

Court of Appeals No. 70412-5-I

WASHINGTON STATE COURT OF APPEALS
DIVISION 1

JOHN JONES

Appellant,

v.

MCDONALD'S RESTAURANTS OF WASHINGTON,
INC, Store # 4957,

Respondents.

RECEIVED
 COURT OF APPEALS
 DIVISION I
 SEATTLE, WA
 11/11/11


REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
1. IDENTITY OF MOVING PARTY1
2. ISSUES PRESENTED FOR REVIEW.....1
3. REPLY ARGUMENT1
4. CONCLUSION6

TABLE OF AUTHORITIES

Cases

Ciminski v Finn Corp., 13 Wash.App. 815, 537 P.2d 850, *rev. denied*, 86 Wash.2d 1002 (1975)

Griffiths v Big Bear Stores, 55 Wash.2d 243, 347 P.2d 532 (1959)

Iwai v. State, 129 Wn. 2d 84, 96.915 P. 2d 1089 (1996)

Messina v Rhodes Co. 67 Wash.2d 19; 406 P.2d 312 (1965)

Odonnell v Zupon enterprises 107 Wash.App 854, 28 P.3d 799 (2001)

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

Tilton v Quality Food Centers, 154 Wash.App 1022 (2010)

Vallandigham, 154 Wn.2d at 26, 109 P.3d 805 (2005)

Wiltse v Albertson's, Inc., 116 W.2d 452 (Wash. 1991)

1. IDENTITY OF MOVING PARTY/APPELLANT

John Jones, the Appellant, moves for review of the Summary Judgment ruling in favor of McDonald's Restaurant of Washington in Superior Court of Washington State, Snohomish County.

2. ISSUES PRESENTED FOR REVIEW

Whether McDonald's failed to conduct periodic frequent inspections based on the nature of its business as a self-service cafeteria style fast-food business for the adequacy of the safety of its customers.

3. REPLY ARGUMENT

The *Pimentel* rule applies in this case. The *Pimentel* exception also extends to the type of business the proprietor engages in. In McDonald's case, it is a fast food restaurant that is open all hours. The frequency of inspecting is dependent on the foreseeability of spills of any kind of food or refreshment. McDonald's is aware of the foreseeability of the risk that is present for its customers since there is more than one entrance and exit for the customers to come in and leave the premises for take-out or to sit and eat their food. Some customers only buy a liquid refreshment, fill the cup on their own, and exit the premises with the refreshment in hand. The spills on the floor are continuous and foreseeable, inherent in the nature of the business and mode of operation. The facts that apply to the foreseeability, frequency of inspection and the

safety measures taken is up to the jury. The housekeeping procedures, practices, frequency and the surrounding area which invites the customers to engage on repeated use of self-served foods or refreshments is up to the jury. The adequacy of housekeeping procedures is a jury question. McDonald's claims that there was not adequate time to notice and clean the spill off the floor where the customers use the restrooms and enter and exit the McDonald's restaurant at Marysville. McDonald's is aware that there is transitory unsafe conditions throughout the fast food restaurant, especially entering and exiting to the restaurant, the restrooms, and the icemaker, liquid refreshment areas. These are the areas where hazards are apparent. The owner is on notice that McDonald's has to take extra caution because of the activity that occurs in a fast food restaurant. Customers, who have used the restrooms for cleanup purposes, or any other purpose, have a tendency not to pay attention to the floor and slipping on unseen water. The person usually wants to return to their table or to pick up their order for consumption, whether on or off the restaurant premises. In *Pimentel*, 100 Wash.2d at 49 (1983), the majority states that liability extends to foreseeable results from unforeseeable causes. The trial court, in its oral decision (CP 50, p 19), stated that the time of the inspection by McDonald's employee of the premises and Mr. Jones exiting the restroom and slip and fall, would raise the standard to strict

liability. The society has increased its oversight of self-service business and the watchdog of accidents through the electronic system. In this day and age, our society now has video surveillance cameras and electronically operated stop and go signs, store surveillance cameras for security of the premises and the security of its customers. McDonald's restaurant had video cameras of the premises, recording any and all activity on the premises. (Exhibit A, Plaintiff's DVD provided by court reporter on appellant's oral deposition and Defendant's DVD). It is surprising that McDonald's did not have a motion sensitive light as soon as any unsafe condition exists. The McDonald's restaurant has surveillance cameras all throughout the restaurant, but does not have motion sensitive, hazardous condition light, warning customers to be cautious because of an unsafe condition.

