

69434-1

69434-1

No. 69434-1-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

DEANNE ALVAREZ,

Appellant,

v.

WAL-MART STORES, INC., a Delaware corporation doing business in the State
of Washington,

Respondent.

APPELLANT'S OPENING BRIEF

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN 28 PM 4:46

John M. Macdonald; WSBA #24919
Attorney at Law
Attorney for Appellant
1001 Fourth Ave.
Suite 3200
Seattle, WA 98154
(206) 684-9315

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR..... 4

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. 4

IV. STATEMENT OF THE CASE.....5

A. Factual Background.....5

B. Procedural Background.....9

C. The Standard of Review is De Novo..... 15

V. ARGUMENT..... 16

A. There is a Material Question of Fact as to Whether Wal-Mart Breached its Duty to Exercise Reasonable Care to Make Conditions in the Area Where Ms. Alvarez Fell Reasonably Safe..... 16

B. There Exists Significant Questions of Credibility Sufficient to Preclude Summary Judgment. Wal-Mart has not Produced any Direct Evidence to Establish That it Exercised Reasonable Care and has not Produced Verifiable Evidence of Measures Taken to Exercise Reasonable Care..... 17

1. Wal-Mart submits conclusory declarations based on hearsay and devoid of context or specificity..... 21

C. Wal-Mart’s Entire Theory of its Duty of Care is That a Material Fact Must Exist Simply Because it Has General Store Policies and Procedures Intended to Prevent Falls..... 30

1. Wal-Mart has no factual evidence that it took preventive measure on the day in question 32

2. Despite allegations by Wal-Mart that two managerial witnesses

spoke to Ms. Alvarez after her fall, these two witnesses are now
conspicuously absent from the record.38

D. Actual or Constructive Notice of a Hazard is Not Required for
Premises Liability Under the Pimentel Self Service Exception. . .40

1. Ms. Alvarez was not required to be on vigilant watch for
substances on the floor.42

VI. CONCLUSION.44

TABLE OF AUTHORITIES

Federal Cases

Whitaker v. Coleman, 115 F.2d 305 (5th Cir.1940) 40

State Cases

Alexander v. Gonser, 42 Wn. App. 234, 711 P.2d 347 (1985),
review denied, 105 Wn.2d 1017 (1986) 19

Arment v. Kmart Corp., 79 Wn. App. 694, 902 P.2d 1254 (1995) . . . 36, 37

Balise v. Underwood, 62 Wash.2d 195, 381 P.2d 966 (1963) 18

Blomster v. Nordstrom, Inc., 103 Wn. App. 252, 11 P.3d 883 (2000) . . . 23

Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 896 P.2d 750,
review denied, 128 Wn.2d 1004 (1995) 36

Charbonneau v. Wilbur Ellis Co., 9 Wn. App. 474, 512 P.2d 1126 (1973) .
. 24

Costacos v. Spence, 74 Wn.2d 884, 447 P.2d 704 (1968) 43

Dickinson v. Edwards, 105 Wn.2d 457, 716 P.2d 814 (1986) 16

Duckworth v. Bonney Lk., 91 Wn.2d 19, 586 P.2d 860 (1978). 19

Dunlap v. Wayne, 105 Wn.2d 529, 716 P.2d 842 (1986) 24

Egede-Nissen v. Crystal Mt., Inc. 93 Wn.2d 127, 606 P.2d 1214 (1980) . .
. 31

Fairbanks v. J.B. McLoughlin Co., et al., 131 Wn.2d 96, 929 P.2d 433
(1997) 16

Falconer v. Safeway Stores, Inc., 49 Wash.2d 478, 303 P.2d 294 (1956) . .
. 31

<u>Fitzpatrick v. Okanogan County</u> , 169 Wn.2d 598, 238 P.3d 1129 (2010)	15
<u>Ford vs. Red Lion Inns</u> , 67 Wn.App. 766, 840 P.2d 198 (1982)	30
<u>Frothinger v. Serier</u> , 57 Wn.2d 780, 360 P.2d 140 (1961)	30
<u>Gingrich v. Unigard Sec. Ins. Co.</u> , 57 Wn.App. 424, 788 P.2d 1096 (1990)	17
<u>Griffin v. Cascade Theatres Corp.</u> , 10 Wn.2d 574, 117 P.2d 651 (1941)	43
<u>Grimwood v. University of Puget Sound, Inc.</u> , 110 Wn.2d 355, 753 P.2d 517 (1988)	22
<u>Harris v. Burnett</u> , 12 Wn. App. 833, 532 P.2d 1165 (1975)	44
<u>Henry v. St. Regis Paper Co.</u> , 55 Wn.2d 148, 346 P.2d 692 (1959)	23
<u>Hertog v. City of Seattle</u> , 138 Wash.2d 265, 979 P.2d 400 (1999)	16
<u>Iwai v. State</u> , 129 Wn.2d 84, 94, 915 P.2d 1089 (1996)	42
<u>Jones v. Allstate Ins. Co.</u> , 146 Wn.2d 291, 45 P.3d 1068 (2002)	15
<u>Matsyuk v. State Farm Fire & Cas. Co.</u> , 155 Wn. App. 324, 229 P.3d 893 (2010)	15
<u>Nivens v. 7-11 Hoagy's Corner</u> , 133 Wn.2d 192, 943 P.2d 286 (1997).	30
<u>Pimentel v. Roundup Co.</u> , 100 Wn.2d 39, 666 P.2d 888 (1983)	3, 5, 11, 13, 37, 40, 41
<u>Presnell v. Safeway Stores, Inc.</u> , 60 Wash.2d 671, 374 P.2d 939 (1962)	30, 35
<u>Preston v. Duncan</u> , 55 Wn.2d 678, 349 P.2d 605 (1960)	33, 40
<u>Sanders v. Day</u> , 2 Wn. App. 393, 468 P.2d 452 (1970)	33

<u>Schmidt v. Coogan</u> , 135 Wn. App. 605, 145 P.3d 1216 (2006), <u>rev'd on other grounds</u> , 162 Wn.2d 488, 173 P.3d 273 (2007)	34, 35
<u>Smith v. Mannings, Inc.</u> , 13 Wn.2d 573, 126 P.2d 44 (1942)	42, 43
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980)	41
<u>Tincani v. Inland Empire Zoological Soc'y</u> , 124 Wn.2d 121, 875 P.2d 621 (1994)	16
<u>Todd v Harr Inc.</u> , 69 Wash.2d 166, 417 P.2d 945 (1966).	43
<u>Vacova Co. v. Farrell</u> , 62 Wn. App. 386, 814 P.2d 255 (1991)	23
<u>Wiltse v. Albertson's, Inc.</u> , 116 Wn.2d 452, 805 P.2d 793 (1991). . .	36, 37
<u>Wise v. Hayes</u> , 58 Wn.2d 106, 361 P.2d 171 (1961)	31
Court Rules	
CR 33.	18
CR 56.	10, 12, 15, 19, 22, 23, 34, 39
Other Authorities	
WPI 120.06.01.	31
Restatement of Torts (Second)(1965)	31, 42

I. INTRODUCTION

On March 22, 2008, DeAnne Alvarez entered a Wal-Mart store in Lynwood, Washington. Ms. Alvarez was accompanied by her mother and her daughter. After entering the store's health and beauty department, Ms. Alvarez slipped and fell on a white, liquid substance on the floor. The store was not busy and neither Ms. Alvarez nor her family saw any customers or employees in or near the aisle where they were walking at the time of her fall. After the fall, neither Ms. Alvarez nor her family saw any customers or employees other than a single store manager in or near vicinity of the spill, or where Ms. Alvarez was situated recovering from her fall. As a result of the fall, Ms. Alvarez sustained serious bodily injuries.

