

Snohomish County Superior Court No. 11-2-08400-9
Court of Appeals No. 70412-5-I

WASHINGTON STATE COURT OF APPEALS
DIVISION 1

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION 1
[Signature]

JOHN JONES

Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The Trial Court erred in its decision concerning applicable law of liability of a self service, Fast Food Restaurant to its invitee, customer.

2. The Trial Court erred in granting the Defendant's Motion for Summary Judgment on the basis of defendant's edited DVD as a matter of fact which was provided to the court as a courtesy copy.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. What is the standard of liability of self-serve, fast food restaurant owners to their customers?

2. A) Should the defendant's Motion for Summary Judgment have been granted?

2. B) Is the DVD Exhibit that was provided by Defendant compliant with the rules of evidence, so that it is to be relied upon?

C. STATEMENT OF THE CASE

This case comes from Snohomish County Superior Court Cause No. **11-2-08400-9**, Judge Ellis, granting the defendants Motion for Summary Judgment, and denying the plaintiff's Motion for Reconsideration. (CP 30 Vol. I p. 9-10); (CP 36 Vol. I p. 7-8).

1. Procedural History

On April 12, 2013, the trial court signed the defendant's order on Summary Judgment. (CP 30 Vol. I p. 9-10).

On April 24, 2013, the trial court denied the plaintiff's Motion to Reconsider. (CP36 Vol. I p. 7-8).

On September 21, 2011, this matter was filed with the Superior Court Snohomish County, Everett, WA. On September 30, 2011, the summons and complaint were duly served on Prentice Hall Corp System, the Registered Agent for McDonald's Restaurants of Washington, Inc. (CP 6 Vol. I p. 54-56). On December 2, 2011, upon the request of the defendant, the Amended Complaint for Damages was filed and accepted by the defendant, amending the defendant from McDonald's Corporation, Store #4957 to McDonald's Restaurants of Washington, Inc, Store # 4957. (CP I p. 50-53). The Acceptance of Service was filed on December 8, 2011. (CP I p. 48-49).

On October 11, 2011 the defense filed for a jury demand of 12 persons. (CP Vol. I p 32-39). On August 7, 2012, the defense noted the matter for trial. (CP Vol. I p 40-42).

On May 17, 2012, the oral deposition of John Jones was taken. One of the defendant's exhibits for the deposition was a

DVD of surveillance footage being cut/paste and accelerated time adjustment instead of Mr. Jones doing different drawings, sketches on a piece of paper during his explanation of events. The defense questioned Mr. Jones on the events on this DVD in which Mr. Jones slipped and fell in front of the men's restroom. Mr. Jones, in pain, limped, holding his left hip area sought assistance from the store employees.

On June 11, 2012, the plaintiff's attorney forwarded a Subpoena Decus Tecum to the defendant for "a true and correct copy of the security camera footage of the premises from September 25, 2008, beginning from the time Mr. John Jones enters the premises to the point when Mr. John Jones leaves the premises, with no footage being cut/paste or time adjustment or any tampering." The defendant's objection to the subpoena, dated July 23, 2013, claimed the subpoena was deficient, and that it sought production of information and materials that may be subject to the attorney work product doctrine. In the defendant's later response, the defendant claimed that they would "produce a copy of surveillance footage taken at the subject restaurant on September 25, 2008". However, this footage was not received until the defendant included a DVD from a different angle with cut

and paste, edited, of another surveillance footage as Exhibit 1 to Motion for Summary Judgment. The plaintiff objected to the Exhibit 1 to Motion for Summary Judgment. The plaintiff was not aware that the defendants manipulated, edited, different surveillance tapes taken on the same day with cut and paste to Mr. Jones' slip and fall on the iced liquid drink dropped by another customer while Mr. Jones was coming out of the restroom. (CP 20 Vol. I p 32-39)

2. Facts of the Case

On September 25, 2008, Appellant was in McDonald's Marysville, WA, to purchase food. Appellant made his order at the cash register with other persons in line before him and after him. Appellant went to the bathroom while waiting for the food to be prepared. While the Appellant was in the bathroom, an unknown individual spilled pop and ice onto the floor directly in front of the bathroom door. When the Appellant left the bathroom, the pop and ice on the floor caused Appellant to slip and fall sideways on his right side, primarily the knee and shoulder. Appellant ended up on his back. There was no warning sign of wet floor. Defendant failed to properly keep the bathroom entryway safe which the hallway leads to the exit door of the self service

area for use by the customers. Appellant, Mr. Jones', injuries were the direct and proximate result of defendants negligence herein stated. Restatement 2nd of Torts, § 343.