In *Tilton v Quality Food Centers*, 154 Wash.App 1022 (2010)(unpublished opinion, filed for public record pursuant to RCW 2.06.040) Ms. Tilton slipped and fell in the area containing fresh cut flowers. Ms. Tilton did not see any water on the floor. However, her body, where she fell, which was the left side back, was soaking wet. Ms. Tilton did not see any water on the floor before she fell. Ms. Tilton alleged that QFC should have taken further steps to prevent accumulation of water on the floor. The type of tile surface in the area of the slip and

fall may contribute further unsafe condition. The Court of Appeals reviewed the Summary Judgment in favor of the defendant, QFC, de novo. The court of appeals reiterated that the summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence, citing *Vallandigham*, 154 Wn.2d at 26, 109 P.3d 805 (2005). The court reiterated the *Pimentel* exception that an unsafe condition exists because of the business' mode of operation. The court cited *Pimentel*, the frequency, the conduct of periodic inspections required by the foreseeability of risk, citing *Iwai* 129 Wash.2d at 99 (1996). After analyzing the case *Wiltse v Albertson*, 116 Wash.2d 452, 805 P.2d 793 (1991), the *Tilton* court held that the application of the *Pimentel* and the frequency of the inspections of the premises required by the foreseeability of the risk created by the mode of operation does not create strict liability. In *Tilton* the court also analyzed that the type of tile that is on the floor may have increased the unsafe condition of a slip-and-fall. The opinion also inquired any precautionary measures such as safety mats in an area where water or any slippery substance may occur. In *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wash.App 854, 28 P.3d 799 (2001), the customer slipped and fell on a piece of lettuce in a grocery store check-out aisle. The court held that it was a self-service store because the customers are required to unload their grocery items at check-out area. This was a task

once performed by the checker. The grocery store created a “self-service area” such that it was foreseeable that a grocery item would fall on the floor and create a hazard. The customers handle and transfer grocery items from one place to another, presenting an inherent risk of items dropping on the floor and creating a hazard. The court held that the customer slipped and fell on a piece of lettuce a few steps inside the check-out aisle was relieved of burden of proving that store had actual or constructive notice of lettuce on the floor in order to establish the store’s duty to keep the area safe. *O’Donnell* cites *Coleman v Ernst Home Center* 71 Wash.App at 219, 853 P.2d 473 (1993); *Ciminski*, supra.

In *Messina v Rhodes Co.* 67 Wash.2d 19; 406 P.2d 312 (1965), the Supreme Court of Washington held that jury questions were presented as to both contributory negligence of customer and of store owners with respect to customer’s fall in a store on a rainy day during which customers tracked in quantities of dirt, sand, and water, which made the floor highly slippery. There was attention to the fact that the asphalt tile floors to be slippery and the color of the floor was difficult to determine if there was any unusual amount of dirt, sand, and water, which also made the floors highly slippery. Consequently, the lower court’s ruling was reversed and remanded for new trial. Similarly, the tile floors and the color of the tiles

in the area of the restroom make it difficult to differentiate or perceive any liquids on the floor at McDonald's in Marysville

The *Messina* case has been analyzed in different cases on slip-and-fall. In *Griffiths v Big Bear Stores*, 55 Wash.2d 243, 347 P.2d 532 (1959), the floors were mopped where the customer fell. However, the mopped floor had not dried. The case was remanded for new trial. One aisle was mopped, but the other aisle was not being mopped by someone else at the same time. In *Griffiths*, there was more than one aisle.

