

69434-1

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No. 69434-1-1

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WASHINGTON STATE COURT OF APPEALS, DIVISION I

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DEANNE ALVAREZ,

Appellant,

v.

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

Respondent.

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**REPLY BRIEF OF APPELLANT**

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2013 APR -8 PM 4:54  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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

**ORIGINAL**

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## I. ARGUMENT

It is axiomatic that complaints for premises liability are fact specific and will generally rise or fall on the specifics in the factual record. Although the threshold determination as to whether a duty exists is a question of law, “[o]nce the issue of legal duty is determined, it is the function of the trier of fact to decide whether the particular harm should have been anticipated and whether reasonable care was taken to protect against the harm.” Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 54, 914 P.2d 728 (1996), citing Tincani v. Inland Empire Zoological Soc’y, 124 Wn.2d 121, 875 P.2d 621 (1994). In “slip and fall” cases, there are few decisions that do not turn on the particular facts of the fall and surrounding circumstances within the premises in question.<sup>1</sup>

For this very reason the parties in the case at bar are focusing on their disagreements as to the underlying factual events within the record. However, it is one thing to advocate that facts do not legally support the other parties’ case, but quite another for the moving party to a Motion for Summary Judgment to turn CR 56 on its head and argue that facts do or do

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<sup>1</sup> Nowhere is this factual inquiry more apparent than in cases addressing the “self-service exception” expressed within Pimentel v. Roundup Co., 100 Wn.2d 39, 666 P.2d 888 (1983). “The reasonably foreseeable exception to the notice requirement should be applied to any situation, whether or not the mode of business involves self-service, where “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.”” Iwai v. State, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996), citing, Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 654, 869 P.2d 1014 (1994), quoting Pimentel, at 49.

not exist based upon inference or conjecture. Wal-Mart can have its own legal theories, but it is not entitled to its own inferences. "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, 101-102, 929 P.2d 437 (1997), citing Dickinson v. Edwards, 105 Wash.2d 457, 468, 716 P.2d 814 (1986).

Analysis of a landowner's actual or constructive notice in a premises liability case is a broad, inclusive inquiry into numerous factual circumstances unrestricted to the mere existence of policies a landowner has in place to prevent such conditions. The inquiry includes, *inter alia*, consideration of the time an unsafe condition existed, the opportunity for the landowner to discover the condition and, perhaps most importantly, what steps the landowner did or did not take to discover the unsafe condition.

Under the standard set by Restatement (Second) of Torts § 343, a landowner's duty attaches only 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."

In applying this knowledge requirement to premises liability actions, Washington law requires plaintiffs to show the landowner had actual or constructive notice of the unsafe condition. . . . To prove constructive notice, Plaintiffs carry the burden of showing the specific 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." The notice requirement insures liability attaches only to owners once they have become or should have become aware of a dangerous situation.

Iwai v. State, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996)(citations omitted).

**A. Wal-Mart's Recitation of the Factual Record is Inaccurate and Misleading.**

In this case, Wal-Mart's claim that it met its duty and it could not possibly have had notice of an unsafe condition is founded upon the testimony of individuals who make no pretensions of being present in the store when the injury occurred. It is difficult to understand just how Wal-Mart contends that it could not have had actual or constructive notice when there is no factual record that the policies it had in place to prevent unsafe conditions were in fact implemented. Wal-Mart has produced no testimony from anyone who claims to have been in the store that day, instead resting upon its policies and procedures. However, the mere existence of policies and procedures do not account for the more fact specific inquiries as to the time the unsafe condition existed or where Wal-Mart employees who were physically in the store were located at the time

of the fall, or what actions said employees did or did not take that could have alerted them to the unsafe condition.

The permissible period of time for the discovery and removal or warning of the dangerous condition is measured by the varying circumstances of each case, such as the number of employees, their physical proximity to the hazard, and the general likelihood they would become aware of the condition in the normal course of duties. A plaintiff may prove liability by direct and/or circumstantial evidence. However,, whether an unsafe condition existed long enough so that it should have reasonably been discovered is ordinarily a question of fact for the jury. Presnell v. Safeway Stores, Inc., 60 Wash.2d 671, 675 (1962). See also Helman v. Sacred Heart Hosp., 62 Wash.2d 136, 148 (1963); Falconer v. Safeway Stores, Inc., 49 Wash.2d 478, 479 (1956).

