

68506-6

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IN THE COURT OF APPEALS FOR THE STATE OF  
WASHINGTON DIVISION ONE

Court of Appeals No. 68506-6  
Skagit Superior Court No. 10-2-01191-1

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Sandra and Alfred SMITH

Plaintiffs/Appellees,

v.

FOOD PAVILION; DBA BROWN & COLE, INC.

Defendant/Appellant.

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BRIEF OF APPELLANTS

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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I.  
INTRODUCTION

This is a claim for injuries sustained when Sandra Smith fell at a grocery store owned by Defendant and operated under the name of Food Pavilion.

II.  
ASSIGNMENT OF ERROR

Mr. and Mrs. Smith assign error to the grant of Summary Judgment dismissing their claim.

III.  
ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the evidence raises a material issue of fact as to whether Defendant had constructive notice of the hazard which caused Sandra Smith to fall.

2. Whether the method by which Defendant operated the Food Pavilion store created an unreasonable risk of hazard to Mrs. Smith.

IV.  
STATEMENT OF THE CASE

Sandra Smith described the accident and surrounding events as follows:

“The accident occurred May 24th, at the Mount Vernon Food Pavilion. We stopped to get some groceries, mainly chicken breast. I couldn’t find the one on sale, so I left my husband in the meat department with my purse and cart while I went to the check stand to inquire. The clerk told me the sale was over, so I said ‘fine’ and started walking back to my husband in the meat department. The next thing I knew two men were asking me if I was OK and if they could help me up. At first I said ‘no’ because I was disoriented, my head was pounding and couldn’t move. I asked them what happened and they told me that my feet went out from under me and I fell real hard hitting my head on the cement tile floor. It knocked me out for at least 5 minutes. I saw that the floor was covered with a clear liquid about 3 feet in diameter. There was also a lady who saw me fall and also saw my bluetooth go flying and brought it to me after they got me up off the floor. She went and told the checker right away that I had fallen and she said they were busy and would get there as soon as they could. There were no caution signs in sight.”

(CP 133)

Defendant's employee, Jim Cross, concurs in the main with this account. He was working on the day in question as an assistant manager. When Mrs. Smith fell he was operating a check out stand nearby. (CP 119) <sup>1</sup> He investigated and saw a pool of clear liquid approximately two feet in diameter. (CP 112) He never knew the roof of the store to leak in that area, nor did he notice moisture tracked in from outside on that day. (CP 115) <sup>2</sup>

Cross didn't see the liquid before Mrs. Smith was hurt. (CP 113) He said he was simply too busy at the time to see the spill. (CP 120) <sup>3</sup> He found no evidence that any store employee tried to mark the spill site with a warning sign. Patrons buy beverages from Defendant's deli or bring them into the store and frequently consumed them while shopping.

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<sup>1</sup> Q This pool of water was located about two aisles away from where you worked, is that correct?

A Well there was one check stand in between and about two aisles, yes.

<sup>2</sup> Q So then is it fair to say it that it probably wasn't from a leaky roof but caused from a spill?

A Yes.

<sup>3</sup> Q Can you tell us, why, given the circumstances, you didn't notice the three foot pool of water in this walkway?

A Because I had been busy in the check stand for-- I don't know the exact amount of time but it had been a while.

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(CP 116; CP 117) <sup>4</sup> Cross believes the water was spilled from a shopping cart or by a patron consuming bottled water. (CP 112; CP 113; CP 115) <sup>5</sup>

On the day in question, Defendant operated a multi-department supermarket and deli with a staff of 3 and sometimes two persons. (CP 99)

<sup>6</sup> Photos show that the fall occurred on the main arterial of the store which lies between the shopping aisles and checkout stands as well as Mrs.

Smith's line of travel. (CP 137; CP 138) The Food Pavilion had no policy or practice in place to keep the floors safe from debris.

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<sup>4</sup> Q Do they open them and consume them inside of your store?

A Frequently, yes."

Q Again, just to be clear, I'm still talking about May 24th, 2010, were your customers free to consume food, to purchase and consume food and beverages while moving around the store in different aisles and shopping?

A Yes.

<sup>5</sup> Q Alright, I just want to make this clear for the record. Given all the facts as you know it, is the most probable source of that spill water from a customer drinking or having an opened water container?

A Yes.

<sup>6</sup> Q Was there anybody working in the stock room?

A No it would have only been us because our labor had been cut past the bone.

Q Please describe what you mean?

A We were operating at bear minimum personnel.

Q Define bear minimum?

A Just a couple of checkers plus may be a courtesy clerk and we were very busy and could have used some more help.

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(CP 102) <sup>7</sup> He also testified that he was occupied at a check stand for at least 30 minutes before Mrs. Smith was injured. (CP 120; CP 121) <sup>8</sup> Cross said that had he been performing other duties requiring him to move about, he probably would have noticed the spill. (CP 121) The few other employees on hand didn't notice it either. (CP 124)

V.

