

69434-1

69434-1

NO. 69434-1-I

COURT OF APPEALS STATE OF WASHINGTON

DEANNE ALVAREZ,

Appellant.

v.

WAL-MART STORES, INC.,

Respondent.

RESPONDENT'S BRIEF

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2013 FEB 28 PM 3:12
COURT OF APPEALS
STATE OF WASHINGTON
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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE.....	3
A. Ms. Alvarez slipped on a liquid substance in Wal-Mart’s health and beauty section.....	3
B. There were only two slip and fall accidents in the health and beauty section during the 3 years prior to Ms. Alvarez’s accident only one of which involved a health and beauty product.....	5
C. Wal-Mart acted reasonably in keeping the store safe for its customers by regularly inspecting all areas of the store for unsafe conditions.	7
D. Procedural History.	8
IV. SUMMARY OF ARGUMENT	10
V. ARGUMENT	12
A. Summary judgment was proper because no genuine factual dispute exists.....	12
B. The court should disregard statements in Ms. Alvarez’s brief that are not supported by the record.	14
C. As a matter of law, Ms. Alvarez cannot prove the elements of her premises-liability claim.	18
1. Ms. Alvarez failed to produce evidence that Wal-Mart knew or should have known of an unreasonable risk of harm.....	21
2. The plaintiff failed to produce evidence, as she must, to support the application of the self-service exception.	28
D. Wal-Mart met its burden of showing an absence of any evidence that it failed to take reasonable steps to prevent a hazard.....	35
1. Wal-Mart met its duty to use reasonable care to maintain the safety of the premises.....	35

2.	The declarations of Wal-Mart employees adequately describe the care that was taken on March 22, 2008 to prevent any hazards.....	38
3.	Plaintiff failed to produce evidence impeaching the credibility of Wal-Mart employees.....	42
E.	Wal-Mart did not assert Ms. Alvarez’s contributory negligence in its motion for summary judgment.	47
VI.	CONCLUSION.....	47

TABLE OF AUTHORITIES

Table of Cases

	Page(s)
Cases	
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L. Ed.2d 265 (1986)	13, 40, 41, 42
State Cases	
<i>Arment v. Kmart Corp.</i> , 79 Wn. App. 694, 902 P.2d 1254 (1995).....	17, 29, 30, 35
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P.2d 966 (1963)	42
<i>Brant v. Market Basket Stores</i> , 72 Wn.2d 446, 433 P.2d 863 (1967).....	20, 22
<i>Carlyle v. Safeway Stores, Inc.</i> , 78 Wn. App. 272, 896 P.2d 750 (1995).....	passim
<i>Coleman v. Ernst Home Ctr., Inc.</i> , 70 Wn. App. 213, 853 P.2d 473 (1993).....	25, 26, 27
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	14
<i>Fairbanks v. J.B. McLoughlin Co., Inc.</i> , 131 Wn. 2d 96, 929 P.2d 433 (1997).....	45, 46
<i>Fernandez v. State ex rel. Dept. of Highways</i> , 49 Wn. App. 28, 741 P.2d 1010 (1987).....	20
<i>Ford v. Red Lion Inn</i> , 67 Wn. App. 766, 840 P.2d 198 (1992)	18, 19
<i>Fredrickson v. Bertolino's</i> , 131 Wn. App. 183, 127 P.3d 5 (2005)	22, 36
<i>Green v. Am. Pharm. Co.</i> , 136 Wn.2d 87, 960 P.2d 912 (1998)	14
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn. 2d 355, 753 P.2d 517 (1988).....	13, 38, 39, 41
<i>Guile v. Ballard Cmty. Hosp.</i> , 70 Wn. App. 18, 851 P.2d 689 (1993)	13
<i>Hanson v. Washington Natural Gas Co.</i> , 95 Wn.2d 773, 632 P.2d 504 (1981).....	20, 47
<i>Hash v. Children's Orthopedic Hosp. & Med. Ctr.</i> , 110 Wn.2d 912, 757 P.2d 507 (1988).....	13
<i>Herron v. Tribune Publ'g Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987).....	13

