' inherent danger, FHS should have foreseen Mrs. Schweikart's fall based on the general nature of hospitals. Hospitals are beehives of activity, with constant movement of nurses, medics, orderlies, and doctors, who might on occasion spill things. Visitors also frequently circulate the hospital. The hospital staff might spill medically-related liquids that they are transporting or spill liquids that they consume, such as liquid purchased at the cafeteria. Elevator vestibules are natural areas where these liquids could be spilled because they are frequently trafficked and because people of all ages, genders, and disabilities naturally congregate there.

Furthermore, compared to other businesses, hospitals serve a population who is disproportionately elderly, injured, or ill. This population is less able to protect themselves against slipping and falling if something is on the floor. A significant portion of the population visiting hospitals are at risk of falls, which is the second most common cause of accidental death and injury.

Based on this evidence, FHS undoubtedly had general knowledge of the dangerous floors and knew that the floor was slippery when wet. The dangerous condition was foreseeable, and the trial court erred in granting FHS judgment as a matter of law on the issue.

B. The trial court failed to properly instruct the jury.

1. Standard of Review

Jury instructions are sufficient if ‘they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.’” *Cox v. Spangler*, 141 Wn.2d 431, 443, 5 P.3d 1265 (2000) (quoting *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995)). “On appeal, jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party.” *Cox*, 141 Wn.2d at 443. “An error is prejudicial if it affects the outcome of the trial.” *Afinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010). A trial court’s decision to give a particular instruction is a matter that appellate courts review for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

Here, the trial court did not adequately instruct the jury that FHS could be found liable without knowledge if it failed to exercise reasonable care with regard to the vinyl floors. The court next erred by failing to weigh facts on the record to determine whether FHS’s spoliation necessitated a rebuttable presumption instruction. In the same vein, the trial court erred by failing to give a rebuttable presumption instruction, effectively disregarding the severity of the spoliation that severely

prejudiced the Schweikarts at trial. Finally, the trial court erred in misstating the law in the spoliation instruction it gave.

2. The trial court committed reversible error in erroneously instructing the jury on premise liability law.

- a) *The trial court failed to instruct the jury that FHS could be found liable without knowledge if did not exercise reasonable care with regard to the vinyl floors.*

The trial court first erred by refusing to give two crucial premise liability instructions. CP at 264, 266 (Nos. 13, 15). Omitting these instructions significantly prejudiced the Schweikarts' ability to prevail under legally cognizable theories. The first was the Schweikarts' proposed instruction number 13, taken directly from WPI 120.06's "Duty to Business or Public Invitee—Activities or Condition of Premises":

An owner of premises owes to a business invitee a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use.

CP at 264. The second was the Schweikarts' proposed instruction number 15, taken directly from WPI 120.07's "Liability to Business or Public Invitee—Condition of Premises":

An owner of premises is liable for any physical injuries to its business invitees caused by a condition on the premises if the owner:

- (a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves

an unreasonable risk of harm to such business invitees;
(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 ordinary care to protect them against the danger.

CP at 266. By omitting these two instructions, the trial court prevented the Schweikarts from arguing their theories. The instructions that were ultimately given also mislead the jury by giving them an incomplete view of the law.⁶

FHS's position was that special instruction WPI 120.06.02 replaced WPI 120.06 and WPI 120.07. RP (Sept. 21, 2011) at 12. Rather than discussing whether the latter were proper, the trial court focused on whether the following underlined portion of WPI 120.06.02 applied: "An owner of premises has a duty to correct a temporary unsafe condition of the premises that was not created by the owner, and that was not caused by the negligence on the part of the owner." (Emphasis added); RP (Sept. 21, 2011) at 12-18. The debate was whether this underlined portion was proper where a jury could infer, based on spoliation, that FHS had actually caused the water on the floor. After hearing arguments, the trial court stated, without explanation, "I'm satisfied that the proper instruction to give is the one that [FHS] is asking for, and not the 120.07 or the standard

⁶ The Schweikarts' formally objected to the trial court's refusal to include these instructions. CP (Sept. 22, 2011) at 69-70.

120.06, so that's the one I'm going to give." RP (Sept. 21, 2011) at 23-24.

