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No. 73228-5-I

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

BARBARA SMITH,
Plaintiff/Appellant

vs.

ALBERTSON'S LLC and
Unknown JOHN DOES,
Defendants/Respondents

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON
IN AND FOR THE COUNTY OF KING
CAUSE No: 14-2-11618-7 KNT
HONORABLE TANYA THORP, Trial Judge

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
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I. ARGUMENT

A. Albertson's concedes that the notice of dangerous condition is not required when the defendant created the dangerous condition and that the trial court's analysis is erroneous.

Respondent/defendant Albertson's (hereinafter "Albertson's") concedes the trial court's analysis that "[t]he only time that this [notice] requirement is **excused** is [when] the plaintiff can establish that the self service or [*Pimentel*] exception applies" is erroneous and contrary to the existing law. Albertson's notes in its response brief that "Smith correctly points out that the knowledge element can be established by proof that the **defendant itself created a dangerous condition** that caused the plaintiff's injury." Resp. Brief at 15 (emphasis added.) Furthermore, Albertson's does not dispute but rather repeatedly admits that Albertson's itself placed the mat at issue in front of the cut flower display. CP 58, 81.

Appellant/plaintiff Smith (hereinafter "Smith") submits the trial court committed prejudicial error in finding that the only time the notice requirement is waived in a premises liability case is when the self-service or *Pimentel* exception applies. Smith further submits the trial court committed error in finding Smith was required to prove notice by Albertson's because the self-service or *Pimentel* exception did not apply to Smith's case and granting Albertson's motion for summary judgment.

B. Unlike Albertson’s contention, material facts are in dispute.

Smith objects to Albertson’s contention that “[t]he material facts are not in dispute.” Resp. Brief at 1. First, it is **disputed** whether the mat in front of the flower stands was the same type of the commercial mat used by stores and businesses. Not only Smith’s expert pointed out differences between the mat at issue, placed in front of the flower stands, and the mats placed immediately at the entrance of the store, Albertson’s own CR 30(b)(6) designee could not testify to what type of mat was placed in front of the flower stands. CP 81. In light of such evidence and construing all facts and their inferences in the light most favorable to Smith, it cannot be determined that genuine issue of material fact does not exist.

Second, unlike Albertson’s contention, Smith did not drag her feet into the edge of the mat. The video clip shows Smith taking steps, although not lifting her feet as high as people much younger than her, but walking normally for a woman in late sixties. CP 128. In fact, while asking questions about the still photographs of the security video clip to Smith at her deposition, Albertson’s counsel described Smith’s moving of her feet as the following:

Q. . . . would you agree that your right foot in the photo . . .
is **stepped** just in front of the mat . . . ?

A. Yes, sir.

...

Q. So do you see how you're **stepping**, as you're moving your right foot **onto the mat** or toward the mat, it's now moving the mat?

A. Okay. I see that.

...

Q. . . . do you see how the mat is continuing to get more and more bunched up as you're **walking across it**?

...

A. Okay. I see it.

CP 77-78 (emphasis added.)

Third, it is disputed that the mat was in it of itself a danger and whether the same is too flimsy to be used in a commercial setting and is a trip hazard. Although the mat was not folded, creased, or bunched up at the time Smith's foot landed on the edge of the mat, it was too flimsy that it crumpled up then obstructing or arresting a normal striding, stepping motion and thus causing Smith to trip over it. The mat was inappropriately flimsy and not properly secured to the floor for its intended use and placement and created an unreasonable trip hazard and danger for customers such Smith.

Furthermore, just as "[a] fall . . . , does not, of itself, tend to prove that a surface over which one is walking is dangerously unfit for the purpose" (Resp. Brief at 16)(internal citation omitted), defendant's own statement that "[t]he thousands of other daily visitor to the store had no

problem walking on the mats” is not sufficient to establish that the mat was not a trip hazard, therefore not dangerous. “Proof of the prolonged injury-free use of the product prior to the occurrence of the injury is **not sufficient** to establish that it was not defective.” *Ulmer v. Ford Motor Co.*, 75 Wash. 2d 522, 533, 452 P.2d 729 (1969)(internal citation omitted.) In the instant case, defendant’s own self-serving statement addresses customers, employees or others walking over the mats placed at the entrance of the store and does not distinguish the mat at issue, placed in front of the flower stands, from the two large mats placed immediately at the entrance of the store. Even if no one has ever tripped over the mat at issue prior to Smith’s injury, such is not sufficient to negate that the mat was an unreasonable trip hazard and danger.

C. Albertson’s objection to plaintiff’s expert is unsound.

1. Smith’s expert was timely disclosed, and the expert’s opinion was disclosed at the earliest opportunity.

First, Albertson’s contends that Smith’s walkway and floor safety expert, Tom Baird, or his opinion was not disclosed as required by the court’s case schedule order and discovery rules. Resp. Brief at 5. However, as the clerks papers indicate, Smith **timely disclosed** Mr. Baird as one of her experts in her disclosure of possible primary witnesses on January 12, 2015, as required by the case schedule order. CP 14, 174. In

the disclosure, Smith noted Mr. Baird's qualifications and that Mr. Baird was expected to investigate the accident, cause of the accident, and how the accident occurred. CP 14. Furthermore, in *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011), the Washington State Supreme Court found:

Although a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion, “the record **must show three things**—the trial court's consideration of a **lesser sanction**, the **willfulness of the violation**, and **substantial prejudice** arising from it.” This Court in *Mayer* stated, “[We] ... hold that the reference in *Burnet* to the ‘harsher remedies allowable under CR 37(b)’ applies to such remedies as dismissal, default, and the exclusion of testimony—sanctions that affect a party's ability to present its case—but does not encompass monetary compensatory sanctions.”

(emphasis added)(internal citations omitted.) When considering whether to exclude a witness, the court's “overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997)(citing CR 1).

In the instant case, even if the disclosure were untimely, such was not willful. When Smith obtained Mr. Baird's opinion in the form of his declaration, Smith served a copy upon the Albertson's counsel, along with her response to Albertson's summary judgment motion. CP 82-86. Furthermore, there is no substantial prejudice arising from the alleged

untimely disclosure. Albertson's did not ask to take the deposition of Mr. Baird after he was disclosed as one of Smith's possible witnesses, but if Albertson's chose to do so, Smith was amenable to coordinate the deposition. The trial was not until June 15, 2015; the discovery cut-off was not until April 27, 2015, according to the Order Setting Case Schedule. CP 174.

2. Smith's expert is qualified to testify in regards to floor and walkway safety.

Smith objects to Albertson's contention in its response brief that Mr. Baird is not qualified or that his opinion is not admissible. ER 702 provides:

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.

(emphasis added.) Once an expert is shown to meet the minimum requirements to testify under **ER 702**, any deficiencies in his qualifications go to the **weight** of his testimony rather than to its admissibility. *Keegan v. Grant County PUD*, 34 Wn.App. 274, 661 P.2d 146 (1983).

In the instant case, Mr. Baird is a court qualified safety expert, certified floor safety technician, and a certified walkway safety auditor.

CP 88. He was retained to investigate and to give his opinion on safety issues on over 1,100 injury cases. *Id.* He made presentations and published articles in regards to slip, trip, and fall cases and attended continuing education courses in regards to safety issues. CP 89 – 127. Smith submits Mr. Baird meets the minimum requirements to testify under ER 702 and is qualified to testify in regards to the safety issues in this case.

3. Smith’s expert bases his opinion in facts noted in the materials he reviewed, including the security video clip.

Albertson’s contention that Smith’s expert “merely read Albertson’s summary judgment motion and pleadings and tried to interpret them . . .” is incorrect. Resp. Brief at 4. Smith also objects to Albertson’s implicit argument that Smith’s expert reaches “an opinion by drawing inferences from facts not in evidence or by assuming facts conflicting with the evidence.” *Id.* at 9. As noted in the expert’s declaration, in addition to reviewing the motion, pleadings, deposition transcripts, and the still photographs, he has also reviewed Albertson’s security video clip. CP 83. Expert’s reliance on photographs does not preclude his testimony. See *State v. Groth*, 163 Wn.App. 548, 563-64, 261 P.3d 183, *review denied*, 173 Wn.2d 1026, 272 P.3d 852 (2012) (held the expert’s opinion based upon photographs of the shoe prints was properly allowed and **rejected** a

defense argument that the expert's opinion should have been based upon **first-hand examination of the actual shoe prints.**)

In the instant case, Smith's expert set forth specific facts as depicted on the security video clip as basis of his opinion. These facts are in evidence and do not conflict with the evidence. The expert noted the two large mats placed immediately at the entrance of the store had labels at their top left corners, customarily indicating that they were cleaned by cleaning services. CP 84-85. The mat at issue, placed in front of the flower stands, does not have such label. CP 85. Also, the large mats placed immediately at the entrance of the store appear significantly heavier as noted by another patron captured in the video clip rubbing his feet on one of the two large mats and such movements did not crumple up the mat. *Id.* Furthermore, Smith's expert further noted the mat at issue, placed in front of the flower stands, to be flimsy and unsecured to the floor as Albertson's own employee lifts and straightens the mat with one swift motion with only one hand in the security video clip. *Id.* While the expert may not have inspected the mat in issue, he set forth facts he observed about the mat depicted on the security video clip. He reviewed other pertinent facts noted in depositions of Smith and Albertson's CR 30(b)(6) designee and other materials in accordance with his experience, education, and training in floor and walkway safety, Smith's expert came to a

conclusion that the mat at issue is too flimsy to be used in a commercial setting and is a trip hazard. CP 83-84. As noted in *Groth*, there is no requirement in the evidence rule that the expert must have first-hand examination to give an opinion. As such, the expert's opinion is not conjecture and speculation as Albertson's alleges in its response brief.

Albertson's cites to *Safeco Ins. Co. v. McGrath*, 63 Wash. App. 170, 177-78, 817 P.2d 861 (1991), which is easily distinguishable. The appellate court found the expert's opinion that defendant's mental capacity was so impaired at the time of the shooting that he could not form an intent to injure had no foundation. Particularly, the appellate court noted that nowhere in his affidavit, deposition, or testimony, defendant claimed he was too intoxicated to be able to form the intent to injure.

Another case cited by Albertson's, *State v. Warness*, 77 Wash. App. 636, 643, 893 P.2d 665 (1995), does not support Albertson's argument, either. The appellate court noted:

Expert testimony which is merely speculative is not admissible. **However**, inadmissible speculation is not the same as a **legitimate opinion regarding what "could be" the truth**, so long as that opinion can be stated with the requisite reasonable scientific probability.

...

[E]xpert testimony couched in terms of "could have", "possible", or "similar" is uniformly admitted at trial. The lack of certainty goes to the **weight** to be given the testimony, **not to its admissibility**. This is so, in part,

because the scientific process involved often allows no more certain testimony.

(emphasis added)(internal citations omitted.)

In the instant case, factual basis set forth by Smith's expert is what is depicted in the security camera clip and is not in conflict with what is in the evidence. While Albertson's states in its brief that the mat at issue is the same type of commercial mat used in stores and businesses throughout the region, Albertson's own CR 30(b)(6) designee testified that "[he could not] – [he did not] know" whether the mat was the same type of mat placed in front of the flower stands every time. CP 81. Albertson's does not dispute that the mat at issue, placed in front of the flower stands, does not have the same label as the mats placed immediately at the entrance do. Also, Albertson's does not dispute that another patron captured in the video clip rubbing his feet on one of the two large mats placed immediately at the entrance of the store did not crumple up the mat. Neither does Albertson's dispute that Albertson's own employee lifts and straightens the mat with one swift motion with only one hand in the security video clip. Considering these facts that are undisputed by Albertson's, Smith's expert gave an opinion that the mat at issue was an unreasonable trip hazard and danger "based on a more likely or probable than not basis as a safety professional." CP 86.

4. The trial court's oral rulings are relevant as they were incorporated into the order granting summary judgment.

Albertson's contends the trial court's oral statements during summary judgment hearing are immaterial. Resp. Brief at 21. Albertson's adds "[i]t is apparent from the context that the superior court used the term 'weight' when commenting about the admissibility of Baird's opinions, not his credibility."

However, the Order Granting Defendant Albertson's Motion for Summary Judgment specifically states:

The Court having heard argument of the parties and is fully informed in the premises, **incorporating its oral ruling**, now hereby ORDERS that the defendant's motion is granted.

CP 169 (emphasis added.) Furthermore, the trial court specifically stated:

While I may **not be striking the declaration**, it is entirely within **my discretion to apportion weight**. Mr. Baird's declaration **received zero weight** in my reaching this conclusion

RP 18:3-5; 18:23-19:1 (emphasis added.)

Smith submits the trial court specifically incorporated its oral rulings and committed prejudicial error in apportioning zero weight to Smith's expert.

5. Albertson's caused a dangerous condition by placing an inappropriately flimsy, unsecured mat.

Albertson's contends that it did not cause a dangerous condition unlike the cases cited in Smith's appellate brief. Resp. Brief at 17. That is incorrect. Just as in *Falconer v. Safeway Stores, Inc.*, 49 Wn.2d 478, 478-79, 303 P.2d 294 (1956), where a pedestrian was injured when she slipped on a piece of 'suet,' about three-quarters of an inch long, which defendant grocery store put on the sidewalk while loading and unloading meat, Albertson's put the flimsy mat in front of the flower stands. Just as the defendant grocery store's argument in *Falconer* that it was not negligence to put such a tiny piece of suet was rejected, an argument that it was not negligence to put the flimsy mat that is an unreasonable trip hazard should be rejected, particularly at the summary judgment.

Negligence is a question for the jury unless we can say, as a matter of law, that no negligence was shown. We are not prepared to say, as a matter of law, that the suet in question was too small to sustain the finding of negligence made by the jury.

Id. at 480 (emphasis added.)

Similarly, just as in *Batten v. S. Seattle Water Co.*, 65 Wn.2d 547, 550-51, 398 P.2d 719 (1965), where defendant municipal corporation created a dangerous condition by installing a meter box whose lid was inappropriately small that it did not make snug fit and gave away when plaintiff stepped on it, Albertson's created a dangerous condition by

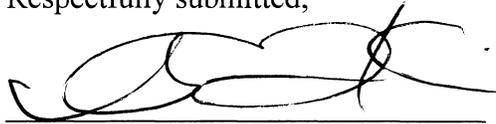
placing a mat that was inappropriately flimsy that it crumpled and tripped plaintiff when plaintiff was walking over the mat.

II. CONCLUSION

For the foregoing reasons, the trial court committed unfair prejudicial error. Smith seeks a reversal of the order granting summary judgment and a remand of the case to the trial court for a trial on the merit.

DATED this 8th day of Sept., 2015.

Respectfully submitted,



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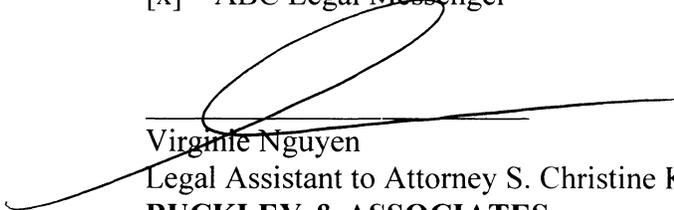
CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 8 day of September 2015, she caused a true and correct copy of the following document(s):

1) REPLY BRIEF OF APPELLANT

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