<i>Hurlbert v. Gordon</i> , 64 Wn. App. 386, 824 P.2d 1238 (1992).....	14
<i>Ingersoll v. DeBartolo, Inc.</i> , 123 Wn.2d 649, 869 P.2d 1014 (1994).....	20
<i>Iwai v. State</i> , 129 Wn.2d 84, 915 P.2d 1089, 74 A.L.R.5th 711 (1996).....	18, 21, 22
<i>Jarr v. Seeco Const. Co.</i> , 35 Wn. App. 324, 666 P.2d 392 (1983).....	21
<i>Jenson v. Scribner</i> , 57 Wn. App. 478, 789 P.2d 306 (1990)	14
<i>Kalinowski v. Y.M.C.A.</i> , 17 Wn.2d 380, 135 P.2d 852 (1943)	20
<i>Kamla v. Space Needle Corp.</i> , 147 Wn. 2d 114, 52 P.3d 472 (2002).....	42, 43
<i>Las v. Yellow Front Stores, Inc.</i> , 66 Wn. App. 196, 831 P.2d 744 (1992).....	30, 35
<i>Merrick v. Sears Roebuck and Co.</i> , 67 Wn.2d 426, 407 P.2d 960 (1965).....	20
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 519 P.2d 7 (1974)	45
<i>Nielson v. Spanaway Gen. Med. Clinic, Inc.</i> , 135 Wn.2d 255, 956 P.2d 312 (1998).....	12
<i>Pimentel v. Roundup Co.</i> , 100 Wn.2d 39, 666 P.2d 888 (1983).....	21, 25, 32, 35
<i>Presnell v. Safeway Stores Inc.</i> , 60 Wn. 2d 671, 374 P.2d 939 (1962).....	24, 25
<i>Preston v. Duncan</i> , 55 Wn. 2d 678, 349 P.2d 605 (1960).....	39
<i>Radford v. City of Hoquiam</i> , 54 Wn. App. 351, 773 P.2d 861 (1989)	20
<i>Sanders v. Day</i> , 2 Wn. App. 393, 468 P.2d 452, 454 (1970).....	42
<i>Schmidt v. Coogan</i> , 135 Wn. App. 605, 145 P.3d 1216, 1218 (2006).....	32, 33, 34
<i>Schmidt v. Coogan</i> , 162 Wn. 2d 488, 173 P.3d 273 (2007).....	24, 32
<i>Smith v. Manning's, Inc.</i> , 13 Wn.2d 573, 126 P.2d 44 (1942)	23
<i>Space Needle v. Kamla</i> , 105 Wn. App. 123, 19 P.3d 461 (2001).....	42
<i>State v. Marintorres</i> , 93 Wn.App. 442, 969 P.2d 501 (1999).....	17
<i>Tincani v. Inland Empire Zoological Soc 'y</i> , 124 Wn.2d 121, 875 P.2d 621 (1994))	18, 36

<i>Vacova Co. v. Farrell</i> , 62 Wn. App. 386, 814 P.2d 255 (1991).....	passim
<i>Van Dinter v. Kennewick</i> , 121 Wn.2d 38, 846 P.2d 522 (1993).....	18
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	14, 16, 17
<i>Wiltse v. Albertson's, Inc.</i> , 116 Wn.2d 452, 805 P.2d 793 (1991).....	passim
<i>Younce v. Ferguson</i> , 106 Wn.2d 658, 724 P.2d 991 (1986).....	19, 20
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	13, 38, 40, 41

Rules and Regulations

RAP 10.3.....	14
RAP 10.3(a)(6).....	17
RAP 10.4.....	14
CR 30(b)(6).....	34, 35
CR 56.....	41
CR 56(c).....	12
CR 56(e).....	13, 39, 41

Other Authority

Restatement (Second) of Torts § 332 (1965)	5, 19, 41
Restatement (Second) of Torts § 343 (1965)	19, 21, 47

I. INTRODUCTION

Defendant-Respondent Wal-Mart Stores, Inc. ("Wal-Mart") offers this brief in answer to the brief of Plaintiff-Appellant DeAnne Alvarez.

