73417-2

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No. 73417-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DANA IMORI AND DANIEL IMORI

Appellants,

v.

MARINATION, LLC

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

To sustain an action for premises liability business invitee plaintiffs must first establish that the business actually owed them a duty under the three-part test set forth in RESTATEMENT (SECOND) OF TORTS §343. Only if a duty is found does the analysis turn to the other necessary elements of a common law negligence claim. The trial court here found that plaintiffs had not set forth evidence sufficient to impart a duty upon defendant; thus, without establishment of one essential element, plaintiffs' claim of negligence failed as a matter of law. The trial court conducted the proper legal analysis, viewing the facts in a light most favorable for plaintiffs and found a paucity of evidence essential to sustain this action.

Plaintiffs Dana and Daniel Imori ("hereinafter referred to jointly as "Imori") assign error to the trial court's granting of summary judgment alleging that Marination did not properly remove nor warn Imori of the dangerous condition of a spill at the restaurant. Imori also assigns error to the trial court's granting of summary judgment alleging that a genuine issue of fact remains as to whether Marination followed posted cleaning instructions.

Imori argues that liquid on the floor of a restaurant is an unreasonably dangerous condition. It is not, as has been held by a long

line of Washington cases. Imori next contends that Marination did not follow a specific procedure in mopping the spill and such failure constitutes unreasonable care in removing the alleged danger. This assertion was made without any admissible evidence of a required mopping procedure, and in itself does not provide proof of unreasonable care. Finally, Imori asserts that in putting up one warning sign Marination failed to sufficiently warn Imori of the spill and such conduct fell below an undefined standard of care. Imori provided no basis for the alleged standard of care, other than an unqualified expert providing nothing more than inadmissible conclusory testimony in the guise of expert opinion.

The trial court viewed all of the evidence provided by Imori in the light most favorable to them, and found that such evidence was insufficient to prove (a) an unreasonable risk of harm existed, (b) Marination should have expected that Imori would fail to see a large, yellow warning sign; and (c) Marination failed to exercise reasonable care in mopping a liquid spill and posting a large, yellow warning sign. Without proof of all of the above elements, there was no error by the trial court in its decision on summary judgment or on Imoris' motion for reconsideration.

Imori had the burden to provide sufficient, admissible evidence establishing first a duty to business invitees, and second, that such duty

was breached. Imoris' presentation of inadmissible expert opinion and contradictory speculative assertions of fact fails to meet that burden. The trial court's determination on summary judgment should be affirmed.

II. STATEMENT OF THE CASE

A. Facts Underlying the Dispute.

This case arises out of a slip and fall incident occurring on November 29, 2013, at the Marination Ma Kai restaurant owned by Marination, LLC ("Marination"). Clerk's Papers ("CP") 2. At some point during the lunch service, a customer informed Marination that there had been a spill near the restroom. Marination employee Denise Patricelli instructed employee Alex Smith to address the spill by mopping up the affected area. CP 38. Mr. Smith went to the mop sink and filled a bucked with fresh water and a quick drying biodegradable mop solution to mop up the spilled clear liquid. CP 40 – 41. The mopping solution is automatically pre-mixed a system installed by the product manufacturer. CP 41. He took the mopping bucket, a mop, and a yellow, A-frame "wet floor" sign ("Sign") with him to where the clear liquid had spilled outside of the restroom. CP 41. While mopping up the liquid, Mr. Smith wrung out excess water in the mop bucket twice. CP 40. Because the mop solution is quick drying, it is not standard procedure to dry the area with towels. CP 42. As with any cleaning detergent, after the mopping, the area was a bit

damp, but Mr. Smith did not leave any standing pools or puddles of water. After mopping the area, Mr. Smith posted the Sign next to the bathroom door. CP 40, 41.

Plaintiff Dana Imori, a regular visitor of Marination Ma Kai, visited the restaurant for lunch. She placed her order in the small front lobby and walked to the restroom located at the East end of the lobby. As she made her way to the restroom, Mrs. Imori "slipped and fell on water". CP 2. Imori claims that there was such an excess of water on the floor that her pants became soaked with "water/liquid" while she was waiting for medical attention. CP 68. She simultaneously claims that she did not see water on the floor or a "wet" or "caution sign" until she fell. CP 5, 67, 68. When she slipped and fell on "some water/liquid" she allegedly landed on her knee and fractured her knee cap. CP 67.

B. Procedural History

Imori filed this lawsuit against Marination on or about March 3, 2014. CP 3. The parties took depositions, exchanged written discovery, and a site inspection was conducted by Imoris' expert, Mr. William Christensen of the Marination Ma Kai facility. On February 26, 2015, Marination filed a motion for summary judgment against Imori on the basis that Imori had failed to provide any evidence that Marination was negligent in cleaning the clear liquid and posting a warning sign for gusts

of the restaurant. Washington law has long held that water or mere wetness on the floor does not create an unreasonably dangerous condition that would impart a duty upon business owners. CP 4.

Imori opposed Marination's motion for summary judgment alleging questions of material fact existed with regard to the spill and the care exercised by Marination in cleaning up the clear liquid. CP 48 – 56. Imori relied heavily upon the Declaration of William Christenson its position that Marination had not followed certain cleaning instructions or posted sufficient warning signs to alert customers and thus had not met an undefined standard of care. CP 57 – 59. Mr. Christenson's testimony is inadmissible based upon the lack of evidence to support his assertions and upon his lack of qualifications to make him an expert in the field of restaurant and/or slip and fall safety procedures. CP 291 – 294. The trial court granted Marination's motion for summary judgment on March 27, 2015. CP 128 – 129.[1]

On or about April 6, 2015, Imori filed a motion for reconsideration requesting that the trial court reverse its decision based upon newly-submitted evidence despite the fact that such evidence was in the possession of Imori prior to the filing of its response in opposition to

[1] Imori acknowledges in it Motion for Reconsideration that the trial court held that "the Christenson Declaration was not admissible". CP 180.

Marination's motion for summary judgment. CP 179 – 186. On or about April 23, 2015, after inviting briefing from Marination and allowing Imori to file a reply brief, the trial court denied Imoris' motion for reconsideration. CP 310 – 311.

Imori assigns error to the trial court's granting of Marination's motion for summary judgment contending that there are "specific facts" that Marination "did not properly remove nor properly warn Imori of the dangerous condition." Brief of Appellant ("Br. of Appellant") at 2. Imori also assigns error to the trial court's granting of Marination's motion for summary judgment claiming an issue of fact exists as to whether Marination followed its own "posted clean up procedures". Br. of Appellant at 2.

Imori assigns no error, and offers no argument or citation to authority in support of an assignment of error, to the trial court's denial of its motion for reconsideration. Br. of Appellant at 2. Thus, Marination must assume Imori no longer seeks appellate review of the trial court's denial of the motion for reconsideration.

III. ARGUMENT

A. Standard of Review.

A trial court's decision to grant summary judgment is reviewed by this Court *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663 – 664,

958 P.2d 301 (1998); *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001); *Davies v. Holy Family Hosp.*, 114 Wn. App. 483, 491, 183 P.3d 283 (2008). This Court should consider only evidence and issues called to the attention of the trial court during the summary judgment motion. *Green v. Normandy Park*, 137 Wn. App. 665, 677 – 678, 151 P.3d 1038 (2007). When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court, and may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *See Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994); *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994); *Davies*, 114 Wn. App. at 491, 183 P.3d 283 (2008).

The trial court has heard Imoris' arguments, reviewed all the evidence set before it by both parties, and denied Imoris' claim of negligence. Moreover, the trial court considered Imoris' motion for reconsideration, which reiterated their original argument and added new, inappropriate testimony on the law surrounding the standard of care, and denied Imoris' request to reverse its ruling on summary judgment. Marination respectfully asks this Court in reviewing the evidence before it to again deny Imoris' arguments and affirm the trial court's decision

dismissing Imoris' lawsuit against Marination, consistent with Washington precedent for premise liability for business invitees.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and 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). Once the moving party has met its burden by alleging there is no genuine issue of material fact or insufficient evidence to support the claim against it, the burden shifts to the nonmoving party to set forth "specific facts showing there is a genuine issue for trial." *Rathvon v. Columbia Pac. Airlines,* 30 Wn. App. 193, 201, 633 P.2d 122 (1981). In doing so, the nonmoving party can no longer rely on allegations in the pleadings, *Ashcroft v. Wallingford*, 17 Wn. App. 853, 854, 565 P.2d 1224 (1997), and cannot rely on speculation or argumentative assertions that unresolved factual issues remain. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

In a negligence action, the nonmoving party must present proof sufficient to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that the moving party should be held liable. *Gardner v. Seymour*, 27 Wn.2d 802, 808–09, 180 P.2d 564 (1947). In supporting its argument, the nonmoving party cannot provide

reasonable inferences based upon conjecture. *Id.* at 808. Further, all affidavits shall be made on personal knowledge and set forth admissible evidence. CR 56 (e). Inadmissible evidence and speculation is insufficient to rebut summary judgment and sustain Imoris' claims.

B. The Trial Court Properly Granted Summary Judgment.

1. Imori Cannot Establish that Marination Owed a Duty.

The mere fact that the nonmoving party sustained an injury does not entitle the party to put the defendant to the expense of trial. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 781, 133 P.3d 944 (2006) *citing Marshall*, 94 Wn. App. at 377 (an accident does not necessarily lead to an inference of negligence).

A negligence action requires the plaintiff to prove: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127–28, 875 P.2d 621 (1994). The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law. *Id. citing Hutchins v. 1001 Fourth Ave. Assocs.,* 116 Wn.2d 217, 220, 802 P.2d 1360 (1991); *Pedroza v. Bryant,* 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Where there is an absence of even one element necessary to establishing a prima facie case of negligence, plaintiffs' claims must fail

as a matter of law. *See Versteeg v. Mowery*, 72 Wn.2d 754, 755, 435 P.2d 540 (1967).

Section 343 of the RESTATEMENT (SECOND) OF TORTS provides that 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 v. State, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996) (*citing* RESTATEMENT (SECOND) OF TORTS §343); *see also, Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 189, 127 P.3d 5 (2005). In sum, a landowner is liable for an invitee's physical harm caused by a condition on the land if, and only if, the landowner should have realized an unreasonable risk existed and thereafter failed to protect the invitee. *Barker v. Skagit Speedway, Inc.*, 119 Wn. App. 807, 812, 82 P.3d 244 (2003). Plaintiff presumes Marination owes them a duty and fails to provide legal or factual support, analysis, or admissible evidence that

establishes any of the three requisite elements to establishing a duty by Marination. As set forth below, Imori cannot establish a duty and without a duty, Imori cannot sustain a claim of negligence. Br. of Appellant at pp. 5 – 6; *Ruff v. County of King*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995).

a. There was No Unreasonably Dangerous Condition.

The first element of the three part test is that the landowner "knows or by the exercise of reasonable care would discover the condition, and should realize that it involved an unreasonable risk of harm to such invitees." A necessary predicate to establishing this factor is the existence of a condition that poses an "unreasonable risk of harm" to invitees. Plaintiffs cannot establish this necessary element.

Washington courts have unequivocally held that water or mere wetness on the floor is not an unreasonably dangerous condition. In *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 433 P.2d 863 (1967), the plaintiff slipped and fell inside a store within 8 to 12 feet of an entrance. Water was on the floor, having been tracked in by customers from outside, where it had been snowing. The court affirmed a summary judgment dismissal of the plaintiff's case, and in doing so quoted *Shumaker v. Charada Inv. Co.*, 183 Wash. 521, 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."