#### STANDARD OF REVIEW

An appellate court reviews a summary judgment order *de novo*, performing the same inquiry as the trial court. **Kruse v. Hemp**, 121 Wn.2d 715, 853 P.2d 1373 (1993). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **CR 56** The court must consider the facts submitted and all reasonable inferences from those facts in the light most

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<sup>7</sup> Q: Did you have any method for--and I'm talking about May 24th, 2010, any kind of method in place for looking over the store to see if there were spills or other hazards?

A A method as in a camera at the check stand?

Q Any kind of policy, method or plan to use to keep an eye on what is on the floors?

A Just if you were on the floor and saw something. You know we had a sweep and mop log at the time but other than that, just as you came across the situation.

<sup>8</sup> Q How long had you been busy in the check stand?

A Without looking at the records, you know, from when I was logged into the check stand, it could have been a half hour to an hour. Being as busy as I was I would assume at least a half an hour.

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favorable to the nonmoving party. **Wilson v. Steinbach**, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

In summary judgment proceedings the court does not try factual issues; rather it decides whether or not factual issues are present which should be tried. **Graves v. P.J. Taggares Co.**, 94 Wn.2d 298, 616 P.2d 1223 (1980). Issues of negligence and causation are questions of fact not usually susceptible to summary judgment. **Miller v. Likins**, 109 Wn.App.140, 34 P.3d 835 (Div.1, 2001). A question of fact may be decided as a matter of law only when reasonable minds can reach one but conclusion on the matter. **Ruff v. County of King**, 125 Wash.2d 697, 703, 887 P.2d 886 (1995); **LaPlante v. State**, 85 Wash.2d 154, 159, 531 P.2d 299 (1975); **Miller v. Likins**, supra.

## VI.

### ARGUMENT

#### **1. The evidence raises an issue of fact as to Defendant's constructive knowledge of the hazard.**

Where a fall is caused by a temporary unsafe condition, the injured party can establish liability by showing that the proprietor had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the plaintiff's injury or to warn the plaintiff of the danger.

**Wiltse v. Albertson's Inc.** 116 Wn. 2d 452, 459, 805 P.2d 793 (1991).

Such constructive knowledge exists if the unsafe condition has been present long enough that a person exercising ordinary care would have discovered it. **Id.** citing **Pimentel** at 100 Wash.2d at 44, 666 P.2d at 893; **Hemmen v. Clark's Restaurant**, 72 Wash.2d 690, 692, 434 P.2d 729, 732 (1967).

It is ordinarily a question of fact for the jury whether, under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care.

**Frederickson v. Bertolino's Tacoma, Inc.**, 131 Wn. App. 183, 189; citing **Coleman v. Ernst Home Ctr., Inc.**, 70 Wn. App. 213, 220, 853 P.2d 473 (1993) and **Morton v. Lee**, 75 Wn.2d 393, 397, 450 P.2d 957 (1969); modified on other grounds in **Pimentel v. Roundup Co.**, 100 Wn.2d 39, 49, 666 P.2d 888 (1983). Reasonable care requires a landowner to inspect for dangerous conditions” ‘followed by such repair, safeguards, or warning as may be reasonably necessary for an invitee’s protection under the circumstances. **Tincani v. Inland Empire Zoological Soc’y**, (quoting RESTATEMENT (SECOND) OF TORTS § 343, cmt. b.) 124 Wn.2d 121, 139, 875 P.2d 621 (1994);

The facts in this case give substantial grounds for consideration by a jury. Mrs. Smith's testimony and photographs show that she exited a row of goods and traversed the main aisle in several steps. She also said she stopped and spoke to a checker after waiting to get her attention. She did this at an unhurried pace. Plaintiff is entitled to the inference that the hazard was present when this interval began because Mr. Cross says he didn't notice a spill when he transferred himself to a check stand, and Mrs. Smith didn't notice anyone make a spill after she entered the main aisle.

A reasonable person could conclude that the time interval required for Mrs. Smith to push her cart across the distance described, stop, engage a checker, and travel on was sufficient for a prudent storekeeper to discover the hazard and either clean up or give warning. However, as Mr. Cross testified, Food Pavilion had no policy of inspecting for dangerous conditions. The placement of a common yellow hazard sign would have sufficed. Summary judgment should therefore be denied on these grounds.

**2. The hazard which caused Sandra Smith's fall was created by the method in which the Food Pavilion was operated.**

Assuming *arguendo* that Defendant did not have constructive notice of the spill hazard, it can still be found responsible for Mrs. Smith's fall. Liability may attach if Defendant's business and methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable; provided that a relation between the hazardous condition and the self-service mode of operation of the business is provable. **Ingersoll v. DeBartolo**, 123 Wn.2d 649 (1994). This "self-service exception," is meant for narrow application.