D. ARGUMENT

This matter comes before this Court, on a summary judgment ruling in favor of the defendant, McDonald's Restaurant. The appellate court reviews summary judgments de novo.

I. Did the Trial Court err in its decision concerning applicable liability standard of a Self-Service Fast Food Restaurant?

An owner or occupier of land owes a duty to invitees to inspect for dangerous conditions and to make such repairs or institute such safeguards or warnings as may be reasonably necessary under the circumstances for the protection of invitees.

An owner or occupier of land does not have constructive notice of an unsafe condition on the land unless the specific unsafe condition had existed for such time as would have afforded the owner or occupier sufficient opportunity, in the exercise of ordinary care, to make a proper inspection of the premises and remove the danger.

However, an owner or occupier of land may be liable to an invitee for injuries resulting from a dangerous condition on the

land of which the owner or occupier does not have actual or constructive knowledge if (1) the specific unsafe condition is foreseeably inherent in the nature of the owner's or occupier's business or mode of operation or (2) the owner or occupier caused the hazardous condition. The first exception may be applied to any situation, whether or not the mode of business involves self-service, where the nature of the proprietor's business and methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable. *Iwai v State of Washington*, 129 Wn.2d 84; 915 P.2d 1089, (1996).

In *Pimental v Roundup Co.*, 100 Wash.2d 39, 666 P.2d 888 (1983), the court held that: where operating procedures of any store were such that unreasonably dangerous conditions were continuous or reasonably foreseeable, there was no need to prove actual or constructive notice of such conditions in order to establish liability for injuries caused by them.

The plaintiff, Mr. Jones, does not have to show that the defendant knew of the specific puddle that caused the accident; rather defendant has knowledge of the floors tendency to get slippery when wet when the customer uses the self-serving drink dispenser alongside of the ice dispenser and when customers carry

their take-out drinks and food throughout the restaurant, including but not limited to the seating area or carrying their take out passing the bathroom to the exit door. If the business creates a dangerous condition on the self-serving eatery area, dispensers, the business owner is presumed to have notice of the dangerous condition. It is the nature of the business, self service establishment. The business owner is presumed to know and have notice of the dangerous conditions. It was reasonably foreseeable that an accident would happen. Therefore, the dangerous condition of the self-dispenser of ice and liquid refreshments are continuous or reasonably foreseeable. There is no need to prove actual or constructive notice of such conditions in order to establish liability for injuries caused by the self-dispensers of liquid refreshment and ice. In *Ciminski v Finn Corp.*, 13 Wash.App. 815, 537 P.2d 850, *rev. denied*, 86 Wash.2d 1002 (1975), the court held that the notice requirement was satisfied as a matter of law because the nature of the defendant's business was a self-service establishment. The rationale for such a holding is stated by the court that a business that chooses to adopt the self-service merchandising techniques, which allows for lower overhead and greater profits is in a better position to accept the risks involved. *Pimental v Roundup Co.*, 32

Wash.Ap. 647, 651-52, 649 P.2d 135 (1982). However, the Supreme Court ruling in *Pimental v Roundup Co.*, 100 Wash.2d 39, 666 P.2d 888 (1983), states that the requirement of showing notice will be eliminated only if the particular self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable. However, in *Iwai v State of Washington*, 129 Wn.2d 84; 915 P.2d 1089, (1996), the Supreme Court added the ruling that when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves. The defendant, McDonald's Restaurant, has a person constantly cleaning the floors. The defendant, McDonald's, knew the nature of the business can and will cause foreseeable damage to customers. There are even children pushing buttons on the self service soda dispenser and ice maker, the kids throw their fries, ketchup packets at each other. Adults drop their coffee cups on the ground. Then, actual or constructive notice of the specific condition need not be proved. Citing *Pimental v Roundup Co.*, 100 Wash.2d 39, 666 P.2d 888 (1983). Furthermore, the *Iwai v State of Washington*, 129 Wn.2d 84; 915 P.2d 1089, (1996), the Supreme Court reiterated that this court has applied the reasonably

foreseeable exception exclusively to self-service type stores because, in those situations,

it is more likely that items for sale and other foreign substances will fall to the floor Customers are naturally not as careful in handling the merchandise as clerks would be . . .

