

No. 37917-1-II

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DIVISION II

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COURT OF APPEALS, DIVISION II STATE OF WASHINGTON  
OF THE STATE OF WASHINGTON *MS*  
DEPUTY

TERRY R. TILTON,

Appellant,

v.

QUALITY FOOD CENTERS,  
a division of The Kroger Co., a foreign corporation,

Respondent.

**REPLY BRIEF OF APPELLANT**

Teri L. Rideout, WSBA No. 13989  
John E. Wallace, WSBA No. 38073  
Rumbaugh Rideout Barnett & Adkins  
Attorneys for Appellant  
PO Box 1156  
Tacoma, WA 98401  
Phone: (253) 756-0333

ORIGINAL

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## I. SUMMARY OF REPLY

In its Response Brief, Quality Food Centers ("QFC") failed to offer a substantive response to Ms. Tilton's arguments. It merely dismissed her arguments as "irrelevant" and "inconsequential." Ms. Tilton offered sufficient evidence to show the existence of a genuine issue of material fact regarding whether an unsafe condition caused her fall.

QFC also raises a new issue for the first time in its Response Brief. It now argues there is insufficient evidence to show QFC failed to exercise reasonable care in maintaining its floor. That issue was never presented to the trial court, never argued, and never briefed. As such, this Court should not consider it.

## II. ARGUMENT

### A. **The Only Issue On Appeal Is Whether There Is Sufficient Evidence To Raise A Material Question Of Fact Regarding Whether An Unsafe Condition Caused Ms. Tilton's Fall.**

QFC stated the issue in its Motion for Summary Judgment as follows: "Is dismissal appropriate when plaintiff cannot establish the existence of a dangerous condition causing her fall?"<sup>1</sup> In its Response Brief before this Court, QFC argued that Ms. Tilton cannot "produce

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<sup>1</sup> CP at 12.

any evidence to support her claim that QFC was somehow negligent in maintaining [the floor]."<sup>2</sup> QFC goes on to argue that the mere presence of water on a floor is not enough to prove negligence (i.e., failure to exercise reasonable care), and that the plaintiff must prove the owner knew water was on the floor.<sup>3</sup> Since QFC did not raise this issue before the trial court, QFC cannot raise it now.<sup>4</sup>

Moreover, QFC misstates the trial court's ruling, claiming the court granted summary judgment for "two separate" reasons: because Ms. Tilton could not prove water caused her fall, and because she failed to show water caused the floor to be dangerously slippery. The Verbatim Report of Proceedings clearly shows what the trial court ruled:

... I disagree with the plaintiff on whether there's an issue of fact created by whether or not *that condition [i.e., water] caused her fall* and that's the **only** area where there does not appear to be an issue of fact.<sup>[5]</sup>

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<sup>2</sup> Response Brief ("RB") at 13.

<sup>3</sup> *Id.*

<sup>4</sup> *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007) (citing RAP 2.5(a) and *Better Fin. Solutions, Inc. v. Caicos Corp.*, 117 Wn. App. 899, 912-13, 73 P.3d 424 (2003)).

<sup>5</sup> Verbatim Report of Proceedings at 11 (emphasis added).

As detailed in Ms. Tilton's opening brief, and further explained below, Ms. Tilton did in fact offer sufficient evidence to show a material factual question regarding whether water on the tile floor caused her fall.

**B. QFC's Argument That There Is No Evidence Showing An Unsafe Condition Caused Ms. Tilton's Fall Is Not Supported By The Record.**

After dismissing Ms. Tilton's evidence as "irrelevant," QFC claims that "Ms. Tilton failed to produce any evidence of the existence of a substance on the floor that caused her fall at QFC."<sup>6</sup> QFC further argues that from the evidence produced, it is "equally" likely that Ms. Tilton simply tripped "over her own feet."<sup>7</sup> The record shows otherwise.

Ms. Tilton raised a genuine issue of material fact regarding whether she slipped in water and, if so, whether the water constituted an unsafe condition. At least six pieces of evidence would allow a reasonable juror to conclude that Ms. Tilton slipped in water, especially when viewed in the light most favorable to her. First, the manner in which she fell indicates that she slipped on a slippery floor: her left foot

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<sup>6</sup> RB at 4.

