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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CHERYL N. McPHERSON, et.vir.,

Appellants,

v.

WAL – MART STORES, INC.

Respondent.

BRIEF OF APPELLANTS

Cause No. 15 – 2 - 01375 – 0

Appeal No. 34696 – 0 - III

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McPHERSON v. WAL – MART STORES, INC.

Appeal No. 34696 - 0 - III

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A. ASSIGNMENT OF ERROR

The trial court erred when it granted the defendant's motion for summary judgment of dismissal, and dismissed the Complaint.

B. INTRODUCTION / STATEMENT OF CASE

Cheryl McPherson was shopping at the Wal – Mart store in Sunnyside, Washington on the afternoon of June 27, 2012. (CP 13) She walked into an aisle in the store where shampoo was shelved, slipped and fell. (CP 13)

Wal – Mart filed a CR 56 dismissal motion supported by the affidavit of store employee, Josh Winklesky. (CP 1-21)

Wal – Mart had a video surveillance camera in the area of the fall. (CP 14) A CD containing the video was provided to McPhersons' lawyers in discovery. (CD 22) A copy of the CD was attached as Exhibit C to the Sworn Statement of Richard R. Johnson in opposition to the summary judgment motion if the trial court judge wanted to view it. (CP 22 & 24)

At 4:48 p.m. on the injury date, two women who were a bit further down the aisle from where Cheryl McPherson fell were handling multiple bottles of shampoo. (CP 22)

At 4:53 p.m. two younger – looking females wearing black tops entered the same aisle. One of the females took a bottle of shampoo from a

shelf on the left side of the aisle. (CP 23) She then very quickly placed the bottle back on the same shelf. (CP 23) The two females quickly walked away. (CP 23).

At 4:54 p.m. a female in a white top pushing a shopping cart walked down the middle of the same aisle without incident. (CP 23)

At 4:57 p.m. a female in a green top pushing a shopping cart walked down the middle of the same aisle without incident. (CP 23) She was joined by a male in a brown shirt at 4:58 p.m. (CP 23)

At 5:02 p.m. Cheryl McPherson walked into the aisle along the shelving on the right side of the aisle. (CP 23) She suddenly slipped so that her feet went toward her left / toward the center of the aisle. (CP 23) She then fell onto the right side of body near the shelving on the right side of the aisle. (CP 23)

Wal – Mart Stores employee Josh Winklesky looked at store surveillance video and concluded that one of the females in the black tops spilled shampoo on the floor of the aisle at 4:53 p.m. - about eight minutes before Cheryl McPherson slipped and fell there. (CP 14)

The Superior Court Judge Susan Hahn granted Wal – Mart’s motion and entered an order dismissing the Complaint on August 10, 2016. (CP 38-39) Judge Hahn stated on the record at the hearing on the summary judgment motion that she had reviewed the Wal – Mart video. (CP 22 & 24)(RP ?)

The McPhersons filed their Notice of Appeal to this court on September 7, 2016. (CP 40-43)

C. ARGUMENT

1. The Standard of Review on Appeal

This court reviews trial court orders granting motions for summary judgment of dismissal *de novo*. *Loeffelholz v. Univ of Washington*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

2. Summary Judgment Principles

Balise v. Underwood, 62 Wn.3d 195, 381 P.2d 966 (1963) remains a leading case on summary judgment. Such motions can be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Capitol Hill Methodist Church of Sea. v. Seattle*, 52 Wash.2d 359, 324 P.2d 1113 (1958).

A material fact is one upon which the outcome of the litigation depends. *Zedrick v. Kosenski*, 62 Wn.2d 50, 380 P.2d 870 (1963).

The court determines if there is a genuine issue of material fact. The court can't resolve factual issues. *Thoma v. C. J. Montag & Sons, Inc.*, 54 Wash.2d 20, 337 P.2d 1052 (1959).

The party moving for summary judgment has the burden of proving that there are no genuine issues of material fact. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960).

The material evidence, and all reasonable inferences therefrom, is viewed most favorably for the nonmoving party. Summary judgment should be denied when reasonable minds could reach different conclusions. *Wood v. Seattle*, 57 Wash.2d 469, 358 P.2d 140 (1960).

3. Owner / Occupier Liability to Business Invitees

An owner / occupier of a business owes a duty to people entering the premises for a business purpose to maintain common areas in a reasonably safe condition. *Musci v. Graoch Assoc. Ltd. Ptrship.*, 144 Wn.2d 847, 31 P.3d 684 (2001), *citing Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996).

An owner / occupier has liability to a business invitee for a temporary hazardous condition on the property if: 1) He knows, or in the exercise of reasonable care, could discover the condition, and should realize that it involves an unreasonable risk of harm to an invitee, and 2) He should expect that an invitee won't discover or realize the danger, or will fail to protect against it, and 3) He fails to exercise reasonable care to protect the invitee against the danger. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621(1994), and 6A *Washington Practice*, Washington Pattern Jury Instructions – Civil, 120.07 (2005).