Brant, 72 Wn.2d at 450, 433 P.2d 863 (*quoting Shumaker*, 183 Wash. at 530–31). The court held that something more must be shown to establish that water makes a floor dangerously slippery. *Id.* at 448–49, *citing Hooser v. Loyal Order of Moose, Inc.*, 69 Wn.2d 1, 416 P.2d 462 (1966); *Hanson v. Lincoln First Federal Savings & Loan Ass'n*, 45 Wn.2d 577, 277 P.2d 344 (1954); *Pement v. F. W. Woolworth Co.*, 53 Wn.2d 768, 337 P.2d 30 (1959). There is no liability when a plaintiff cannot come forward with evidence "other than the fact that the plaintiff slipped and fell, to establish that a dangerous condition existed." *Brant,* 72 Wn. 2d at 448.

Brant forecloses Plaintiffs' claims. They have not, and cannot, establish that the floor was dangerously slippery. Imori repeatedly claimed that she "fell on water that had spilled on the floor," stating "I did not see the water…until I fell." Imori now claims that the substance on the floor was grease, not water, but this is contrary to their allegations and testimony. Indeed, it is contrary to Imoris' own photographs that depict water on the floor though it is unclear where that water derived from, most likely from the ice Imori was given by an employee after the fall.

In their Complaint, responses to discovery, and even in Ms. Imori's declaration in response to Marination's motion for summary judgment, Imori repeatedly contends that the substance upon which she slipped was water. CP 2, 24, 67, 68, 72.

Additionally, Imori has no specific, factual evidence that the liquid on the floor was grease or anything other than water. "A 'fact' is a reality rather than supposition or opinion." *McBride v. Walla Walla County*, 95 Wn. App. 33, 37, 975 P.2d 1029 (1999). "The facts required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice." *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430 – 431, 38 P.3d 322 (2002)(internal citations omitted). The only mention of grease in the record is hearsay. Marination's employee, Mr. Smith prepared a Witness Statement eleven days after the incident wherein he wrote that another Marination employee told that employee that some unknown guest had spilled something greasy. During Mr. Smith's deposition he was questioned about the substance he personally observed and mopped, and about his Witness Statement:

> Q: So the first sentence is accurate?
> A: Minus the last word.
> Q: Why?
> A: Because it was a clear liquid.
> Q: So why did you write "greasy"?
> A: I don't think I was really thinking about it when I wrote this. I was just kind of writing down the basic statement and probably used that just out of lack of care.
> Q: Did Denise tell you that somebody spilled something greasy?
> A: No. Beverage.
> ...
> Q: Do you have any idea what spilled?

> A: I have theories.
> Q: I just want to know what you know. I don't want you to guess.
> A: Well, it was a clear liquid, so it could have been water or lemonade, Sprite. CP 113.

Mr. Smith's Witness Statement constitutes inadmissible hearsay and is not a specific, evidentiary fact upon which Imori can defeat summary judgment.

In *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991), our Supreme Court cited with approval the following observations by the Ninth Circuit in *Kangley v. United States*, 788 F.2d 533 (9th Cir. 1986):

> Washington cases make it clear that the mere presence of water on a floor where the plaintiff slipped is not enough to prove negligence on the part of the owner or occupier of the building. To prove negligence, the plaintiff must prove that water makes the floor dangerously slippery and that the owner knew or should have known both that water would make the floor slippery and that there was water on the floor at the time the plaintiff slipped.

Wiltse, 116 Wn.2d at 459–60 (*citing Kangley*, 788 F.3d at 534–35) (internal citations omitted). The burden is on Imori to prove all there necessary elements, yet they cannot prove any element: that the alleged water made the floor "dangerously slippery", that Marination knew or should have known that the alleged water would make the floor slippery, or that there even was residual water on the floor when Mrs. Imori allegedly slipped.

Imori retained Mr. William Christenson as an expert in this matter. Mr. Christenson had the opportunity to inspect Marination Ma Kai and conduct the testing he felt appropriate. Mr. Christenson conducted no testing. Imori has no objective evidence to establish that "something more" was present on the floor to cause the floor to become "dangerously slippery." Even if the substance was grease, as Imori now claims it was despite any substantive evidence to support that claim, there is no evidence that such substance created an unreasonably dangerous condition to satisfy the first part of this test. The undisputed evidence supports at *best* a "guess or a hunch", "highly speculative conjecture", that the floor was slippery, much less "dangerously slippery." Imori must not only prove that water or wetness existed at the floor at the time of the fall but also that such water or wetness created an unreasonably dangerous condition. They failed to prove so, and cannot establish negligence. Where plaintiff fails to provide evidence that the floor was slippery, dismissal is warranted. *See Merrick v. Sears, Roebuck & Co.*, 67 Wn.2d 426, 429-30, 407 P.2d 960 (1965) ("Any idea of a negligently maintained washroom floor derived from such evidence would be no more than a guess or a hunch – a highly speculative conjecture – for no one testified that…the floor was in fact slippery.")

b. Marination had no Reason to Expect that Imori Would Fail to Discover the Alleged Danger.

Not only is Imori unable to satisfy the first element of the test necessary to impart a duty upon Marination, but Imori likewise cannot establish the second element: that Marination "should expect that they will not discover or realize the danger, or will fail to protect themselves against it." *Iwai,* 129 Wn.2d at 94 (citing RESTATEMENT (SECOND) OF TORTS §343). In *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 624 P.2d 215 (1981), the court clarified that a defendant's duty was "tempered by what it could reasonably expect its guests would perceive for themselves." *Id.* at 479.

If we ignore this element, defendants are virtually rendered insurers of their business invitees, and the Courts have held that defendants hold no such obligation. *Id.* at 479-80. The *Pearce* Court also cited *Leek v. Tacoma Baseball Club*, 38 Wn.2d 362, 229 P.2d 329 (1951), holding that a party's "failure to observe what was plainly there to be observed cannot … operate to enlarge a respondent's duty of care beyond that which it would otherwise be." *Id.* at 369. Water on the floor is a most common condition to be readily noticed by invitees. *See Brant*, 72 Wn.2d at 450.

It is undisputed that Marination posted a Sign in the immediate vicinity of the mopped area. Imori argues that there was only one sign and

it was placed next to the bathroom door, not in front of it, thus, the warning was insufficient. However, Imori offers no evidence that Marination should have expected that customers would not have seen a large, yellow warning sign in a small lobby. It would not be safe to post the Sign directly in front of a door where patrons are continually entering and exiting, and would move the sign in order to enter the restroom. Instead, placing the Sign directly adjacent to the bathroom door in a small lobby corridor is sufficient to provide warning to a customer approaching the bathroom. Imori claims she did not see the Sign. That claim alone is insufficient to impart liability on Marination as it had no reason to expect that Imori would fail to notice a large, yellow sign posted directly adjacent to the bathroom door, and it had no duty to insure Mrs. Imori's safety when she failed to pay attention and observe the Sign, and protect herself accordingly.

c. Marination Exercised Reasonable Care.

After receiving notification of the spill, Marination immediately had employee Alex Smith mop the area and place a Sign warning patrons of the recent mopping and potential wet floor. Mr. Smith admitted that the mopping was reasonably quick because the area of the clear liquid spill was small. Likewise, one Sign was sufficient to warn customers of the mopped area. Imori contends without foundation or admissible evidence

that Mr. Smith's mopping was insufficient as to process and that he did not place enough warning Signs to alert patrons. The third element of the RESTATEMENT (SECOND) OF TORTS §343 requires Imori prove that Marination "fail[ed] to exercise reasonable care to protect them against danger." *Iwai,* 129 Wn.2d at 94. Marination's actions after it learned of the spilled liquid were reasonable and sufficient to protect Mrs. Imori and other patrons against the alleged danger of wetness on the concrete floor.

Marination promptly mopped the area with a clean mop and biodegradable, quick drying mop solution, leaving no residual puddles of water, and put up a large, yellow, warning sign near the area mopped. Although there are no published Washington decisions directly addressing whether a "Caution: Wet Floor" sign constitutes reasonable care after mopping up a spill, there is a large body of persuasive precedent establishing that erecting a "Wet Floor" sign or similar warnings constitutes reasonable care.

In *Golden Corral Corp. v. Trigg*, 443 S.W.3d 515, 519-20 (Tex. App. 2014), plaintiff testified that she did not see the warning sign, yet there was "no evidence to show that she was visually impaired. And, the video conclusively shows that the sign was displayed in a location that gave Cynthia reasonable notice of the hazard where she slipped. While Golden Corral could have provided a warning that was inescapably

obvious, it had no duty to do so." In *Eure v. Kroger Ltd. P'ship I*, No. 7:11-CV-00190, 2012 WL 896347, at *7 (W.D. Va. Mar. 15, 2012), defendant mopped the spill area and placed a yellow warning cone. "That was all that ordinary care required of Kroger as a premises owner. . . . While the result might have been different if Eure had fallen twelve feet from where the cone was placed . . . Eure fell only several feet away from where the cone stood. Furthermore, she concedes that she did not see the large yellow warning cone." In *Scott v. Wal–Mart Stores E., Inc.*, Civil Action No. 2:07cv41KS-MTP, 2008 WL 346096, at *4 (S.D.Miss. Feb. 6, 2008) defendant was found to have used reasonable care in cleaning the area around an ice cooler after loading it and then placing a warning sign in the alter to alert customers to unseen hazards. "That is all that is required of a premise's owner." The court in *Lee v. Ryan's Family Steak Houses, Inc.*, 2006-1400 (La. App. 1 Cir. 5/4/07), 960 So.2d 1042, 1047 (La. Ct. App.) found that an "approximately three-foot-high yellow warning cone containing the universal symbol for a wet floor to be adequate to alert a patron of a hazardous condition." Finally, in *Lindquist v. Dairy Mart/Convenience Stores of Ohio, Inc.*, No. 97-A-0015, 1997 WL 1945289, at *5 (Ohio Ct. App. Nov. 14, 1997), "[a]ppellees satisfied this duty by placing the warning cone at the front of the store where incoming customers could see it."

Imori contends that whether Marination took reasonable steps to clean the spill and warn customers is a question that only a jury can determine. However, Imori has provided no factual or legal support to call into question the reasonableness of Marination's action. In direct contrast, extensive case law across the country has held that a warning sign near the area mopped constitutes reasonable care in warning patrons. Imori has the burden of proving that reasonable care was not exercised, and offers no substantive or admissible evidence to even begin to meet this requirement to sustain their claim.

2. There Are No Questions of Fact.

Imori has not presented evidence sufficient to establish any one of the three requisite elements of RESTATEMENT (SECOND) OF TORTS §343 to impart a duty on Marination for business invitees. Without any argument or evidence to establish a duty, Imoris' claim must fail as a matter of law. Instead, Imori offers speculation, conjecture, and inadmissible expert opinion to attempt to create a question of fact with regard to causation and whether Marination followed clean up procedures. The courts do not turn to the other elements of negligence unless the factors creating a duty have been established. Where that has not occurred, as is the case here where Imori offers no substantive or legal basis imparting a duty, disputing the element of causation is inappropriate. Moreover, whether Marination

followed any particular cleaning procedures is wholly irrelevant to whether Marination owed a duty to Imori and whether that duty was breached. Nonetheless, Marination will address these arguments should this Court find a duty and move forward in the negligence analysis.