Nothing in Washington law suggests that WPI 120.06.02 displaces WPI 120.06 and WPI 120.07. To the contrary, WPI 120.06 and WPI 120.07 were entirely necessary under the facts of this case. The trial court's decision to omit WPI 120.06 and WPI 120.07 foreclosed the Schweikarts from recovering if the jury found that FHS failed to exercise reasonable care with regard to the vinyl floors. By so doing, the trial court committed reversible error by removing a crucial and legally cognizable theory that the Schweikarts had been advancing throughout trial. *Huston v. First Church of God, of Vancouver*, 46 Wn. App. 740, 732 P.2d 173 (1987); *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 624 P.2d 215 (1981).

WPI 120.06 simply describes the general duty that an owner of premises owes to invitees—exercise ordinary care to maintain areas that the invitee might use or be expected to use. Without WPI 120.06, the jury received an incomplete view of Washington's premises liability law and the duty owed to business invitees. FHS did not dispute that Mrs. Schweikart was a business invitee; thus, the trial court should have given WPI 120.06. RP (Sept. 21, 2011) at 11.

More egregious and concerning than omitting WPI 120.06 was the trial court's decision to omit WPI 120.07. WPI 120.07 is a direct application of Restatement § 343 (1965), which for years has been the law

in Washington. *Iwai*, 129 Wn.2d at 93 (citing *Ford v. Red Lion Inns*, 67 Wn. App. 766, 840 P.2d 198 (1992)); *Leek v. Tacoma Baseball Club, Inc.*, 38 Wn.2d 362, 365-66, 229 P.2d 329 (1951); *Huston*, 46 Wn. App. at 744-745; *Pearce*, 28 Wn. App. at 478-79. The basic tenet of premise liability is that duty of care is predicated upon knowledge and reasonable care. Interestingly, both *Huston* and *Pearce* were cases in which the defendant successfully argued that the trial court erred in not giving an instruction reflecting the law that WPI 120.07 now encapsulates. Here, without WPI 120.07, the jury was not properly instructed that it could return a plaintiff's verdict if it found FHS would have discovered the dangerous spill by exercising reasonable care. "[T]he failure to give the instruction precluded [the plaintiffs] from meaningfully presenting [their] case and from arguing [their] theories . . . to the jury and consequently of a fair trial." *Pearce*, 28 Wn. App. at 478.

b) *Alternatively, the dangerous conditions were reasonably foreseeable, and the trial court erred in instructing that actual or constructive notice was necessary.*

When the dangerous conditions are reasonably foreseeable, actual or constructive notice instructions are not necessary. *Pimentel*, 100 Wn.2d 39. Therefore, if this court relies on the Pimentel exception to reverse and remand, holding that the spills were foreseeable, then the trial court would

have also erred in giving instruction number 16 (based on WPI 120.06.02) and instruction number 17.

3. The trial court committed reversible error in erroneously instructing the jury on spoliation law.

- a) *The trial court (1) improperly failed to weigh facts on the record to determine whether FHS's spoliation necessitated an inference or rebuttable presumption instruction and (2) erroneously refused to give a rebuttable presumption instruction.*

Spoliation is the “intentional destruction of evidence.” *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999) (citing *Black's Law Dictionary* 1401 (6th ed. 1990); *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996)). When a party spoliates evidence, a trial court has discretion to impose sanctions. *Henderson*, 80 Wn. App. at 605. Here, this court's opinion in *Schweikart*, No. 36805-6-II, 149 Wn. App. 1038 (March 31, 2009) (Not Reported), directed the trial court to impose spoliation sanctions.

When deciding whether to impose a spoliation sanction, the trial court engages in a two-part analysis. The first analysis is whether the spoliated evidence is connected to the party against whom the sanction is directed. *Henderson v.*, 80 Wn. App. at 606. This is not at issue on appeal because the Schweikart's argued and the jury found that Mr. Dunne was an FHS agent (FHS has not cross-appealed this finding). The second

analysis—what remedy the trial court should fashion to cure the spoliation—is directly at issue. *Henderson*, 80 Wn. App. at 605; *see, e.g., Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

Where the severity of the spoliation is high, courts apply a rebuttable presumption, which shifts the burden of proof to the party that destroyed, altered, or lost important evidence. *Henderson*, 80 Wn. App. at 605; *see, e.g., Pier 67, Inc.*, 89 Wn.2d at 385-86. In deciding whether to apply a rebuttable presumption, the court considers (1) the missing evidence’s potential importance or relevance, and (2) the adverse party’s culpability or fault. *Henderson*, 80 Wn. App. at 607 (citing *Sweet v. Sisters of Providence*, 895 P.2d 484, 491 (Alaska 1995)). Here, the trial court failed to engage in this analysis on the record, and simply rejected the following rebuttable presumption instruction without explanation:

If you find that Franciscan Heath System had control of evidence that would naturally be produced for its own interest, and that party destroys, alters, or loses the evidence without a satisfactory explanation, the law presumes that the destroyed, altered, or lost evidence was sufficient to prove that Franciscan Health Systems had sufficient actual or constructive notice of the spill. You are bound by this presumption unless you find by a preponderance of the evidence that Franciscan Health System did not have notice of the spill.

CP at 277 (No. 25); *see* RP (Sept. 21, 2011) at 24 (trial court: “Some cases talk about being a rebuttable presumption, some talk about being an

inference. I'm not sure one way or the other, as long as the jury is instructed correctly on spoliation with the evidence."), and 32-33 ("I'm presuming that Your Honor has done that analysis and you've elected it to be the permissive inference rather than rebuttable presumption.").

Instead of examining the facts to determine whether a rebuttable presumption was necessary, the trial court refused to acknowledge the Schweikarts' position and drafted an instruction that muddled presumption concepts with simple inferences, which was also error, explained *infra*. In sum, FHS's spoliation unduly prejudiced the Schweikarts ability to have a fair trial, and the proper sanction was to shift the burden to FHS to show that it did not destroy evidence of actual or constructive notice.

(1) *The evidence that FHS destroyed here was important and relevant to the Schweikart's negligence claims.*

The particular circumstances of the case dictate whether the missing evidence is important or relevant. *Henderson*, 80 Wn. App. at 609. The importance of the evidence turns on "whether the loss or destruction of the evidence has resulted in an investigative advantage for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence." *Henderson*, 80 Wn. App. at 607. Here, the Schweikart's presented numerous pieces of evidence under FHS's control that were destroyed. As a result, FHS obtained a

clear advantage at trial by denying the Schweikarts an opportunity to examine the evidence in discovery.

Mr. Dunne investigated Mrs. Schweikart's slip and fall. To determine what happened, Mr. Dunne interviewed witnesses, including a disinterested third party eyewitness and Mrs. Schweikart. He also interviewed John Gastelum, an ER technician who was one of the first people to arrive at the scene and who testified that two other security officers were present. Mr. Dunne initially promised the Schweikarts a copy of his report, complete with the eyewitness's contact information, which Mrs. Schweikart's family specifically requested. But when the Schweikarts sought the report the following day, FHS rebuffed them with an excuse. FHS's stall tactics continued until security officer Dillon White emailed Mike Hill on May 1, 2005, with news that Mrs. Schweikart was in the hospital and was dying. Mr. Hill then referred the Schweikarts to risk management, which refused to give them the report without a lawyer.

Eventually, FHS produces a report devoid of the essential information that Mr. Dunne gathered. Conspicuously missing from FHS's report is (1) the statement and contact information of a disinterested third party eyewitness, (2) the statements that Mrs. Schweikart and Mr. Gastelum made immediately after the incident, (3) the names of the 2

officers who first responded to the incident, and (4) Mr. Dunne's notes regarding the incident.

Destroying this evidence gave FHS an advantage in this lawsuit because it impaired the Schweikarts' ability to prove the two essential elements of negligence, duty and breach. The only direct evidence from a disinterested eyewitness was destroyed, including his or her contact information. FHS claimed that they preserved the witness's statement in their report, but its synthesized, adulterated report did nothing to level the playing field in this lawsuit. Similarly, FHS maintained that failing to obtain contact information does not constitute spoliation, but FHS's position is untenable in light of the evidence that, shortly after the incident, Mr. Dunne told the Schweikarts that they could get the eyewitness's contact information in his report.

Just as all evidence pertaining to the only disinterested eyewitness was destroyed, evidence of both Mrs. Schweikart's and Mr. Gastelum's statements that they made immediately after the incident was also destroyed. Destroying these original statements precluded the Schweikarts from using them as direct evidence of negligence and as impeachment testimony. Without this evidence, FHS witnesses' testimonies went unchecked, giving FHS a clear advantage at trial.