The owner / occupier may have liability if there was actual or constructive notice of an unsafe condition. *Coleman v. Ernst Home Center, Inc.*, 70 Wn.App. 213, 853 P.2d 473 (1993).

The condition must have existed for a sufficient length of time, and under such circumstances, that the owner / occupier should have discovered it in the exercise or ordinary care. 6A *Washington Practice*, Washington Pattern Jury Instructions – Civil, 120.06.02, *supra*.

An owner / occupier owes an affirmative duty to inspect the premises to discover unsafe conditions, and to effect repairs, safeguards or warnings as may be reasonably necessary for the protection of invitees, under the facts and circumstances of the case. *Tincani v. Inland Empire Zoological Society, supra*, and *Egede - Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980).

The court in *Morton v. Lee*, 75 Wn.2d 393, 450 P.2d 957 (1969) held that whether or not an unsafe condition had been present long enough to give constructive notice to the owner / occupier is ordinarily a jury question. The time allowed for discovering the condition will vary from case to case depending on the facts and circumstances.

In the *Morton* case, Helen Morton exited a grocery store, slipped on an apricot on the sidewalk and fell down and broke a leg. Her husband testified that he exited the store about five minutes before store employees

told him that Mrs. Morton had been injured. Mr. Morton noticed an apricot on the sidewalk when he came out of the store.

Mrs. Morton took her case against the store to a jury trial. The jury returned a verdict in her favor. The store challenged the sufficiency of the evidence on appeal. It argued that five minutes - the time between when Mr. Morton saw the apricot on the sidewalk and when Mrs. Morton slipped on it - wasn't enough time to constitute constructive notice of the unsafe condition, as a matter of law.

The Washington Supreme Court affirmed the verdict in favor of Mrs. Morton. The court held that it's ordinarily a question of fact for the jury, whether, under all of the circumstances, an unsafe condition existed long enough that it could have been discovered by an owner / occupier who was exercising reasonable care. *See, also, Presnell v. Safeway*, 60 Wn.2d 671, 374 P.2d 939 (1962).

Wal – Mart Stores concedes that an unsafe condition in an aisle of its Sunnyside store existed for eight minutes before Cheryl McPherson was injured there. (CP 1& 14)

As in the *Morton* case, Cheryl McPherson submits that it's a question of fact whether Wal - Mart employees had constructive knowledge of the unsafe condition that caused Cheryl McPherson to be injured there.

Wal – Mart employee Josh Winklesky relies on his review of store surveillance video to conclude that a female in a black shirt caused a shampoo spill about eight minutes before Cheryl McPherson was injured, and that was the cause of Cheryl’s fall. (CP 14).

Cheryl McPherson submits, however, that the Wal – Mart store video doesn’t clearly show when, or how, the slippery condition that caused her injuries got on to the floor.

Even though Mr. Winklesky took a photograph of some bottles of shampoo on a shelf in the shampoo aisle, (CP 14 & 21) he / Wal – Mart didn’t produce any photos, or any video, of the floor in the shampoo aisle. He / Wal – Mart didn’t produce any photos, or video that showed the / a slippery condition on the floor in the shampoo aisle that caused Cheryl McPherson to fall.

The female in the black top seen handling a shampoo bottle in the store video took it from a shelf on the **left** side of the shampoo aisle. (CP 23) She then very quickly put the bottle back on to the same shelf. (CP 23) The Wal – Mart store video shows Cheryl McPherson slipping on something on the floor on the **right** side of the shampoo aisle. (CP 23)

If the female in the black top handled a shampoo bottle on the **left** side of the aisle, how did doing that cause an unsafe / a slippery condition on the floor on the **right** side of the aisle where Chery slipped?

Reasonable minds could differ on whether or not the female in the black top seen in the Wal – Mart video even caused / was the cause of the / an unsafe condition that injured Cheryl.

Reasonable minds could differ on how long the / an unsafe condition that injured Cheryl had been on the floor. Reasonable minds could conclude that the unsafe condition had been on the floor for considerably longer than eight minutes before Cheryl fell.

This court should conclude that it's a question of fact whether or not the female in a black top even caused the / an unsafe condition that injured Cheryl. It's a question of fact what / who caused the unsafe condition that injured Cheryl. It's a question of fact how long the unsafe condition had been on the floor before Cheryl was injured.

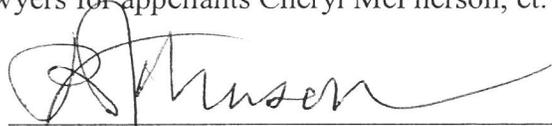
D. CONCLUSION

This court should reverse the trial court and remand this case for further proceedings.

Respectfully submitted,

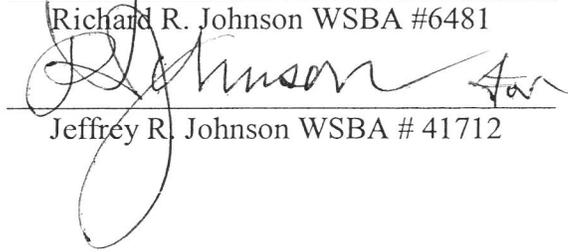
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