An owner of a self-service operation has actual notice of these problems. In choosing a self-service method of providing items, he is charged with the knowledge of the foreseeable risks inherent in such a mode of operation . . .

Ciminski v Finn Corp., 13 Wn. App. 815, 818-19, 537 P.2d 850, 85 A.L.R.3d 991, *review denied*, 86 Wn.2d 1002 (1975).

Wiltse v Albertson's, Inc, 116 W.2d 452 (Wash. 1991), is cited by the defense in support of their motion for summary judgment. In *Wiltse*, a customer, Mr. Steven Wiltse, at an Albertson's store slipped on a puddle of water between the aisles that resulted from a leak in the roof. Mr. Wiltse brought forth a

personal injury claim against Albertsons, seeking damages for negligence.

The issue before the Supreme Court was whether the plaintiff, Mr. Wiltse, had the burden of proving actual or constructive notice of the water existing at defendant's grocery store, based on *Pimental v. Roundup Co.*, 100 Wn. 2d 39, 666 P. 2d 888 (1983).

There are substantial differences between this matter and *Wiltse*. The puddle of water found in Albertson's was the result of a leak in the roof. The court properly ruled that the conditions which led up to the accident were neither continuous nor reasonably foreseeable that unsafe condition in the self service area might be created, since the leak was a structural malfunction which was neither continuous nor reasonably foreseeable and in no way related to the store's self-service operation.

The *Coleman v Ernst Home Center*, 70 Wash. App 213, (1993), is parallel to *Wiltse v Albertson's*. In *Coleman*, Florence Coleman, a police officer, was injured when she tripped and fell on a carpet at the entrance of a store, Ernst Home Center. The court held that the entryway carpet was not part of Ernst Home Center's self service area or department. Self service departments are areas

where lots of goods are stocked and customers take and remove items, then the hazards are apparent. The entrance to the store had entryway carpeting. The heavy rubber carpeting is often found in the entryways of schools, hotels, hospitals, and business that have a large volume of pedestrian traffic. This does not make Ernst premises “self-service”. The court held that the store’s actual or constructive knowledge of the dangerous condition was an element of the claim and that the slip and fall did not occur in a self-service area. There was insufficient evidence that the proprietor had actual or constructive knowledge of an unsafe condition. The court held that to create a jury question as to whether a business should have discovered a dangerous condition, an injured customer must present some evidence from which a rational trier of fact could conclude that inspections conducted by the business were inadequate in light of the nature of the risk presented. The appellate court held that when there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain a verdict, then the question is for the jury, not the court. However, where circumstantial evidence leads only to speculation, a verdict cannot be based on inferences drawn from the evidence. The frequency, method of housekeeping

procedures in the store have been found to present a jury question concerning whether the defendant's store exercised proper type of care based upon frequency of customers which indicate the foreseeability of the risk of inadequate housekeeping of the premises. The housekeeping care extends to everything that threatens the invitee, customer with an unreasonable risk of harm.

Here, Mr. Jones, in fact, as a customer at McDonald's slipped and fell on the ice and refreshment puddle dropped by another customer, after coming out the of the bathroom. The slip and fall of Mr. Jones specifically occurred in the self-service area. McDonald's is not only self-service restaurant, but fast food restaurant chain. Each McDonald's store is open for long hours, according to their circumstances. The McDonald's restaurant had refreshment and ice dispenser in the seating area for self-service. The McDonald's store is presumed to have notice of the dangerous condition. There are multiple video cameras/security cameras monitoring the store in order to fix an occurring problem promptly. The security camera/video camera is to diminish a dangerous condition on the self-serving area, especially in the dispenser area of refreshments and ice. The McDonald's is presumed to have notice of the dangerous condition. McDonald's is presumed to

know and have notice of the dangerous conditions. That is one of the reasons the McDonald's store has security camera/video cameras since it is reasonably foreseeable that a customer can have an accident. The dispensers in the seating area are the focus for customers to eat their orders on the premises or take them out through the exit door hallway where the restrooms are located. McDonald's was aware and had notice of the dangerous conditions. McDonald's foresaw that an accident would happen. For this reason, McDonald's has a cleanup person constantly mopping, cleaning up food residue off the floor. Therefore, the court's application of reasonable care liability standard in the maintenance of the business premises to its customers is limited to conditions that threaten the customers with an unreasonable risk of harm standard is incorrect.