Wal-Mart blurs the record by repeatedly arguing that Ms. Alvarez's version of events is inaccurate.<sup>2</sup> How it can do so without the testimony of employees or other witnesses who claim to have been in the store at the time of the fall is difficult to understand. Without any first-hand testimony to support its factual version of the events, Wal-Mart has placed itself in a precarious position when it comes to reliability relating to

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<sup>2</sup> This is not the first time Wal-Mart has accused Ms. Alvarez (and her counsel) of misrepresenting the facts of the case. *See e.g.*, CP 8-10.

the actual circumstances surrounding Ms. Alvarez's fall. Instead, it relies upon a strained reading of the factual record established by the *only* first-hand witness affidavits before the Court: that of Ms. Alvarez and her daughter.

As a preliminary matter, Wal-Mart continues to insinuate that Judge Dingley was inclined to grant its Motion for Summary Judgment, but changed her mind after reading Ms. Alvarez's testimony.<sup>3</sup> Response at 8-9. While the undersigned agrees that Judge Dingley make a vague reference to such an inclination, anything more as to what Judge Dingley was thinking is entirely speculative. Wal-Mart argues as follows:

At the hearing, the court commented that she was considering granting Wal-Mart's motion until she reviewed Ms. Alvarez's testimony that she had not seen any other employees in the health and beauty aisle. The court's statements indicated that she thought that Ms. Alvarez had testified she was in the health and beauty aisle for half-an-hour and had seen no employees or that she had been in the store for half-an-hour and had seen no employees. Neither is in the record.

Id.

Wal-Mart has no support for such a sweeping conclusion and instead relies upon conjecture. In an effort to manufacture factual support, Wal-Mart cites to the Clerk's Papers (Id., i.e., CP 31-32). However, this

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<sup>3</sup> It is unclear why Wal-Mart focuses on this assertion; the case at bar is before the Court *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).

section of the Clerk's Papers is merely an excerpt from Wal-Mart's Motion for Reconsideration and not a citation to the factual record. Id. The essence of Wal-Mart's argument is that it is Ms. Alvarez who is manufacturing and/or misrepresenting the factual record.

Wal-Mart's recitation of the facts at bar continues as follows:

The evidence in the record shows that Ms. Alvarez was in the health and beauty aisle for *a few minutes only*. Ms. Alvarez fell while walking down the health and beauty aisle immediately after entering that section. She did not stop to look at any items. Her mother and daughter assisted her to the pharmacy area *a few minutes after she fell*. From her seat in the pharmacy department *Ms. Alvarez could no longer see the area where she slipped*. During the *20 to 30 minutes* she remained there she "did not speak to any other store employee other than the manager..." and she does not recall any employee "walking by me to see what had happened."

Accordingly, Ms. Alvarez *did not testify that she was in the health and beauty section for half an hour without seeing any Wal-Mart employees* or that she failed to see any employees within the store. Her evidence was solely that (1) she did not see anyone in the health and beauty aisle *before* she fell; and (2) she spoke to one manager and no other Wal-Mart employees after the accident.

Response at 9-10 (emphasis added; citations omitted). The actual circumstances surrounding Ms. Alvarez's fall and the actions or inactions of Wal-Mart's employees cannot be so readily discharged. Unfortunately for Wal-Mart, its efforts to blur the events of that day do not hold up when viewed with Ms. Alvarez's actual testimony and that of her daughter.

For example, according to Wal-Mart, the time frame that Ms. Alvarez was in the store, from her fall to her leaving the premises, was somewhere in the neighborhood of 20-30 minutes. Id. Such a conclusion is not supported by the record. A closer look at the actual testimony of Ms. Alvarez and her daughter reveals the strained factual recitation given by Wal-Mart.

Neither Ms. Alvarez nor her daughter testified 1) that they were in the health and beauty aisle “for a few minutes only,” 2) that Ms. Alvarez was assisted her to the pharmacy area “a few minutes after she fell,” 3) that Ms. Alvarez “could no longer see the area where she slipped,” or 4) that they were “not in the health and beauty section for half an hour without seeing any Wal-Mart employees.” The entirety of these distorted recitations amount to either a plain misreading of the record, or more likely, an effort to distort the actual testimony.