On March 22, 2008, Ms. Alvarez slipped on an unknown substance in the health and beauty section of Wal-Mart's store in Lynnwood, Washington as she visited that area of the store for the first time that day. There is no evidence supporting the inference that Wal-Mart created the substance or that Wal-Mart had actual or constructive notice that the substance was on the floor. Ms. Alvarez does not know how long the substance had been present on the floor or how it came to be there. Accordingly, she cannot establish the notice element. Wal-Mart witnesses testified to the scarcity of reported accidents or claims arising from a slip and fall in the health and beauty area or involving a health and beauty product. Ms. Alvarez failed to present any evidence as required under Washington law to support her conclusory assertion that the self-service exception applied in these circumstances. Absent evidence to raise a material issue of fact as to either notice or the self-service exception, the court should affirm summary judgment in favor of Wal-Mart.

Ms. Alvarez also failed to present evidence that Wal-Mart failed to exercise reasonable care. Wal-Mart employees testified that the floor was inspected frequently for hazards which were immediately wiped up. The manager of the health and beauty area testified that these inspections occurred at a minimum on an hourly basis. Ms. Alvarez failed to present any evidence that the inspections carried out by Wal-Mart were

inadequate. This is a second alternative reason for affirming dismissal of her complaint.

Ms. Alvarez's criticisms of Wal-Mart's affidavits are unfounded for several reasons. First, Wal-Mart witnesses testified as to the inspection practices that were followed. Ms. Alvarez failed to present any evidence that these regular inspections were not in fact carried out, resorting instead to inadmissible speculation. Second, Ms. Alvarez failed to point to any evidence that directly impeached the testimony of Wal-Mart witnesses or raised a material issue of fact. Third, corporate witnesses can testify on behalf of Wal-Mart as to its history and business records. Further, Wal-Mart managers testified from their personal knowledge as to the scarcity of accidents. Fourth, Wal-Mart only had to show the absence of evidence supporting her claim. Because Ms. Alvarez presented no evidence as to how long the substance was present in the health and beauty area, she cannot establish constructive notice as a matter of law. Therefore her claim must fail in any event.

Accordingly, the court should affirm the dismissal of Ms. Alvarez's claim. After Wal-Mart met its burden of showing an absence of evidence to support the elements of Ms. Alvarez's premises liability claim, Ms. Alvarez failed to meet her burden of introducing evidence to raise an issue of material fact as to each element.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Wal-Mart assigns no error to the trial court's decision to grant its

motion for reconsideration and dismiss Ms. Alvarez's complaint on summary judgment.

Issues Pertaining to Ms. Alvarez's Assignments of Error

Wal-Mart disagrees with Ms. Alvarez's statement of the issues on appeal, which are more properly stated as follows:

Whether the trial court properly dismissed Ms. Alvarez's complaint where (1) there was no evidence that Wal-Mart had actual or constructive notice of a dangerous condition **and** there was no evidence to support the self-service exception; **and/or** (2) there was no evidence that Wal-Mart failed to exercise reasonable care to protect Ms. Alvarez from a condition that involved an unreasonable risk of harm.

III. STATEMENT OF THE CASE

A. Ms. Alvarez slipped on a liquid substance in Wal-Mart's health and beauty section.

On March 22, 2008, appellant Donna Alvarez slipped in the health and beauty section of the Wal-Mart Store No. 2594 at Lynnwood, Washington. CP 224, 241-244.

After arriving at the store, Ms. Alvarez may have gone to the area of the store displaying Easter items because Easter was the following day. CP 94, 107 (Dep. at 13-14), 240, 242-243. She then went directly to the health and beauty area for the first time that day. CP 94, 243. The area was well lit. CP 243. Ms. Alvarez did not look at any products in the health and beauty aisle. CP 242. As she walked down the aisle to reach

an item at the far end she slipped in a “white, creamy, thick substance” on the floor. CP 243-245. She did not see the substance before she slipped so she can only guess as to the size of the pool. CP 244-245, 247.