II. A) Should the Defendant's Motion for Summary Judgment have been granted?

The defendant's request for summary judgment should have been denied. Summary judgment is only appropriate if the pleadings, depositions, answers to Interrogatories, any admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law. CR 56 (c). A Material Fact is one upon which the outcome of the litigation depends on, whole or in part. In determining whether a genuine issue of material fact exists, the court views all facts and draws all reasonable inferences in favor of the nonmoving party. *Owen v Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

In a summary judgment motion, the moving party, defendant McDonald's Restaurant Store # 4957, must first show the absence of an issue of material fact. *Young v Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then shifts to the non-moving party to set forth specific facts showing a genuine issue for trial. CR 56(e); *Young*, 112 Wn.2d at 225. All evidence and all reasonable inferences therefrom should be considered in a light most favorable to the nonmoving party. *Van Dinter v City of Kennewick*, 121 Wn.2d 38, 44, 846 P.2d 522 (1993).

The McDonald's restaurant breached its duty of care to its invitee, Mr. John Jones, Appellant. The applicable law of liability is *Pimental, Iwai, Ciminski*. Here, the McDonald's was a self

service fast food restaurant where spills throughout the restaurant happen on a daily basis is foreseeable.

The standard of liability is negligence. The elements of an action for negligence are (1) the existence of a duty owed, 2) breach of that duty, (3) resulting injury, and (4) a proximate cause between the breach and the injury. Here, McDonald's restaurant is an occupier of the property. Mr. John Jones is a customer. Mr. John Jones fell on a puddle of refreshment and ice when he was coming out of the restroom. The McDonald's is a fast food, self-serving restaurant, who was aware, the specific unsafe condition is foreseeably inherent in the nature of the business mode of operation.

Mr. John Jones sought medical assistance as his initial pain increased from the slip and fall. The defendant's DVD does show that Mr. Jones slipped and fell even though certain other areas were edited, tampered, cut and paste, time accelerated. John Jones DVD ordered from the court reporter shows Mr. John Jones slip and fall and his attempt to minimize the slip and fall. The DVD also shows certain facial expressions of surprise slipping on something.

Therefore, the court incorrectly granted the Summary Judgment Motion for the Defendant, McDonald's Restaurant, based upon not only incorrect liability standard for self-service fast food restaurant, but also to accept the tampered, cut and paste, edited DVD as the appropriate evidence to grant a Summary Judgment in favor of the Defendant, McDonald's restaurant. Furthermore, the DVD that was presented to the court as a courtesy copy was not an admissible evidence, but may be qualified as the defendant's own interpretive, illustrative version of the incidents that happened. An illustrative evidence is not the same as the defendant's submission of the DVD as the facts asserted. An illustrative DVD contents cannot be given substantive value. Furthermore, the DVD could not be filed with the Superior Court Clerk because of the rule, GR 14. The rule requires 8-1/2 by 11 inch non-colored paper, which includes attachments to documents.

II. B) Is the DVD Exhibit that was provided by Defendant compliant with the rules of evidence, so that it is to be relied upon?

The first DVD provided from the defendant, McDonald's Restaurant, to the appellant, Mr. Jones, and as courtesy copy to the court on the defendant's motion for summary judgment contained a single video. The video was one minute, 46 seconds long. The

video is of the McDonald's restaurant on September 25, 2008. The video begins with the security camera viewing the bathroom and side exit door hallway, then shifts to the front counter, and then shifts back to the view of the security camera viewing the bathroom hallway and side exit door. The appellant, John Jones, upon reviewing the DVD provided by the defendant, McDonald's, realized that this was not the same DVD that was used during the deposition. Therefore, the appellant ordered a copy of the time accelerated DVD Mr. Jones was questioned upon as show and tell deposition at Seattle Deposition Reporters. The DVD provided by Seattle Deposition Reporters has three videos on it. The first is the security camera footage of the cashier's area, is named "01080925180001 _Slow Speed", and is 40 minutes 29 seconds long. The second video is of the bathroom hallway and side entrance for the McDonald's restaurant, is named "07080925180004 _Slow Speed", and 19 minutes 53 seconds long. The third video is a cut-and-paste of the first and second video, named "Excerpts" and is 1 minute 46 seconds long and is identical to the video provided to the appellant, Mr. Jones, by the defendant, McDonald's Restaurant.

