

68506-6

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IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON DIVISION ONE

Court of Appeals No. 68506-6
Skagit County Superior Court No. 10-2-01191-1

Sandra and Alfred SMITH

Appellants,

v.

FOOD PAVILION; DBA BROWN & COLE, INC.

Respondent.

BRIEF OF RESPONDENT

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I.

INTRODUCTION

This is a personal injury claim arising from a slip and fall at a Food Pavilion store. The Respondent requests the Court affirm the Trial Court's Order Granting Summary Judgment of Dismissal.

II.

STATEMENT OF THE CASE

On May 24, 2010, Appellant Sandra Smith and her husband, Alfred Smith, arrived at the Food Pavilion to buy chicken on sale. (CP 13). When the Smiths could not find the chicken on sale, Mrs. Smith walked from the meat department in the back of the store to a check stand to inquire. Her husband remained in the meat department to wait for her. (CP14). On her way to the check stand Mrs. Smith did not notice any water on the floor. (CP 18).

After talking to a checker, Mrs. Smith retraced her steps back toward the meat department to rejoin her husband. (CP

14). When she had travelled about 30 feet she slipped and fell on a puddle of clear liquid, which the parties agree was probably water. (CP 16; CP 28; CP 68). Mrs. Smith estimated that a total of five minutes or less elapsed. (CP19).

The appellant offers no evidence regarding the source of the liquid.¹ The fall occurred in an area of the store that used to be a pharmacy in front of a “dollar aisle.” (CP 107-108). There were no refrigerators, freezers, or other machines nearby which could have leaked water. (CP 69). There was no evidence to suggest that customers were tracking water into the store on the day in question. (CP 70). One of the Respondent’s employees, Mr. Cross, believes the likely source of the puddle was a spill from a customer drinking water or having an open water container. (CP 71).

Nor does the appellant offer any evidence regarding how long the water had been on the floor. Her deposition testimony

¹ Brief of Appellants, pgs 5-9.

reveals that it was probably a very short period of time; perhaps a few seconds. Her husband testified that he did not notice any shoe or cart tracks going through the puddle. (CP 28) He could not determine where the water came from. (CP 28) He did not know how long the water had been present on the floor. (CP 29).

The respondent brought a Motion for Summary Judgment, arguing that Food Pavilion did not cause the puddle, did not have actual or constructive knowledge of the puddle, and that the self-service exception to the notice requirement is inapplicable. The trial court granted summary judgment and this appeal followed.

III.

ARGUMENT

A. The appellants have failed to produce evidence that the respondent had actual or constructive notice of the puddle.

The appellants do not allege that the respondent created

the puddle or had actual knowledge of it. Instead, the appellants argue that the respondent had constructive knowledge of the puddle or, in the alternative, that the self service exception obviates the need to establish constructive notice.² These arguments should be rejected.

Negligence cannot be inferred from the slip and fall alone, or from the mere presence of water on the floor. **Brandt v. Market Basket Stores**, 72 Wn.2d 446, 448, 433 P.2d 863 (1967). The burden is on the appellant to show how long the dangerous condition existed. **Schmidt v. Coogan**, 135 Wn.App. 605, 612, 145 P.3d 1216 (2006). Further, the appellant must establish that the respondent knew, or should have known, of the dangerous condition for a sufficient period of time to enable the respondent to rectify the condition or warn of its existence. In **Ingersoll v. Debartolo, Inc.**, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) the court stated the rule as follows:

As to the law, we start with the basic and well-established principle that for a possessor of land to

² The self service exception is addressed in section B below.

be liable to a business invitee for an unsafe condition of the land, the possessor must have actual or constructive notice of the unsafe condition. *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942). Constructive notice arises where the condition "has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Smith*, at 580. The plaintiff must establish that the defendant had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the plaintiff of the danger. *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 451-52, 433 P.2d 863 (1967).

In the present case, the appellants have offered no evidence that the spill existed for more than a few seconds. Neither Mrs. Smith nor her husband had any idea how long the water had been on the floor. (CP7; CP 29). The spill was apparently not present when Mrs. Smith walked from the meat department to the check stand, but was present when she returned moments later and fell. Mr. Smith did not notice any foot or cart tracks in or around the puddle, further suggesting the puddle had been in existence for only a very short period of time. In short, the appellants offered no evidence that the spill

had been in existence for more than a matter of seconds, an inadequate period of time for the respondent to, in the exercise of reasonable care, discover and remedy or warn of the puddle. The appellants' constructive notice argument fails for lack of evidence.

B. The self service exception to the notice requirement is inapplicable.

In *Pimentel v. Roundup Company*, 100 Wn.2d 39, 666 P.2d 888 (1983), the Supreme Court developed a narrow exception to the requirement of establishing actual or constructive notice of a dangerous condition. In a self service establishment, if unreasonably dangerous conditions are continuous or easily foreseeable, constructive notice need not be established. However, the self service exception is a narrow one, applying only to areas of the store where there is constant handling of slippery products. In *Schmidt v. Coogan*, 135 Wn.App. 605, 610-611, 145 P.3d 1216 (2006) the court stated the rule as follows:

The courts have applied this narrow exception only when the slip and fall happens in an area where there is constant handling of slippery products. See, eg, *Morton v. Lee*, 75 Wn.2d 393, 397-398, 450 P.2d 957 (1969) (outdoor produce display); *O'Donnell v. Zupan Enters, Inc.* 107 Wn.App. 854, 856, 28 P.3d 799 (2001) (grocery store checkout aisle); *Ciminski v. Finn Corp.*, 13 Wn.App. 815, 823-824, 537 P.2d 850 (1975) (cafeteria buffet line); cf *Carlyle v. Safeway Stores, Inc.*, 70 Wn.App. 272, 276, 896 P.2d 750 (1995). In *Carlyle*, the plaintiff asked the court to extend the self service section to encompass a shampoo spill in the coffee aisle. Division Three, noting that the produce department was the most hazardous area of the store and that neither the coffee nor the shampoo was kept in the produce section, declined to do so. *Carlyle*, 78 Wn.App. 278.

In the present case, the spill occurred in an aisle of the store where dollar items were displayed for sale. Appellant has presented no evidence that there were slippery items for sale nearby. The fall did not occur in or near the produce section, near refrigerators or other machinery which could leak, or in any other area where spills were "continuous or easily foreseeable." **Pimentel**, supra at 48.

Schmidt v. Coogan, supra, is on point. In **Schmidt** the

plaintiff slipped and fell on spilled shampoo located in the shampoo aisle. The plaintiff attempted to distinguish **Carlyle v.**

Safeway Stores, Inc., supra, as follows:

But Schmidt attempts to distinguish Carlyle. According to Schmidt, Carlyle turns on the fact that the spilled shampoo was in the coffee aisle; here, the spilled shampoo was in the shampoo aisle, a more foreseeable location for a shampoo spill.

In rejecting this argument, the court reasoned:

But shampoo in the coffee aisle was not a critical factor in Carlyle...Schmidt also reasons that a slip and fall is reasonable foreseeable in the shampoo aisle because a customer might open a shampoo bottle to smell it and accidentally spill it in front of the shelf. If so, most areas of modern grocery stores would be especially hazardous and qualify for the self service exception. Yet the courts have never intended the exception to be so broadly applied. See *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 461, 805 P.2n 793 (1991)...We decline to apply the self service exception to the shampoo spill here.³

If a shampoo spill in a shampoo aisle does not give rise to the self service exception, water on the floor in an area where no slippery items are displayed or handled, does not

³ Schmidt at pages 611-612 [Emphasis added].

implicate the self service exception either. Application of the self service exception in this context would result in the exception swallowing the rule. As the trial court recognized in granting the summary judgment motion in this case,

There really has to be some evidence that the area where plaintiff fell was subject to continuous use such that spills were likely or that spills were reasonably inherent in the process that was going on in the area of the spill. Something like the area where people fill those big water bottles out of a water dispenser. . . . Or in the area where people are unloading their carts . . . or taking an apple off the pile and setting loose a cascade of apples falling in the produce department. Those areas are Pimentel areas. But the area where plaintiff fell is simply not that kind of area, and Pimentel doesn't apply. If it did, every store that had a cooler from which you could buy a bottled Pepsi or bottled water and drink it while you did your shopping would be subject to the Pimentel exception throughout the entire store. I'm pretty sure that's not a rule in Washington. (RP 19).

Indeed, in a long line of cases, our appellate courts have refused to expand what is intended to be a "narrow exception" to the requirement of actual or constructive notice. **Schmidt**, supra, at 610.

IV.

CONCLUSION

It is undisputed that the respondent neither created nor had actual knowledge of the puddle of water in its store. The appellant has failed to produce any evidence that the puddle was in existence for more than a second before Mrs. Smith's fall. Hence appellant has not met her burden to create an issue of fact whether respondent had constructive notice of the spill. Finally, the narrow self service exception is inapplicable because the slip and fall did not occur in a portion of the store where dangerous conditions are continuous or easily foreseeable. The trial court's Order on summary judgment dismissing the appellant's claims should be affirmed.

DATED this 13th day of August, 2012.

BOLTON & CAREY



Kevin M. Carey WBSA 17102

PROOF OF SERVICE

I certify that on the 13 day of August 2012 I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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