On March 21, 2011, Ms. Alvarez brought a complaint for personal injuries against Wal-Mart alleging negligence in Snohomish County Superior Court. In particular, Ms. Alvarez alleges that Wal-Mart was negligent in failing to exercise reasonable care to make the area where she slipped and fell reasonably safe. Wal-Mart contends that it complied with its duty of reasonable care.

After several months of discovery by both parties, Wal-Mart moved for an order of summary judgment alleging that it met its duty of care and seeking dismissal of all claims. Ms. Alvarez argued in response

that there existed material questions of fact as to whether Wal-Mart exercised reasonable care to make the area where she slipped and fell reasonably safe. In particular, Ms. Alvarez argued that the facts asserted by Wal-Mart in support of its Motion for Summary Judgment were both conclusory and impeached by the evidence it produced during the course of discovery.

On July 27, 2012, the trial court heard oral argument on Wal-Mart's Motion for Summary Judgment. At hearing, the court entered an order denying Wal-Mart's Motion, specifically finding that "[t]here is a material issue of fact in dispute." CP 4.

Wal-Mart timely filed a Motion for Reconsideration asserting that Ms. Alvarez did not establish that it failed to exercise reasonable care or had actual or constructive knowledge of the spill on the floor where she fell. In response, Ms. Alvarez argued again that Wal-Mart's contentions were both conclusory and unsupported by the totality of the evidence.

On September 13, 2012, the trial court reversed its earlier ruling by entering an Order granting Wal-Mart's Motion for Summary Judgment and dismissing Ms. Alvarez's complaint. The Order on Reconsideration was made without oral argument and the Order does not indicate why the trial court now suddenly finds the absence of a material question of fact.

place to another, and if it is related to that self-service operation. Nowhere in a store such as Wal-Mart is this more reasonably foreseeable than within the health and beauty department, a section of the store containing more lotions, creams, gels and oils than any other department. In such circumstances the store is considered to be on constant notice that spills will occur. Wal-Mart did not need to have actual notice of the hazard in order to be liable for the damages that resulted. Nor did Ms. Alvarez need to present additional proof of notice or foreseeability of the hazard, such as evidence of other similar spills.

Ms. Alvarez respectfully requests this court reverse the trial court's Order Granting Wal-Mart's Motion for Summary Judgment on Motion for Reconsideration and remand the case for trial.

II. ASSIGNMENTS OF ERROR

The trial court erred on September 13, 2012, by dismissing Ms. Alvarez's complaint on Wal-Mart's Motion for Reconsideration when it reversed its earlier finding of the existence of a material question of fact in the court's finding on the underlying Motion for Summary Judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there a material question of fact whether or not Wal-Mart breached its duty to exercise reasonable care to make conditions in the area where DeAnne Alvarez slipped and fell reasonably safe when there is

an absence and/or conflicting evidence of measures taken to ensure the safety of its customers?

2. Whether the hazard encountered by DeAnne Alvarez, which was within a self-service area where customers handle goods and is clearly related to that self-service operation, was reasonably foreseeable under Pimentel v. Roundup Co., or whether additional evidence of the foreseeability of the hazard is required.

3. Whether the trial court properly considered questions of credibility created by the contradictory and impeaching evidence provided by Wal-Mart to Ms. Alvarez in discovery when compared with the evidence it presented on its Motion for Summary Judgment.

IV. STATEMENT OF THE CASE

A. Factual Background.

On March 22, 2008, DeAnne Alvarez entered the Wal-Mart store in Lynnwood, Washington, accompanied by her mother, Barbara Mooney, and her daughter, Ashton Alvarez. CP 93, 148. Ms. Alvarez recalls that they initially went to look at the Easter items in the seasonal aisle and then headed to the health and beauty department, which is located near the pharmacy. CP 94. As they entered the health and beauty department, the aisle in which they were walking contained shelving on both sides with a white tile floor. CP 93, 94, 149, 108 (Dep. 16). The store did not seem

Ms. Alvarez did not see the substance before she slipped and did not know how long the substance was present on the floor. 107 (Dep. 15), 108 (Dep. 19). However, Ms. Alvarez was wearing tennis shoes and, after her fall, could see the trail that her shoe made when it slipped in the substance. CP 94. The trail was quite visible. CP 109 (Dep. 20-21). Ms. Alvarez's daughter, Ashton Alvarez, recalls that "[m]y mom's foot print was clearly visible in the smear she made when she slipped. You could see where her shoe had drug the white substance as she slipped and went up into the air." CP 149. The amount of the substance that she had stepped in was "a puddle, maybe three or four inches." 108 (Dep. 19), 109 (Dep. 20-21).

Finally, after a bit of time and effort Ms. Alvarez's mother and daughter were able to assist her to a seat in the pharmacy area. CP 94, 149, 110 (Dep. 25-26). Her daughter, Ashton, went in search of the nearest Wal-Mart employee find the store manager. CP 94, 149, 110 (Dep. 26). Ashton Alvarez recalls:

I still did not see any employees around so I went to look for someone to call a manager. I finally found the nearest employee in the pharmacy area and told them I needed a manager. They then left me, presumably to call for a manager to come to the pharmacy area.

CP 149.

Ashton returned to her mother several minutes later, and after approximately five more minutes, Wal-Mart store manager Quang Phung came to where Ms. Alvarez was sitting, identifying himself as the store manager and asking how he could help. CP 94-95, 110 (Dep. 26-27), 111 (Dep. 28), 149. Ms. Alvarez was still shaken and her mother and daughter explained to Mr. Phung that she had slipped in some kind of substance and fallen. CP 95. Mr. Phung asked Ms. Alvarez if she was alright. CP 95.

I explained that I had slipped, injuring my wrist and shoulder as I came down, hit the shelves and hurt my left ankle, leg and lower back. I made it clear to him that I was in serious pain.

CP 95.

Initially, Mr. Phung “appeared flustered” and uncertain as to what he should do with Ms. Alvarez. CP 95. He asked where she had fallen and Ashton Alvarez led him to the health and beauty department aisle in question. CP 95, 149. Mr. Phung then called for a clean-up in the aisle and returned to Ms. Alvarez, asking her if she wanted to fill out an accident report, to which she responded that she did. CP 95. Mr. Phung left to retrieve the form and when he returned, Ms. Alvarez completed the accident report form and signed it. CP 95. Mr. Phung also signed the accident report. CP 98. Ms. Alvarez asked for a copy of the report and Mr. Phung went and made one for her. CP 95.