3. There is No Evidence to Support Imoris' Claim that Marination Failed to Exercise Reasonable Care.

Imori relies solely on the Declaration of Mr. Christenson to assert that Marination failed to "even follow its own posted clean up procedures" and violated the standard of care "to set multiple barricades" at the hazard area. Imori asserts that Mr. Smith did not take enough time to clean the area, did not squeegee the mop, and did not set sufficient barriers to warn patrons of the mopped area. All of these assertions are baseless, and Imori has provided no admissible evidence or legal theory to prove that Marination failed to exercise reasonable care. First, there is no evidence offered on the amount of time one must take to mop a spill. Conjecture and argumentative assertions alone will not rebut summary judgment. Second, Mr. Smith wrung out the mop at least twice during the clean-up, ensuring that no spilled liquid remained on the floor and that there was no standing water or puddles when he was done. Moreover, the mop solution is quick drying and does not need a towel dry as a standard procedure. Finally, there is no standard of care on how many warning signs must be

placed at a mopped area. Case law on point indicates that one sign is sufficient to warn patrons.

Imori argues that "by not following the instructions Smith increased the potential for a person to slip and fall." Br. of Appellant at 10. This is an unsupported conclusory assertion that cannot defeat summary judgment. Imori offers no admissible expert testimony, objective testing, or even the instructions upon which they are relying to make this assertion. Imori inappropriately opines that the potential for a fall was increased based upon Mr. Smith's actions, yet, again, fails to provide any evidence to support this conclusion.

In a motion for summary judgment, affidavits must be based on the personal knowledge of the affiants. CR 56(e). An expert's affidavit submitted in opposition to a motion for summary judgment must be factually based and must affirmatively show that the affiant is competent to testify to the matters stated therein. *McKee v. American Home Products Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). The opinion of an expert that is only a conclusion or that is based on assumptions is inadmissible. *Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 787, 819 P.2d 370 (1991). "The limitations on expert opinion testimony are … well settled. The opinion must be founded on facts in evidence, whether disputed or undisputed, and all material facts necessary to the formulation

of a sound opinion must be considered." *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 653, 508 P.2d 1370 (1973). "It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

Imori argues that Marination did not follow its "own posted clean up procedures", but Imori did not provide the trial court with a copy of those procedures at the time of the alleged fall. More importantly, Imori's expert opines on the instructions without providing them to the court, without stating that he ever reviewed the instructions and without evidence that these instructions were the same as those posted at the time of the incident. CP 58. This argument and expert opinion is inadmissible as no facts are in evidence or the record upon which to base the assertion that the procedures were not followed. *See Tokarz*, 8 Wn. App. at 653. This Court cannot review information and evidence that was not presented to the trial court when reviewing the record de novo. *Green,* 137 Wn. App. at 677 – 678. Imori fails to provide the instructions that Marination allegedly failed to follow and cannot use a speculative argument to create a question of fact. Moreover, Imori's expert's opinion is inadmissible as it is not based on evidence in the record. "There is no value in an opinion where material supporting facts are not present." *Davidson v. Municipality of*

Metropolitan Seattle, 43 Wn. App. 569, 575, 719 P.2d 569 (1986). A fact finder cannot infer that specific directions were followed or not followed when the directions are not provided and Mr. Christenson's testimony is entirely unsupported. CP 57 – 66. Any argument regarding the mopping instructions must be disregarded due to the lack of admissible evidence provided by Imori.

Finally, Imori's argument that Marination breached a "standard of care" with regard to how many warning signs must be posted also fails as a matter of law. Imori relies upon Mr. Christenson who opines that the "standard of care is to set multiple barricades at the outer perimeter of the hazard area to provide warning as to the location and size of the hazard area." CP 58. Imori provides no documentation on what particular standard of care is being analyzed and no legal authority supporting this contention. Mr. Christenson is an expert in "construction management, building and civil construction, building envelope investigations, and building envelope design." CP 61 – 64. He does state that he has been a "Personal Injury – Consulting Expert" but no detail is provided as to what that entailed, including in what settings he has consulted. It is clear that Mr. Christenson is a construction professional. However, he has provided no evidence of experience in the restaurant industry or safety analysis in the restaurant industry. The standard of care for how many signs and

where such signs should be placed to sufficiently warn customers after an area is spot-mopped is well beyond his area of expertise and is an argumentative assertion and conclusory statement that not only is inadmissible but also cannot create a question of fact. "An expert may not offer opinions on standards of care when they provide no evidence that they have any expertise regarding that relevant standard of care." *Tortes v. King County*, 119 Wn. App. 1, 13, 84 P.3d 252 (2003).

Furthermore, the trend among courts is that a single warning sign in a reasonably visible location at or adjacent to the mopped area satisfies the reasonable care requirement. Mr. Christenson cannot simply offer a baseless opinion of law in the guise of expert testimony when he has set forth no experience, factual support, documentation, or any admissible evidence to support his position.

C. Imori Has Conceded Their Appeal of the Trial Court's Denial of Their Motion for Reconsideration.

"It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Emmerson v. Weilep*, 126 Wn. App. 930, 939-940, 110 P.3d 214 (2005). "[W]hen an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on

the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637 (2005), *citing State v. Olson*, 126 Wn.2d 315, 321, 983 P.2d 629 (1995). In *Ang*, the appellant's brief contained no argument or citation to authority on a question regarding jury's access to the proposed instructions. The appellate court found it inadequate to satisfy RAP 10.3 and did not consider the issue. "We do not address issues that a party neither raises appropriately nor discuses meaningfully with citations to authority." *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008).

Imori filed a Notice of Appeal requesting that this Court review the trial court's decisions granting Marination's motion for summary judgment and denying Imoris' motion for reconsideration. Pursuant to the designation of issues on appeal, Imori included briefing related to the motion for reconsideration in the Designation of Clerk's Papers. Marination did not object to such designation due to Imoris' notice of issues on appeal. However, Imori subsequently failed to assign error to the trial court's decision on motion for reconsideration. Imori also failed to raise, present any argument, or provide citation to any legal authority regarding the trial court's denial of their motion for reconsideration, including setting forth the standard of review for a motion for

reconsideration which differs from that of a motion for summary judgment. Finally, Imori did not cite to any of the pleadings or supporting papers related to the motion for reconsideration in its opening appellate brief.

Imori may not argue this assignment of error or any other new issue in its reply brief. "We will not consider issues argued for the first time in the reply brief." *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990).

Therefore, Marination respectfully requests that this Court not consider the motion for reconsideration or those papers related to that decision. This Court should consider only evidence and issues called to the attention of the trial court during the summary judgment motion. *Green*, 137 Wn. App. at 677 – 678.

D. Should this Court Consider the Trial Court's Denial of Imori's Motion for Reconsideration, the Trial Court's Decision Should be Affirmed.

A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). A trial court abuses its discretion if the decision on reconsideration is "manifestly unreasonable or based upon untenable grounds or untenable reasons." *Id., citing Weems v. North Franklin Sch. Dist.*, 109 Wn. App. 767, 777, 37 P.3d 354 (2002); *Martini*

v. Post, 178 Wn. App. 153, 161, 313 P.3d 473 (2013); *Weyerhauser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

The trial court did not abuse its discretion in denying Imoris' motion for reconsideration when the motion was merely an attempt to rectify an incomplete expert declaration and take a second bite of the apple after a failed summary judgment motion. Imori contended that there was an irregularity in the summary judgment hearing due to ongoing discovery in the lawsuit. However, they failed to provide any evidence of a procedural irregularity or legal authority that ongoing discovery created an irregularity under CR 59(a)(1).

Imori alleged that the incomplete discovery prevented them from producing supporting documentation for Mr. Christenson's declaration, including a photograph Mr. Christenson took of mopping instructions. The deficiencies in Mr. Christenson's declaration were, among others, a failure to provide proof of relevant expertise and qualifications, and failure to support his opinion with any evidence as to the applicable standard of care so as to qualify under ER 702 and the *Frye* Standard. Additional discovery would not have remedied these failures.

"The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence." *Go2Net, Inc.,* 115 Wn. App. at 91. Evidence can be considered "newly

discovered evidence" under CR 59(a)(4) only if the moving party shows that it could not have obtained the evidence earlier. *See, e.g.*, *West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008); *Eugster v. City of Spokane*, 121 Wn. App. 799, 811, 91 P.3d 117 (2004); 4 Karl B. Tegland, Washington Practice: Rules Practice CR 59 at § 16 (6th ed. 2014) (collecting cases) (to present "new evidence" in a post-trial motion for reconsideration, "[t]he evidence must truly be newly discovered, and not simply evidence that was available but not presented at trial."). The qualifications of Mr. Christenson and the basis of his opinions were in no way new evidence, and the additional pictures submitted as exhibits were in Imoris' possession at the time it filed its opposition to Marination's motion for summary judgment.

Further, even with Mr. Christenson's new declaration, Imori still failed to set forth an admissible basis to qualify him as an expert in slip and fall accidents. "An expert may not offer opinions on standards of care when they provide no evidence that they have any expertise regarding that relevant standard of care." *See Tortes v. King Cnty.*, 119 Wn. App. 1, 13, 84 P.3d 252 (2003). Mr. Christenson's experience remained the same despite his testimony reiterating his CV. He has no experience in slip and fall analysis. His subsequent review of the American National Standard Provision of Slip Resistance on Walking/Working Surfaces did not create

expertise his citation to the document fails to support his alleged standard of care with regard to the number of signs a business owner must use. The standard simply requires that devices shall be placed "so that it is clear as to where the hazard exists." There is no required number of signs to create adequate warning, and Mr. Christenson's review of the document is no more an expert opinion than any other individual reading the document.

A motion for reconsideration does not provide Imori with an opportunity for a second bite at the apple. Washington courts will not permit parties to merely re-argue issues already addressed. *See Anderson v. Farmers Ins. Co. of Washington*, 83 Wn. App. 725, 730, 923 P.2d 713 (1996), *as amended on denial of reconsideration*, (Nov. 22, 1996); *see also* WASHINGTON PRACTICE, CIVIL PROCEDURE, § 22.25 (1st Ed. 2003) (CR 59 "does not provide litigants with an opportunity for a second bite at the apple. Courts will not permit parties to merely re-argue issues already addressed"); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 519 n.5 (2008) (a motion for reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment," citing 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2810.1 at 127–28 (2d ed. 1995)); *Backlund v. Barnhartt*, 778 F.2d 1386, 1388 (9th Cir. 1985) (motion for reconsideration was properly denied because it presented no arguments

that had not already been raised in summary judgment); *Ziegler v. Ziegler*, 28 F.Supp.2d 601, 621 (E.D. Wash. 1998) (motion for reconsideration is not appropriately brought to present arguments already considered by the Court). Imori's arguments that Marination did not make a reasonable attempt to clean up the spill, that Imori violated the standard of care, and that Mr. Christenson's declaration created a material issue of fact were already raised in its opposition to Marination's summary judgment motion, already argued during the hearing, and already considered by this Court.

Imori partially, and incorrectly, based their motion for reconsideration upon CR 59(a)(7 – 9):

> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
>
> (8) Error in law occurring at the trial and objected to at the time by the party making application; or
>
> (9) That substantial justice has not been done.

