93139-9

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

CASE NO. 73417-2-I

DANA IMORI and DANIEL IMORI, husband and wife,

APPELLANTS,

v.

MARINATION LLC, a Washington Limited Liability Company,

RESPONDENT.

APPELLANTS' PETITION FOR REVIEW TO SUPREME COURT

Peter J. Nichols, WSBA #16633
LAW OFFICE OF PETER J. NICHOLS
2611 N.E. 113th Street, Suite 300
Seattle, WA 98125
Telephone: [206] 440-0879
Email: peternichols@msn.com

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I. IDENTIFICATION OF PETITIONERS

Appellants Dana Imori and Daniel Imori petition this Court for the relief stated herein.

II. COURT OF APPEALS DECISION TO BE REVIEWED

Appellants seek review of the attached March 7, 2016 unpublished Opinion in this matter affirming summary judgment. Reconsideration was denied April 13, 2016.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Court of Appeals decision is conflict with *Bodin v. City of Stanwood, Messina v. Rhodes and Babcock v. State* by assuming the function of the jury by 1.) Factually determining that the substance was water despite evidence of a greasy substance; and 2.) Factually determining that there was no evidence that Marination failed to exercise reasonable care despite evidence to the contrary.

B. Whether the Court of Appeals decision is in conflict with this Court's line of wet floor cases that support the position that water alone can create a dangerous condition.

IV. STATEMENT OF THE CASE

On or about November 29, 2013, appellant Dana Imori, hereinafter referred to as "Imori" went to respondent

Marination Ma Kai, restaurant, hereinafter referred to as "Marination" to order take out lunch. She placed her order with the cashier and paid the amount due. While she was waiting for her order she decided to use the restroom. As she walked toward the restroom she slipped on a greasy spill that was on the floor and fell and fractured her knee cap. See Dec. of Dana Imori, CP 67 -74, 99-102.

As Dana was laying on the floor in pain, her pants were soaking up the greasy liquid that was left on the floor. She took a cell phone photograph of an A-frame type warning sign that was faced in the opposite direction of her travel path toward the bathroom. See Ex. "A" , to the Dec. of Dana Imori. CP 69 -71. She also took photographs of the greasy liquid on the floor. See Ex. "B" and "C" to the Dec. of Dana Imori. CP 71-74. She did not see the liquid on the floor nor the A-frame sign prior to her fall. See Dec. of Dana Imori, CP 67 - 68.

Prior to Dana's arrival at Marination, the respondent's employees were alerted by a customer that there had been a greasy spill near the bathroom. Marination's employee

Alex Smith was asked to clean up the greasy spill. See Witness Statement dated 12/10/13 attached as Ex "A" to Dec.of Peter J. Nichols, CP 99-102. Smith had mopped the floor "in front of the bathroom door and outside the bathroom area" See Smith Dep. Transcript Page 27, Lines 14 - 20, attached to the Dec. of Peter J. Nichols. CP 115. Smith took about a minute to mop up the greasy spill with the cleaning solution. Smith Transcript Page 21, Lines 14 - 19. CP 113 -114. He did not dry the floor. Smith Transcript Page 20, Lines 19 - 21. CP 113 - 114. He then placed a single A-frame warning barricade sign underneath the fire extinguisher next to the bathroom door and went back in the kitchen. Smith Transcript Page 29, Lines 2 - 5. CP 115. There is a factual dispute in the testimony of Imori and Smith on the placement of the warning sign and the amount of greasy liquid left on the floor.

Smith did not follow the cleaning solution manufacturer's instructions, which require the area mopped to also be rinsed and dried. Smith did not place enough A-frame warning barricades around the spill. See Dec. of William Christenson. CP 58.

V. ARGUMENT

This Court should accept review under RAP 13.4.(b)(1). The Court of Appeals Opinion was rendered without oral argument. The Opinion assumed the role of the jury by weighing facts. The Opinion is in direct conflict with Washington's line of wet floor cases. This Court needs to accept review and clarify that water can be a hazardous substance and that an unreasonable risk of harm is a question for the Jury. The process to date has been an unfair substitute for trial by Jury.

Ms. Imori alleges that she was injured when she slipped on a slippery polished concrete restaurant floor after an employee negligently failed to adequately clean up a spill. The March 7, 2016, Opinion affirmed dismissal on summary judgment, but failed to consider significant evidence to support Ms. Imori's negligence claim.

A. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH *BODIN V. CITY OF STANWOOD, MESSINA V. RHODES AND BABCOCK V. STATE*

This Court held in *Messina v. Rhodes Co.*, 67 Wn.2d 19, 27, 406 P.2d 312 (1965):

What constitutes a reasonably safe versus dangerous condition "depends upon the nature of the business conducted and the circumstances surrounding the particular situation". Due to this fact-intensive inquiry,"[n]egligence is generally a question of fact for the jury, and should be decided as a matter of law only "in the clearest of cases and when reasonable minds could not have differed in their interpretation" of the facts. *Bodin v. City of Stanwood, 130 Wn.2d 726, 741, 927 P.2d 240 (1996).*

The Court in *Bodin,* stated that it should be a rare case that is taken from the jury when reasonable minds can differ.

The evidence of a "greasy spill", "spilled beverage", "amount of greasy spil left by Smith on the floor" "substandard cleaning" and "warning sign placement" is fact intensive. Reasonable minds can differ in the interpretation of the facts of this case and it should be questions of fact for the jury pursuant to *Bodin* and *Messina.*

1. Evidence of a "Greasy" Substance:

A fundamental holding of the Opinion is that there is no evidence that Ms. Imori slipped on an unusually slippery or "greasy" substance. This holding appears as a footnote in the Opinion as follows:

> In a statement made shortly after Imori's fall, Smith described the spill he was asked to clean as "greasy." In a later statement as well as in his deposition, Smith denied the spill was greasy and testified that it was a "clear liquid." Imori never testified that the spill was greasy, only that it was water or liquid. Imori now argues that she is entitled to an inference that the spilled substance was greasy. Imori's claim is of no consequence because the only

> evidence in the record, even viewed in the light most favorable to Imori, was that the floor was wet, not greasy, at the time she slipped. (Footnote 1 to Opinion)

The footnote mistakenly rejects Smith's own handwritten initial statement. This was because Smith signed a later statement (written by the insurance adjuster) that denied that he was assigned the task of cleaning up a "greasy" spill. The evidence was improperly weighed and the inference that the Opinion applied was incorrect for summary judgment purposes.

He later testified at his deposition that he was instructed to clean up a beverage and when asked what it was he stated "Well, it was a clear liquid so it could have been water, lemonade, or Sprite." CP 113.

2.) Smith's Initial Statement was Admissible Evidence

A copy of Smith's initial statement is attached as an Appendix. Smith's initial statement was a record of a business event made in the course of his employment at the direction of his boss, Shawn Finley. CP 112. The statement form was provided by Finley and was completed and returned to Finley as instructed. CP 118.

After rejecting the initial statement that the spill was "greasy" footnote 1 goes on to conclude "the floor was wet, not greasy, *at the time she slipped*". (Emphasis supplied). The Court of Appeals thereby assumed the function of the jury by weighing the facts as presented in documents prior to trial contrary to *Babcock v. State, 116 Wn.2d 596, 809 P.2d 143.*

This Court stated in *Babcock,*

> "Because the trial court disposed of the case on a motion for summary judgment, we may only affirm if no issues of material fact exist. CR 56(c); *Hartley v. State,* 103 Wash.2d 768, 774, **698 P.2d 77** (1985). This rule prevents courts from assuming the function of a jury by weighing the facts as presented in documents prior to trial. See *Palmer v. Waterman S.S. Corp.,* 52 Wash.2d 604, 608-09, **328 P.2d 169** (upholding denial of summary judgment when facts were at issue), cert. denied,**359 U.S. 985**, **79 S.Ct. 940**, 3 L.Ed.2d 933. (1958).
>
> Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial. See *Graves v. P.J. Taggares Co.,*94 Wash.2d 298, 302-03, **616 P.2d 1223** (1980) (summary judgment only appropriate when facts are susceptible to only one interpretation). Accordingly, we construe facts in the light most favorable to the nonmoving party in reviewing a motion for summary judgment. *Wendle v. Farrow,* 102 Wash.2d 380, 383, **686 P.2d 480** (1984). Id, at 598.

Here Smith's initial statement is admissible as a business record.

RCW 5.45.020. Business records as evidence

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Also see, ER 613 Prior Statements of Witnesses as evidence.

(a) **Examining Witness Concerning Prior Statement.** In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at the time, and on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

ER 801

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(2) *Admission by Party-Opponent.* The statement is offered against a party and is . . .

iii. a statement by a person authorized by the party to make a statement concerning the subject.

Respondent did not object to the Smith statement as admissible until it argued it as inadmissible in its Court of Appeals reconsideration brief.

