

No. 42720-6 -I -II

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

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' REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY ARGUMENT 3

 A. By knowingly disregarding the danger of the floors, FHS negligently created the dangerous condition that took Mrs. Schweikart’s life. 3

 B. Alternatively, actual or constructive notice was not required because the dangerous condition was reasonably foreseeable.. 7

 C. The trial court failed to properly instruct the jury on spoliation..... 8

III. CONCLUSION..... 9

TABLE OF AUTHORITIES

CASES

Ingersoll v. DeBartolo, Inc.,
123 Wn.2d 649, 654, 869 P.2d 1014 (1994)..... 8

Iwai v. State,
129 Wn.2d 84, 98, 915 P.2d 1089 (1996)..... 2, 3, 4, 5, 6, 7, 8

Mucsi v. Graoch Assocs. Ltd. Partnership No. 12,
144 Wn.2d 847, 863, 31 P.3d 684 (2001)..... 8

Pimentel v. Roundup Co.,
100 Wn. 2d 39, 49, 666 P.2d 888 (1983)..... 8

W.R. Grace & Co. v. Dep't of Revenue,
137 Wn.2d 580, 593, 973 P.2d 1011 (1999)..... 6

Wiltse v. Albertson's Inc.,
116 Wn.2d 452, 461, 805 P.2d 793 (1991)..... 2, 8

RULES

RAP 1.2..... 9

OTHER AUTHORITIES

Restatement (Second) of Torts § 343..... 2, 3, 5, 7

I. INTRODUCTION

Helena Schweikart was on her way to visit her husband at St. Joseph's Hospital when she slipped and fell in a hospital elevator vestibule. She died shortly thereafter from a head injury caused by the fall. Her sons, plaintiffs-appellants Craig and Kirk Schweikart (collectively "the Schweikarts"), brought this lawsuit because Mrs. Schweikart's accident was foreseeable and should have been prevented.

Defendant-respondent Franciscan Health System ("FHS") was negligent because it knew or should have known that the vinyl flooring at St. Joseph's was slippery and dangerous when wet. Slips routinely occurred a couple times a week at St. Joseph's, and it was "common knowledge" that the floors were slippery when wet. Workers frequently slipped and fell on the floors, even when signs warned of the wet floors. So many employees slipped and fell, in fact, that FHS considered safety shoes for employees, mats, and other alternative measures to decrease the number of slip and falls that were occurring. Despite this evidence, FHS did nothing, which amounts to negligence.

In its response brief, FHS decries that this lawsuit is all but frivolous, citing repeatedly the general rule in premises liability that notice is required. However, the Schweikarts presented ample evidence that FHS

failed to exercise reasonable care in keeping St. Joseph's slippery flooring safe. The Schweikarts showed that FHS knew that the flooring was dangerous and that FHS did nothing to improve safety by warning of the danger, by better monitoring spills, or by using slip resistant tiling. Under Restatement (Second) of Torts § 343, a jury, not the court, should have decided whether FHS acted negligently by knowingly failing to keep the premises safe. Alternatively, the Schweikarts respectfully maintain that notice is not required when "a specific unsafe condition is 'foreseeably inherent in the nature of the business or mode of operation.'" *Iwai v. State*, 129 Wn.2d 84, 98, 915 P.2d 1089 (1996) (quoting *Willse v. Albertson's Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991)). Either way, the trial court erroneously took questions from the jury and refused to instruct the jury according to the Schweikarts' theory of the case. The proper remedy is to reverse and remand.

The Schweikarts also argue that the trial court erred in the instructions it gave 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. 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. REPLY ARGUMENT

A. **By knowingly disregarding the danger of the floors, FHS negligently created the dangerous condition that took Mrs. Schweikart's life.**

FHS knew that St. Josephs' flooring was dangerous but refused to do anything to make it safer. By knowingly disregarding the danger of the flooring, FHS negligently created the dangerous condition that took Mrs. Schweikart's life. Based on evidence supporting this theory, the jury should have decided whether FHS knew or should have known that a dangerous condition was on the floor. *Iwai*, 129 Wn.2d at 103 (Alexander, concurring) (citing Restatement (Second) of Torts § 343 (1965)). Having decided this question as a matter of law, the court erroneously took a question from the jury and failed to instruct it properly.

FHS goes great lengths to minimize the evidence that the Schweikarts presented at trial because, under *Iwai*, such evidence was more than sufficient to put the issue before the jury. On much less evidence than the Schweikarts presented here, the *Iwai* Court held that a

jury, not the court, must have determined whether the defendant knew or should have known about a dangerous condition on the premises.

In *Iwai*, “Plaintiffs offered very little evidence to support their negligence claim.” *Iwai*, 129 Wn.2d at 88. “The only solid piece of evidence regarding the actual and specific parking lot conditions on the day Iwai slipped is temperature and precipitation information from the National Weather Reports.” *Id.* “Employment Security did not have the opportunity to document the parking lot conditions on [the day of the slip] because Plaintiff did not notify Employment Security of the accident until the following week.” *Id.*

To show notice, “Plaintiffs deposed John Lester, who was in charge of maintenance for Employment Security’s parking lots at the time of Iwai’s fall.” *Id.* Lester had “no specific recollection of the conditions during the month that Iwai fell” but testified that “he often received complaints about the condition of the parking lot in the wintertime, and ‘it wasn’t unusual’ for cars to spin out and slide towards the office building from the inclined strip of parking where Plaintiff allegedly slipped.” *Id.* at 88-89. Lester remembered only two other incidents of persons slipping and falling in the parking lot. *Id.* at 89.