Presumably during this period, the aisle where Ms. Alvarez had fallen was cleaned. However, neither Ms. Alvarez nor her family witnesses the cleanup. CP 95, 150, 111 (Dep. 28-29). Eventually, Mr. Phung asked Ms. Alvarez if she needed an ambulance, or “aid car.” CP 95. She responded that she didn’t think that she needed one, but that she “just needed to sit for awhile.” CP 95.

I sat there for approx. 20-30 minutes before I felt able to get up and walk back to our car. I used the aid of my daughter and mother to get to the car and sat in the back seat while my daughter drove home.

CP 95.

Although Ms. Alvarez was situated next to the Wal-Mart pharmacy while she regained her senses -- a very public area of the store -- the entire time that she was there she did not see or speak to any other Wal-Mart employee other than Mr. Phung. CP 95-96, 110, (Dep. 25-27), 150. Moreover, neither Ms. Alvarez nor her daughter saw any other employee walking by to see Ms. Alvarez or discuss what had happened; no Wal-Mart employee was observed or heard by Ms. Alvarez or her daughter discussing the fall with Mr. Phung or anyone else. CP 95-96, 150.

B. Procedural Background.

On March 21, 2011, Ms. Alvarez brought a complaint against Wal-Mart for personal injuries in Snohomish County Superior Court alleging,

inter alia, that the store was negligent under theories of premises liability applicable to business invitees. CP 257-259. Subsequent to the service of the summons and complaint, both parties commenced discovery, including written Interrogatories and Requests for Production and, on January 24, 2012, the taking of Ms. Alvarez's deposition by counsel for Wal-Mart. CP 120-144, CP 102-118 (Dep.).

During the course of discovery, Wal-Mart produced voluminous documentation of general store policies and procedures,¹ but no records contemporaneous to the day that Ms. Alvarez fell in the Lynnwood Wal-Mart (Store 2594), or any store records memorializing what actions, inspections, examinations or remedial measures were taken by Wal-Mart employees in relation to Ms. Alvarez's fall. In addition, Wal-Mart did not submit any such contemporaneous records in support of its Motion for Summary Judgment.

On June 15, 2012, Wal-Mart moved for an order of summary judgment pursuant to CR 56 seeking the dismissal of Ms. Alvarez's complaint. CP 158-172. Within its Motion for Summary Judgment, Wal-Mart did not assert that Ms. Alvarez was uninjured or contributorily negligent; the entirety of Wal-Mart's position on Summary Judgment was

¹ The majority of these policies and procedures were produced on a CD after the parties entered into a Stipulated Protective Order governing their admission into the Superior Court record. However, for purposes of the later summary judgment proceedings, neither party submitted any such policies and procedures invoking said Protective Order.

essentially that it met its standard of care and, therefore, the case should be dismissed as a matter of law. CP 172.

Wal-Mart made three primary arguments in favor of summary judgment. First, it argued that Ms. Alvarez could not prove the elements of her claim by failing, in substantial part, to produce evidence that Wal-Mart knew or should have known of an unreasonable risk of harm under the facts of this case. CP 162-168. Second, it argued that the self-service exception expressed in Pimentel v. Roundup Co. does not apply to the facts of this case. CP 168-171. Third, Wal-Mart argued that it met its duty to use reasonable care to maintain the safety of its premises. CP 171-172.

In factual support of Wal-Mart's arguments that it met its obligations to exercise reasonable care as a business owner, and that it could not have had actual or constructive notice of the unsafe condition, Wal-Mart submitted the declarations of four Wal-Mart employees: Stacey Hathaway, (CP 252-253), Brent Harris, (CP 219-220), Janet Boston (CP 173-218) and Deborah Antcliff (CP 260-262).² Of these four employees, only two (Ms. Boston and Ms. Antcliff) were actually employed at Wal-Mart's Lynnwood store on the day that Ms. Alvarez fell. CP 261, 173. However, neither Ms. Antcliff nor Ms. Boston were on the premises at the

² Also submitted was the Declaration of Wal-Mart's counsel, Rosemary Moore, which was provided for the purpose of introducing exhibits into the record. CP 221-251.

time of the fall; after Ms. Alvarez noted in her Response to the Motion for Summary Judgment that neither employee were actually present at the store when she fell (CP 79), Wal-Mart did not submit any supplemental declarations indicating that these employees were indeed on site at the time of the accident.

The entire thrust of Wal-Mart's four employee declarations is that Wal-Mart has policies and procedures designed to ensure that its premises are safe for business invitees and, more importantly, that said policies and procedures were strictly followed on the day that Ms. Alvarez's fell.

On July 9, 2012, in Response to Wal-Mart's Motion for Summary Judgment, Ms. Alvarez argued that there existed material questions of fact as to whether Wal-Mart exercised reasonable care to make the area where she slipped and fell reasonably safe on the day in question. CP 70-92. In particular, Ms. Alvarez argued that the facts as asserted by the four Wal-Mart employees in support of its Motion for Summary Judgment were inadmissible pursuant to CR 56 and impeached by the evidence Wal-Mart produced during the course of discovery. CP 76-87. In factual support of her arguments, Ms. Alvarez submitted her own declaration (CP 93-98) as well as that of her daughter (CP 148-151).

Finally, Ms. Alvarez argued that the self-service exception expressed in Pimentel v. Roundup Co. applies to the facts at bar, further serving to preclude summary judgment. CP 89-91.

On July 23, 2012, Wal-Mart submitted its Reply, arguing that Ms. Alvarez failed to present any questions of material fact in either her recitation of the evidence or in her accounting of what occurred on the day that she fell. CP 48-61.

On July 27, 2012, Snohomish County Superior Court Judge Marybeth Dingley heard oral argument on Wal-Mart's Motion for Summary Judgment. CP 47. As Wal-Mart later pointed out in its Motion for Reconsideration (CP 31), Judge Dingley indicated at oral argument that she was initially considering granting summary judgment until she reviewed Ms. Alvarez's accounting of the events on the day that she fell.³ Ultimately, Judge Dingley entered an order denying Wal-Mart's Motion, specifically finding that "[t]here is a material issue of fact in dispute." CP 5-6.

³ Wal-Mart's Motion for Reconsideration suggests that Judge Dingley commented at hearing that the specific evidence to which she referred in reference to Ms. Alvarez's accounting of the day in question was limited to Ms. Alvarez's statements that "she did not see Wal-Mart employees." CP 31. This is not the recollection of Ms. Alvarez's counsel. Regardless, pursuant to Snohomish County Superior Court administrative practice, no recording of the proceedings in this case were made and, therefore, no transcription of the proceedings exists from which to gauge this accounting.

On August 1, 2012, Wal-Mart timely filed a Motion for Reconsideration, asserting that Ms. Alvarez's "evidence was inadequate as a matter of law to show (1) that Wal-Mart knew or should have known that the condition presented an unreasonable risk of harm to its invitees; (2) that the self-service exception applied, and (3) that Wal-Mart failed to exercise ordinary care to protect plaintiff against any danger." CP 31-44.