Ms. Alvarez does not know how long the substance was present on the floor and she has no knowledge of how the liquid came to be there. CP 245. She did not see any bottles or containers on the floor. CP 245-256. Ms. Alvarez did not smell the substance and she does not recall touching it. CP 245. She thinks it looked like hair conditioner but she does not know what the substance was. *Id.*, CP 248.

Ms. Alvarez does not recall seeing anyone in the health and beauty aisle. CP 94, 110 (Dep. at 25).

After a few minutes, Ms. Alvarez’s mother and daughter helped her to a seat in the pharmacy. CP 94, 110 (Dep at 25-27). Ms. Alvarez’s daughter then reported the fall. CP 94, 110 (Dep at 26).

The manager who responded arranged for the spill to be cleaned up immediately. CP 150, 249-250. Ms. Alvarez could not see the health and beauty aisle where she slipped from her seat on a bench in front of the pharmacy. CP 95, 110 (Dep. at 27). While resting on the bench, Ms. Alvarez completed a form to report her fall. CP 95, 98, 110-111 (Dep. at 27-28), 150. Ms. Alvarez declined the medical aid that was offered. CP 111 (Dep. at 30). After sitting in the pharmacy for

approximately 20 to 30 minutes she left the store. CP 95.

B. There were only two slip and fall accidents in the health and beauty section during the 3 years prior to Ms. Alvarez's accident only one of which involved a health and beauty product.

The area where Ms. Alvarez slipped is in the health and beauty section of the Wal-Mart Lynnwood store. Ms. Hathaway works at Wal-Mart's Market office which keeps customer statistics including those for the Lynnwood store. CP 252. The store has approximately 5000 shoppers a day. *Id.* It had approximately the same number of shoppers in 2006. CP 219.

Although Wal-Mart had therefore approximately 1,825,000 customers during the **one-year** period prior to March 22, 2008, there were **no** reported slip-and-fall accidents in the health and beauty section of Store 2594 during that period. CP 219, 232, 219-220, 252, 261-262.

Although Wal-Mart had approximately 5,475,000 customers during the **three-year** period prior to March 22, 2008, Wal-Mart's records show that there were only **two** reported slip-and-fall accidents in the health and beauty section of Store 2594 during that period. *Id.* Of these the first occurred in November, 2005 when the customer reported slipping on some soap. CP 219-220, 261-262. The second accident occurred in April, 2006 when the customer reported slipping on a chocolate smear. *Id.*

Therefore, the most recent event occurred almost two years prior to Ms. Alvarez's accident.

In sum, there were a total of **two** reported accidents in the health and beauty section only one of which involved a health and beauty product, although there were well over **five million** visitors during this three-year period. *Id.* There was only one incident involving a health and beauty product in the health and beauty department during that period. *Id.*

Deborah Antcliff who was an assistant manager of the store at the date of Ms. Wal-Mart's accident, testified that she was personally unaware of any accidents in the health and beauty section during the three and a half years she had worked at the store prior to Ms. Alvarez's claim. CP 262.

Janet Boston who was the manager of the health and beauty department at the date of the Ms. Alvarez's accident and had held that position since 1999 recalled only one other accident in that section between 1999 and March 22, 2008. CP 173.

In answer to discovery, Wal-Mart confirmed that it had received no allegations that anyone had slipped in the health and beauty area or on a health and beauty product anywhere in the store during the year preceding Ms. Alvarez's fall. CP 231-232. Wal-Mart also had no record of a substance being present on the floor in that area in the year prior to

Ms. Alvarez's fall. *Id.* In response to the Ms. Alvarez's request, Wal-Mart stated that no-one had reported falling within the store in the week preceding her accident. CP 130. Within the three years preceding her fall there were two alleged falls within the Wal-Mart Lynnwood store which led to litigation. CP 141-142.