<sup>7</sup> *Id.* at 9-10.

suddenly and quickly slipped; her left leg flew up in front of her, forcing her to fall backwards.<sup>8</sup> In *Allen v. Matson Navigation Co.*, the Ninth Circuit concluded this manner of falling evidenced that the plaintiff slipped on a slippery surface, and did not trip over her own feet.<sup>9</sup>

Second, when Ms. Tilton fell, she landed in a pool of water.<sup>10</sup> As Ms. Tilton set forth in her opening brief at page 3, when she fell, she landed in a large amount of 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.<sup>11</sup>

A reasonable inference from this evidence is that she slipped in the water in which she landed.

Third, QFC knew water dripped onto the floor when customers picked bouquets of flowers from the water-filled display containers.<sup>12</sup>

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<sup>8</sup> CP 49-50.

<sup>9</sup> 255 F.2d 273, 280 (9th Cir. 1958).

<sup>10</sup> CP 49-50, 54.

<sup>11</sup> CP 54. *See also*, CP 49 ("I was soaking wet, and there was water all over the floor"); CP 50 ("there was water all over").

<sup>12</sup> CP 43-44. The floral manager, Magan Robinson testified:

This evidence strengthens and reinforces the inference that Ms. Tilton slipped in water.

Fourth, although QFC alleges Ms. Tilton caused the water to spill on the floor after she fell, she testified that she did not spill any water as she fell, or if she did, it would not have been very much water compared the large amount of water in which she landed.<sup>13</sup> While QFC is free to argue its theory that all the water on the floor was caused by Ms. Tilton when she fell, the court is not at liberty to weigh the competing evidence and theories.<sup>14</sup> It is the jury's role to do so.

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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.

<sup>13</sup> CP 49-55. The testimony, in part, was:

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. Is it possible that as you went down, in the process of grabbing the pot, water splashed out of it onto the ground and onto you?

A: There's a possibility, yes. **The amount of water that was on the floor versus the amount of water that was still in the pot that I disrupted, there was a considerable – that pot wouldn't have held all that water.** (Emphasis added).

<sup>14</sup> *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 181 (1964).

Fifth, there is no testimony in the record contradicting Ms. Tilton's evidence that she did not spill any water or spilled only a little bit of water when she fell.

Sixth, there was no evidence of anything else on the floor which would have caused her fall.

QFC's entire argument is premised on an ambiguous statement Ms. Tilton made in the incident report that she bumped a pot of flowers on her way down. Ms. Tilton explained the statement in her deposition. She testified that she did not spill water, or if she did, it was not very much compared to the large amount on the floor. Whether Ms. Tilton spilled the water that was on QFC's floor is a material disputed fact that mandates the trial court's summary judgment order be reversed.

Imagine that the incident report did not exist. If the facts were simply that Ms. Tilton slipped in the floral department in the manner described above and landed in a pool of water, in an area known to accumulate water, there would be no dispute that Ms. Tilton's testimony was substantial evidence that she slipped because of water on the floor.<sup>15</sup> In most slip and fall cases, the victim does not see the

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<sup>15</sup> "Substantial evidence" means evidence sufficient in quality and quantity to support the proposition for which it is offered. *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 780, 193 P.3d 1077 (2008).

condition that caused his or her fall until after the fact. Indeed, case law holds that customers need not keep their eyes riveted to the floor as they shop.<sup>16</sup>

On its face, the incident report in which Ms. Tilton stated she took out a pot of flowers on her way down provides QFC with a defense *theory*. The report does not render Ms. Tilton's evidence irrelevant, as QFC claims. QFC essentially asked the trial court to weigh the evidence and discredit Ms. Tilton's testimony, and now it asks this court to do the same.<sup>17</sup> The law is well settled that a court ruling on summary judgment does not weigh evidence or determine witness credibility.<sup>18</sup> That is the jury's job.

QFC also argues that there was insufficient evidence that the water Ms. Tilton slipped in rendered the floor unsafe. To the contrary. Ms. Tilton slipped in the water, evidencing that the water caused the tile floor to be dangerously slippery. Further, QFC admitted that water

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<sup>16</sup> *Smith v. B&I Sales Co.*, 74 Wn.2d 151, 153, 443 P.2d 819 (1968); *Hammer v. Haggard*, 56 Wn.2d 744, 749-50, 355 P.2d 334 (1960); *Wardhaugh v. Weisfield's, Inc.*, 43 Wn.2d 865, 873, 264 P.2d 870 (1953).

<sup>17</sup> See CP 16 (calling Tilton's testimony "her self-serving assertion"); CP 64 (stating Tilton's testimony did not "produce any credible evidence").

<sup>18</sup> *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963); *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004) ("The trial court erred when it made the credibility decision for the parties on summary judgment.").

on its tile floor presented a safety hazard.<sup>19</sup> Third, there was a *large quantity* of water on the floor (as compared to the few drops the plaintiff encountered in *Merrick v. Sears, Roebuck & Co.*, 67 Wn.2d 426, 407 P.2d 426 (1965)). The quantity of water is evidenced by the fact Ms. Tilton's clothes were soaking wet after she landed in the puddle. She further testified that water was all around her and that the amount of water on the floor was more than would fill a two foot display vase. Moreover, jurors' common experience and common sense would allow a reasonable conclusion that pooled water on a tile floor is unsafe. QFC offered no evidence that a wet tile floor is *not* unsafe.

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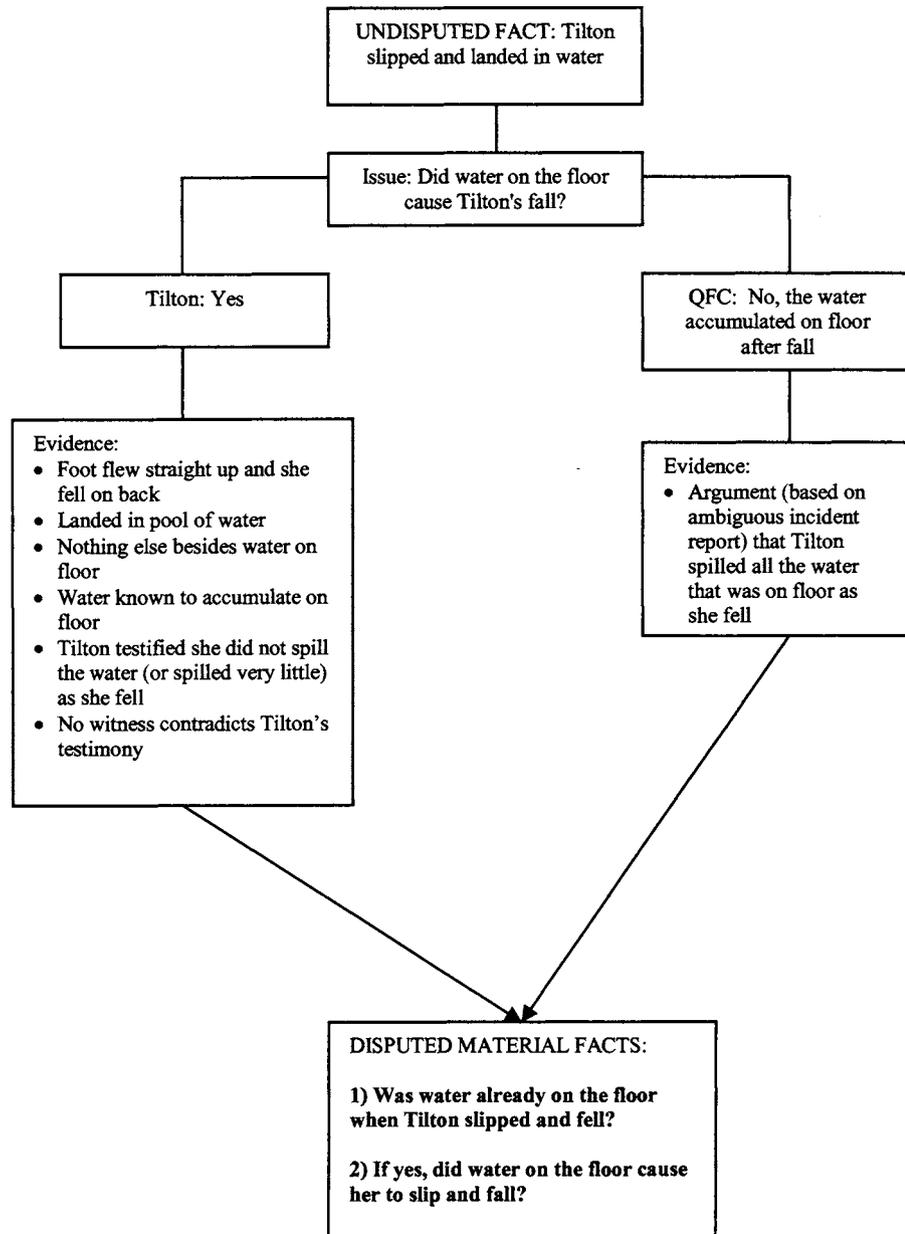
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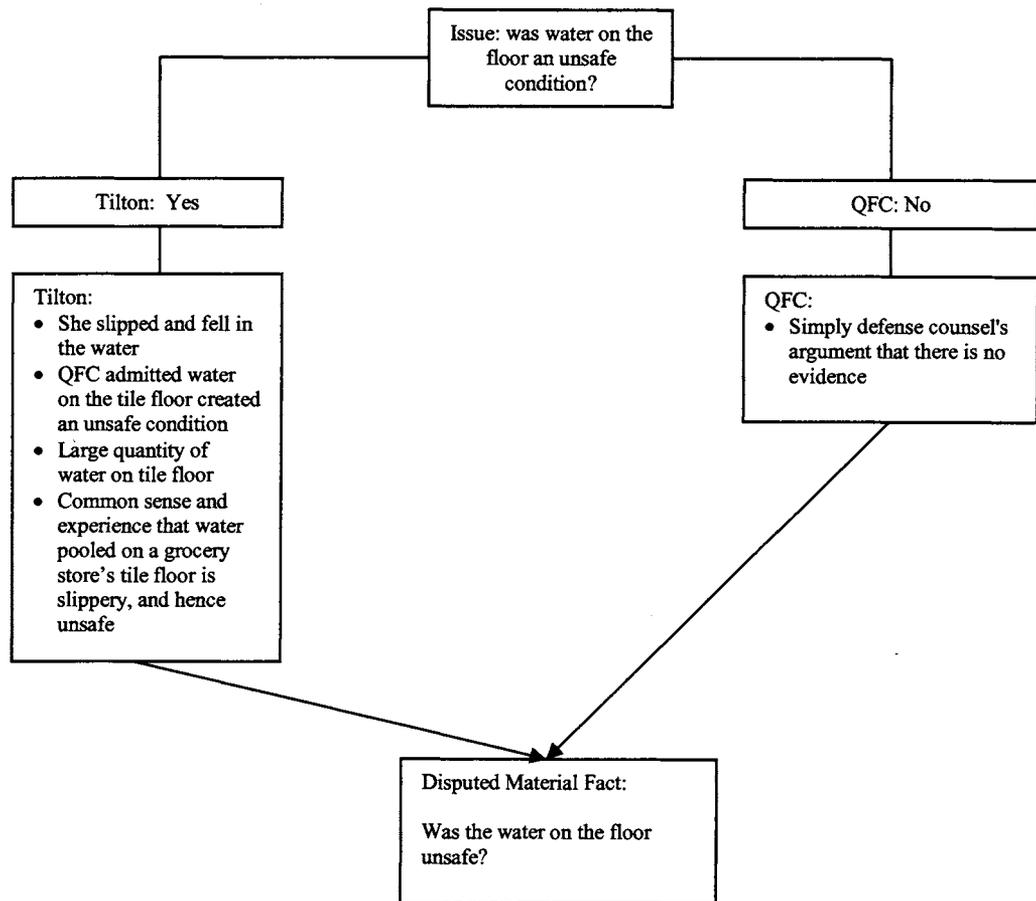
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<sup>19</sup> CP 45.

The issue of whether water caused Ms. Tilton's fall can be depicted as follows:



The issue of whether water on the floor was unsafe can be depicted as follows:



In its Response Brief, QFC's briefly references *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 433 P.2d 863 (1967). *Brant* is distinguishable from the present case. There, the plaintiff suffered injuries when she slipped and fell on water inside the defendant's

store.<sup>20</sup> The court affirmed the dismissal of the case because there was "no evidence, other than the fact that the plaintiff slipped and fell, to establish that a dangerous condition existed."<sup>21</sup> In contrast to Ms. Tilton's case, there was no evidence of the manner in which the plaintiff fell, or whether the defendant was aware that water on the floor created a safety hazard, or the amount of water on the floor, or the type of floor. The Court went on to hold that even if there was an unsafe condition, the plaintiff failed to offer any evidence to establish the notice element of her prima facie case.<sup>22</sup> Here, QFC admitted the *Pimentel* rule applies so notice need not be proven.

Another case briefly referenced by QFC was *Merrick v. Sears, Roebuck & Co.*, 67 Wn.2d 426, 407 P.2d 426 (1965). In *Merrick* the plaintiff slipped in the women's restroom.<sup>23</sup> The issue on appeal was whether the defendant failed to use reasonable care in maintaining the restroom floor.<sup>24</sup> The only evidence the plaintiff submitted was her own testimony that after she fell, she felt a little water on the floor with

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<sup>20</sup> 72 Wn.2d 446, 447, 433 P.2d 863 (1967).

<sup>21</sup> *Id.* at 448 (emphasis added).

<sup>22</sup> *Id.* at 451-52.

<sup>23</sup> 67 Wn.2d 426, 427, 407 P.2d 426 (1965).

<sup>24</sup> *Id.* at 429.

her hand, and the testimony of a Sears' employee who saw a few drops of water on the bathroom floor four hours later.<sup>25</sup> The court held that because there was no evidence from which it could be inferred that there was an inordinate amount of water on the restroom floor when the plaintiff fell, the trial court properly dismissed the case.<sup>26</sup>

In its Response Brief, QFC also attempts to distinguish *Messina v. Rhodes Co.*, 67 Wn.2d 19, 406 P.2d 312 (1965), by claiming in that case "the condition was known."<sup>27</sup> The condition that caused Ms. Tilton's fall was also known, albeit disputed. In *Messina*, the evidence that established the existence of an unsafe condition was (1) plaintiff's testimony that she saw water on the floor and slipped in the water,<sup>28</sup> (2) a witness's statement that she saw water,<sup>29</sup> and (3) the defendant's maintenance employee's statement that water was known to accumulate on the floor on rainy days.<sup>30</sup> The evidence supporting the existence of

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<sup>25</sup> *Id.* at 427-28.

<sup>26</sup> *Id.* at 428-29 (the court also noted that a few drops of water on a restroom floor should to be expected).

<sup>27</sup> RB at 10.

<sup>28</sup> 67 Wn.2d 19, 21-22, 406 P.2d 312 (1965).

<sup>29</sup> *Id.* at 24.

<sup>30</sup> *Id.* at 23-24.

an unsafe condition in *Messina* is remarkably similar to the evidence produced by Ms. Tilton, detailed above.

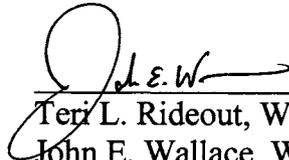
### III. CONCLUSION

Ms. Tilton produced substantial evidence that an unsafe condition caused her fall. The trial court should not have dismissed her case. This Court should reverse and remand for trial.

DATED this 3<sup>rd</sup> day of February, 2009.

Respectfully submitted,

**RUMBAUGH RIDEOUT BARNETT & ADKINS**



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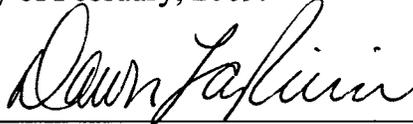
Teri L. Rideout, WSBA No. 13989  
John E. Wallace, WSBA No. 38073  
Attorneys for Terry Tilton

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the date entered below, I sent via legal messenger a copy of this brief to:

James M. Owen, Jr.  
Lawrence & Versnel, PLLC  
3030 Two Union Square  
601 Union Street  
Seattle, WA 98101

DATED this 14<sup>th</sup> day of February, 2009.



Dawn LaRiviere, legal assistant

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