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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 34696-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CHERYL N. MCPHERSON, et. vir.,

Appellants,

v.

WAL-MART STORES, INC., a Delaware corporation,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The legal issue in this case is neither controversial nor complicated. This is a straightforward premises liability action wherein Petitioner Cheryl McPherson (“McPherson”) slipped in clear liquid shampoo at the Sunnyside, Washington Wal-Mart store.

In a Washington premises liability action, a plaintiff must show that the landowner had actual or constructive notice of an unsafe condition. *See Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652 (1994). Here, the undisputed evidence demonstrates that a Wal-Mart employee inspected the shampoo aisle for spills or hazards less than one hour before McPherson’s fall. Moreover, video footage of the scene depicts two young females handling and opening bottles of clear liquid shampoo at the precise location of the fall only eight minutes before McPherson slipped.

This Court of Appeals, Division III, has previously established that “there is no basis for submitting the issue of constructive notice to a jury unless there is some evidence that hourly inspections (or even two to three inspections per 8-to 9-hour shift) were not adequate because the risk of spilled shampoo in the coffee aisle required greater vigilance.” *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 278 (1995), *rev. den.* 128 Wn.2d 1004 (1995). McPherson has put forth no evidence that Wal-Mart’s hourly inspections were inadequate.

And contrary to McPherson's insistence, this case does not present grounds to establish new law in this state and expand the limited "self service" exception under *Pimentel v. Roundup Grocery*, 100 Wn.2d 39 (1983) to the shampoo aisle. To do so would invariably enable any petitioner in a premises liability action to circumvent the notice requirements, thereby creating a strict liability standard for retail businesses.

As detailed more fully below, the trial court correctly applied well-established Washington law to the facts of this case, and summary judgment was proper.

II. RESTATEMENT OF THE ISSUE

Whether the trial court properly granted summary judgment for Wal-Mart where Plaintiff presented no evidence that Wal-Mart had actual or constructive notice of spilled clear, liquid shampoo on the floor where Wal-Mart inspected the area less than one hour before the fall, and where other customers were handling shampoo in the same area just eight minutes before Plaintiff slipped in it.

III. COUNTERSTATEMENT OF THE CASE

A. The Incident

This case arises out of a slip and fall accident at the Sunnyside, Washington Wal-Mart store. McPherson was shopping at Wal-Mart with her adult daughter, Melissa Jones, on June 27, 2012. CP 2. McPherson

entered the shampoo aisle at 5:01 p.m., with her daughter pushing a shopping cart behind her. CP 14, 24. When McPherson was about halfway down the aisle, she slipped and fell. *Id.* Former Assistant Manager Josh Winklesky responded to McPherson's fall, but McPherson declined any medical attention. CP 13-14.

When Mr. Winklesky responded to the incident, he noticed that a bottle of Garnier Fructis shampoo had been knocked over on the shelf, and that a small amount of clear shampoo had spilled out and dripped down the shelf to the floor. CP 14. Photographs were taken of the partially opened bottle of Garnier Fructis shampoo. CP 14, 20-21.

B. Customer and Witness Statements

Immediately following the incident, Mr. Winklesky asked McPherson and her daughter, Ms. Jones, to complete Wal-Mart customer and witness statements. CP 13-14. McPherson wrote on her Customer Statement that she was “[w]alking down shampoo aisle, slipped on clear shampoo . . .” CP 16-17. Ms. Jones corroborated this account of the events by stating on her Witness Statement, “[i]t was clear liquid something we could not see.” CP 18-19.

C. Wal-Mart Surveillance Camera

After McPherson left the store, Mr. Winklesky reviewed the store surveillance camera. CP 7. The surveillance video shows a Wal-Mart

Associate checking the shampoo aisle from 4:04 p.m. to 4:06 p.m.—less than one (1) hour before McPherson’s fall at 5:01 p.m. *Id.* The Wal-Mart Associate walked up and down the full length of the aisle twice observing the condition of the aisle. *Id.*

The surveillance video also shows two young ladies at 4:53 p.m., eight (8) minutes prior to McPherson’s incident, handle bottles of hair product in the shampoo aisle in the precise area where McPherson fell. CP 14, 24. One of the ladies put a bottle back on the shelf in the exact location where the partially full bottle of Garnier Fructis shampoo was found following McPherson’s fall. *Id.* No one notified Wal-Mart of any spilled shampoo in the shampoo aisle prior to McPherson’s fall. CP 15.