C. Wal-Mart acted reasonably in keeping the store safe for its customers by regularly inspecting all areas of the store for unsafe conditions.

Wal-Mart conducted regular safety sweeps to ensure the floor was clean on March 22, 2008 in accordance with its policies and procedures. CP 128, 174-175, 230, 262. Wal-Mart has no record of finding any defect in the health and beauty area within 12 hours before Ms. Alvarez slipped. CP 230.

In March 2008 (and at the present time) customer safety was a high priority at Wal-Mart. CP 174-175. The floor of the store was cleaned throughout every night. *Id.*; CP 262. In 2008, two associates were employed during the day in the health and beauty department whose duties included restocking, reviewing and cleaning merchandise, removing any damaged items, ensuring bottles were closed and had not leaked, ensuring items were securely on the shelves behind a riser, cleaning the shelves as necessary, removing clutter and reviewing the area for any spills or debris, including a continual review of the floor area for any hazards. CP 174; CP

262.

Prevention of slip and falls was a high priority; it was the focus of many of Wal-Mart's policies and procedures and its training initiatives. CP 174-175; *see also*, CP 176-218.

Wal-Mart associates conducted regular inspections of the floor area every hour throughout the store. CP 174-175. These "safety sweeps" included a close examination of the floor for any spills or safety hazards. *Id.*; CP 262. If liquid was observed on the floor, the associate remained by the liquid until a cone is placed or until the liquid is removed. *Id.* Materials for use in cleaning and guidelines were located throughout Store No. 2594, including within the health and beauty section. CP 174-175. Every associate and member of management was required to keep a paper towel and pocket pad in their pocket at all time to quickly clean up spills or debris. *Id.* In addition, they were trained to continually look out for any liquid on the floor or any hazardous condition. *Id.*; CP 262. In addition, to safety sweeps Wal-Mart staff clean and pick up all garbage in their designated area, "zoning" three or more times a day. *Id.*

D. Procedural History.

On July 27, 210, the trial court heard oral argument on Wal-Mart's motion for summary judgment. 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. CP 31-32. 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. *Id.* Neither is in the record.

The evidence in the record shows that Ms. Alvarez was in the health and beauty aisle for a few minutes only. CP 94, 242-244, 110 (Dep. at 25-26). Ms. Alvarez fell while walking down the health and beauty aisle immediately after entering that section. CP 242-245. She did not stop to look at any items. *Id.* Her mother and daughter assisted her to the pharmacy area a few minutes after she fell. CP 94, 110 (Dep. at 25-26). From her seat in the pharmacy department Ms. Alvarez could no longer see the area where she slipped. CP 94-95, 110 (Dep. at 27). 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.**" CP 95-96 (emphasis added); *see also*, CP 150-151.

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.

Further, to establish a material issue of fact as to the third element of Ms. Alvarez's premises liability claim (namely, whether Wal-Mart failed to exercise reasonable care) the question was not whether Wal-Mart employees were present in the aisle within a half-hour; the question was whether they carried out periodic inspections of the area to discover and clean up any potentially hazardous condition. Ms. Alvarez presented no evidence that Wal-Mart failed to do this or that its practices were insufficient. Because she failed to raise an issue of fact as to this essential element of her claim summary judgment was appropriate.

Ms. Alvarez also failed to present any evidence as to how long the substance was present or how it was created. She was therefore unable to establish constructive notice. This was a second alternative reason why summary judgment was appropriate.

After reviewing further briefing from both parties, the trial court granted Wal-Mart's motion for reconsideration and dismissed Ms. Alvarez's claim.

IV. SUMMARY OF ARGUMENT

The superior court properly dismissed Ms. Alvarez's claim as a

matter of law because Ms. Alvarez was unable to raise a material issue of fact as to each element of her claim after Wal-Mart showed there was an absence of evidence supporting her claim. Ms. Alvarez failed to produce any evidence that Wal-Mart had actual or constructive notice of a dangerous condition by showing how long the substance had been present or how it was created. Ms. Alvarez also failed to meet her burden of producing any evidence to support the self-service exception, relying instead on unsupported argumentative assertions. In contrast, Wal-Mart employees testified on behalf of the company and from personal knowledge as to the scarcity of a history of accidents. Absent admissible evidence to support that exception the lack of notice alone was sufficient to warrant dismissal.