Subsection (9) is a "catch all". Washington courts have emphasized that granting reconsideration based on subsection (9) should be rare given the other broad grounds available under CR 59. *See Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001); *Kohfeld v. United*

Pacific Ins. Co., 85 Wn. App. 34, 41, 931 P.2d 911 (1997). Additionally, Imori had the ability to request a CR 56(f) continuance "as is just" to obtain the discovery it contends was necessary but failed to do so. Their failure to use the tools of the court does not constitute substantial injustice.

Subsections (7) and (8) of CR 59 are in essence arguments that the Court made a mistake. Imori provided no factual support or legal argument or authority for the proposition that the trial court erred or that there was no evidence or reasonable inference to justify the decision.

Based upon the arguments, evidence, and legal authority set forth by Imori on its motion for reconsideration, the trial court did not abuse its discretion in denying the motion. The additions to Mr. Christenson's declaration were not newly discovered evidence, Imori presented no new argument it did not or could not have made in the motion for summary judgment, and Imori failed to establish reconsideration was warranted under any subsection of CR 59. Marination respectfully requests that this Court affirm the trial court's decision denying Imoris' motion for reconsideration where the trial court did not abuse its discretion.

IV. CONCLUSION

A. Motion for Summary Judgment

Even in the light most favorable to Plaintiffs, Imori has failed to rebut summary judgment on their claims. The trial court did not err in

granting summary judgment when Imori provided no argument or evidence to establish the requisite elements of the RESTATEMENT (SECOND) OF TORTS §343 to impart a duty upon Marination. There was no unreasonably dangerous condition at Marination on the date of the incident. Water or wetness on the concrete floor is a common condition that guests should perceive. Without evidence to show that water, wetness, or even grease was actually on the floor at the time of the fall, and without any evidence to establish that such wetness made the floor unreasonably dangerous, Imori cannot sustain their claim. Moreover, Marination could not have expected that Imori would not see a large, yellow warning sign in the middle of a small lobby. It would have been inappropriate to place the sign directly in front of the bathroom door as that could have caused difficulty in entering and exiting the facility. Placing the sign near the mopped area was sufficient to warn customers. Imori's failure to see the sign does not in itself impart a duty on Marination otherwise that would imply that all restaurateurs are also insurers of patron's safety, a burden that has been dismissed by the courts. Finally, Marination's immediate mopping of the clear liquid with fresh water and a quick drying mop solution and placing of a warning sign was reasonable. Imori has not set forth sufficient evidence or admissible opinion as to how long one must

mop, the appropriate size of the mopped area, or the placement of warning signs that creates a question of fact as to reasonableness.

The trial court granted summary judgment due to Imoris' failure to set forth sufficient evidence to overcome its initial obstacle and prove the requisite elements establishing that Marination had a duty to Imori. On appeal Imori has not provided any argument that would create an issue of fact on either the elements creating a duty or the elements of the claim of negligence. The fact that an accident occurred does not in and of itself create a claim for negligence. There must be something more, and Imori has not and cannot set forth any evidence of something more to sustain a claim of negligence against Marination.

Marination's motion for summary judgment was properly granted by the trial court. Marination respectfully requests that this Court affirm the trial court's decision in granting the motion and dismiss Imoris' claims against Marination. Imori cannot provide evidence sufficient to prove its claim of negligence when Marination acted with care, Imori failed to protect herself, and no unreasonably dangerous condition existed at the restaurant at the time of the fall. Without establishing that Marination owed Imori a duty, Imori cannot sustain a claim of negligence, and this lawsuit should be dismissed as a matter of law.

///

B. Motion for Reconsideration

Imori did not assign error to the trial court's ruling on their motion for reconsideration. Because Imori did not assign error, identify a standard of review, present argument, provide legal citation on this issue, or even cite to any of the pleadings, supporting documents, or order for the trial court's denial of the motion for reconsideration. Marination respectfully requests that this Court not consider the motion for reconsideration or any related papers. Should this Court decide to consider the motion for reconsideration, Marination respectfully requests that this Court affirm the trial court's denial of the same when Imori presented no grounds upon which to reconsider the summary judgment motion and the trial court did not abuse its discretion in denying the motion based upon evidence that was not "newly discovered" and upon argument that was merely a reiteration of argument made on summary judgment.

Dated this 18th day of September, 2015.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____

Joanne T. Blackburn, WSBA No. 21541
Abigail J. Caldwell, WSBA No. 41776
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2015, I filed the foregoing document (original and one) with the Court of Appeals, Division I and delivered a copy of the document via electronic mail on this date and placed and United States Mail to:

Attorney for Appellant

Peter J. Nichols, WSBA No. 16633
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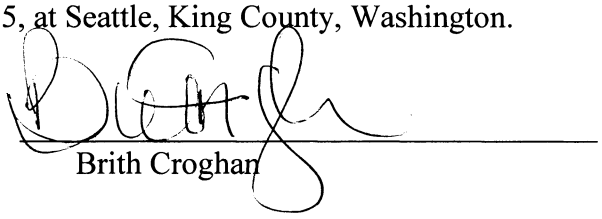
Dated on September 18, 2015, at Seattle, King County, Washington.



Brith Croghan

APPENDIX A

APPENDIX

WASHINGTON STATE COURT RULES

(Pursuant to RAP 10.4(c))

1. CR 56(c), CR 56(e), and CR 56(f)
2. CR 59
3. ER 702
4. RAP 10.3

CR 56

Summary Judgment

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CR 59

New Trial, Reconsideration, and Amendment of Judgment:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

ER 702

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RAP RULE 10.3

CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) Title Page. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) Introduction. A concise introduction. This section is optional. The introduction need not contain citations to the record for authority.

(4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(7) Conclusion. A short conclusion stating the precise relief sought.

(8) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

(b) Brief of Respondent. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.

(c) Reply Brief. A reply brief should conform with subsections (1), (2), (6), (7), and (8) of section (a) and be limited to a response to the issues in the brief to which the reply brief is directed.

(d) [Reserved; see rule 10.10]

(e) Amicus Curiae Brief. The brief of amicus curiae should conform to section (a), except assignments of error are not required and the brief should set forth a separate section regarding the identity and interest of amicus and be limited to the issues of concern to amicus. Amicus must review all briefs on file and avoid repetition of matters in other briefs.

(f) Answer to Brief of Amicus Curiae. The brief in answer to a brief of amicus curiae should be limited solely to the new matters raised in the brief of amicus curiae.

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

(h) Assignments of Error on Review of Certain Administrative Orders. In addition to the assignments of error required by rule 10.3(a)(3) and 10.3(g), the brief of an appellant or respondent who is challenging an administrative adjudicative order under RCW 34.05 shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.

APPENDIX B

APPENDIX
UNPUBLISHED OTHER JURISDICTION CASES

No. 1: *Eure v. Kroger Ltd. P'ship I,* Np. 7:11-CV-00190, 2012 WL 896347 (W.D. Va. Mar. 15, 2012)

No. 2: *Lindquist v. Dairy Mart/Convenience Stores of Ohio, Inc.,* No. 97-A-0015, 1997 WL 1945289 (Ohio Ct. App. Nov. 14, 1997)

No. 3: *Scott v. Wal-Mart Stores E., Inc.,* Civil Action No. 2:07cv41KS-MTP, 2008 WL 346096 (S.D.Miss. Feb. 6, 2008)

No. 1: *Eure v. Kroger Ltd. P'ship I,* Np. 7:11-CV00190, 2012 WL 896347 (W.D. Va. Mar. 15, 2012)

2012 WL 896347
Only the Westlaw citation is currently available.
United States District Court, W.D. Virginia,
Roanoke Division.

Elva EURE, Plaintiff,
v.
KROGER LIMITED PARTNERSHIP I, Defendant.

Civil Action No. 7:11–cv–00190. | March 15, 2012.

Attorneys and Law Firms

John F. Pyle, Danny Davis Ashwell, Jr., Crandall & Katt, Roanoke, VA, for Plaintiff.

C. Kailani Memmer, Guynn Memmer & Dillon, PC, Salem, VA, for Defendant.

MEMORANDUM OPINION

GLEN E. CONRAD, Chief Judge.

***1** This slip-and-fall case is presently before the court on the defendant's motion for summary judgment. For the reasons set forth below, the court will grant the defendant's motion.

I. *Factual and Procedural Background*

On June 18, 2010, Elva Eure ("Eure" or "plaintiff") entered a grocery store owned by Kroger Limited Partnership I ("Kroger" or "defendant"), located at 72 Kingston Drive, Daleville, Virginia. (Docket No. 1–3 at 2–3.)Eure alleges that, while walking through the store with two of her children, she slipped and fell in a wet area on the floor and sustained bodily injuries as a result of the fall. (*Id.* at 3.) Eure then initiated this negligence action in state court against the defendant, seeking $500,000.00 in compensatory damages. Kroger then removed the action to federal court on the basis of diversity jurisdiction. (Docket No. 1.) The defendant has now filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, contending that the plaintiff cannot establish a prima facie case of negligence. (Docket No. 17.)In her response, the plaintiff urges the court to deny the motion based on the existence of genuine issues of material fact. (Docket No. 21.)The court heard argument on the motion on March 6, 2012. The matter is therefore ripe for disposition.

II. *Discussion*

1. Legal Standard

In considering a motion for summary judgment under Federal Rule of Civil Procedure 56, "the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party."*Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir.1994). The court may grant summary judgment only when, viewing the record as a whole and in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the nonmoving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–24 (1986); *Terry's Floor Fashions, Inc. v. Burlington Indus., Inc.,* 763 F.2d 604, 610 (4th Cir.1985). For a party's evidence to raise a genuine issue of material fact that avoids summary judgment, the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party."*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

2. Evidence in the Record

The record in this case reveals that, around 8:00:00 on June 18, 2010, Michael Ripley ("Ripley"), an employee of the Daleville Kroger, noticed a large accumulation of water on the floor of the store in the middle of a large main aisle. (Docket No. 21–1 at 8.) Ripley stated in his deposition that the water originated from a spill. (*Id.*) According to Ripley, the water on the floor spanned a "[r]eal big" area, the size of approximately two tables.(*Id.* at 9.) Ripley cleaned up the spill, using paper towels and a mop, and placed a large yellow warning cone in the middle of the spill area. (*Id.* at 10–13; Docket No. 18–2.)Ripley acknowledged in his deposition that the floor was not completely dry, but was still moist, after he finished mopping up the spill. (Docket No. 21–1 at 12–13.)A store surveillance video recording shows that Ripley placed the warning cone at approximately 8:14:41 and that he left the spill area at approximately 8:15:28. (Docket No. 18–2.)The yellow warning cone stood 36 inches high, was 12 inches by 12 inches at its base, and featured the following words in large black type: "Caution" and "Wet Floor [.]" (Docket No. 18–4 at 2; Docket No. 18–14.)