**1. Ms. Alvarez was in the Shampoo Aisle for a Considerable Period of Time and saw no Wal-Mart Employees.**

Immediately upon falling in the shampoo aisle,<sup>4</sup> Ms. Alvarez remained on the ground for an indeterminate period of time while trying to collect herself; as Ms. Alvarez testified, upon her fall she “sat there for a few minutes in shock.” CP 94. Ms. Alvarez further testified that after this

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<sup>4</sup> Ms. Alvarez’s contemporaneous recollection at the time of her fall was that she was in the shampoo aisle. CP 98.

indeterminate period of time, her mother and daughter were “eventually” able to assist her to her feet. CP 110 (Dep. 25). Upon getting back on her feet, Ms. Alvarez did not simply walk away, but had the presence of mind to pause and look at the substance in which she fell, at minimum, long enough for her to testify with certainty that the substance was approximately half an inch deep and “had the [specific] characteristics of hair conditioner or a thick lotion.” CP 109 (Dep. 23).

A. And I can't tell you exactly how big the puddle was before I stepped in it. Maybe the portion that I hadn't dragged out with my heel, with my foot, may have been a couple of inches left. But what I did step in and carried out as I went up in the air, at least four to six inches, I would guess.

Q. And how deep was it? Was there anything left that you hadn't smeared and slipped on --

A. Yes.

Q. -- to judge the depth? Was it a couple of millimeters?

A. I don't recall exactly, but I would say approximately half an inch.

Q. Now, half an inch is as deep as that {indicating}, perhaps a quarter. That sounds quite deep. You think it was that deep?

A. To the best of my recollection.

Q. Could it have been less than that? Maybe a quarter of an inch?

A. I think it was deeper.

Q. Okay. And you don't know specifically what kind of lotion it was?

A. I thought it could be conditioner, but I don't know.

Q. Right. That's a guess on your part?

A. Based on the thickness.

Q. Could it have been a detergent?

A. No.

- Q. Why not? I mean, detergents can be white, and they can be basically a similar condition.
- A. There was not detergent in that area. I was in the health and beauty aids, in the hair product area.
- Q. I understand that. But what I'm saying is -- so you're assuming it wasn't detergent because you weren't in that section?
- A. It looked like conditioner, hair conditioner, or a very thick lotion.
- Q. Okay. But it's possible it could have been detergent; it's just you weren't expecting it to be detergent?
- A. I don't believe so. No.
- ....
- Q. Because dish-washing detergent can be thick and white, correct?
- A. No. This was a hair conditioner or thick lotion product.
- Q. And that's an assumption you're making because you were in that aisle?
- A. No.
- Q. And because you think it looked like conditioner?
- A. Because I visually saw the product.
- Q. It was a white substance. But you cannot know for certain that it was hair conditioner, correct?
- A. It looked -- it had the characteristics of hair conditioner or a thick lotion.

CP 109 (Dep. 21-23).

Ms. Alvarez's time in the shampoo aisle can hardly be brushed aside as "a few minutes only." Moreover, Ms. Alvarez did not testify that "she did not see anyone in the health and beauty aisle [only] before she fell." Response at 9. Rather, she testified that from the time she entered the shampoo aisle to the time she was eventually able to make her way to the pharmacy, she did not see any employees, let alone other customers.

- Q. And did [your mother and Daughter] help you to your feet?
- A. Eventually.
- Q. Was there anybody else in the vicinity?
- A. I don't recall.
- Q. Did anybody else approach you?
- A. No.
- Q. You don't recall seeing *anybody* else during that time?
- A. No.

Id. (Dep. 24-25)(emphasis added).

For purposes of summary judgment, it is more than a reasonable inference that Ms. Alvarez was in the shampoo aisle for a *considerable* period of time, as opposed to “a few minutes only.”

**2. Ms. Alvarez remained in the pharmacy, at minimum, for approximately an additional 20-30 minutes.**

After the indeterminate period of time in the shampoo aisle, Ms. Alvarez' mother and daughter were eventually able to help her “hobble to a seat in the pharmacy.” CP 94. Ms. Alvarez testified that at the time of her fall, she was “close to the pharmacy.” CP 110 (Dep. 26).<sup>5</sup> Upon arriving at the bench in the pharmacy, Ms. Alvarez recalls that she probably sat there for approximately 20-30 minutes<sup>6</sup> until she “felt able to

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<sup>5</sup> Discovery produced by Wal-Mart establishes that pharmacy is *directly* adjacent to the health and beauty department.