On August 7, 2012, in Response to Wal-Mart's Motion for Reconsideration, Ms. Alvarez again argued that Wal-Mart's factual support was of questionable admissibility and impeached by the totality of the factual evidence. CP 15-24.⁴ On August 8, 2012, Wal-Mart submitted a Reply, again arguing that Ms. Alvarez was engaging in speculation that it had actual or constructive notice of the spill or that it failed to exercise reasonable care.⁵ CP 8-14.

On September 13, 2012, Judge Dingley summarily reversed her earlier ruling by signing an Order granting Wal-Mart's Motion for

⁴ Pursuant to Snohomish County Superior Court local rule, Ms. Alvarez's Response was filed by facsimile transmission and, unfortunately, the copy in the Clerk's Papers is somewhat difficult to read.

⁵ Wal-Mart also accused Ms. Alvarez and her counsel of mischaracterizing the record in her Response on Reconsideration, requesting that the trial court strike and disregard statements in said Response that were not supported by the record. CP 8-10. There is nothing on the court record, however, to indicate whether, or to what extent, this request was considered by Judge Dingley.

Summary Judgment and dismissing Ms. Alvarez's complaint.⁶ CP 7. The Order states that the action is dismissed but does not indicate why Judge Dingley reversed her earlier conclusion that there exists a material question of fact. The entirety of the Order is as follows:

THIS MATTER, came before the Court on Defendant, Wal-Mart Stores, Inc.'s Motion for Reconsideration of the Court's Order of July 27, 2012, which denied the Defendant's Motion for Summary Judgment. **THIS COURT** having read the pleadings and materials presented by the parties, together with the record and file, and having previously heard oral argument, **NOW THEREFORE, GRANTS** the Defendant's Motion for Summary Judgment.

CP 7 (bold in original).

C. The Standard of Review is De Novo.

"The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). As the nonmoving party, the court must consider all facts and inferences in the light most favorable to Ms. Alvarez. CR 56(c); Matsyuk v. State Farm Fire & Cas. Co., 155 Wn. App. 324, 329, 229 P.3d 893 (2010). Wal-Mart, as the moving party, has the burden of demonstrating that there is no genuine issue of material fact. Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010).

⁶ According to the court docket, the Order was not formally entered into the court record until September 17, 2012.

In considering summary judgment, the court views the facts, and all reasonable inferences therefrom, in the light most favorable to the non-moving party. "In reviewing summary judgment . . . [w]e must accept [the non-moving party's] evidence as true and must consider all the facts and all reasonable inferences therefrom in the light most favorable to her." Fairbanks v. J.B. McLoughlin Co., et al., 131 Wn.2d 96, 101, 929 P.2d 433 (1997)(citing Dickinson v. Edwards, 105 Wn.2d 457, 468, 461, 716 P.2d 814 (1986)).

V. ARGUMENT

A. **There is a Material Question of Fact as to Whether Wal-Mart Breached its Duty to Exercise Reasonable Care to Make Conditions in the Area Where Ms. Alvarez Fell Reasonably Safe.**

When faced with a motion for summary judgment in a case for premises liability, the courts agree that to establish negligence, a plaintiff must prove "(1) duty . . . , (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). "Existence of a duty is a question of law. Breach and proximate cause are generally fact questions for the trier of fact. However, if reasonable minds could not differ, these factual questions may be determined as a matter of law. Hertog v. City of Seattle, 138 Wash.2d 265,

275, 979 P.2d 400 (1999)(citations omitted). In the case at bar, there are material questions of fact as to what Wal-Mart store employees did or did not do on that day to ensure a safe condition and to meet their standard of care.⁷

B. There Exists Significant Questions of Credibility Sufficient to Preclude Summary Judgment. Wal-Mart has not Produced any Direct Evidence to Establish That it Exercised Reasonable Care and has not Produced Verifiable Evidence of Measures Taken to Exercise Reasonable Care.

In reviewing the factual evidence submitted to the trial court in an effort to determine just what actions Wal-Mart took to prevent an unsafe condition, and just what exactly transpired at its Lynnwood store on the day Ms. Alvarez fell, there are glaring inconsistencies between Wal-Mart's discovery responses, its employee declarations and the testimony of Ms. Alvarez, both at her deposition and within her declarations submitted to the trial court. This court should note said inconsistencies when weighing the credibility of Wal-Mart's factual arguments.

Summary judgment should not be granted when the credibility of a material witness is in issue. Gingrich v. Unigard Sec. Ins. Co., 57 Wn.App. 424, 428, 788 P.2d 1096 (1990).

When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the

⁷ Wal-Mart did not raise the questions of either injury or causation in its Motion for Summary Judgment.

contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied.

Balise v. Underwood, 62 Wash.2d 195, 200, 381 P.2d 966 (1963). See also Dickinson, 105 Wn.2d at 461 (“It is not the court's function to resolve existing factual issues nor can the court resolve a genuine issue of credibility such as is raised by reasonable contradictory or impeaching evidence”). The reviewing court's role is not to determine the truth of the matter, or engage in credibility determinations, but only to review whether the nonmoving party has presented evidence supporting the elements of his claim. “It is not the court's function to resolve existing factual issues, nor can the court resolve a genuine issue of credibility such as is raised by reasonable contradictory or impeaching evidence.” Fairbanks, 131 Wn.2d at 101.

There are substantial and material questions of credibility within the evidence Wal-Mart submitted in support of its Motion for Summary Judgment when viewed in light of its Responses to Ms. Alvarez’s Interrogatories and Request for Production. “Interrogator[y] . . . answers may be used to the extent permitted by the Rules of Evidence.” CR 33(b). “In support of a motion for summary judgment [a party] may rely on pleadings, depositions, *answers to interrogatories*, affidavits and

admissions on file to determine whether there is a genuine issue as to any material fact.” Duckworth v. Bonney Lk., 91 Wn.2d 19, 22, 586 P.2d 860 (1978), citing CR 56 (emphasis added). See also Alexander v. Gonser, 42 Wn. App. 234, 240-41, 711 P.2d 347 (1985), review denied, 105 Wn.2d 1017 (1986)(in determining whether there exists a genuine issue as to any material fact “[b]oth parties may rely on pleadings, depositions, *answers to interrogatories*, affidavits and admissions on file . . .”)(emphasis added). The admissibility of interrogatory answers are limited at the summary judgment stage only at the discretion of the trial court and the Rules of Evidence. In the case at bar, the trial court made no ruling on Ms. Alvarez’s use of Wal-Mart’s contradictory and impeaching discovery responses. This court should not ignore their glaring implausibility.

No greater implausibility of Wal-Mart’s credibility is found than within its account of what occurred after Ms. Alvarez fell. In response to Ms. Alvarez’s interrogatory request to describe its knowledge or understanding of how she fell, Wal-Mart was not content to obfuscate the issue: Wal-Mart answered said request directly and as follows:

Tracie Pappenheim, Dept Manager of Cosmetics, attended [Ms. Alvarez] after she complained she had almost fallen between 4.30 and 5.00 p.m. . . . [Ms. Alvarez] and her son told Ms. Pappenheim that she had slipped the previous day at her home. Assistant Manager Quang Phung was called; he found 2 to 3 small drops or dots of a lotion on

the floor. . . . [Ms. Alvarez] refused treatment or assistance, saying she was unhurt.