3.) Overlooked Evidence of Negligent Cleaning

The opinion mistakenly concludes as a matter of law that:

> Finally, even if the wet area was hazardous, there is no evidence that Marination failed to exercise reasonable care in alleviating the hazard. (Opinion p. 7)

However,

- Smith testified:

I was dishwashing, doing the regular thing, and then Denise came up to me and said someone spilled a beverage outside and asked me to go mop it up. So I grabbed a mop bucket, a mop and a "wet floor" sign. Then I filled up the mop bucket, took it out, saw that the spill wasn't very big. So I just kind of got the mop. It had the solution in it, but was mostly dry so I could just sponge it up and it wouldn't leave the area terribly wet. So I did that, and then I put up the sign, went back inside, went back to dishwashing. CP 111.

- Q. And this whole process took about a minute? Is that what your testimony was earlier?
  A. Yeah. CP 116.

Smith's initial effort failed to follow posted cleaning instruction. CP 58.

- Immediately after Ms. Imori was taken to the hospital Mr. Smith was directed by his supervisor to "go mop again." CP 112.

- The second time, Mr. Smith prepared "fresh mopping solution" and dried the area with clean towels. CP 105. He also placed wet floor signs around the area in triangular formation (Opinion p. 3.)

- Before Ms. Imori fell, there was a ubiquitous yellow sign "on the wall near the bathroom." CP 105. . . . it was placed off to the side of the bathroom door facing the wall instead of facing approaching traffic. CP 58.

A jury could conclude that Smith performed a quick substandard initial cleaning of a wet greasy substance; or a wet slippery substance; that a careless effort did not conform to defendant's posted instructions; and such a conclusion is reinforced by the fact that it was necessary for Smith to go back and do a second, more careful cleaning where Ms. Imori slipped.

4.) Expert Testimony Was Improperly Rejected.

The opinion acknowledged that appellants' expert witness testified that:

> Christenson also claimed that Smith failed to use the manufacturers instruction for the mop solution, which he asserted required the user to rinse the floor after mopping and then dry the floor using a dry mop or squeegee. Christenson opined that failing to follow the instructions "increased the potential for a person to *slip and fall.*" Finally, Christenson claimed that the industry standard is to set multiple warning barricades at the outer perimeter of a hazard area and that Smith failed to use enough wet floor signs or orient them correctly after mopping for the first time. (Opinion p. 4.)

But the Opinion mistakenly goes on to reject Christenson's opinion as follows:

> But Christenson did not provide a copy of the manufacturer's instructions nor any evidence that the industry standard requires multiple warning signs. The facts required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature, and conclusory statements are insufficient. Christenson's declaration fails to establish the existence of genuine issues of fact for trial. (Opinion p. 8.)

5.) Facts Support the Expert Opinion

Criticism that "Christenson did not provide a copy of the manufacturer's instructions" shows the misunderstanding of the evidence. These cleaning instructions were "posted" by the restaurant itself (CP 58). Certainly the law does not require plaintiffs' expert to provide the defendant a copy of instructions that were posted on defendant's own premises.

There was no challenge to the accuracy of Mr. Christenson's recitation of the cleaning instructions that were posted. Further, Smith's second effort to clean the spill followed the standard testified to by Mr. Christenson – both as to cleaning and as to the placement of warning signs.

Mr. Christenson's opinion was soundly based on defendant's own posted policy as well as his personal experience. It was erroneously rejected.

B. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THE SUPREME COURT'S LINE OF WET FLOOR CASES AND THE DETERMINATION OF A REASONABLY SAFE CONDITION.

1.) This Court's Line of wet floor cases hold that water on the floor can be dangerous.

The Opinion of the Court of Appeals states in part:

> "Imori's claim is of no consequence because the only evidence in the record, even viewed in the light most favorable to Imori, was that the floor was wet, not greasy, at the time she slipped." (Footnote 1 to Opinion)

The line of wet floor cases start with *Shumaker v. Charada Inv. Co., 183 Wash 521, 530, 1935,* and continue with *Merrick v. Sears, Roebuck & Co., 67 W.2d 426, 1965, Brant v. Market Basket Stores, Inc.,72 Wash 466,1967, Charlton v. Toys R Us-Delaware Inc, 158 Wash. App. 906, and Tavai v. Walmart Stores, 176 Wash. App. 122, 2013.*

The Court of Appeals states the "floor was wet, not greasy, at the time she slipped."

This part of the Opinion underscores the Court of Appeals conflict with this Court's wet floor jurisprudence.