<sup>6</sup> Q. So how long did you remain seated on the bench?  
A. I don't recall. 20 or 30 minutes, to the best of my recollection.

CP 111, (Dep. 30).

get up and walk back to [her] car.” CP 95. Aston Alvarez testified that “[w]e waited about a half an hour until my mother felt okay enough to make it out to the car.” CP 150.

Given this testimony, it is a reasonable inference that, although Ms. Alvarez may have been in the pharmacy for approximately 20-30 minutes, the time from her fall to the time she left the premises was in the neighborhood of 45-55 minutes.

- 3. Neither Ms. Alvarez nor her daughter saw any Wal-Mart employees in the shampoo aisle at the time of the fall. They also did not see any Wal-Mart employees circulating in the area in which she fell afterward.**

Wal-Mart goes to great lengths to declare that Ms. Alvarez was not physically located within “the health and beauty section for half an hour without seeing any Wal-Mart employees” or that she failed to see any employees other than a store manager after she fell. CP 9-10. This is not, however, supported by the record. Ashton Alvarez testified in relevant part:

I was to the left of my mother when out of nowhere she flew up into the air and onto her backside on the tile floor. . . . I do not recall seeing any other customers or Wal-Mart employees in the aisle.

After a bit of time and effort, my grandmother and I were able to help my mom and assisted her to a seat in the pharmacy area. I still did not see any employees around.

CP 149 (emphasis added). Wal-Mart's presentation of the factual circumstances relating to where its employees were that day, or what they did not do, suffers from the absence of firsthand accounts.

Contrary to the claims by Wal-Mart, neither Ms. Alvarez nor her daughter ever testified that they "could not see the area" in which she fell; Ms. Alvarez's testimony was merely that she could not see the *precise location* where she slipped from where she sat.<sup>7</sup> This is not a subtle distinction. Given that the pharmacy is directly adjacent to the health and beauty aisles, Ms. Alvarez could certainly see "the area" in which she fell, just not the precise location. There is nothing within her testimony from which to infer that she was somehow partitioned off from the area or was unable to see the flow of foot traffic in and out of the area.

**4. Wal-Mart's objections to Ms. Alvarez's description of the health and beauty department are not well taken. Not only is the health and beauty department an area where the Pimentel exception may apply, Wal-Mart's argument against such an application is impeached by its own evidence.**

Wal-Mart asserts repeatedly that "Ms. Alvarez attempts to bring herself within the [self-service] exception by making a number of broad and conclusory statements in her brief about the nature of the health and

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<sup>7</sup> Q. From where you were sitting at this bench, could you see the place where you had slipped?  
A. No.

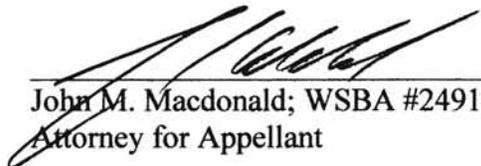
CP 110 (Dep. 27).

beauty area of the store without citing any supporting evidence or legal authority.” Response at 29. Frankly, Wal-Mart would have this Court leave its common sense at the door. “Legal causation “rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend.” Hertog v. City of Seattle, 138 Wn.2d 265, 283, 979 P.2d 400 (1999), quoting Taggart v. State, 118 Wash.2d 195, 226, 822 P.2d 243 (1992), Hartley v. State, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). The potential hazards within any large chain store’s health and beauty department – let alone the shampoo aisle – speak for themselves.

## II. CONCLUSION

The trial court's grant of Defendant's Motion for Summary Judgment should be reversed and remanded to Superior Court for trial.

Respectfully submitted this 5 day of April, 2013.

  
John M. Macdonald; WSBA #24919  
Attorney for Appellant

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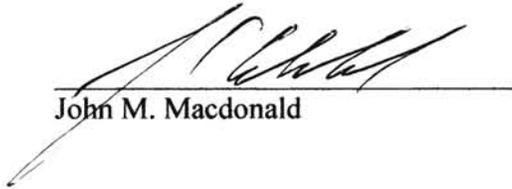
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CERTIFICATE OF SERVICE

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 Appellant's Reply Brief to counsel of record as follows.

DATED this 11 day of April, 2013, in Seattle, Washington.

  
John M. Macdonald

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

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Facsimile at \_\_\_\_\_  
 Messenger on April 8, 2013  
 U.S. Mail  
 Overnight Mail  
 email on \_\_\_\_\_

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