Other than Lester, Plaintiffs submitted an affidavit from a traffic engineer who inspected the parking lot two years after the alleged

incident. *Id.* The engineer opined that persons and cars “‘would more probably than not’ be expected to slip without special sanding or de-icing because of the steep nature of the slope.” *Id.* The engineer concluded that the parking lot was negligently designed. *Id.* “The affidavit, however, does not say how much ice or snow must be present before the condition ‘become [s] extremely dangerous,’ nor does the affidavit claim to have any knowledge of the specific conditions on the day that Iwai slipped.” *Id.*

On the forgoing facts, the *Iwai* majority held that Plaintiff Iwai presented sufficient evidence to give rise to a duty that Employment Security owed under § 343 and that a jury must consider whether the defendant was negligent in failing to alleviate a dangerous condition of snow and ice. *Id.* In Justice Alexander’s own words, “Plaintiffs have raised factual questions about whether the Defendants exercised reasonable care in keeping Employment Security’s parking lot free from dangerous snow and ice. I agree that a jury, not the court, must decide these questions.” *Id.* at 103 (Alexander, concurring); *see W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) (“[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.”).

Here, a jury should have considered whether FHS was negligent in failing to alleviate a dangerous condition, namely, the flooring itself. In an attempt to distinguish *Iwai*, FHS touts that Employment Security “knew” that snow and ice had accumulated in the parking lot “because it had plowed the lot (or had the lot plowed).” Br. of Resp’t. at 20. But FHS knew that its flooring was dangerous, just like the defendants in *Iwai* knew that snow had fallen. In fact, the evidence here is more certain than in *Iwai* because the flooring created an ongoing dangerous condition, whereas the evidence of plowing in *Iwai* was days old at best. The *Iwai* Court clearly stated the only evidence about the conditions of the parking lot on the day of the slip was temperature and precipitation information from weather reports. *Iwai*, 129 Wn.2d at 88. Still, *Iwai* held that this was sufficient to ask a jury what the defendant knew or should have known under § 343.

At trial, the Schweikarts 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. In fact, FHS even considered safety shoes because several workers slipped even when “slippery when wet” signs

were up. Despite having evidence of the danger of the floors, FHS took no effort to prevent slips in the 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. FHS's decisions amounted to negligence.

By disregarding the danger of the floor and by failing to improve safety, FHS negligently created a dangerous condition on its premises. Therefore, the trial court erred in granting a directed verdict and refusing to instruct the jury on WPI (Civ.) 120.07.

B. Alternatively, actual or constructive notice was not required because the dangerous condition was reasonably foreseeable.

Even if the spill was categorized as a temporary unsafe condition, the Schweikarts were not required to present evidence of notice because the dangerous condition was foreseeable. In Washington, evidence of notice is not necessary where a “specific unsafe condition is ‘foreseeably inherent in the nature of the business or mode of the operation.’” *Iwai*, 129 Wn.2d at 98 (quoting *Wiltse*, 116 Wn.2d at 461). FHS dismisses this argument as ignoring the “self-service” cases; however, the Schweikarts submit that the plurality opinion in *Iwai* aside, Washington law has always looked to the foreseeability. *See, e.g., Mucsi v. Graoch Assocs. Ltd.*

Partnership No. 12, 144 Wn.2d 847, 863, 31 P.3d 684 (2001); *Iwai*, 129 Wn.2d at 99-100; *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994); *Wiltse*, 116 Wn.2d at 461; *Pimentel v. Roundup Co.*, 100 Wn. 2d 39, 49, 666 P.2d 888 (1983).

Here, it was tragically foreseeable that an elderly woman like Mrs. Schweikart would slip and fall on the tile flooring found throughout the hospital. Spills in the hospital were likely, particularly in highly trafficked areas such as elevator vestibules, where people might be hurrying. Through numerous other incidents in the hospital, FHS knew that the floors were very slippery. Workers would even slip despite warning signs that a floor was wet, and safety shoes were proposed. Despite the facts, FHS did nothing to prevent slips in the highly trafficked areas like the elevator vestibule where Mrs. Schweikart slipped. Instead, FHS made cost saving decisions and refused to use vinyl tile with slip resistant coatings. Just as juries consider the precautions in “self-service” cases, the jury had a right to consider the foregoing evidence in determining whether FHS should have foreseen the spill that killed Mrs. Schweikart.

C. The trial court failed to properly instruct the jury on spoliation.

RAP 1.2(a) calls for a liberal interpretation of the rules and allows review on substantive issues to promote justice. Here, a substantive review is warranted because the Schweikarts clearly identified each

instruction by number that were improperly given or refused under the heading "Assignments of Error." Br. of App. at 3-4. Simply because the Schweikarts placed them under the subheading "Issues Pertaining to Assignments of Error" is a hyper-technical view of the rules and would unfairly deprive the Schweikarts from a review on the merits. Furthermore, review on the merits is warranted where the trial court deprived the Schweikarts of a fair trial by both incorrectly giving some instructions and incorrectly omitting others.

The Schweikarts rest on their opening brief in arguing that the trial court improperly instructed the jury.

III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 10th day of October, 2012.

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CERTIFICATE OF SERVICE

Jeanne Lyon, 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 October 10, 2012, I caused to be personally delivered, a true and correct copy of the foregoing Appellants' Reply Brief to:

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DATED this 10th day of October, 2012.

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