***2** The video shows that, between the time that Ripley left the spill area after placing the cone and the time that Eure fell (approximately 8:36:26), a time period of approximately twenty-one minutes, numerous people walked near the cone without falling. (Docket No. 18–2.)More specifically, the

video shows that eleven people walked in the exact area where Eure fell during that 21–minute period. (*Id.*) Eure first appears in the video at approximately 8:27:28 and, between that time and the time of her fall, she and her two children walked past the yellow warning cone at least four times. (*Id.*)

As stated above, Eure's fall occurred at approximately 8:36:26. She was wearing flip-flops at the time that she slipped and fell. (Docket No. 18–1 at 40.)In her deposition, Eure stated that she did not notice a yellow warning cone at any time prior to, or at any time after, her fall. (*Id.* at 21, 24.)She acknowledged that she had an unobstructed view of the floor in the area of the fall (*id.* at 31–32); however, Eure stated that the store "had moved stuff around" and she was attempting to locate certain items. (*Id.* at 17, 19.)The video shows that Eure and her two children were walking down a main aisle toward the spill area when she slipped and fell approximately several feet away from the warning cone. (Docket No. 18–2.)Eure conceded that she did not see exactly what she stepped in that precipitated her fall. (Docket No. 18–1 at 32, 50.)However, Eure asserted that:

> After I fell and I was laying there I seen where my foot had kind of slid, where I kind of skidded or slipped when I fell. And it was kind of like a little wet track with my foot and the print of my shoe kind of, if that makes sense. But I didn't see no water or just like a wet residue after I had fallen.

(*Id.* at 50.)Although she did not see what caused her to slip and fall, she stated that, after her fall, she saw "Kroger ladies" using paper towels to wipe up "quarter size puddles of water all along the floor."(*Id.* at 32.)However, Eure clarified that the puddles of water that she noticed after the fall were not the cause of her fall, because the puddles were "off to the side" from the site of the fall. (*Id.* at 32, 35, 37.)Furthermore, the plaintiff stated that she did not see any Kroger employees wiping up puddles in the exact area of her fall. (*Id.* at 37.)Although, as explained above, Eure stated that she never saw a warning cone, she maintained that, after she fell, she noticed a small brown fold-out "wet floor sign ... propped up against" a display approximately six or seven feet away from where she fell. (*Id.* at 24–27.)

Eure's fall was witnessed by at least two Kroger employees, Ripley and Kelly Doak ("Doak"). Furthermore, Eure's seventeen-year-old son, Cody Eure, witnessed his mother's fall, and denied in his deposition ever seeing a cone in the vicinity of the fall. (Docket No. 21–5 at 20–24.)In fact, Cody Eure alleged that Kroger employees retrieved a flat fold-out "[w]et floor sign" and placed it next to his mother only after she had fallen. [1] (*Id.*)

***3** With respect to the location and amount of water that was observed on the floor after Eure's fall, Ripley stated that wiping up the moisture on the floor after Eure's fall required a "[w]hole lot" of paper towels. (Docket No. 21–1 at 20.)Ripley further stated that there were lots of "little puddle [s]" of water on the floor after the fall. (*Id.* at 20–21.)Another Kroger employee, Theresa Kelly ("Kelly"), affirmed that she saw liquid on the floor around the area of Eure's fall. (Docket No. 21–3 at 13.)In quantifying the amount of water on the floor after the fall, Kelly stated that the wet area "wasn't very small[,]" and was "definitely bigger than a few inches."(*Id.* at 14.)Cody Eure stated that, after his mother's fall, he saw four or five dime-sized puddles of water around the area of the fall. (Docket No. 21–5 at 29–30.)However, Doak stated that she did not observe any moisture on the floor after Eure's fall. (Docket No. 21–2 at 14.)

As a result of her fall, the plaintiff alleges, she sustained serious injuries and has incurred continuing medical expenses related to those injuries. (Docket No. 1–3 at 4.)

3. Analysis

Based on this series of events, the plaintiff instituted this negligence action against the defendant. In order to establish a negligence claim under Virginia law, [2] a plaintiff must satisfy four basic elements by a preponderance of the evidence: (1) duty, (2) breach, (3) causation, and (4) harm. *Murray v. United States,* 215 F.3d 460, 463 (4th Cir.2000). The legal issues that arise in the summary judgment motion in this case implicate the duty and breach elements of the plaintiff's negligence claim.

Although, under Virginia law, a business owner is not an insurer of an invitee's safety, *Franconia Assocs. v. Clark,* 463 S.E.2d 670, 672 (Va.1995), a business owner nonetheless owes a duty to exercise ordinary care toward invitees on its premises. *Colonial Stores Inc. v. Pulley,* 125 S.E.2d 188, 190 (Va.1962); *Whitfield v. Cox,* 52 S.E.2d 72, 73–74 (Va.1949). Whether a business owner satisfies this duty toward an invitee is measured by consulting the relevant standard of care. The standard of care applicable to slip-and-fall cases is well-settled in Virginia:

> In carrying out this duty [the store owner] was required to have the premises in a reasonably safe condition for [the customer's] visit; to remove, within a reasonable time, foreign objects from its floors, which it may have placed there or which it knew, or should have known, that other persons have placed there; to warn the [customer] of the unsafe condition if it was unknown to her, but was, or should have been, known to the [store owner].

Rodgers v. Food Lion, Inc., 103 F.3d 119, 1996 WL 673802, at *1 (4th Cir.1996) (per curiam) (unpublished table decision) (quoting *Colonial Stores Inc.*, 125 S.E.2d at 190). Hence, as this passage indicates, the standard of care in this case required Kroger (1) to remove from its floor within a reasonable time any hazardous condition that it created or of which it knew or should have known, and (2) to warn invitees of such a condition.

a. Whether Kroger knew or should have known of the hazardous condition that allegedly caused Eure's fall

***4** In order for Kroger to be adjudged negligent in this case, the plaintiff must first show that Kroger either created or was aware of, or should have been aware of, a hazardous condition on its floor. Eure has produced no evidence suggesting that Kroger created a hazardous condition on the floor. Hence, to defeat the motion for summary judgment, Eure must demonstrate that Kroger either had actual or constructive notice of a hazardous condition on the floor in time to remove it. *See Rodgers*, 1996 WL 673802, at *2 ("[T]he plaintiff need not prove that the defendant had actual notice of a hazardous object on its floor in time to remove it; it is sufficient for the plaintiff to prove constructive notice."). Regarding constructive notice, the Supreme Court of Virginia has stated: "If an ordinarily prudent person, given the facts and circumstances [the defendant] knew or should have known, could have foreseen the risk of danger resulting from such circumstances, [the defendant] had a duty to exercise reasonable care to avoid the genesis of the danger."*Memco Stores, Inc. v. Yeatman*, 348 S.E .2d 228, 231 (Va.1986).

The defendant in this case contends that Eure has failed to point to any evidence in the record indicating that Kroger possessed either actual or constructive notice of a hazardous condition. To support this contention, the defendant cites numerous cases, several of which the court will examine below. In *Winn–Dixie Stores, Inc. v. Parker*, 396 S.E.2d 649 (Va.1990), the plaintiff slipped on a bean on the floor in the produce section of a grocery store. In granting summary judgment in favor of the defendant, the Supreme Court of Virginia stressed that the plaintiff adduced no evidence showing *how* the bean arrived on the floor. *Id.* at 651.The court observed that it could not be inferred that a store employee who dry-mopped the floor shortly before the accident must have missed the bean merely because the bean was present on the floor when the plaintiff fell. *Id.*"To countenance such an inference would ignore the likelihood that the bean found its way to the spot where [the plaintiff] fell as the result of some action taken by another customer after [the employee] finished mopping the produce section."*Id.*

In *Rodgers*, the plaintiff slipped in a puddle of water, which, according to the plaintiff, had pooled in the vicinity of a produce display counter containing crushed ice. *Rodgers*, 1996 WL 673802, at *1. Store personnel testified that they had seen crushed ice fall from the display on previous occasions when produce was removed from the display. *Id.* Store personnel further stated than an employee had spot-mopped the floor beside the display approximately one half-hour before the plaintiff's fall. *Id.* Applying Virginia law, the United States Court of Appeals for the Fourth Circuit concluded that *Winn–Dixie* controlled the outcome of the case, because the plaintiff produced no evidence showing how the crushed ice arrived on the floor. *Id.* at *2. More specifically, the plaintiff produced no evidence suggesting either that the store placed the ice on the floor or that the employee overlooked the ice when he mopped the floor prior to the fall. *Id.* The Fourth Circuit observed that "the puddle could have been the result of some action taken by another customer after the employee finished mopping the produce section."*Id.* Accordingly, the Fourth Circuit determined that, under Virginia law, the plaintiff failed to meet her burden of adducing evidence indicating that the store had either actual or constructive notice of the pooled water. *Id.*

***5** In *Brown v. Rose's Stores, Inc.*, 145 F.3d 1323, 1998 WL 230914 (4th Cir.1998) (per curiam) (unpublished table decision), the plaintiff slipped and fell on a plastic tape dispenser. Applying Virginia law, the Fourth Circuit determined that the fact that store employees carried tape dispensers was too attenuated to suggest that an employee must have been responsible for the tape dispenser on which the plaintiff tripped and fell. *Id.* at *2. Furthermore, the Fourth

Circuit observed that the plaintiff adduced no evidence as to how long the tape dispenser laid on the floor before the fall. *Id.* Hence, the Fourth Circuit concluded that the plaintiff failed to produce evidence suggesting that the store had either actual or constructive notice of the hazardous condition.

After considering these, and the other, cases cited by the defendant in its brief, the court perceives a common thread running through these cases: To establish that a defendant had constructive notice of a hazardous condition, a plaintiff must adduce evidence suggesting both how the object arrived on the floor and for how long the object had been on the floor before the accident occurred. Furthermore, mere speculation or conjecture is insufficient to satisfy this burden. *See, e.g., Murphy v. J.L. Saunders, Inc.*, 121 S.E.2d 375, 378 (Va.1961) ("It is incumbent upon the plaintiff to show why and how the accident happened. If that is left to conjecture, guess or random judgment, the plaintiff is not entitled to recover."). Based on these overriding principles of Virginia negligence law, the defendant argues that Eure cannot establish that Kroger had either actual or constructive notice of any hazardous condition because the plaintiff cannot show how the quarter-sized puddles of liquid arrived on the floor. According to the defendant, it is unknown whether the puddles originated from another customer or even from Eure herself.

The court finds the defendant's arguments unpersuasive. Eure identifies evidence in the record suggesting that Kroger had both actual and constructive notice of the water on the floor. First, with respect to actual notice, Ripley testified that a large spill occurred in the area in which the fall later transpired. He mopped up the water and placed a warning cone in the middle of the spill area approximately twenty-one minutes before Eure's fall. Furthermore, he testified that the floor was still moist after he had mopped it and left the area. Ripley's deposition testimony establishes that Kroger, through one of its employees, likely had actual notice of the wet floor. Second, with respect to constructive notice, the plaintiff has identified evidence as to how the wetness on the floor originated (through the spill and the subsequent mopping), and as to how long the wetness had existed on the floor before her fall (approximately twenty-one minutes). Hence, the cases cited by the defendant are distinguishable on their facts. Unlike the plaintiffs in those cases, the plaintiff in the instant case need not rely on mere speculation or conjecture to establish how the water arrived on the floor and for how long it laid there before the accident happened. Eure points to video and deposition evidence in support of her contention that the water arrived on the floor through the spill and the subsequent mopping and that the water pooled there for approximately twenty-one minutes prior to her fall. In contrast, the plaintiffs in the cases cited by Kroger could not identify any evidence relating to the genesis of the hazardous conditions beyond mere speculation or conjecture. Hence, Eure demonstrates that there is a genuine issue of material fact regarding whether Kroger had actual and/or constructive notice of a hazardous condition on its premises. [3]

b. Whether Kroger adequately warned of the hazardous condition

***6** However, merely showing that a business owner had actual or constructive notice of a hazardous condition is not sufficient to demonstrate liability. Instead, the plaintiff must demonstrate that the defendant acted unreasonably in response to the hazardous condition of which it had notice. In the instant case, the defendant reacted to the hazardous condition by mopping up the spill and placing a large yellow warning cone in the middle of the spill area.