D. Summary Judgment

Wal-Mart filed a motion for summary judgment predicated on McPherson’s inability to come forth with any evidence that Wal-Mart had actual or constructive notice of the spilled shampoo. CP 1-21. Of note, there was no outstanding discovery at the time of Wal-Mart’s Motion for Summary Judgment, and McPherson did not seek a continuance under CR 56(f). CP 22-30.

The Honorable Susan Hahn granted Wal-Mart’s motion, and McPherson now appeals. CP 40-43.

IV. ARGUMENT

This is a case in which the trial court did nothing remarkable. It applied basic law to undisputed facts, and dismissed a lawsuit consistent with well-established Washington law. This Court should affirm the trial court's granting of summary judgment in favor of Wal-Mart.

A. Standard of Review

Summary judgment orders are reviewed *de novo*, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 483 (2003). The purpose of a summary judgment motion is to avoid an unnecessary trial. *Eakins v. Huber*, 154 Wn. App. 592, 598 (2010). As such, a party may seek summary judgment in two ways. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, *rev. den.*, 122 Wn.2d 1010 (1993). First, the moving party may argue there are no issues of material fact. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169 (2012). Once the moving party meets its burden of showing no genuine issue of material fact exists, the burden shifts to the nonmoving party, who "must set forth specific facts rebutting the moving party's contentions." *Id.* If, after reviewing all the facts in the light most favorable to the nonmoving party, the trial court concludes no issue of fact exists, the moving party is entitled to summary judgment as a matter of law. CR 56.

Alternatively, the moving party may meet its burden under summary judgment by demonstrating that the nonmoving party lacks sufficient evidence to support his case. *Guile*, 70 Wn. App. at 21. If the nonmoving party then fails to present sufficient evidence supporting the elements of his claim, summary judgment is warranted. *Atherton Condominium Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). However, a nonmoving party cannot defeat summary judgment by relying on mere speculation or argumentative assertions. *Adams v. King Cnty.*, 164 Wn.2d 640, 647 (2008).

B. The Trial Court Correctly Determined There Was No Genuine Issue of Material Fact Regarding Wal-Mart's Lack of Actual or Constructive Notice

In a negligence action, a plaintiff must establish (1) the existence of a duty owed; (2) breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury. *Tincani Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28 (1994). A landowner's duty only attaches if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk. . ." The phrase "reasonable care" imposes on the landowner the duty to "inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for

[the invitee's] protection under the circumstances.” *Tincani*, 124 Wn.2d at 139, quoting RESTATEMENT (SECOND) OF TORTS § 343 cmt. b.

In a premises liability action, a plaintiff must show that the landowner had actual or constructive notice of an unsafe condition. *See Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652 (1994). A plaintiff carries the burden of showing that the alleged unsafe condition had “existed for such time as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.” *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44 (1983) (quoting *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 580 (1942)). Liability attaches only to owners once they have become or should have become aware of a dangerous situation. *See Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 453-54 (1991) (quoting *Jasko v. F.W. Woolworth Co.*, 177 Colo. 418 420-21 (1972)).

The legal duty owed by a landowner to a person on the premises depends on whether the person falls under the common law category of a trespasser, licensee, or invitee. *See Iwai v. State*, 129 Wn.2d 84 (1996). In this case, McPherson's status as a business invitee is not disputed. Regardless, even when a possessor of land owes a duty of reasonable care, the case cannot go to the jury unless the record supports a reasonable

inference that its duty was breached. *Leonard v. Pay'n Save Stores*, 75 Wn. App. 445 (1994).