CP 134-135.

A more polar opposite account of what actually transpired is hard to imagine. The *only* Wal-Mart employee Ms. Alvarez ever spoke to regarding her fall was Mr. Phung; Ms. Alvarez did not speak to any female employee, or any other employee, after her fall. CP 94-96, 150. Perhaps not so coincidentally, there is no declaration submitted by either Mr. Phung or Ms. Pappenheim. Wal-Mart does admit, however, that the substance on which Ms. Alvarez slipped was “most likely to have been spilled by a customer.” CP 124-125. One can presume that this concession is due to the location in which the spill occurred: the self-service health and beauty department.

In an effort to impeach Ms. Alvarez, Wal-Mart again strains its credibility by claiming that “upon report, plaintiff had slipped the day before and therefore may not have been fit when she visited Wal-Mart.” CP 131. This contention has not a modicum of support; at no time during her deposition, or at any other time, did Ms. Alvarez ever state that she had fallen at her home on any day prior to March 22, 2008. In fact, at her deposition, Ms. Alvarez specifically denied any such incident.

Q. Now, had you had a fall shortly before the slip in Wal-Mart? Had you fallen at home the weekend before that accident, that you recall?

A. No, I don't recall.

CP 114 (Dep. 43).

Wal-Mart's discovery responses assert that I stated that I had fallen at home the previous day [before the fall]. This is categorically untrue. I did not fall at home the day before my visit to Wal-Mart and never stated to anyone that I had. In fact, I have *never* fallen at home that I can recall – and certainly never to the point of hurting myself.

CP 96.

Wal-Mart ignores this conflicting evidence of what transpired on the day in question, choosing instead to rely upon conclusory declarations by employees who were not in the store at the time of the incident. Wal-Mart contends that the contradictions and inconsistencies of its discovery responses in relation to the evidence submitted in support of its Motion for Summary Judgment are immaterial. What Wal-Mart fails to acknowledge is that these contradictions and inconsistencies are material to its credibility. Regardless of the fact that Wal-Mart does not argue whether Ms. Alvarez was fit on the day of her fall, or whether she spoke to its mysterious Ms. Pappenheim, Wal-Mart cannot now escape the material questions of credibility that its discovery responses create.

- 1. Wal-Mart submits conclusory declarations based on hearsay and devoid of context or specificity.**

Wal-Mart submits Declarations in support of its Motion for Summary Judgment that raise significant issues of both credibility and admissibility. The Declarations of Stacey Hathaway and Brent Harris are clear in that neither witness was an employee of the Wal-Mart in question on the day Ms. Alvarez fell. These witnesses do not provide any documentation or context in support of their individual contentions. Pursuant to the Rules of Evidence, the credibility (and admissibility) of their Declarations is suspect.

Although most commonly seen in non-moving party responses to a Motion for Summary Judgment, conclusory statements are just as fatal in support of such a motion. CR 56 is explicit in its requirements of personal knowledge and admissibility. Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988); CR 56(e).

[T]he emphasis is upon *facts* to which the affiant could testify from personal knowledge and which would be *admissible in evidence*. Thus, there is a dual inquiry as to whether an affidavit sets forth "material facts creating a genuine issue for trial": does the affidavit state material facts, and, if so, would those facts be admissible in evidence at trial? . . .

A fact is an event, an occurrence, or something that exists in reality. *Webster's Third New International Dictionary* 813 (1976). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. 35 C.J.S. *Fact* 489 (1960). The "facts" required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient.

Grimwood, 110 Wn.2d at 359 (emphasis in original). See also Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991) (“Inadmissible evidence is surplusage which cannot support or defeat a motion for summary judgment.”), citing Henry v. St. Regis Paper Co., 55 Wn.2d 148, 346 P.2d 692 (1959).

Wal-Mart rests its case on the credibility of conclusory declarations consisting of hearsay, speculation and second-hand information. “The ‘facts’ required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.” Grimwood, *supra* at 359-60 (citations omitted); See also Blomster v. Nordstrom, Inc., 103 Wn. App. 252, 258, 11 P.3d 883, 887 (2000) (“The court should not consider conclusory statements [at summary judgment] made by either party”).

Mr. Harris testifies in his declaration that he has been employed by the store in which Ms. Alvarez fell (Store No. 2594) for only one year. He

then declares that “[b]ased on information provided by Wal-Mart’s head office, there were only two reported slip-and fall [sic] incidents in the health and beauty section of Wal-Mart Store No. 2594 in the three year period prior to March 22, 2008. These occurred on November 20, 2005 and on April 30, 2006.” CP 219-220. Mr. Harris further declares “[t]he number of customers at Store 2594 in “2006, 2007, and 2008 were approximately the same they are currently.” CP 219. Mr. Harris’ factual recitation of the store’s history is unsupported by documentation and consists of second hand information, hearsay and speculation.

“A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.” Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986), citing Charbonneau v. Wilbur Ellis Co., 9 Wn. App. 474, 477, 512 P.2d 1126 (1973)(“hearsay is not competent evidence upon a defendant's motion for summary judgment”).

Ms. Hathaway’s declaration also suffers from admissibility problems. Ms. Hathaway declares that she is “currently the Field Administrative Assistant for Wal-Mart’s Market Office which keeps statistics for customer numbers, including the Wal-Mart Store No. 2594 . . .” CP 252. Ms. Hathaway further declares that “I have reviewed the daily customer counts for the Wal-Mart Store No. 2594 from August, 2010, through to February, 2012. During this period of time Store No. 2594 has

had on average at least 5,000 customers each day.” CP 252. Even assuming for the sake of argument that Ms. Hathaway’s recitations are accurate, Wal-Mart does not establish how they are relevant to the facts at bar.

Although an Administrative Assistant within the company structure, Ms. Hathaway was not present at Store No. 2594 on March 22, 2008, and it is not clear where or how the “daily customer counts” she cites to were generated, or how they were provided to her office. They were certainly not admitted into the trial court record. Like Mr. Harris, Ms. Hathaway’s factual recitations are unsupported by documentation and consist of second hand information, hearsay and speculation.

Ms. Janet Boston, on the other hand, presents a declaration indicating that she was the manager of the health and beauty department at Store No. 2594 at the time of Ms. Alvarez’s fall. CP 173-218. However, Ms. Boston’s declaration also suffers from the same questions of admissibility. Ms. Boston declares, for example, that although she is the health and beauty department’s manager, she has only a vague recollection of “hearing of” one prior slip and fall in said department -- and cannot recall with specificity what product the customer actually slipped on. CP 173. One would normally expect that a store department manager would

recall such incidents with greater clarity – or at least be able to provide supporting documentation of said incidents.⁸

More striking however, is the complete absence of any reference to Ms. Alvarez's fall within her declaration. Given that she was the health and beauty department's manager at the time, it defies imagination why Ms. Boston does not provide any documentation memorializing said fall or any corresponding records of what occurred in response to said fall.