Eure argues that, under the circumstances of this case, placing a single cone in the middle of a liquid spill that originally spanned an area as large as two tables constituted an inadequate warning of the hazardous condition. In support of this argument, Eure cites *Casas v. Wal–Mart Stores, Inc.*, 201 F.3d 435, 1999 WL 999434 (4th Cir.1999) (unpublished table decision). The plaintiff in that case slipped and fell on a wet carpet. *Id.* at * 1. The parties did not dispute that the defendant provided some warning about the wet carpet; however, as the Fourth Circuit observed, the primary issue was "whether the warning given was adequate under the circumstances."*Id.* at *2. The plaintiff testified that she did not see, until after her fall, a "Caution, wet floor" sign that had been placed approximately twelve feet from where she fell.*Id* . However, the defendant's employees offered conflicting testimony as to the number, location, and type of warnings that the defendant had posted.*Id.* In applying North Carolina law, which mirrors Virginia law with respect to the liability of premises owners for hazardous conditions, the Fourth Circuit reversed the district court's grant of summary judgment, explaining that "genuine issues of material fact arise as to the number, location, and adequacy of the warnings given by defendant."*Id.* at *3.

The facts in *Casas,* however, are distinguishable from the facts in the instant case. The video recording in this case clearly establishes that there was one warning cone placed in

the middle of the spill area. Hence, unlike in *Casas,* there is no genuine issue of material fact in this case as to the number or location of the warnings given by Kroger. Furthermore, while the evidence in *Casas* suggested that the warning sign stood approximately twelve feet from the location of the fall, the video in this case illustrates that the large yellow warning cone stood only several feet from where Eure fell.

The court in this case believes that the defendant breached no duty owed to Eure. As stated above, Kroger owed Eure only a "duty to exercise ordinary care toward her as its invitee upon its premises."*Colonial Stores Inc.,* 125 S.E.2d at 190. In carrying out this duty, ordinary care required Kroger

> to have the premises in a reasonably safe condition for [Eure's] visit; to remove, within a reasonable time, foreign objects from its floors, which it may have placed there or which it knew, or should have known, that other persons had placed there; to warn [her] of the unsafe condition if it was unknown to her, but was, or should have been, known to [Kroger].

*7 *Id.*The facts of this case demonstrate that the defendant discharged this duty within the parameters established by the relevant standard of care—after becoming apprised of the existence of a spill, the defendant mopped the area and placed a large yellow warning cone in the middle of the spill area. That was all that ordinary care required of Kroger as a premises owner. *See, e.g., Scott v. Wal–Mart Stores E., Inc.,* Civil Action No. 2:07cv41KS-MTP, 2008 WL 346096, at *4 (S.D.Miss. Feb. 6, 2008) ("The admissible evidence indicates that the defendant used reasonable care in cleaning up the area around the ice cooler after loading it and then placed a warning sign in the area to alert customers to unseen hazards. That is all that is required of a premises owner.").

While the result might have been different if Eure had fallen twelve feet from where the cone was placed, *Casas,* 1999 WL 999434, at *2, those are not the facts in this case—instead, Eure fell only several feet away from where the cone stood. Furthermore, she concedes that she did not see the large yellow warning cone before she fell despite the fact that she had walked by the cone at least four times prior to her fall. [4] In *Great Atlantic & Pacific Tea Co. v. Rosenberger,* 124 S.E.2d 26 (Va.1962), a customer dropped a bottle of liquid starch on a store's floor, causing the starch to pool over a four- to five-foot area. *Id.* at 27.The store manager immediately posted a store employee at the site of the spill to guide customers around the pool. *Id.* When the plaintiff approached the spill area, she looked behind her to ensure that her grandson was following her and, while looking back, slipped and fell on the pool of starch. *Id.* At the time of her fall, the plaintiff did not see the employee stationed next to the starch, who was engaged in directing a young child around the pool. *Id.* Based on these facts, the Supreme Court of Virginia reversed the jury's verdict in favor of the plaintiff, and ordered that judgment be entered in favor of the defendant. *Id.* at 28.The court stated:

> There is, therefore, no evidence in the record to show that the defendant was negligent. But the evidence is without conflict that the reason the plaintiff did not see ... the guard directing the child around [the pool of starch] was because she was carelessly inattentive to her own safety, not because of something which the defendant failed to do.
>
> If we adopt the view of this case which the plaintiff urges upon us, we would then place the defendant in the position of an insurer of the plaintiff's safety. It may be well to say, as we have often said before, that such is not the law in this type of case.

Id. Similarly, the court in the instant case believes that, even when viewing the evidence in a light most favorable to the plaintiff, there is no evidence in the record to show that Kroger was negligent under Virginia law—it satisfied its duty of ordinary care by mopping up the spill and placing a warning cone only several feet from where Eure later slipped and fell. To require anything further of the defendant would transmute Kroger, as a premises owner, into an insurer of its invitees' safety. *See Franconia Assocs.,* 463 S.E.2d at 672 ("The owner of premises is not an insurer of his invitee's safety. Rather, the owner must use ordinary care to render the premises reasonably safe for the invitee's visit.").

III. *Conclusion*

*8 As explained above, the record reveals no genuine issue of material fact regarding the defendant's lack of negligence. Accordingly, the court will grant the defendant's motion for summary judgment. The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to all counsel of record.

All Citations

Not Reported in F.Supp.2d, 2012 WL 896347

Footnotes

1 The court notes that the video refutes this allegation. (Docket No. 18–2.)

2 Because this case is before the court on the basis of diversity jurisdiction, the court must apply the law of Virginia in this negligence action. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938).

3 Eure also contends that she can establish constructive notice through the rule of *Austin v. Shoney's, Inc.,* 486 S.E.2d 285 (Va .1997). In that case, the Supreme Court of Virginia stated:

> The plaintiff was not required to prove that Shoney's had actual notice of the dangerous condition of its floor. If the jury accepted the plaintiff's theory that the grease-like film was the result of improper cleaning methods, the hazardous condition was affirmatively created by the property owner. Thus, Shoney's is charged with constructive knowledge of the risk because it "had a duty to exercise reasonable care to avoid the genesis of the danger."

Id. at 288 (quoting *Memco Stores, Inc.,* 348 S.E.2d at 231).

According to the plaintiff in the instant case, Ripley's failure to utilize a product called "Spill Magic" in cleaning up the spill constituted an improper cleaning method that resulted in the floor's continuing wetness after it was mopped. This situation, Eure contends, imputes to Kroger constructive notice of the hazardous condition under the rule in *Austin.*However, based on the above analysis, in which the court determines that Eure has pointed to other evidence to create a genuine issue of material fact on the issue of notice, the court need not reach Eure's argument related to *Austin.*

4 The plaintiff also argues that the placement of only one cone constituted an inadequate warning because the plaintiff's attention was diverted from the cone by distracting displays that the defendant had positioned around its store and by the fact that the store had recently moved the location of certain grocery items. While the plaintiff correctly argues that the diversion of a person's attention is a factor that a court may consider in some slip-and-fall cases, the facts of this case are not amenable to such an argument. The plaintiff had walked by the warning cone at least four times before she slipped and fell. (Docket No. 18–2.)She further acknowledged in her deposition that she enjoyed an unobstructed view down the middle of the large main aisle where the cone was placed. (Docket No. 18–1 at 31–32.)Additionally, Eure stated that she had previously seen warning cones in a Kroger store and recognized that they signaled that customers should exercise caution in traversing the area of the cone. (*Id.* at 21–23.)

No. 2: *Lindquist v. Dairy Mart/Convenience Stores of Ohio, Inc.,* No. 97-A-0015, 1997 WL 1945289 (Ohio Ct. App. Nov. 14, 1997)

1997 WL 1945289
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Ashtabula County.

Lucy LINDQUIST, et al., Plaintiffs-Appellants,
v.
DAIRY MART/CONVENIENCE STORES OF OHIO, INC., et al., Defendants-Appellees.

No. 97-A-0015. | Nov. 14, 1997.

Civil Appeal from Court of Common Pleas, No. 95 CV 616.

Attorneys and Law Firms

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Atty. Hunter S. Havens, Cleveland, OH, For Defendants-Appellees.

Before Hon. JUDITH A. CHRISTLEY, P.J., Hon. ROBERT A. NADER, J., and Hon. WILLIAM M. O'NEILL, J.

OPINION

CHRISTLEY, Presiding J.

***1** This is an accelerated appeal taken from a final judgment of the Ashtabula County Court of Common Pleas. Appellants, Lucy and William Lindquist, appeal from the trial court's decision granting summary judgment in favor of appellees, Dairy Mart Convenience Stores of Ohio, Inc., and Dairy Mart.

Shortly after 4:00 a.m. on December 12, 1993, Lucy Lindquist ("Lindquist") stopped at the Dairy Mart convenience store located at 120 West Main Street in Geneva, Ohio. The store was open to the public twenty-four hours a day, and Lindquist had visited this particular store several times prior to the date in question. In the parking lot, there was snow and slush on the ground as was typical for that time of the year.

Lindquist entered through the front door to the Dairy Mart store. Immediately inside the entrance was a rug on which customers and employees could wipe their feet. As Lindquist entered, she noticed a bright orange cone with the words "Caution Wet Floor" printed down its side. The floor of the store had been mopped by a Dairy Mart employee just prior to Lindquist's arrival, and the cone was placed by the entrance in order to warn customers that the floor might still be damp from the mopping.

Lindquist made her way to the particular aisle within the store containing the sugar products. As she walked down this aisle, Lindquist slipped and fell, causing an injury to her elbow in the process. Several Dairy Mart employees immediately came to her assistance.

Appellants filed a lawsuit against appellees on November 1, 1995. The complaint alleged claims of negligence and loss of consortium arising from the slip and fall incident at the Dairy Mart store. Appellees filed a joint answer on December 11, 1995.

Subsequently, on August 13, 1996, appellees filed a motion for summary judgment pursuant to Civ.R. 56. The motion was accompanied by Lindquist's deposition and an affidavit as allowed under Civ.R. 56(C). In the deposition, Lindquist indicated that the aisle in which she was walking did not seem to be slippery before the fall, and, she did not see any standing water. Lindquist also stated that although it was not bright, the lighting in the store was at least adequate.

At the time of the accident, Lindquist was looking for an item on the store shelves, thereby precluding her from looking at the aisle floor as she walked. After falling, she noticed that her jacked and pants were damp, but she could not say with certainty where the moisture came from. During the course of the deposition, Lindquist was asked whether her shoes could still have been wet from the snow and slush in the parking lot. Lindquist indicated that she had wiped her feet on the rug inside the store upon entering, but did not know whether there was any moisture remaining on her shoes after doing so. Lindquist also admitted that she saw the cone with the warning "Caution Wet Floor."

Appellees also submitted an affidavit from Roberta Dallas ("Dallas") with their motion for summary judgment. Dallas

was the on-duty supervisor at the Dairy Mart store at the time of the accident. In the affidavit, Dallas averred that the floor of the store had been mopped by another employee shortly before Lindquist's arrival and that the cone had been placed at the store entrance so that patrons could see it upon arriving. Attached to this affidavit was a copy of an accident report that Dallas filled out immediately after the accident. In this report, Dallas indicated that the area of the floor where Lindquist fell appeared to be dry.

***2** Appellants filed a brief in opposition to appellees' motion for summary judgment. Attached to the brief were two depositions. The first deposition was that of Patricia Bailey ("Bailey"). Bailey was the acting manager of the Geneva Dairy Mart store on December 12, 1993. She gave testimony at the deposition as to the procedure that was taught to new employees for mopping the floor. The mopping was done each morning between 3:45 a.m. and 5.00 a.m. due to the slow pace of business and light customer traffic at that time of the morning. Two orange cones were generally used during the process. One was placed at the store entranceway, while the other was moved from aisle to aisle as the employee did the mopping.

The second deposition was of the employee, Marilyn Burton ("Burton"), who actually did the mopping on the night of Lindquist's slip and fall. Burton testified in her deposition that while she did not recall the exact time she began mopping on the night in question, she usually started around 3:45 a.m. She first mopped the front entrance area and then replaced the rug inside the entranceway and set out the warning cone. While there was a second cone in the store, Burton did not move it from aisle to aisle as she mopped. Rather, Burton indicated that the second cone was also frequently used in the front of the store, especially in the winter when the parking lot was covered with snow and slush.

Upon considering appellees' request for summary judgment, the trial court granted the motion. In doing so, the trial court found that even upon considering the evidence in the light most favorable to appellants, it could still not conclude that appellees had breached any duty of care which resulted in Lindquist's slip and fall. Because there was no genuine issue as to whether or not appellees had been negligent, the trial court granted summary judgment in their favor.

From this decision, appellants timely filed an appeal with this court in which they assert the following assignments of error:

"[1.] The trial court erred by granting summary judgment to defendants-appellees, as the evidentiary materials submitted by the parties present, at the very least, a genuine issue of material fact as to whether or not defendants appellees breached their duty of care in maintaining the subject premises.

"[2.] The trial court erred in granting summary judgment to defendants-appellees, as genuine issues of material fact exist relative to the comparative negligence of the parties."

In their first assignment of error, appellants maintain that the trial court erred by granting summary judgment on the ground that there was no genuine issue of material fact concerning whether appellees breached a duty of care. The standard for addressing a motion for summary judgment is set forth in Civ.R. 56(C). In order to prevail, the moving party must establish that: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmovant. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 268; *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 65-66.

***3** If the moving party meets its initial burden under Civ.R. 56(C), the nonmoving party then has a reciprocal burden to respond, by affidavit or as otherwise provided in the rule, in an effort to demonstrate that there is a genuine issue of fact suitable for trial . [1] If the nonmovant fails to do so, then the trial court may enter summary judgment against that party. Civ.R. 56(E).

It is well-established that a plaintiff must demonstrate the following elements in an action for negligence: (1) the existence of a legal duty; (2) a breach of that duty; (3) proximate causation; and (4) injury or damages. *Fortman v. Dayton Power & Light Co.* (1992), 80 Ohio App.3d 525, 529; *Keister v. Park Centre Lanes* (1981), 3 Ohio App.3d 19, 22-24. In the context of a summary judgment motion, if the moving party in a negligence action can point to evidence illustrating that the nonmoving party will be unable to prove any one of these elements, then the movant is entitled to judgment as a matter of law.

In the case at bar, there is no doubt that appellees owed some type of legal duty to Lindquist. The relevant inquiry, therefore, is into the scope of that duty. At the time of the accident, Lindquist's status as a customer in the Dairy Mart store was that of a business invitee. Under Ohio law, the owner of a store or other similar place of business is under a duty of ordinary care to maintain the premises in a reasonably safe condition so that customers are not unnecessarily and unreasonably exposed to danger. *Keiser v. Giant Eagle, Inc.* (1995), 103 Ohio App.3d 173, 176; *J.C. Penney Co., Inc. v. Robinson* (1934), 128 Ohio St. 626, paragraph one of the syllabus. The common-law duty of the store owner to exercise ordinary care for the safety of business invitees is that degree of care which an ordinarily reasonable and prudent person would exercise under the same or similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St.2d 310, paragraph two of the syllabus. [2]

A shopkeeper is not, however, an insurer of the customer's safety. *Keiser* at 176; *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. A store operator is under no duty to protect business invitees from dangers which are known to the customer or are so open and obvious to such an invitee that he or she may reasonably be expected to discover and protect against them. *Keiser* at 176; *Paschal* at 203-204; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. Thus, the obligation to warn customers simply extends to latent or concealed perils. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50.

Finally, the duty of ordinary care does not operate to impose liability on a store owner when a customer slips and falls in a puddle of water that was caused by patrons who tracked snow, slush, or rain into the premises. [3] "It is not the duty of persons in control of such buildings to keep a large force of moppers to mop up the rain as fast as it falls or blows in, or is carried in by wet feet or clothing or umbrellas, for several very good reasons, all so obvious that it is wholly unnecessary to mention them here in detail ." *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718, 724. See, also, *Boles v. Montgomery Ward & Co.* (1950), 153 Ohio St. 381, paragraph two of the syllabus (holding that liability will ordinarily not attach to a store owner for injury to a patron who slips and falls on a floor due to outside precipitation tracked in by other patrons). There was no suggestion by the submitted materials as to the source of the "moisture" which caused Lindquist's slip. In fact, Lindquist indicated she did not know if she still had snow or slush on her feet after entering.

***4** In the present case, both parties agree that appellees were under a duty to maintain the Dairy Mart in a reasonably safe condition. The dispute arises over whether appellees breached that duty. Appellants' theory of the case was that it was not snow or slush but appellees' failure to adhere to the store policy relating to the floor mopping procedure which resulted in an inadequate warning being given to business invitees of the potentially hazardous condition caused by the mopping. Specifically, appellants claim that appellees deviated from the ordinary standard of care by not using the second warning cone as the floor was being mopped.

In support of this position, appellants brought forth the depositions of Bailey and Burton. According to appellants, the failure to use the second cone was in derogation of established store policy and created a genuine issue of material fact as to whether or not appellees breached the duty of ordinary care.

Upon review, we can not agree with appellants' position for two reasons. The apparent point of the second cone was to warn that mopping was in progress in a particular aisle of the store, thereby alerting patrons that the aisle was wet and potentially slippery. There was uncontradicted evidence that Burton had completed the mopping of the entire floor prior to Lindquist's arrival. Specifically, appellees submitted Dallas' affidavit and accompany accident report in which she averred the following: that the mopping of the entire store had been completed prior to Lindquist's arrival at the store that the warning cone was stationed at the store entranceway; and that the area of the store where Lindquist fell appeared to be dry immediately after the accident. In addition, appellees relied on the deposition testimony of Lindquist herself in which she admitted that she had seen the warning cone upon entering the store, and that she did not see any accumulation of water in the aisle where she fell.

Once appellees satisfied the initial burden imposed upon them under Civ.R. 56(C) to come forward with evidence demonstrating that they had not breached the duty of ordinary care, the burden then shifted to appellants under Civ.R. 56(E) to set forth specific facts showing that, nevertheless, there was a genuine issue of fact concerning whether appellees had breached that duty of ordinary care.

Appellants did not, however, submit any evidence contradicting appellees' submissions which indicated that the mopping had been completed before Lindquist entered the store. Lindquist was already on notice because of the

placement of the first cone at the front of the store that the entire floor might be damp. And, because the entire mopping process had been completed, there was no specific aisle to mark as being recently mopped.

Thus, the issue of whether Burton had apparently violated store policy became irrelevant. It did not matter if Burton failed to move the second cone from aisle to aisle as she mopped because, prior to Lindquist's entry into the store, Burton had completed all the aisles, including the aisle in which Lindquist fell. In other words, there was no longer a need to place a second cone in the aisle to warn customers that a particular aisle might still be wet.

***5** The second reason that appellants' position goes awry is simply that the presence of a second cone somewhere within the store would have been duplicative. It is uncontroverted that there was a cone at the entranceway to the Dairy Mart store on the night in question warning "Caution Wet Floor." It is also undisputed that Lindquist noticed the cone upon entering the store. Appellants failed to demonstrate how the presence of a second cone in a different location, but identical to the one at the front entrance, would have made a difference.

As discussed above, appellees were under a duty of ordinary care to maintain the Dairy Mart store in a reasonably safe condition so that its customers were not unnecessarily and unreasonably exposed to danger. Appellees satisfied this duty by placing the warning cone at the front of the store where incoming customers could see it. Even construing the evidence in the light most favorable to appellants as the nonmoving party, we conclude that there was no genuine issue of material fact as to whether appellees breached the duty of ordinary care, and appellees were entitled to judgment as a matter of law. As such, appellants' first assignment is without merit.

In their second assignment of error, appellants contend that the trial court erred in granting summary judgment because there was a genuine issue relating to the comparative negligence of the parties.[4] Appellants basically assert that questions of comparative negligence are rarely resolvable through summary judgment exercises. Rather, the issue of comparative negligence should be for the jury to resolve because the evidence is usually not compelling enough to reach but one conclusion.

As a general proposition, we agree that often times in comparative negligence cases there will be a legitimate controversy surrounding the respective fault of the parties. In such cases, the trier of fact must apportion the percentage of negligence attributable to each party that proximately contributed to the plaintiff's injuries.

Summary judgment, however, can properly be granted in favor of a defendant in a comparative negligence case where, pursuant to Civ.R. 56(C), the trial court can make any one of the following determinations as a matter of law: (1) the defendant was not negligent; or (2) the defendant's negligence, if any, was not the proximate cause of plaintiff's injury; or (3) the plaintiff's own negligence outweighed any negligence of the defendant. *Motorists Mut. Ins. Co. v. Rockwell* (1990), 69 Ohio App.3d 159, 162.

In the case *sub judice,* we previously determined that appellants did not put forth evidence tending to show that appellees had breached the duty of ordinary care. The trial court determined that appellees were not negligent as a matter of law. We agree. Summary judgment was properly granted in this case even though appellees had raised the issue of comparative negligence as an affirmative defense in their responsive pleading. As a result, appellants' second assignment lacks merit.

***6** For the foregoing reasons, appellants' two assignments of error are not well-taken. Accordingly, the judgment of the trial court granting summary judgment to appellees is affirmed.

NADER and O'NEILL, JJ, concur.

All Citations

Not Reported in N.E.2d, 1997 WL 1945289

Footnotes

1 In applying Civ.R. 56 to motions for summary judgment, the Supreme Court of Ohio has summarized the exercise as follows:
"Accordingly, we hold that a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the

record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." (Emphasis *sic.*) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

2 The *Smith* decision was subsequently overruled by the Supreme Court of Ohio in *Helms v. American Legion, Inc.* (1966), 5 Ohio St.2d 60. The *Helms* court, however, specifically exempted the *Smith* syllabus from being overruled. *Helms* at syllabus.

3 Although there was some suggestion in this case that Lindquist may have slipped due to moisture remaining on her shoes from the parking lot, appellees did not come forward with enough supporting evidence in this regard. If appellees had done so, then the burden would have shifted to appellants to prove that the slip and fall were the result of the mopping.