In accord with FHS's apparent cavalier attitude toward destroying

evidence, the Schweikarts also never knew the names of the two security officers who first arrived at the scene because, even though Mr. Gastelum testified in his deposition that two officers were present, FHS refused to further identify these witnesses.⁷ Although FHS maintains that it does not have such information, these security officers were FHS's apparent agents, and FHS is deemed to have control over them. Yet evidence of these two security guard witnesses was conveniently omitted from the incident report, again preventing the Schweikarts from interviewing and deposing crucial witnesses. In a case such as this, where the facts were hotly contested, destroying original statements and witness contact information severely hindered the Schweikarts' ability to prove negligence.

Finally, as if destroying the foregoing evidence was not enough to give FHS a distinct advantage at trial, Mr. Dunne's personal notes related to the incident were also destroyed. In lieu of this destroyed evidence, FHS's risk management produced to the Schweikarts a polished incident report. Allegedly, this incident report contains all the relevant evidence; however, unclear and unknown to the Schweikarts is the degree in which FHS risk management padded or outright rewrote portions of what really happened. Clearly, FHS destroyed, lost, or altered evidence that was extremely relevant to the Schweikarts' negligence lawsuit.

⁷ The Schweikarts will supplement the record with John Gastelum's deposition.

(2) *When FHS destroyed the evidence, it acted in bad faith and conscious disregard of the evidence.*

In examining culpability, courts next consider “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*, 80 Wn. App. at 609. Bad faith gives rise to “the inference of consciousness of a weak cause.” *Henderson*, 80 Wn. App. at 609 (quoting John W. Strong, *McCormick on Evidence* § 265, at 191 (4th ed. 1992)).

Here, ample evidence supports a finding that FHS acted in bad faith in destroying evidence from the only disinterested eyewitness. After Mrs. Schweikart slipped and fell, a sophisticated entity such as FHS could reasonably foresee that, eventually, the issue would be whether it acted negligently with regard to Mrs. Schweikart’s slip and fall. Despite this foreseeable knowledge, FHS did not act to safeguard evidence such as witnesses’ original statements and contact information. Instead, FHS moved quickly to destroy pertinent evidence directly related to the issue of whether it acted negligently. The only inference that can be drawn from FHS destroying evidence was that such evidence was unfavorable. Because FHS destroyed unfavorable evidence related to the issue of negligence, it acted in bad faith and conscious disregard of evidence that

was essential to the Schweikarts' obtaining any justice.

FHS's spoliation presented impossible hurdles for the Schweikarts at trial. Without the information, the Schweikarts were prejudiced from showing the jury complete picture. And without the information at trial, the Schweikarts could not successfully impeach any of the FHS agents responsible for the spoliation. Instead, the responsible agents were free to change their story as they wished. To receive a fair trial on the issue, the Schweikarts needed a rebuttable presumption, which would have required FHS to prove that the spoliated evidence did not show actual or constructive notice. As the original steward of the destroyed evidence, FHS was much better poised than the Schweikarts in seeking and presenting such evidence.

FHS acted in bad faith because it destroyed evidence that was highly relevant to the Schweikarts' negligence claim. *Cf. Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.2d 654 (2006). By destroying this evidence, FHS intentionally kept the Schweikarts from proving essential elements of duty and breach. Accordingly, the proper remedy was to shift the burden of proof onto FHS for the issues of duty and breach, to disprove why they acted improperly. By failing to weigh any of these facts on the record and by refusing to give the jury a rebuttable presumption instruction like the ones proposed (Instruction

Nos. 24, 25, 27), the trial court erred and caused the Schweikarts to suffer irreparable prejudice. CP at 276-277, 279.

(3) *A rebuttable presumption is in accord with Pier 67, Washington's leading spoliation case.*

In *Pier 67*, the county failed to preserve records relating to property valuation techniques. The plaintiff alleged that failure to preserve such records created an inference that the county used discriminatory practices in valuating property. Our Supreme Court stated:

We have previously held on several occasions 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. In so holding, we have noted, '[t]his rule is uniformly applied by the courts and is an integral part of our jurisprudence.'

Pier 67, 89 Wn.2d at 385-86 (quoting *British Columbia Breweries (1918) Ltd. v. King County*, 17 Wn.2d 437, 455, 135 P.2d 870, 877 (1943)). The court applied the rule to the facts and gave the plaintiff an inference that the county had used discriminatory practices. The inference was sufficient to prove discrimination on the dates in question.