Senior U.S. District Judge Justin L. Quackenbush analyzed this Court's line of wet floor cases in *Steffen v. Home Depot,*

CV-13-199-JLQ. 2014,

"The plaintiffs' low success rates in the wet floor cases outlined above should not be misconstrued to suggest that the law shields businesses from liability in an entire category of wet floor slip and falls. Home Depot's premise that "the alleged substance - water - is not hazardous" (ECF No 35 at 4) fails to recognize that *it could be.* Just like any other foreign substance, it can expose an invitee to an unreasonable risk of harm."

An unreasonable risk of harm or dangerous condition is a question for the Jury.

It is for the jury to decide whether a unreasonable risk of harm existed considering the business conducted and the circumstances surrounding this case. *Steffen, id.*

Imori's fall occurred during the lunch hour, a very busy time for the defendant. The location of the fall was a main thorough fare approaching the only access to the bathroom, not an area where liquid on the floor would be expected. There were multiple witness identifications of the substance, grease, water, sprite, lemonade and the cleaning solution. The floor was polished concrete. There were multiple sources of the substance on the floor. One source is the original spill. Secondly the defendant's employee applying a

mop with cleaning solution in the existing mop bucket. There were multiple descriptions of the amount of liquid on the floor from Imori's pants being soaking wet to dampness and pictures of the puddles. There were multiple descriptions of the placement of the single warning sign ranging from not enough to the signage turned in the wrong direction so the warning was not visible to oncoming foot traffic. The defendant's picture of the scene was staged and taken after Imori was transported to the hospital.

These are all questions of fact, which under *Messina*, is a fact intensive inquiry for the Jury to decide whether an unreasonable risk of harm exists.

VI. CONCLUSION

The Opinion quotes case law for the proposition that "the fact that Imori slipped and fell does not, by itself, mean that there is an unreasonably dangerous condition. . . . Nor is the mere presence of water on a floor where someone slips enough, in and of itself, to prove a breach of duty by the landowner." (Emphasis supplied.)

Admissible evidence shows there is more than an inexplicable fall "in the mere presence of water on a floor."

Washington Supreme Court cases hold that water on floors can be a hazard. They hold that wet floor cases are fact intensive inquiries that should be left for the Jury. The Court of Appeals rendered its Opinion in violation of *Babcock v. State* using CR 56 as an unfair substitute for Trial. The Opinion was rendered without hearing oral argument. The Opinion usurped the function of the Jury, and it is in direct conflict with the Supreme Court's wet floor jurisprudence.

Under Babcock v. State the Court can only affirm if there is no issue of fact. A Jury could reasonably conclude that Mr. Smith's original statement that he was directed to clean up a greasy spot is more accurate than the second version written out by the adjuster. The jury could also reasonably conclude that the danger of slipping was not adequately removed before Ms. Imori slipped.

The Court is requested to reverse the March 7, 2016 Opinion and remand the case for trial. Admissible evidence shows more than the "mere presence of water on a floor."

Respectfully submitted this 10 day of May, 2016.

Peter J. Nichols, WSBA #16633
Attorney for Appellants

VII. DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 10, 2016 via hand delivery, an envelope containing a true and correct copy of the Appellants Petition for Review.

Brief addressed to:

Joanne Blackburn / Abigail Caldwell
Gordon Thomas Honeywell
600 University Street, Suite 2100
Seattle, WA 98101
jblackburn@gth-law.com
acaldwell@gth-law.com

DATED AT Seattle, Washington on this 10 day of May, 2016.

Peter J. Nichols

APPENDIX

WITNESS STATEMENT

To be completed by each witness.

1. GENERAL INFORMATION

Marination Location Ma Kai | *Address* 1660 Harbor Ave SW | *Telephone Number* 206-328-9226

Guest Name

2. WITNESS INFORMATION

Name Alex Smith ☐Guest ☒Employee | *Address* 7508 44th Ave SW. Seattle, WA 98136 | *City/State/Zip* Seattle, Wa 98136

Email Address apsmo.lowell@gmail.com | *Phone Number(s)* Home: ( ) ___-____ Work: ( ) ___-____ Cell: (425) 457-6184

3. ACCIDENT DETAILS

Location of Incident

☐Dining Area ☐Expo Line ☐Order/Pickup
☐Restroom ☐Hot Line ☐Patio
☐Dry Storage ☐Sidewalk ☐Other (specify) _____
☐Bar/Rail ☐Parking Lot

Date of Accident:

Time of Accident: ☐AM ☐PM

Description of Accident:

Denise had asked me to mop in front of the bathroom, explaining that someone had spilled something greasy. I went and mopped in a 5ft area in front of the bathroom. I then put down a wet floor sign next to the bathroom door. 10 minutes later I was told someone had slipped. I mopped again, dried the area with a towel, and put down two more wet floor signs.