4 The issue of comparative negligence was raised by appellees as an affirmative defense in their joint answer to appellants' complaint.

End of Document

No. 3: *Scott v. Wal-Mart Stores E., Inc.,* Civil Action No. 2:07cv41KS-MTP, 2008 WL 346096 (S.D.Miss. Feb. 6, 2008)

2008 WL 346096
Only the Westlaw citation is currently available.
United States District Court,
S.D. Mississippi,
Hattiesburg Division.

Shelia SCOTT, Plaintiff
v.
WAL-MART STORES EAST, INC., Defendant.

Civil Action No. 2:07cv41KS-MTP. | Feb. 6, 2008.

Attorneys and Law Firms

Jay L. Jernigan, Hattiesburg, MS, for Plaintiff.

W. Pemble Delashmet, Delashmet & Marchand, P.C., Mobile, AL, for Defendant.

MEMORANDUM OPINION AND ORDER

KEITH STARRETT, District Judge.

***1** This matter is before the court on Motion for Summary Judgment [# **29**] filed on behalf of the defendant. The court, having reviewed the motion, the response, the briefs of counsel, the pleadings and exhibits on file and being otherwise fully advised in the premises finds that the motion is well taken and should be granted. The court specifically finds as follows:

FACTUAL BACKGROUND

On October 20, 2005, the plaintiff was shopping in Wal-Mart's Petal, Mississippi store located at 36 Byrd Blvd., a store owned and operated by Wal-Mart Stores East, L.P. (incorrectly identified in the Complaint as Wal-Mart, Inc.). The plaintiff checked out and after paying for her items, she proceeded to exit the store. After walking past an ice cooler near the front of the store, the plaintiff slipped and fell.

It is undisputed that prior to the plaintiff's fall, Wal-Mart Associates had loaded bags of ice into the ice cooler located at the front of the store as the events previous to and subsequent to plaintiff's accident were captured by a Wal-Mart security camera. The video of the incident has been preserved in the regular course of business by Wal-Mart and produced in this action and offered in support of this motion.

The video shows that subsequent to the ice being placed in the ice cooler as described in the preceding paragraph but prior to the plaintiff's fall, Chris Mixon and another Wal-Mart Associate began cleaning up any visible water and ice and immediately placed a "Wet Floor" warning cone near the area of the ice cooler. The video also shows the Associate on his hands and knees wiping up visible water and ice with paper towels and surveying the area from the cooler to the exit, bent over looking for any visible ice or water on the floor. There was also a non-slip mat in front of the ice cooler. Further, the video shows that prior to the plaintiff's fall, twenty people walked through the very same area where the plaintiff fell, all without incident.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure, Rule 56(c) authorizes summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law ."*Celotex Corporation v. Catrett,* 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). The existence of a material question of fact is itself a question of law that the district court is bound to consider before granting summary judgment. *John v. State of La. (Bd. of T. for State C. & U.),* 757 F.2d 698, 712 (5th Cir.1985).

A Judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986).

***2** Although Rule 56 is peculiarly adapted to the disposition of legal questions, it is not limited to that role. *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis,* 799 F.2d 218, 222 (5th Cir.1986)."The mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material."*Id.*"With regard to 'materiality', only those disputes

over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment."*Phillips Oil Company v. OKC Corporation,* 812 F.2d 265, 272 (5th Cir.1987). Where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action does not exist as a matter of law, ... all other contested issues of fact are rendered immaterial. *See Celotex,* 477 U.S. at 323, 106 S.Ct at 2552."*Topalian v. Ehrman,* 954 F.2d 1125, 1138 (5th Cir.1992). In making its determinations of fact on a motion for summary judgment, the Court must view the evidence submitted by the parties in a light most favorable to the non-moving party.*McPherson v. Rankin,* 736 F.2d 175, 178 (5th Cir.1984).

The moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail on his motion. *Union Planters Nat. Leasing v. Woods,* 687 F.2d 117 (5th Cir.1982). The movant accomplishes this by informing the court of the basis of its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. *Topalia* n, 954 F.2d at 1131.

"Rule 56 contemplates a shifting burden: the nonmovant is under no obligation to respond unless the movant discharges [its] initial burden of demonstrating [entitlement to summary judgment]."*John,* 757 F.2d at 708."Summary judgment cannot be supported solely on the ground that [plaintiff] failed to respond to defendants' motion for summary judgment," even in light of a Local Rule of the court mandating such for failure to respond to an opposed motion. *Id.* at 709.

However, once a properly supported motion for summary judgment is presented, the nonmoving party must rebut with "significant probative" evidence.*Ferguson v. National Broadcasting Co., Inc.,* 584 F.2d 111, 114 (5th Cir.1978). In other words, "the nonmoving litigant is required to bring forward 'significant probative evidence' demonstrating the existence of a triable issue of fact."*In Re Municipal Bond Reporting Antitrust Lit.,* 672 F .2d 436, 440 (5th Cir.1982). To defend against a proper summary judgment motion, one may not rely on mere denial of material facts nor on unsworn allegations in the pleadings or arguments and assertions in briefs or legal memoranda. The nonmoving party's response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), Fed.R.Civ.P. *See also, Union Planters Nat. Leasing v. Woods,* 687 F.2d at 119.

***3** While generally " '[t]he burden to discover a genuine issue of fact is not on [the] court,' (*Topalian* 954 F.2d at 1137), 'Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention-the court must consider both before granting a summary judgment.' " *John,* 757 F.2d at 712 (quoting *Keiser v. Coliseum Properties, Inc.,* 614 F.2d 406, 410 (5th Cir.1980)).

PREMISES LIABILITY IN MISSISSIPPI

To prevail in the plaintiff's negligence claim, she must prove by a preponderance of the evidence the following elements:

1. A duty owed by the defendants to the plaintiff;

2. A breach of that duty;

3. Damages; and

4. A causal connection between the breach and the damages, such that the breach is the proximate cause of the damages.

Grisham v. John Q. Long V.F.W. Post, 519 So.2d 413, 416 (Miss .1988).

The defendant's motion has challenged the plaintiff's negligence claim generally and the plaintiff's ability to prove a breach of duty by the defendant, specifically. The court notes that in order for the plaintiff to prevail against the defendant's challenge by the defendant's Motion for Summary Judgment, she must make a showing sufficient to establish the existence of the defendant's breach of duty on which she will bear the burden of proof at trial. *See Celotex Corp. v. Catrett,* 477 U.S. at 322.

Because this court has original jurisdiction of this civil action via complete diversity of citizenship of the parties under 28 U.S.C § 1332(a)(1), Mississippi law controls substantive issues. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78-80, 58 S.Ct. 817, 82 L.Ed. 1188 (1934); *Huss v. Gayden,* 465 F.3d 201, 205-06 (5th Cir.2006).

Under Mississippi law an owner, occupant or person in charge of a premises owes a business invitee the duty to keep the premises in a reasonably safe condition or to warn the invitee of dangerous conditions, not readily apparent, which the owner or occupier knows of or should know of in the

exercise of reasonable care. *Waller v. Dixieland Food Stores, Inc.*, 492 So.2d 283 (Miss.1986). Further, when a dangerous condition on the business premises is caused by the owner's or occupier's own negligence, no knowledge of its existence need be shown. In this case, the plaintiff contends that the defendant actually caused the water in which the plaintiff fell to be on the floor but failed to warn the plaintiff of the dangerous condition.

"Under Mississippi law, proof of an injury is not the basis for premises liability, rather negligence of the business owner must be shown. The operator of a business premises owes a duty to an invitee to exercise reasonable care to keep the premises in a reasonably safe condition. However, the business operator is not the insurer against all injuries."*Almond v. Flying J Gas Co.*, 957 So.2d 437, 439 (Miss.Ct.App.2007) (citations omitted). Further, "[t]he fact that the Plaintiff suffered injuries as a result of a slip-fall on the Defendant's premises is not decisive to the issue of whether the Defendant committed a negligent act. The premises' owner is not considered the insurer of the safety of its invitees."*Dickens v. Wal-Mart Stores, Inc.*, 841 F.Supp. 768, 770 (S.D.Miss.1994)(quoting *Kroger, Inc. v. Ware*, 512 So.2d 1281, 1282 (Miss.1987)).

***4** In this case, Wal-Mart was under a duty to " 'keep the premises reasonably safe and when not reasonably safe to warn only where there [was] a hidden danger or peril that is not [in] plain and open view.' " *Magnusen v. Pine Belt Inv. Corp.*, 963 So.2d 1279, 1282 (Miss.Ct.App.2007) (quoting *Little v. Bell*, 719 So.2d 757 (Miss .1998)).

The defendant has provided proof that after filling the ice cooler, its employees cleaned the area around the ice cooler, placed a non-slip mat in front of it, and placed a wet floor sign in the area. Thus the defendant argues that these actions comply with its duty to keep the area reasonably safe and further to warn of any unseen potential hazard related to refilling the ice cooler and the presence of water in the area.

The plaintiff now alleges that after she fell, she saw wet foot prints on the floor all around her. This assertion is not supported by what can be seen on the video nor any other witness statements. The plaintiff does not contend that time elapsed related to the wet floor and constructive notice of the condition or that the condition was caused by a third party are issues in this case. She only contends that the defendant caused the condition and failed to remedy it or to warn her of it.

The defendant argues that if indeed the plaintiff slipped on a wet floor, her failure to see or heed the warning of the "wet floor" sign alone prevents recovery in the instant case and that coupled with the other factors, Wal-Mart is due to prevail as a matter of law. *See Barnette v. Wal-Mart Stores, Inc.*, 2001 W L 1524406, 1-3 (N. D.Miss.2001)(holding that placing a warning sign that Plaintiff saw would prohibit Plaintiff from asserting a claim against a Defendant); *McGowan v. St. Regis Paper Co., Inc.*, 419 F.Supp. 742, 744 (S.D.Miss.1976)("it is frequently held that reasonable care requires nothing more than a warning of danger."); *Piggly Wiggly of Greenwood, Inc. v. Fipps*, 809 So.2d 722, 725-26 (Miss.App., 2001)(stating in dicta that where it is undisputed that a warning sign was in place, summary judgment is proper).

After reviewing the facts of this case, in the light most favorable to the plaintiff as the non-moving party, the court concludes that there is no genuine dispute of any material fact upon which a rational trier of fact could find that the defendant breached its duty of care to the plaintiff. The admissible evidence indicates that the defendant used reasonable care in cleaning up the area around the ice cooler after loading it and then placed a warning sign in the area to alert customers to unseen hazards. That is all that is required of a premises owner. "The duty of the proprietor is to 'eradicate the known dangerous situation within a reasonable time *or* to exercise reasonable diligence in warning those who were likely to be injured because of the danger.' " *Caruso v. Picayune Pizza Hut, Inc.*, 598 So.2d 770 (Miss.1992)(emphasis in the original)(quoting *J.C. Penney Co. v. Sumrall*, 318 So.2d 829, 832 (Miss.1975)).

***5** IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Summary Judgment [**# 29**] filed on behalf of the defendant is Granted and the plaintiff's Complaint is dismissed with prejudice with each party to bear its own costs and that any other pending motions are denied as moot. A separate judgment shall be entered herein in accordance with Rule 58, Federal Rules of Civil Procedure.

SO ORDERED AND ADJUDGED.

All Citations

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