1. Plaintiff Has No Evidence that Wal-Mart Knew of, or Had Reasonable Time to Discover, the Spilled Shampoo

To impose liability under Washington law for failure to maintain business premises in a reasonably safe condition requires McPherson to prove (1) the unsafe condition was caused by Wal-Mart, or (2) Wal-Mart had actual or constructive notice of the dangerous condition. *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn. App. 213, 217 (1993) (quoting *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 49 (1983)). There is no dispute that Wal-Mart neither caused the condition, nor had actual notice of the condition. For constructive notice to arise, the condition has to have existed for such time as would have afforded Wal-Mart sufficient opportunity, in the exercise of reasonable care, to inspect the premises and remove the danger. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652 (1994); *Pimentel Co.*, 100 Wn.2d at 44.

At summary judgment, and again on appeal, McPherson rests on mere conclusory allegations that there must be a “question of fact” regarding Wal-Mart’s lack of constructive notice. The undisputed evidence demonstrates otherwise.

The store surveillance camera shows two female customers handling shampoo containers and putting one back on the shelf at the precise location where McPherson slipped just eight minutes later. CP 14, 24. A Wal-Mart Manager, Mr. Winklesky, responded to the incident and discovered a tipped over bottle of Garnier Fructis leaking clear liquid shampoo. CP 14. The fact that clear liquid shampoo was on the floor is consistent with both customer statements of McPherson and her daughter. CP 16-19.

Under Washington law, Wal-Mart is not required to employ herculean measures or 24-hour-per-day monitoring or surveillance of every aisle of its stores. Rather, the standard is that Wal-Mart must exercise reasonable care. The liquid spilled by the customers eight minutes prior to McPherson's fall was not there long enough to afford Wal-Mart sufficient opportunity, in the exercise of ordinary care, to discover the spill. Lack of evidence that a hazard existed for a long enough time for proper inspection precludes recovery. *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 275 (1995), *rev. den.*, 128 Wn.2d 1004 (1995) (holding "even two or three inspections per 8-to 9-hour shift" by a store would be sufficient) (citing *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 458 (1991)). The Court can reasonably end its analysis here.

Even assuming, for the sake of argument, the Court entertains McPherson's conclusory allegations that the surveillance video somehow does not reveal the source and timing of the condition, McPherson cannot overcome the undisputed fact that the shampoo aisle was inspected for hazards less than one hour before her fall. CP 14. Wal-Mart, which does not carry the burden of proof, provided a declaration of the Wal-Mart manager who investigated the scene and reviewed the surveillance footage. CP 13-15. A Wal-Mart associate inspected the shampoo aisle at 4:04 p.m. to 4:06 p.m., less than one hour before McPherson's fall at 5:01 p.m. *Id.* That inspection did not reveal any potential hazards, and there is no evidence to the contrary.

McPherson failed to come forth with *any* evidence at summary judgment to create a genuine issue of material fact regarding constructive notice. Instead, McPherson rests on mere speculation that "reasonable minds could differ" as to when the slipping hazard was first created, who created it, how it occurred, or where it occurred in the aisle; but none of those "questions" are material to whether or not Wal-Mart had constructive notice of the spilled liquid shampoo. Moreover, McPherson's attempt to burden shift by exclaiming "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 so fall,” Pet. Brief, at pg. 7, is insufficient to raise a material issue of fact.

The trial court correctly recognized that McPherson provided no evidence at summary judgment to contradict the declaration of the Walmart manager:

THE COURT: If this went to trial, what evidence would the plaintiff present to indicate - - I mean, you need to do it now and you haven't. So what evidence would you produce at trial so that you could argue that they had constructive notice other than speculation and questioning what their evidence is?

In other words, I don't see you coming forward with anything to say, well, we don't think that it happened that way.

MR. JOHNSON: Right.

THE COURT: I don't think that's enough.

* * *

THE COURT: Well, even if they were separated, let's say they were, then what does that tend to show? It shows - - all it may show is that what was happening eight minutes before the fall wasn't the cause of the fall. But you still don't have anything about how it got there or when it happened. You do have a statement or one or two statements indicating that an hour before there had been an inspection of the aisle.

MR. JOHNSON: Correct.

RP 8-9.