Signature: Alex Smith — Witness | Date: 12/10/13

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DANA IMORI and DANIEL IMORI, husband and wife,	)	DIVISION ONE
Appellants,	)	NO. 73417-2-I
v.	)	UNPUBLISHED OPINION
MARINATION LLC, a Washington Limited Liability Company,	)	
Respondent.	)	FILED: March 7, 2016

DWYER, J. — Dana Imori (Imori) and her husband Daniel Imori appeal from the summary judgment dismissal of their negligence claim against Marination LLC. Finding no error, we affirm.

I

This case arises out of a slip and fall that occurred at the Marination Ma Kai restaurant around lunchtime on November 29, 2013. After a customer reported spilling a beverage in front of the bathroom area, Alex Smith, a dishwasher at the restaurant, was asked to clean up the spill. Smith poured water into a mop bucket and added a biodegradable mop solution. He took the bucket, a mop, and a collapsible, bright yellow "wet

floor" sign and went to clean up the spill, which he observed to be a puddle of clear liquid about eight inches in diameter.[1] Smith mopped the floor with the solution in the bucket for approximately one minute, wringing out the mop in the bucket at least twice. He stated that, after mopping, the floor remained "a bit damp" but there were no puddles of liquid remaining. Smith did not rinse or dry the floor. He testified that the mop solution is designed to dry quickly and that, in his experience, a floor mopped with the solution would be dry in less than 10 minutes. Smith then placed the wet floor sign immediately next to the mopped area so that it did not block the pathway to the bathroom.

Shortly thereafter, Imori entered the restaurant to buy lunch. After placing her order, Imori walked toward the bathroom, at which point she slipped on what she described as "water" or "liquid." She fell, fracturing her knee. Imori stated that there was enough water on the floor such that it soaked into her pants as she lay on the floor. She alleged she did not see any water or the wet floor sign until after she fell.

Approximately 10 minutes after mopping the spill, Smith learned that Imori had slipped and fallen. Smith mopped the area a second time, dried

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[1] In a statement made shortly after Imori's fall, Smith described the spill he was asked to clean as "greasy." In a later statement as well as in his deposition, Smith denied the spill was greasy and testified that it was a "clear liquid." Imori never testified that the spill was greasy, only that it was water or liquid. Imori now argues that she is entitled to an inference that the spilled substance was greasy. Imori's claim is of no consequence because the only evidence in the record, even viewed in the light most favorable to Imori, was that the floor was wet, not greasy, at the time she slipped.

the area with hand towels, and placed two additional wet floor signs around the area in a triangular formation.

Imori filed a complaint for damages against Marination. Marination moved for summary judgment, contending Imori had failed to set forth facts demonstrating that (1) the wet floor created an unreasonable risk of harm, (2) Marination should have anticipated Imori would fail to protect herself from the danger of slipping, and (3) Marination failed to exercise reasonable care in cleaning the spill.

In response, Imori submitted two photographs she took with her cell phone while waiting for the ambulance to arrive. While it is difficult to glean much useful information from these photographs given the poor reproduction quality, there appears to be a shiny spot in both photographs consistent with Imori's claim that there was water on the floor. One of the photographs corroborates Smith's testimony regarding the placement of the wet floor sign.

Imori also submitted the declaration of William Christenson, a case manager with Construction Dispute Resolution. According to Christenson's curriculum vitae, his background and expertise is in "construction management, building and civil construction, building envelope investigations, and building envelope design." Christenson reviewed Imori's photographs and visited the restaurant to observe the concrete floor outside the bathroom. Christenson claimed that "[t]he area where the fall

occurred varied from slightly gritty to smooth" and this variability "when combined with the wet floor creates an uncertain surface for a person walking to safely navigate." Christenson also claimed that Smith failed to use the manufacturer's instructions for the mop solution, which he asserted required the user to rinse the floor after mopping and then dry the floor using a dry mop or squeegee. Christenson opined that failing to follow the instructions "increased the potential for a person to slip and fall." Finally, Christenson claimed that the industry standard is to set multiple warning barricades at the outer perimeter of a hazard area and that Smith failed to use enough wet floor signs or orient them correctly after mopping for the first time.