As to the years 1963-67, for which no specific evidence . . . is available, the only inference which may be drawn is unfavorable to the contention of the respondents that such discriminatory techniques were not in fact employed. [citation omitted]. There being no evidence to the contrary,

the appellant has clearly met his burden as to these years.

Pier 67, 89 Wn.2d at 386.

Like in *Pier 67*, in which the inference was sufficient to prove discrimination without evidence to the contrary, the inference here should have been sufficient to prove duty and breach without evidence to the contrary. Put differently, FHS should have had the burden to disprove notice by explaining why it destroyed the evidence and how it lacked notice of the liquid on the floor that caused Mrs. Schweikart to slip. Such a remedy would be tailored to the facts here, where FHS destroyed evidence crucial to the Schweikarts' ability to prove that FHS acted negligently.

b) *The trial court's spoliation inference instruction misstated the law.*

After rejecting the Schweikarts' rebuttable presumption arguments without any expiation, the trial court offered the following spoliation instruction number 15:

Spoliation means the destruction of relevant evidence. When a party fails to produce relevant evidence without satisfactory explanation, you may infer that such evidence would be unfavorable to the party that failed to produce the evidence.

To determine if there is spoliation in this case, you may weigh (1) the potential importance or relevance of the missing evidence, and (2) the culpability or fault of the party that failed to preserve the evidence.

To determine the culpability or fault of the party that failed to preserve the evidence you may consider that party's (1) good or bad faith, (2) whether that party had a duty to preserve the evidence, and (3) whether that party knew that the evidence was important to this pending litigation.

If you find spoliation, you may use that evidence only in determining whether to infer actual or constructive notice of a temporary unsafe condition. (see Instruction No. 16). You may not use the evidence of spoliation for any other purpose other than whether to infer actual or constructive notice to defendant of a temporary unsafe condition.

CP at 336. By giving instruction number 15, the trial court muddled a rebuttable presumption with a mere inference. *See, e.g.*, CP at 276-277 (showing that the Schweikarts distinguished between spoliated inference and a rebuttable presumption). This was reversible error.

Instruction number 15 defines spoliation as a product of "(1) the potential importance or relevance of the missing evidence, and (2) the culpability or fault of the party that failed to preserve the evidence." CP at 336. The instruction continues to tease out the concepts of culpability and fault. However, these are the factors that the *Henderson* court held was the framework in which one decides whether a rebuttable presumption applies (explained *supra*). Giving the jury this framework absent a rebuttable presumption instruction was error because it misstated the law. The fact that a proposed jury instruction includes language used by a court in the course of an opinion does not necessarily make it a proper jury

instruction. *Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d 494 (1968); *Hammond v. Braden*, 16 Wn. App. 773, 776, 559 P.2d 1357 (1977).

The trial court also erred in giving instruction number 15 because it failed to also instruct that bad faith was not a necessary prerequisite to spoliation. The Schweikarts asked for this instruction in their proposed number 27. Failing to give this instruction as part of instruction number 15 or as a separate instruction was also a misstatement of the law. *Henderson*, 80 Wn. App. at 605; *Homeworks*, 133 Wn. App. at 900 (“the Henderson opinion suggests that spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith. It is possible, therefore, that a party may be responsible for spoliation without a finding of bad faith.”).

This court had already directed the court to impose spoliation sanctions. *Schweikart*, No. 36805-6-II, 149 Wn. App. 1038 (March 31, 2009) (Not Reported). The question was not whether FHS spoliated evidence but whether it spoliated evidence containing actual or constructive notice. As FHS was best situated to produce evidence that the spoliated evidence was not actual or constructive notice, a rebuttable presumption was necessary. Despite these facts, the trial court was unclear on the law and ended up giving an instruction that confused the jury. As the record makes abundantly clear, the Schweikarts were

punished because of FHS's bad actions. By confusing an inference with a rebuttable presumption, the trial court erred.

VI. CONCLUSION

Based on the foregoing reasons, the Schweikarts respectfully request this court to reverse and remand for a new trial.

RESPECTFULLY SUBMITTED this 4th day of June, 2012.

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CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on June 6, 2012, I personally delivered, a true and correct copy of the above document, directed to:

Timothy L. Ashcraft
Williams Kastner & Gibbs
1301 A St. Ste. 900
Tacoma, WA 98402-4299

DATED this 4th day of June, 2012.



Laura Neal
Legal Assistant to Darrell Cochran

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