When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established.” *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354 (1989); *LaMon v. Butler*, 110 Wn.2d 216, 222 (1988).

McPherson had the opportunity at the summary judgment hearing to present evidence to the contrary, but failed to do so. A nonmoving party cannot defeat summary judgment by relying on mere speculation or argumentative assertions. *Adams v. King Cnty.*, 164 Wn.2d 640, 647 (2008). Furthermore, McPherson’s failure to present evidence at summary judgment cannot be remedied on appeal. “Negligence is not to be presumed from the sole fact that plaintiff fell and was injured.” *Dougan v. City of Seattle*, 76 Wash. 621, 622 (1913), *affirmed on reh'g*, 79 Wash. 696 (1914). Washington law is clear that a condition existing for only eight minutes, or even an hour, is not “a long enough time” to afford Wal-Mart “a sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection and to have removed the hazard.” *Carlyle*, 78 Wn. App. at 275.

The trial court properly granted summary judgment, and the ruling should stand.

C. The Trial Court Correctly Determined the Limited Self-Service Exception Does Not Apply

McPherson's second argument is directly contrary to Washington law. McPherson ostensibly requests this Court rewrite the limited "self-service" exception to include the shampoo aisle. The trial court, again, addressed this issue, and properly concluded the "self-service" exception does not apply to the facts of this case.

McPherson relies solely on a single 1969 case, *Morton v. Lee*, 75 Wn.2d 393 (1969), to argue she does not have to prove that Wal-Mart had actual or constructive notice of the spilled shampoo. As discussed further *infra*, her reliance on *Morton* is misplaced. The holding in *Morton* was modified by *Pimentel v. Roundup Grocery*, 100 Wn.2d 39 (1983), which carved out a limited exception to the reasonable notice requirement for premises liability actions. *Pimentel* developed the "self-service" exception wherein "[s]uch notice need not be shown, however, when the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable." *Pimentel*, 100 Wn.2d at 49. Only then do we look to the "housekeeping procedures and practices" to determine whether reasonable care was exercised. *Id.* at 44 (citing *Morton*, 75 Wn.2d at 397-98).

The "self-service" exception only applies in very limited circumstances. "We will not abandon principles of negligence and make

‘self-service’ stores liable whether they were aware or should have been aware of a dangerous condition.” *Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452 (1991) (holding self-service exception did not apply where customer slipped in water in the dairy aisle, and the store manager had no notice that an unsafe condition existed). *Wiltse* further held, “[t]he Pimentel rule does not apply to all self-service operations, but only if the particular self-service operation of the defendant is such that it is reasonably foreseeable that unsafe conditions in the self-service area might be created.” *Id.* at 456. It does not apply to the entire area of a store in which customers serve themselves, and there must be a relation between the hazardous condition and the self-service mode of operation of the business. *Carlyle*, 78 Wn. App. at 277.

At the summary judgment hearing, McPherson urged the trial court to exempt her from proving constructive notice:

THE COURT: Do you have any case law to support your position that an aisle with shampoo bottles in it is an area where it’s unreasonably dangerous and foreseeable something could happen? Therefore, you don’t actually have to come forward with constructive notice.

In produce [as in *Morton*], you’ve got to admit produce is really different. If what you’re saying applied, then the whole grocery store, any store where you could pick things directly off the shelf would fit under the exception or that narrowing of the rule.

MR. JOHNSON: I do not have a case on point. I don't think one exists. I think I would have found it.

I think, essentially what I'm trying [sic] to do is push Pimentel a bit. I understand the progeny or the following cases have tried to limit it, but those examples that we have from those cases really show that they're not going to say the whole story. But they have not - - Pimentel and all other cases that cite to Pimentel have not made a statement that says we're only confining it to the produce section.

THE COURT: No, they haven't. That's true.

MR. JOHNSON: They do make - - they have - -

THE COURT: But they've also indicated, in carving out that kind of special situation, that doesn't mean that they're going back and redoing the liability analysis for other situations, right?

MR. JOHNSON: Correct.

THE COURT: They've made that pretty clear.

RP 10-11.