This is no different than the McDonald's restaurant in Marysville with multiple entrances, hallways.

Ciminski v Finn Corporation, 13 Wash.App 185, 537 p.2d 850 (1975), was discussed in the appellant's opening brief. In the *Ciminski* case, the plaintiff slipped and fell on a liquid substance near the restrooms. The court remanded the case to the lower court for trial given the fact that the modern trend in slip-and-fall cases in self-service operations have elevated.

4. CONCLUSION.

The Trial Court misapplied liability standard. The liability standard for self-service restaurants should have been applied by the court. The injury to Mr. Jones occurred on a self-serve fast food restaurant which the unsafe conditions are foreseeable in the nature of the business. The

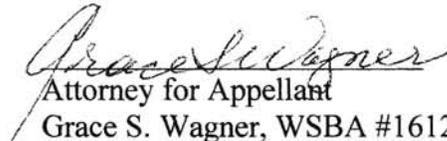
restaurant self-service operation is deemed to have actual notice of the unsafe condition. The self-service restaurant is charged with the knowledge of foreseeable risk inherent in the nature, mode of operation of the business. The trial court applied the ordinary care standard of liability to assess possible physical harm and to eliminate such harm to the customer. This was incorrect standard of liability for self-serve restaurant. The court declined the liability standard for self-service operation in that the existence of unsafe conditions on the premises is reasonably foreseeable. The court declined Mr. John Jones' request that the defendant had actual or constructive notice since the existence of unsafe conditions are reasonably foreseeable, inherent in the operation of the business. The court reasoned that the application of the standard of liability as applied in multiple self-service cases would place the defendant to the same standard of strict liability. According to the trial court the strict liability standard would be unfair application to the defendant, McDonald's, which the standard would place an intolerable burden on the business. The case law and the analysis provided by the higher court states that application of such standard does not rise to strict liability.

The court granted Summary Judgment based upon, basically, the edited, cut and paste, time accelerated, different angles of the occurrence of the accident on the DVD presented to the court by the Defendant,

McDonald's, as the truth of the matter asserted. Furthermore, the court gave weight to the DVD, presented by the defendant, by asserting that it was reliable. The defendant's DVD is not reliable. The editing persons were not present at the McDonald's store to see the actual footage of the DVD on the premises at the time the incident occurred on September 25, 2008. The editing favors the version McDonald's restaurant wants the court to believe in. By reviewing the two different DVD's, the jury may have justifiable inferences from the evidence presented by both parties, which reasonable minds might reach conclusions that would sustain a verdict. In this case, as it was before the trial court, just by reviewing the two DVD's, different people may come to different conclusions than the trial court has assumed. Therefore, the trial court's Order on Motion for Summary Judgment should be reversed. If anyone should be granted a Summary judgment motion based upon the law and the facts in this case, the plaintiff, John Jones, should be granted the Motion for Summary Judgment. The plaintiff requests that the trial court's ruling be reversed. The appellant, the injured person, requests that the matter be set for a jury trial. The parties may proceed with their respective discovery. The appellant requests that this court provide the appropriate directive to the trial court.

Date: 1/24/2014

Respectfully submitted,


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16

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MCDONALD'S
RESTAURANTS OF
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4957,

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**COURT OF APPEALS
DIVISION 1**

NO. 70412-5-1

SUPERIOR COURT OF
WASHINGTON SNOHOMISH
COUNTY

NO. 11-2-08400-9

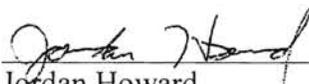
DECLARATION OF MAILING

The undersigned declares under the penalty of perjury under the laws of the State of Washington that he is a citizen of the United States and over the age of 18 years; that on the 24th day of January, 2014 copies were sent by facsimile and, deposited in the mail of the United States of America, postage prepaid, of the following documents:

1. Reply Brief of Appellant;

Said documents were mailed by United States mail, addressed to the following:

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