The trial court granted summary judgment in favor of Marination and denied Imori's motion for reconsideration.[2] Imori appeals.

II

We review a summary judgment order de novo, engaging in the same inquiry as the superior court. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We view the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Lybbert, 141 Wn.2d at 34. A defendant can move for summary judgment by showing that there is an absence of evidence to support the plaintiff's

[2] Because Imori did not assign error to or otherwise challenge the trial court's denial of her motion for reconsideration, we do not address it. See RAP 10.3(a)(4), (6).

case. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The burden then shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial. Young, 112 Wn.2d at 225. Mere allegations or conclusory statements of fact unsupported by evidence are not sufficient to establish a genuine issue of fact. CR 56(e); Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Nor may the nonmoving party rely on speculation or argumentative assertions that unresolved factual issues remain. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" summary judgment is proper. Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

III

To establish negligence, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). For negligence claims based on premises liability, Washington has adopted the standards set forth in the Restatement (Second) of Torts §§

343 and 343A to determine a landowner's duty to invitees.[3] Iwai v. State, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). A landowner is liable for an invitee's physical harm caused by a condition on the land only if the landowner:

> "(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."

Iwai, 129 Wn.2d. at 94-95 (quoting RESTATEMENT (SECOND) OF TORTS § 343 (1965)). Applying this test, we conclude that Imori fails to establish a genuine issue of material fact that Marination breached any duty of care.

First, there is no evidence in the record that the wet floor presented an unreasonable risk of harm. Imori testified that she slipped on a wet floor and fell. Christenson testified that the floor's uneven texture created "an uncertain surface for a person walking to safely navigate" when the floor was wet. Taking all reasonable inferences in Imori's favor, this constitutes evidence that the pathway to the bathroom was wet and the wetness made the floor slippery. But there is no evidence that the floor was *unreasonably* slippery. The fact that Imori slipped and fell does not, by itself, mean that there is an unreasonably dangerous condition. See Knopp v. Kemp & Hebert, 193 Wash. 160, 164-65, 74 P.2d 924 (1938) ("It is common

[3] Imori's status as an invitee is undisputed.

knowledge that people fall on the best of sidewalks and floors. A fall, therefore, does not, of itself, tend to prove that the surface over which one is walking is dangerously unfit for the purpose."). Nor is the mere presence of water on a floor where someone slips enough, in and of itself, to prove a breach of duty by the landowner. See Shumaker v. Charada Inv. Co., 183 Wash. 521, 530-31, 49 P.2d 44 (1935) ("A wet cement surface does not create a condition dangerous to pedestrians. It is a most common condition, and one readily noticed by the most casual glance.").

Second, Imori fails to establish that she could not reasonably have been expected to protect herself from the wet floor. After Smith mopped the spill, he placed a bright yellow sign reading "Caution: Wet Floor" immediately next to the mopped area. Imori argues that the lettering on the sign was "facing the wall instead of facing approaching foot traffic." But this does not create a genuine issue of material fact given the small size of the mopped area, the proximity of the sign, and the fact that a bright yellow sign typically signifies a warning of some kind.

Finally, even if the wet area was hazardous, there is no evidence that Marination failed to exercise reasonable care in alleviating the hazard. The duty of reasonable care requires a 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) (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 343 cmt. b). The evidence shows that as soon as the restaurant was notified of the spill, Smith completely mopped the spill using a quick-drying biodegradable cleaner and placed a bright yellow wet floor sign near the mopped area. Christenson claims that Smith was negligent for failing to follow the manufacturer's instructions for the cleaner or the industry standard for the use of wet floor signs. But Christenson did not provide a copy of the manufacturer's instructions nor any evidence that the industry standard requires multiple warning signs.[4] The facts required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature, and conclusory statements are insufficient. Christenson's declaration fails to establish the existence of genuine issues of fact for trial.

Affirmed.

We concur:

[4] The record shows that Imori later submitted a copy of the manufacturer's instructions with her motion for reconsideration. Under RAP 9.12, our review of an order granting summary judgment is limited to the "evidence and issues called to the attention of the trial court." We do not consider the instructions on appeal because this evidence was not before the trial court at the time of the summary judgment hearing and Imori does not challenge the order denying reconsideration.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DANA IMORI and DANIEL IMORI, husband and wife,	)	DIVISION ONE
Appellants,	)	No. 73417-2-I
v.	)	ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION
MARINATION LLC, a Washington Limited Liability Company,	)	
Respondent.	)	

The appellants having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

DATED this 13th day of April, 2016.

For the Court: