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I. INTRODUCTION

Terry Tilton was injured while shopping at Quality Food Centers ("QFC") when she slipped and fell in the floral department. Ms. Tilton sued QFC for negligently allowing standing water on the tile floor. QFC moved for summary judgment, arguing that the evidence of an unsafe condition was insufficient to raise a genuine question of fact. Evidence showed that Ms. Tilton fell when her left foot flew straight out in front of her (an indication the floor was slippery); she landed in a pool of water; when she hit the floor her clothes became "soaking wet"; the floral department was a self-service area where fresh cut flowers were displayed in large plastic vases full of water; water routinely accumulated on the floor when customers pulled flowers out of the display vases; there were no mats on the floor; and QFC's floral manager admitted that water on the tile floor was a safety hazard. Despite the evidence, the trial court dismissed the case. According to the trial court, there was no *direct* evidence of water on the floor in the floral department prior to Ms. Tilton's fall. As a matter of law, however, "[c]ircumstantial and

direct evidence are deemed equally reliable."¹ The trial court erred in disregarding Ms. Tilton's circumstantial evidence.

II. ASSIGNMENTS OF ERRORS

Assignments of Error

1. The trial court erred in dismissing Ms. Tilton's case on summary judgment when Ms. Tilton had produced substantial evidence that an unsafe condition caused her to fall.

Issues Pertaining to Assignments of Error

1. Is there sufficient evidence to raise a genuine issue of material fact in regard to whether an unsafe condition existed on the floor of QFC's floral department?

III. STATEMENT OF THE CASE

On April 9, 2005, at the QFC in Lakewood, Ms. Tilton went to look at fresh cut flowers in the floral cooler.² In front the floral cooler was a three-tiered merchandizing shelf where large plastic vases containing fresh-cut flowers were displayed.³ These vases

¹ *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

² CP 2, 49.

³ CP 39.

were filled with water.⁴ When shoppers picked up bouquets of flowers to inspect, or to remove, water would drip onto the smooth tile floor.⁵ At the display, Ms. Tilton's left foot slipped out from under her, and she fell onto the floor.⁶ She did not see water on the floor prior to her fall because she was looking at the flowers, not the floor.⁷ When she fell, she landed in water:

I was covered in water. My whole left side of my body and back was wet. There was water all over the floor around me.^[8]

After the fall, her clothes were "soaking wet."⁹

⁴ *Id.*

⁵ CP 43-44. The floral manager, Magan Robinson testified:

Q: Okay. Okay. And were you aware that water would occasionally drip or spill out of these buckets as the customers would get their flowers?

A: Am I – your question – am I aware – can it happen?

Q: Yes.

A: Yes.

Q: Okay. Did you ever see it happen?

A: Yes.

⁶ CP 49-50.

⁷ CP 49.

⁸ CP 54. *See also*, CP 49-50.

⁹ CP 49.

QFC's floral department is a self-service area.¹⁰ QFC knew that because of how the flowers were displayed, water would often accumulate on the floor.¹¹ QFC also knew that water on the tile floor created a danger for shoppers.¹² Despite this knowledge, QFC did not employ any protective floor coverings, such as mats.¹³ The floral manager testified that the housekeeping practice was simply to look at the floor from time to time and clean up the water.¹⁴

In proceedings below, QFC claimed that there was "no evidence" of water on the floor when Ms. Tilton slipped.¹⁵ That claim was based on Ms. Tilton's statement, three days after the fact, that she took out a vase of flowers as she fell.¹⁶ Later, at deposition,

¹⁰ CP 64.

¹¹ CP 43-44. *See* footnote 5 above.

¹² CP 44-45.

¹³ CP 44.

¹⁴ CP 44-46.

¹⁵ CP 11.

¹⁶ *Id.*

she testified that the vase was still upright after she fell.¹⁷ The incident report stated:

4-9-05 about 2:15/2:20 pm finished grocery shopping – decided to look in the flower cooler for flowers, walking slowly looking at displays my left foot went completely out from under me in a fast full [illegible] landing on my left upper rear end – I took out a pot of flowers & water on my way down.^[18]

At deposition, she testified that she did not knock over the pot/vase:

Q: And if I understand your testimony, the pot that you grabbed onto, it did not, then, fall over?

A: I don't believe so.

Q: Okay. Do you recall one way or the other, though, as you lay on the floor, whether or not that pot was overturned?

A: I don't believe it was overturned. There was still water in it when I got up.

Q: Was it still upright when you got up?

A: Yes.

¹⁷ CP 52-54.

¹⁸ CP 7.

Q: Okay. What did you mean when you said: "I took out a pot of flowers and water on my way down?"

A: I hit them.

Q: Okay. When you say "took out," that seems to me to imply that you took them with you and they knocked over. Is that incorrect, my understanding?

A: Yes.^[19]

IV. ARGUMENT

A. Standard Of Review

An appellate court reviews summary judgments de novo.²⁰ Since Washington law favors resolution of cases on their merits,²¹ summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.²² A material fact is one upon which the outcome of the litigation depends.²³ All facts and reasonable inferences from

¹⁹ CP 52-54.

²⁰ *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008).

²¹ *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 563, 178 P.3d 1054 (2008).

²² *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008).

²³ *Paopao v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 45-46, 185 P.3d 640 (2008).

those facts are to be construed in the light most favorable to the nonmoving party, here Ms. Tilton.²⁴ Summary judgment should be denied unless there is only one conclusion that reasonable minds could reach from the evidence.²⁵ It is improper for the court to weigh conflicting evidence:

When reviewing a case on appeal from a summary judgment order, we must be mindful that we are not charged with making factual findings, and we must be particularly careful to give deference to the position of the nonmoving party to avoid usurping the role of the fact finder. ... **we are not entitled to weigh the evidence.**²⁶

"A defendant is not entitled to summary judgment if the plaintiff avers sufficient facts that, if believed, would support the essential elements of the claim."²⁷ An appellate court reviewing summary dismissal decides whether the plaintiff showed a prima facie case –

²⁴ *York*, 163 Wn.2d at 302.

²⁵ *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).

²⁶ *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 308, 996 P.2d 582 (2000) (Sanders, J., dissenting) (citing *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990 (1964); *No Ka Oi Corp. v. National 60 Minute Tune, Inc.*, 71 Wn. App. 844, n.11, 863 P.2d 79 (1993) ("It is axiomatic that on a motion for summary judgment the **trial court has no authority to weigh evidence or testimonial credibility, nor may we do so on appeal.**") (emphasis added)).

²⁷ *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 445, 177 P.3d 1152 (2008).

not whether the plaintiff met the burden of persuasion, which is for a trier of fact to decide.²⁸

B. QFC Disputes Only The Sufficiency Of The Evidence Supporting One Element Of The Prima Facie Case: The Existence Of An Unsafe Condition.

The legal duty owed by a land owner or possessor to a person entering the premises depends on whether the entrant is a trespasser, licensee, or invitee.²⁹ An invitee is a person who the possessor either expressly or implicitly invited onto the premises for some purpose connected with the possessor's business.³⁰ It is undisputed that Ms. Tilton was QFC's invitee.³¹

A possessor of land is liable for physical harm to invitees caused by a condition on the land when (1) the possessor had actual or constructive notice of an unsafe condition, (2) the possessor should have expected that the invitee would not discover or appreciate the danger or be able to protect herself from it, and (3) the possessor failed to exercise reasonable care to protect against the

²⁸ *Id.* at 451.

²⁹ *Iwai v. State*, 129 Wn.2d 84, 91, 915 P.2d 1089 (1996).

³⁰ *Plaisted v. Tangen*, 72 Wn.2d 259, 261, 432 P.2d 647 (1967).

³¹ CP 14.

danger.³² There is an exception to the notice element: a plaintiff need not establish actual or constructive notice if the injury occurred in a self-service area of the store.³³ The rationale behind the exception is that there are inherent, foreseeable risks associated with the self-service mode of operation.³⁴ An owner that elects to operate its business in a self-service mode is responsible for injuries to which the self-service mode contributed.³⁵ In sum, a plaintiff's prima facie case for a slip and fall action in a self-service area of a store is that (1) an unsafe condition caused injury, (2) the possessor should have expected the invitee would not discover or appreciate the danger or be able to protect herself from it, and (3) the possessor failed to exercise reasonable care to protect against the danger.

³² *Iwai*, 129 Wn.2d at 93-94 (citing the Restatement (Second) of Torts § 343 (1965)). See also, *Mucsi v. Graoch Assocs. P'ship #12*, 144 Wn.2d 847, 859-60, 31 P.3d 684 (2001). Also, as in every negligence case, the plaintiff must establish causation and damages. *Iwai*, 129 Wn.2d at 96. Those elements are not at issue in the present case.

³³ *Iwai*, 129 Wn.2d at 98-99 (citing *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983)).

³⁴ *Ciminski v. Finn Corp.*, 13 Wn. App. 815, 818-819, 537 P.2d 850 (1975); see also, *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn. App. 213, 218-19, 853 P.2d 473 (1993) ("Self-service departments are areas of a store where customers service themselves. In such areas, where lots of goods are stocked and customers remove and replace them, 'hazards are apparent'").

³⁵ *Ciminski*, 13 Wn. App. at 819.

The *only* element of the prima facie case QFC challenged on summary judgment was the existence of an unsafe condition.³⁶

QFC admitted that water on the floor was an unsafe condition.³⁷

Therefore, the only question is whether there was evidence that there was water on the floor where Ms. Tilton slipped.

C. Ms. Tilton Offered Sufficient Evidence To Raise A Genuine Issue Of Material Fact Regarding The Existence Of An Unsafe Condition.