Ms. Boston does go to great lengths to detail the procedures entailed by Wal-Mart to avoid incidents such as that experienced by Ms. Alvarez:

Our customers' safety is a high priority and Wal-Mart takes steps to prevent accidents. In 2008, we had two associates on duty in the health and beauty section of the store during the day. Their main job duties were to stock or restock merchandize, review and straighten the merchandize as necessary including the removal of any open or damaged bottles; to ensure lids and bottles are secure and that the contents have not leaked or spilled; to ensure the displays are secured on the shelves by riser strips to prevent falling merchandize; to clean the shelves as necessary; to remove clutter and review the area for any spills or debris. This included a continual review of the floor area for any hazards. The floor is cleaned throughout the store each night. In addition, during the day, there is an overhead announcement every hour which alerts Wal-Mart associates to conduct safety sweeps storewide. These safety sweeps include a close examination of the floor for any spills or safety hazards. If

⁸ Wal-Mart's answers to Ms. Alvarez's discovery requests represented that "there were two lawsuits arising from alleged slip-and-falls occurring inside its Lynwood Store within three years preceding [March 22, 2008]." CP 141.

an associate sees a spill or hazard the associate remains on the spot until it has been corrected (or a warning cone has been placed at the spot pending correction). Every associate and member of management is required to keep a paper towel and pocket pad in their pocket at all time to quickly clean up spills or debris. In addition, to safety sweeps all Wal-Mart staff clean and pick up all garbage in their designated area, "zoning" three or more times a day.

CP 174.

While laudable policies, Ms. Boston's declaration is deficient for purposes of summary judgment in several respects, not the least of which is the conclusory nature of her statements. **Ms. Boston's declaration aptly sums up Wal-Mart's entire argument; Wal-Mart asks the court to conclude that a material fact exists (compliance with its duty of care) simply because its policies "represent" that it does.**

Although Ms. Boston declares that that two Wal-Mart associates were "on duty in the health and beauty section of the store during the day" in 2008 (CP 174), there is no indication as to whether one or both individuals were on duty at the time of the underlying incident, let alone where in the store they may have been located at said time. These individuals' duties are also alleged to "include[] a continual review of the floor area for any hazards." CP 174. However, Ms. Boston does not state with any degree of specificity when these floor reviews occur, except to state that they are "continual," and that "[t]he floor is cleaned throughout

the store each night.” CP 174. These facts as alleged by Ms. Boston are conclusory and without context or specificity.

Ms. Boston’s allegation that “there is an overhead announcement every hour which alerts Wal-Mart associates to conduct safety sweeps storewide” (CP 174) appears to contradict official Wal-Mart policy. Wal-Mart’s policy regarding Safety Sweeps indicates that “Safety Sweeps will be conducted periodically throughout the day.” CP 203. The policy indicates that they are conducted “every three (3) hours,” not “every hour” as alleged by Ms. Boston. CP 203.

Finally, Wal-Mart submits the declaration of Deborah Antcliff, an assistant manager of the Lynnwood store at the time of the incident. CP 260-262. Ms. Antcliff declares that “[b]ased upon information provided by Wal-Mart’s head office, there were only two reported slip-and fall incidents in the health and beauty section of . . . Store No. 2594 in the three year period prior to March 22, 2008.” CP 261. Like Ms. Boston, however, even assuming for the sake of argument that said recitations are accurate, it is unclear how they are relevant. And as with Ms. Boston, despite being the assistant manager of the Lynnwood store at the time of the incident, Ms. Antcliff is conspicuously silent as to Ms. Alvarez’s fall and or documentation memorializing the fall or corresponding records of what occurred in response to said fall.

Hoagy's Corner, 133 Wn.2d 192, 202, 943 P.2d 286 (1997). Here, the parties agree that Ms. Alvarz was an invitee of Wal-Mart.

The operator of a business owes a duty of reasonable care for the safety of members of the public who are invited as customers to the business premises. WPI 120.06.01. That duty of care includes the duty to discover dangerous conditions through reasonable inspection, then to repair that condition or warn the invitees of the hazard, unless it is known or obvious. Egede-Nissen v. Crystal Mt., Inc. 93 Wn.2d 127, 132, 606 P.2d 1214 (1980); Restatement of Torts (Second), § 343 (1965).

Negligence, like any other fact, may be proved by circumstantial evidence. Falconer v. Safeway Stores, 49 Wn. (2d) 478, 303 P. (2d) 294; Wise v. Hayes, 58 Wn. (2d) 106, 361 P. (2d) 171. Evidence of liability need not be conclusive. It is sufficient if respondent's evidence affords room for men of reasonable minds to conclude that there is greater probability that the accident happened in the manner claimed, than that it happened in a way for which appellant would not be liable. Frothinger v. Serier, 57 Wn. (2d) 780, 360 P. (2d) 140.

Id., at 673.

Although the nature of what constitutes compliance with the duty of care imposed upon landowners is a question of law, the determination of the scope of said duty turns on the specific facts of each case. Wal-Mart has a heightened duty of care to its business invitees.

What we have impliedly recognized in earlier cases, we now explicitly hold: a special relationship exists between

a business and an invitee because the invitee enters the business premises for the economic benefit of the business. As with physical hazards on the premises, the invitee entrusts himself or herself to the control of the business owner over the premises . . . Such a special relationship is consistent with general common law principles.

Nivens, 133 Wn.2d at 291.

“A special relationship exists between a business and its invitees so that the business has a duty to take reasonable steps to prevent harm to its invitees . . .” Id., at 294. This duty is not passive but affirmative. Wal-Mart, however, summarily asserts that if they have a policy to prevent harm, it must have implemented it. Such a contention ignores the affirmative nature of their duty and the resultant analysis for purposes of summary judgment.

1. Wal-Mart has no factual evidence that it took preventive measure on the day in question.

Ms. Alvarez requested discovery from Wal-Mart regarding specific actions actually taken on the day in question by Wal-Mart employees that were designed to ensure that such a fall such as Ms. Alvarez’s would not occur. Wal-Mart was requested to answer numerous Interrogatories and Request for Production regarding specific examination(s) of the suspect area as well as specific incident report(s) and/or incident log(s) for such occurrences. CP 120-144. Wal-Mart answered that said responses would

be produced subject to a Stipulated Protective Order. Upon entry of said Order, however, not one of the materials produced contained a single specific incident report, log or examination report; the documents were merely general, internal policy guidelines. The *only* document produced in discovery by Defendant regarding the Ms. Alvarez was a claim form generated for Wal-Mart's insurer. CP 146-147. Indeed, when asked whether it "[gave] anyone in or at the premises any signals, notice, or warnings, whether written, oral or in any other form, concerning water, liquids and/or foreign substance, or any other dangerous condition in the specified area prior to the occurrence," Wal-Mart represented that it "does not keep a record of all such occasions" CP 128-129.