Contrary to McPherson's urging, this case is not analogous to the circumstances in *Morton*. In *Morton*, the court applied the self-service exception standard where a customer slipped on an apricot next to a produce stand where the record established that: (1) the nature of a self-service produce stand presented a likelihood that some produce will fall to the ground and create a hazard; and (2) the store ordinarily only swept the area once before the store opened at 9 a.m., and "not again that day unless a condition came to attention. . ." *Morton*, 75 Wn.2d at 396-99. There is

no similar evidence in this case that Wal-Mart reasonably should have foreseen the risk of shampoo spilling from a close-capped bottle, and McPherson certainly has not presented such evidence. Additionally, Wal-Mart inspected the aisle at issue less than one hour before the fall and there was no spilled shampoo in the aisle at the time.

This Court of Appeals, Division III, addressed this precise issue and held that the self-service exception did not apply. In *Carlyle v. Safeway Stores, Inc.* a customer slipped in spilled shampoo. *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 273 (1995). This Court adamantly denied the customer's attempt to apply the self-service exception: "Under Ms. Carlyle's interpretation, all complaints arising out of slip and fall accidents in self-service establishments would be immune from summary judgment. That is clearly not the narrow interpretation adopted by the Supreme Court in *Pimentel*, *Wiltse*, and *Ingersoll*." *Id.* at 753. This Court further held that "[c]ertain departments of a store, such as the produce department, are areas where hazards are apparent and the proprietor is placed on notice by the activity," but "the mere presence of a slick or slippery substance on a floor is a condition that may arise temporarily in any public place or business." *Id.* at 276-77. Moreover, there was no basis for submitting the issue to a jury unless there was some evidence from which it could infer that hourly inspections (or even two or three

inspection per eight or nine hour shifts) were not adequate because the risk of spilled shampoo required greater vigilance. *Id.* at 278.

Here, the trial court properly recognized the implications of McPherson's attempt to expand the self-service exception to the shampoo aisle. In essence, the exception would swallow the rule, eviscerating the need for any plaintiff to prove actual or constructive notice in a premises liability action.

THE COURT: Yeah. So would you extend it, then, to the cooking oil aisle? How far do you go with this?

MR. JOHNSON: Yeah.

RP 12.

As this Court in *Carlyle* forewarned, to deny summary judgment in this case would purport that "all complaints arising out of slip and fall accidents in self-service establishments would be immune from summary judgment." *Carlyle*, 78 Wn. App. at 753. The notice requirement exists so as to not impose strict liability on self-service stores, which would ultimately exacerbate liability costs to the point where it would be too costly for these stores to operate.

McPherson's attempts to rewrite Washington law and provide for a new all-encompassing exception fail. The trial court properly granted summary judgment for Wal-Mart, and under well-settled Washington law, the ruling should stand.

V. CONCLUSION

Petitioner McPherson failed to come forth with any evidence on summary judgment that Wal-Mart had actual or constructive notice of the spilled shampoo. The uncontroverted evidence demonstrates that Wal-Mart inspected the shampoo aisle less than one hour before McPherson's fall, and the surveillance video shows two customers handling bottles of shampoo at the precise location where McPherson slipped only eight minutes later. Under Washington law, this was "not a long enough time to afford [Wal-Mart] a sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection and to have removed the hazard" *Carlyle*, 78 Wn. App. at 275. Furthermore, McPherson provides no tenable grounds to rewrite Washington law to include the shampoo aisle under the limited "self service" exception. To do so would obviate the notice requirements in any premises liability action.

The trial court correctly applied the law to the facts of the case, and summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of March 2017.

A handwritten signature in black ink, reading "Jordann M. Hallstrom". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

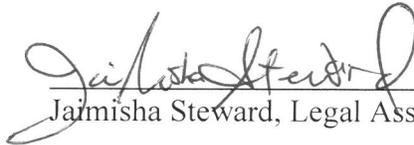
I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 23rd day of March, 2017, I caused a true and correct copy of the foregoing document to be delivered to the following counsel of record as indicated:

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Dated this 23rd day of March, 2017, at Seattle, Washington.



Jamisha Steward, Legal Assistant