Ms. Tilton offered sufficient evidence to raise a material factual dispute as to whether she slipped because the floor was wet.

Circumstantial evidence is as good as direct evidence.³⁸ In fact, circumstantial evidence can be decisive:

The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."^[39]

³⁶ CP 12.

³⁷ CP 44-45.

³⁸ *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). Despite this well established legal principle, QFC argued to the trial court that Ms. Tilton had to show the existence of an unsafe condition with direct evidence. For example, QFC argued that Ms. Tilton's testimony was "at best ... **only circumstantial evidence** before the Court." CP 65 (emphasis added).

³⁹ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)).

"Circumstantial and direct evidence are deemed equally reliable." Juries are routinely instructed that "the law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts."⁴⁰ When circumstantial evidence can persuade a reasonable person that a declared premise is true, summary judgment must be denied.⁴¹

In *Messina v. Rhodes Co.*, the court held that summary judgment should have been denied where the plaintiff slipped and fell on dirty water in the defendant's department store that was tracked in by customers on a rainy day;⁴² the plaintiff testified that she slipped and fell,⁴³ and the defendant's maintenance employee said he had to watch for water on the floor because water created safety concerns.⁴⁴ The maintenance employee was indefinite as to precisely how often he or an other maintenance employee checked

⁴⁰ See WPI 1.03.

⁴¹ *Qwest Corp.*, 161 Wn.2d at 358.

⁴² 67 Wn.2d 19, 20, 406 P.2d 312 (1965).

⁴³ CP 49-50.

⁴⁴ *Id.* at 23, 27.

the floor for water.⁴⁵ Our Supreme Court held: "[w]e think that in the present case appellant's evidence ... when accepted as true with all favorable inferences to be drawn therefrom, was sufficient to be submitted to the jury to determine the issue of respondent's primary negligence."⁴⁶

In *Allen v. Matson Navigation Co.*, the plaintiff was injured when she slipped and fell on a staircase landing on the defendant's ship.⁴⁷ After a verdict for the plaintiff, the trial court granted the defendant's motion for judgment notwithstanding the verdict.⁴⁸ On appeal, the issue was essentially whether the landing was in an unsafe condition.⁴⁹ The plaintiff offered her own testimony about what she experienced when she stepped on the landing as well as two witness statements.⁵⁰ The witnesses testified that when the

⁴⁵ *Id.* at 27.

⁴⁶ *Id.* at 27.

⁴⁷ 255 F.2d 273, 274 (9th Cir. 1958).

⁴⁸ *Id.* at 274.

⁴⁹ *Id.* at 277-78.

⁵⁰ *Id.* at 274-76.

plaintiff fell, her feet "flew straight out in front of her," and the floor was shiny and slippery.⁵¹ The court stated:

Although the mere fact that Mrs. Allen fell would by itself be no evidence as to why she fell, yet the circumstances of how she fell, when considered with other evidence in the case, has considerable significance. The witness who saw Mrs. Allen fall, as well as Mrs. Allen herself, testified that as Mrs. Allen walked across the landing, both her feet flew straight out in front of her and up into the air while she fell with a thud on her back. That is at least some evidence that hers was a slipping fall.^[52]

The court found the manner in which the plaintiff fell sufficient circumstantial evidence to defeat the defendant's motion for judgment notwithstanding the verdict: "[w]e are forced to the conclusion that there was sufficient evidence before the jury to permit a finding of fact on their part that the floor in question was sufficiently slippery to make it unsafe..."⁵³

In the present case, viewing the evidence and inferences therefrom in the light most favorable to Ms. Tilton, there is sufficient evidence to raise a genuine issue of material fact as to whether

⁵¹ *Id.* at 276, 280.

⁵² *Id.* at 280 (emphasis added).

⁵³ *Id.* at 281.

QFC's floor was slippery and unsafe, for three reasons. First, as in *Allen*, the manner in which Ms. Tilton fell evidences that she fell because the floor was slippery.

Second, the evidence permitted a reasonable inference that there was a substantial amount of water on the floor. Ms. Tilton testified:

I was covered in water. My whole left side of my body and back was wet. There was water all over the floor around me.^[54]

Third, as in *Messina*, Ms. Tilton offered evidence that QFC's floral manager had to watch for water on the tile floor because water created a safety hazard. Like *Messina*, QFC's floral manager was indefinite as to precisely how often she checked the floor for water. Moreover, QFC knew water often accumulated on the floor in the floral department. Despite this knowledge, QFC failed to place any mats on the floor.

V. CONCLUSION

Ms. Tilton produced substantial evidence that an unsafe condition existed on the floor of QFC's floral department. The trial

⁵⁴ CP 54.

court should not have dismissed her case. This Court should reverse and remand for trial.

DATED this 3rd day of November, 2008.

Respectfully submitted,

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