There is simply no evidence provided by Wal-Mart to establish when a safety sweep was conducted that day, or what actions Wal-Mart employees did or did not take in response to the fall by Ms. Alvarez. Knowledge is the type of fact which generally must be inferred from circumstantial and other evidence and is not sufficient for an award of summary judgment. "It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, et cetera, a summary judgment would not be warranted." Sanders v. Day, 2 Wn. App. 393, 468 P.2d 452 (1970). See also Preston

v. Duncan, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960)(“Summary judgment procedures are not designed to resolve inferential disputes”). Ms. Boston’s declaration asks the court to conclude that a fact exists simply because Wal-Mart polices represent that it does. CR 56 does not contemplate such a conclusion.

In its Motion for Summary Judgment, Wal-Mart cited with approval the Supreme Court’s reversal in Schmidt v. Coogan, 135 Wn. App. 605, 145 P.3d 1216 (2006), rev'd on other grounds, 162 Wn.2d 488, 173 P.3d 273 (2007). However, the Supreme Court’s holding in Schmidt does not help Wal-Mart. In fact, the lower court’s proceedings that it did not reverse support Ms. Alvarez.

The underlying action in Schmidt was an action for legal malpractice, but the case upon which the malpractice action was based was a premises liability case. The Schmidt court’s analysis of constructive notice is directly on point in this case. Schmidt, 162 Wash.2d at 493.

As the court observed, under the "case within a case" principle, the plaintiff in a legal malpractice claim must prove that, but for the attorney's negligence, the plaintiff would probably have prevailed in the underlying claim. The Schmidt Court dismissed the Court of Appeals’ reasoning as to constructive notice and the burden of proof for the business owner at summary judgment.

In a premises liability claim, the plaintiff must establish that the defendant either caused the dangerous condition or knew or should have known of its existence in time to remedy the situation. Whether a defective condition existed long enough so that it should have reasonably been discovered *is ordinarily a question of fact for the jury*.

Schmidt offered evidence that the spill was visible to employees from the cash registers and that during the time she was at the checkout stand none of the store employees made any effort to clean it up. In addition, there was evidence that preceding the fall the aisle was clear of other customers who might have recently caused the spill.

The Court of Appeals held that, as a matter of law, Schmidt failed to prove the notice element of her premises liability claim. Coogan concedes that the jury was properly instructed on the issue of constructive notice. The jury heard evidence from which it could *reasonably infer* that, *given the surrounding circumstances*, the spill existed for a sufficient period of time and under such circumstances that the owner should have discovered it in the exercise of reasonable care. Schmidt was not required to convince the trial judge or the Court of Appeals of the correctness of her position. At that stage of the proceeding, she was required to have produced only enough evidence so that a reasonable jury could return a verdict in her favor. Viewing the evidence in the light most favorable to Schmidt, we believe she carried her burden.

Id., at 274-75 (emphasis added). See also Presnell 60 Wash.2d at 671 (citing Bridgman v. Safeway Stores, Inc., 53 Cal.2d 443, 348 P.2d 696, 2 Cal.Rptr. 146 (1960))(whether a defective condition exists long enough so that it should have reasonably been discovered is ordinarily a question of fact for the jury).

In the case at bar, Ms. Alvarez produced sufficient evidence establishing that she did not see any other Wal-Mart employees other than the store manager, who was nowhere in sight during or immediately after the fall. During the 30-45 minutes she was inside the store's health and beauty department, she saw no other customers or employees in or near vicinity of the spill.

Wal-Mart hinges its case on Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 896 P.2d 750 (1995), review denied, 128 Wn.2d 1004 (1995), Wiltse v. Albertson's, Inc., 116 Wn.2d 452, 805 P.2d 793 (1991), and Arment v. Kmart Corp., 79 Wn. App. 694, 902 P.2d 1254 (1995).

However, Carlyle, Wiltse and Arment are distinguishable and limited to their facts. Unlike this case, there was testimony in all three cases that certain preventive measure were in fact taken by the store in question – or were unnecessary to discuss for purposes of the court's holding.

In Carlyle, the court held that the hazardous condition created by a leaking shampoo bottle in the coffee aisle was not related to the store's self-service mode of operation and that the plaintiff could not offer sufficient evidence to show that the hazard was reasonably foreseeable in the coffee aisle. Carlyle, 78 Wn. App. at 277.

In Wiltse, a leaking roof led to the plaintiff's fall. The court held that "the hazard came from a leaking roof which could give way suddenly, unforeseen and without notice. This is not the same as a continuing danger resulting from the store's self-service mode of operation." Wiltse, 116 Wn.2d at 456.

The Arment court was presented with an analysis pursuant to the self-service store exception enunciated in Pimentel v. Roundup Co., 100 Wash.2d 39, 666 P.2d 888 (1983). The plaintiff had slipped on some liquid on the floor while walking between two clothes racks through the store's menswear department. In analyzing whether Pimentel applied, the court in Arment held:

In order to fall within the Pimentel exception, therefore, a plaintiff must show that the nature of the particular self-service operation is such that it creates reasonably foreseeable unsafe conditions in the self-service area of the business. While certain departments of a store, such as a produce department, are "areas where hazards were apparent and therefore the owner [is] placed on notice by the activity", it does not follow that specific unsafe conditions associated with a self-service business are reasonably foreseeably in all areas of the business. On the contrary, to invoke the Pimentel exception, a plaintiff must present some evidence that the unsafe condition in the particular location of the accident was reasonably foreseeable.

Arment, 79 Wn. App. at 698.

In short, these cases are individually fact specific. Here, however, the area where Ms. Alvarez fell was the health and beauty department, a self-service area of the store where customer routinely handle lotions, creams, gels and oils. She further presents factual evidence that she did not see but one Wal-Mart employee during and after her fall, and that employee was not in sight and had to be found by her daughter.

At minimum, Wal-Mart was required to put forward *some* factual evidence that it actually implemented its policies and procedures on the day in question, not just that they had said policies written down in a handbook in the office. To conclude otherwise would render virtually every business landowner immune from liability for failure to actually implement their policies designed to prevent unknown dangers. Such a result is not contemplated within the duty imposed upon a business landowner to their invitees. The complete absence of any evidence that the Wal-Mart policies were actually implemented, let alone in what manner and context, raised questions of fact sufficient for Ms. Alvarez to survive Summary Judgment.

2. Despite allegations by Wal-Mart that two managerial witnesses spoke to Ms. Alvarez after her fall, these two witnesses are now conspicuously absent from the record.

After her fall, Ms. Alvarez was questioned by Wal-Mart manager Mr. Phung. CP 95. Wal-Mart's factual support of its Motion for

Summary Judgment, however, is conspicuously absent of any reference to Mr. Phung. This is a glaring omission. Despite Wal-Mart's attempt to account for the events of that day through supporting declarations, only Ms. Alvarez's declaration (and that of her daughter) and corresponding deposition testimony meet the personal knowledge requirement of CR 56 as to what actually occurred. Wal-Mart is silent as to the day, does not produce any witnesses present at the time of the fall, cannot recall any material facts as to the fall and rests on conclusory allegations.