**O'Donnell v. Zupan Enterprises** 107 Wn. App. 854, 858; citing

**Pimentel v. Roundup Co.** 100 Wn.2d 39, 40, 666 P.2d 888 (1983).

The reason for the rule was set forth was summarized as follows:

"It is common knowledge that the modern merchandising method of self-service poses a considerably different situation than the older method of individual clerk assistance. It is much more likely that items for sale and other foreign substances will fall to the floor. . . . (c)ustomers are naturally not as careful in handling the merchandise as clerks would be. . . . (n)ot unreasonably they are concentrating on the items displayed, which are usually arranged specifically to attract their attention. . . (s)uch conditions are equally typical of self-service restaurants and the most common self-service operation, the modern supermarket.

An owner of a self-service operation has actual notice of these problems. In choosing a self-service method of providing items, he is charged with the knowledge of the foreseeable risks inherent in such a mode of operation. The

logic of this rule is obvious . . . (i)n a self-service operation, an owner has for his pecuniary benefit required customers to perform the tasks previously carried out by employees. Thus, the risk of items being dangerously located on the floor, which previously was created by the employees, is now created by other customers.”

**Ciminski v. Finn Corp.**, 13 Wn. App. 815, 818-819; 537 P.2d 850; citing **Wardhaugh v. Weisfield's, Inc.**, 43 Wn.2d 865, 264 P.2d 870 (1953); and **Falconer v. Safeway Stores, Inc.**, 49 Wn.2d 478, 303 P.2d 294 (1956).

The operation of this rule charges the proprietor with actual knowledge of the "foreseeable risks inherent in such a mode of operation" and requires the proprietor to take "reasonable precautions" against the creation of hazardous conditions that this mode of service might cause. **O'Donnell v. Zupan Enterprises**, *supra*, citing **Ciminski v. Finn Corp.**, at 13 Wn. App. 819. The self-service exception does not create strict liability; rather, an injured person while relieved of the burden of proving knowledge must still show the proprietor failed to exercise reasonable care to prevent injury. **Id.**

A self-service area may be where customers serve themselves, where goods are stocked and customers handle the grocery items, or where customers otherwise perform duties that the proprietor's

employees customarily performed. **Ciminski v. Finn Corp.**, supra, at 13 Wn. App. at 818, 820. **Coleman v. Ernst Home Ctr., Inc.**, 70 Wn. App. 213, 291 853 P.2d 473 (1993). For example, where a customer slipped on debris dropped by another patron in a self-service checkout line, the jury could find that the hazard was created by defendant's mode of operation and was reasonably foreseeable. **O'Donnell v. Zuppan**, supra. Likewise, a patron who took a fall at a self-service cafeteria could prove liability even though she fell outside of the serving line. **Ciminski v. Finn Corp.**, supra. A hazard created by shampoo spilled in a coffee aisle is not foreseeably inherent in the nature of defendant's business operation. **Carlyle v. Safeway Stores** 78 Wn. App. 272, 896 P.2d 750 (1995).

In this case, Mr. Cross said the spill was most likely caused by a patron. He also stated that the Food Pavillion operated a deli and permitted its patrons to carry and consume food and beverages throughout the store, whether purchased there or not. As mentioned, he was quite busy, which means that customers were backed up in line in the main aisle where the spill occurred. A reasonable person could foresee that spills occur where patrons converge and congest, handling

food and open containers. Defendant having chosen such a method of operation, it was incumbent upon its employees to exercise reasonable care to protect Mrs. Smith.

The reasonableness of a proprietor's methods of protecting patrons is also a question of fact. **Ciminski v. Finn Corp.** at 13 Wn. App. 820. Our record lays out an important factual issue on this score. Defendant was operating a supermarket as described above with a bare minimum of staff. Nevertheless, it had no policy to make periodic inspections. It was unlikely that the few persons on hand could have executed it anyway, as shown by the fact that the spill occurred so near to where Cross was occupied. It was equally improbable that a patron could have found an employee to summon for help to clean or warn of the spill, as shown by the fact that employees thought themselves too busy to leave their stands even after the fall was reported.

From this evidence a jury could fairly conclude that Defendant breached its duty to exercise reasonable care under these circumstances while running both a self-service store and cafeteria

style restaurant in the same place. Summary judgment may also be denied on these grounds.

VII.  
CONCLUSION

The evidence in this case presents two material issues for trial. The first is whether Food Pavilion employees had reasonable time to discover a spill near a check out stand during an interval where Sandra Smith traversed a main aisle, conversed with an employee, and then walked into the hazard. The second is whether it breached its duty to keep its premises reasonably safe under the circumstances created by permitting patrons to buy and consume food items anywhere on the premises. This choice, made for Defendant's pecuniary benefit, creates a risk for persons shopping its store under any circumstances. In this case Defendant has passed even more risk to patrons by staffing a supermarket and delicatessen with a skeleton crew. Sandra Smith suffered the consequences, and asks for a fair hearing of her case at trial.

DATED this 25<sup>th</sup> day of May, 2012.

  
JOSEPH D. BOWEN, WSBA #17631

**PROOF OF SERVICE**

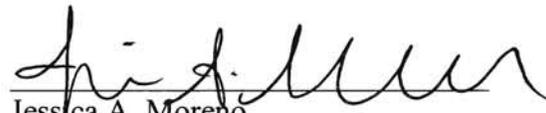
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