On the first video, the appellant, Mr. Jones, is first seen, on September 25, 2008, at 32:07 on the video timer. This was around the noon time of day. Mr. Jones waits in line along with customers in front of him, makes his order, then leaves to use the restroom. A customer uses the self-dispenser of refreshments and proceeds towards the back exit door, walking in front of Mr. Jones, at the back of the McDonald's hallway where the restrooms are located. Mr. Jones leaves the view of the camera at 34:18. Mr. Jones' slip-and-fall occurs exiting presumptively the restroom. Mr. Jones returns to the view of the camera at 35:21, walking with a slight limp. Mr. Jones then apparently informs one of the employees of the puddle that caused his slip-and-fall. This employee apparently goes and informs the manager. The manager of the McDonalds appears and joins Mr. Jones. Mr. Jones and the manager leave the view of the camera at 36:18. Mr. Jones and the manager return to view at 36:31.

On the second video, Mr. Jones is first seen at 14:52, entering the building, and leaves the view of the camera at 14:57, walking from the entrance, right of the camera, to the cashier, left of the camera. Mr. Jones is next seen at 15:58 and enters the restroom at 16:02. The puddle of liquid appears on the floor.

According to the video, Mr. Jones exits the restroom at 16:10. Mr. Jones slips on the liquid at 16:11. Mr. Jones leaves the view of the camera at 16:27, apparently heading to the cashier while holding his hip/back area and limping. Mr. Jones and the manager enter the view of the camera at 16:36 and leave view at 16:52. Mr. Jones returns at 17:07, waits, goes to pick up his order at 17:52 and begins eating his food at the self-seating area. The camera also shows that an employee was cleaning the floor area of self-dispenser of ice and soft drinks, "sit and eat" leading towards the restroom.

The DVD does not indicate recognition between Mr. Jones and the hooded individual. Each person arrived on the premises at separate times. Mr. Jones arrived without a passenger, in his own vehicle. There is no staging of the slip-and-fall. In the event McDonald's is making such a claim, they have no proof of such allegations. Such allegations are demeaning and slanderous given the fact that Mr. Jones is an ethnic minority, with mental challenges.

The McDonald's is a fast food, self-serving restaurant open at all times. Inside the restaurant you order your food, pay and take your food to go or eat on the premises. The McDonald's

restaurant provides drink cups for customer use. The soft drink along with ice dispenser is self-serve, away from the cashier and food pick-up.

The defendant, McDonald's provided two affidavits in connection with the DVD they provided. The first affidavit was from Benjamin Hampton. The second affidavit was from Lindsay Hitchcock. The affidavits/declarations describe the actions Mr. Hampton and Ms. Hitchcock performed on the DVD exhibit. Both affidavits/declarations state that editing was performed on the DVD. (CP 20 Vol. I p 32-39). The dictionary definition: **ed•it** (ed'it) *vt.* [back-formation < EDITOR] 1. to prepare (an author's works, journals, letters, etc) for publication, by selection, arrangement, and annotation 2. to revise and make ready (a manuscript) for publication 3. to supervise the publication of and set the policy for (a newspaper or periodical) 4. to prepare (a film, tape, or recording) for presentation by cutting and splicing, dubbing, rearranging, etc. – **edit out** to delete in editing. Webster's New World Dictionary, Second College Edition.

McDonald's, the defendant, provided edited version of the security camera footage on DVD from different angles, with cut and paste, omissions of certain facts as to the truth of the matter

asserted. This is hearsay. ER 801. The DVD is totally unreliable, it is not authentic. The DVD misinterprets time, place and how the accident occurred. The DVD has different time recordings, but does not state when the whole DVD was taken by the security camera. ER 1001. The two persons, who edited the security camera footage of the DVD, which was presented for the truth of the matter as asserted to the court, as a courtesy copy, did not have firsthand knowledge of the actions occurring or reviewing the actual security cameras that was present and the circumstances as well as the effect of the slip and fall, pain on Mr. John Jones. ER 602. The DVD does not come under any exception to the hearsay rule.

Therefore, the DVD provided by the defendant, McDonald's, is not compliant with the rules of evidence. Consequently, it has no basis for reliability and the truth of the matter as asserted by the defendant. Consequently, the operating procedures of the McDonald's restaurant, foreseeability of the inherent dangerous risks, and the fast food service area inspection adequacy is up to the jury. Alternatively, the court should have granted a Summary Judgment as a matter of law in favor of the injured customer, Mr. John Jones.

E. 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 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 by asserting that it was reliable. The 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. This court provide the appropriate directive to the trial court.

Date: 8/8/2013

Respectfully submitted,


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