Juxtaposed with its speculative evidence of what actually occurred in the Lynnwood store on the day in question and its implausible assertions of fact as to who did what and who said what in relation to Ms. Alvarez on that day, Wal-Mart simply has no direct, credible evidence of any of its factual assertions.

Wal-Mart will argue that the absence of first-hand witness declarations is a collateral issue and not appropriate for a credibility consideration because the question it presents does not address a material question of fact. Such a hyper-technical application of the collateral issue rule stands in opposition to the axiom that the Court "must consider all the facts and *all reasonable inferences therefrom* in the light most favorable to [the non-moving party]". Fairbanks, 131 Wn.2d at 101 (emphasis added).

In this case, the court is presented with affidavits based on speculation and hearsay, contradictory evidence produced during discovery and the glaring absence of any witness present on the day in question. These facts create non-collateral questions and inferences as to credibility and “*otherwise impeach* the evidence of the moving party.” Balise, 62 Wash.2d at 200 (emphasis added).

The summary judgment rule will best serve its purpose when we all, bench and bar alike, become aware that, as Judge Hutcheson has said,
“... Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists. ...*” (Italics ours.)

Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960), quoting Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir.1940).

D. Actual or Constructive Notice of a Hazard is Not Required for Premises Liability Under the Pimentel Self Service Exception.

Where it is reasonably foreseeable to the business operator that there will be unsafe conditions on its premises due to the nature of its business or area in question, the operator is considered to be on constant notice that hazards of that type will occur in the normal course of business, and a plaintiff injured as a result of that hazard need not show that the

operator knew the condition existed at the time of the plaintiff's injury. Pimentel v. Roundup Co., 100 Wn.2d 39, 48, 666 P.2d 888 (1983). In such cases, constructive notice of the existence of such an unsafe condition is charged to the business operator. Id.

In Pimentel v. Roundup Co., our Supreme Court held that "the requirement of showing notice will be eliminated only if the particular self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable." Id., 100 Wn.2d at 50. Pimentel further held:

This does not change the general rule governing liability for failure to maintain premises in a reasonably safe condition: the unsafe condition must either be caused by the proprietor or his employees, or the proprietor must have actual or constructive notice of the unsafe condition.

Id., at 49. Constructive notice may be proved by circumstantial evidence. Indeed, in premise liability cases, it is seldom otherwise. Landowners infrequently admit that they knew of a hazardous condition. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The very nature of the area of the store in which Ms. Alvarez fell (the health and beauty department) satisfies the constructive notice anticipated by Pimentel. It is axiomatic that the health and beauty section of a self-service store contains more lotions, creams, gels and oils than any

other section of the store. It defies common sense to suggest that the hazard encountered by Ms. Alvarez in the health and beauty department was not reasonably foreseeable; the products within the health and beauty department dictate that the existence of unsafe conditions are reasonably foreseeable.

1. Ms. Alvarez was not required to be on vigilant watch for substances on the floor.

Washington courts recognize an invitee's awareness of an unsafe condition does not necessarily preclude a landowner of liability:

A possessor of land is not liable to his [or her] invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*

Iwai v. State, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996)(citing Restatement of Torts (Second) § 343A (1)(1965)(emphasis added).

It has long been the law in Washington that it is not the duty of a customer to a self-service establishment to keep a constant watch for any substance that may be on the floor. Smith v. Mannings, Inc., 13 Wn.2d 573, 578, 126 P.2d 44 (1942)(holding erroneous a jury instruction that a person is charged with seeing what he would have seen if he had looked). As our Supreme Court explains, Mannings held that where “debris on which the plaintiff had fallen was not so conspicuous . . . as to challenge

her attention, [] she [is] under no duty to watch her footing at every step.”
Costacos v. Spence, 74 Wn.2d 884, 887, 447 P.2d 704 (1968), citing
Mannings.

Ms. Alvarez had a duty to use only that care which a reasonably prudent person of ordinary intelligence would exercise under like or similar circumstances, and has the right to assume that the premises are in a reasonably safe condition until such time as the patron knows, or should know, the contrary. Mannings, 13 Wn.2d at 576-77; see also Griffin v. Cascade Theatres Corp., 10 Wn.2d 574, 583, 117 P.2d 651 (1941) (“It was not incumbent” for [a] patron “to watch her footing every step of the way,” and the patron “was justified in assuming that she might safely walk” on the mat upon which a sign rested).

Prudent care for one's own safety should not and does not entail rigid fixation of one's eyes on the pathway, sidewalk, rug, or stairs ahead in the sense that one need keep a constant watch for any danger that might lurk in the next step. Where no danger is apparent, it is a matter of common experience – even in walking up stairs – that one who keeps a reasonable watch for his own safety will simply engage in intermittent glances at the path ahead in order to anticipate protruding obstacles, such as new carpeting. The law requires no higher duty of care, and certainly does not require one to keep his or her eyes fixed on the floor immediately ahead.

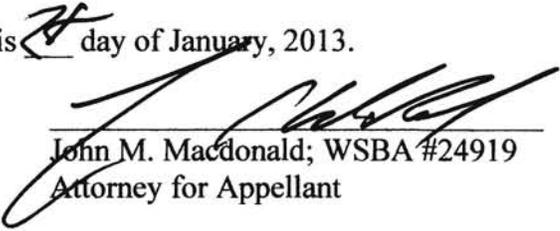
Todd v Harr Inc., 69 Wash.2d 166, 170-71, 417 P.2d 945 (1966).

Here, Wal-Mart can point to no evidence that would support a contention that Ms. Alvarez should have been looking at the floor of the aisle as she was walking through the health and beauty department or that she was not using the degree of care a reasonably prudent person would use. To the extent Wal-Mart contends otherwise, there is an issue of material fact concerning whether she could have discovered or anticipated the danger posed by the substance on the floor. See Harris v. Burnett, 12 Wn. App. 833, 835, 532 P.2d 1165 (1975)(“A jury question arises unless the evidence is such that all reasonable minds would agree that the plaintiff had exercised the care a prudent person would have exercised under the circumstances.”).

VI. CONCLUSION

The trial court's reversal of its finding of material fact on the Defendant's Motion for Summary Judgment should be reversed and remanded to Superior Court for trial.

Respectfully submitted this 28 day of January, 2013.

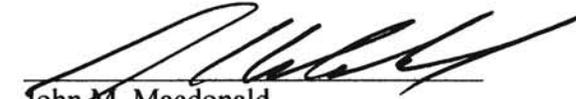


John M. Macdonald; WSBA #24919
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury of the laws of the State of Washington, that on the date indicated below, I caused to be hand delivered, a true and correct copy of the Appellant's Opening Brief to which this certificate is attached.

DATED this 28 day of January, 2013.



John M. Macdonald

Rosemary Jane Moore
Lee Smart PS Inc.
701 Pike St., Ste. 1800
Seattle, WA 98101-3929
Attorneys for Respondent Wal-Mart Stores Inc.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JAN 28 PM 4:46