Ms. Alvarez's failure to raise a question of fact as to whether Wal-Mart exercised reasonable care to protect her from an unreasonable risk of harm was a second separate reason that warranted dismissal of her complaint as a matter of law. Wal-Mart's witnesses testified as to the inspections that were performed but Ms. Alvarez failed to present any evidence that these were inadequate. She falls back instead on inadmissible speculation.

Ms. Alvarez failed to impeach the credibility of Wal-Mart's declarations by introducing excerpts of Wal-Mart's answers to written

discovery into the record because this evidence was not inconsistent with the testimony of Wal-Mart witnesses. Further, for the purpose of summary judgment, Wal-Mart did not contest Ms. Alvarez's description of the alleged substance on the floor or her testimony that she spoke with only one manager after her fall. This evidence was not material to Wal-Mart's motion because Ms. Alvarez cannot meet her burden even if her testimony is accepted.

Finally, whether Ms. Alvarez was at fault is not material to Wal-Mart's motion. It is not the law of Washington that a premises owner is liable for an accident solely because its invitee is free from fault. Therefore, Wal-Mart did not introduce evidence or argument that Ms. Alvarez was at fault in its motion for summary judgment.

V. ARGUMENT

A. Summary judgment was proper because no genuine factual dispute exists.

An appellate court engages in de novo review of an order of summary judgment. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 261, 956 P.2d 312 (1998). Summary judgment will be granted when the pleadings and evidence presented show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A defendant can move for summary judgment in one of two ways. First, the defendant can set out its

version of the facts and allege that there is no genuine issue as to the facts as set out.” *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993) citing *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988). “Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.” *Guile*, 70 Wn. App. at 22 citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

A moving defendant who meets this initial showing is entitled to judgment as a matter of law when the plaintiff fails to make a sufficient showing on an essential element in which she has the burden of proof. *Young*, 112 Wn.2d at 225 citing *Celotex*, 477 U.S. at 322-323.

The nonmoving party will not defeat the motion by offering only a “scintilla” of evidence, evidence that is “merely colorable,” or evidence that “is not significantly probative” (*Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987)) or by relying on speculation or argumentative assertions. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). The nonmoving party’s evidence must set forth **specific**, detailed, and disputed facts; argumentative assertions, opinions, and conclusory statements will not suffice. CR 56(e); *Grimwood v. Univ. of*

Puget Sound, Inc., 110 Wn. 2d 355, 359, 753 P.2d 517 (1988).

This court may affirm a judgment on any ground established by the pleadings and supported by the evidence. *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998); *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990).

Here, the trial court properly granted Wal-Mart's motion for summary judgment on her premises liability claim, because Wal-Mart showed there was an absence of supporting evidence and Ms. Alvarez failed to make out a *prima facie* case on each element of her claim. Instead she relied on speculation, argumentative assertions, and conclusory statements.

B. The court should disregard statements in Ms. Alvarez's brief that are not supported by the record.

This court should decline to consider all statements made by the appellant that are inadequately cited to the record or arguments absent citation to legal authority. RAP 10.3, 10.4; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399, 824 P.2d 1238 (1992); *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012). As set forth below, Ms. Alvarez's brief contains several statements that are not cited to the record or which are not supported by the stated citation. *E.g.* Brief at 1, 4, 8, 9, 10, 12, 30, 36, 38, 41-42.

Ms. Alvarez seriously misstates the evidence by making the following uncited and unsupported allegation: “During the 30-45 minutes [Ms. Alvarez] was inside the store’s health and beauty department, she saw no other customers or employees in or near the vicinity of the spill.” Brief at p. 36.

This is not supported by the evidence. Ms. Alvarez fell while walking down the health and beauty aisle immediately after entering that section. CP 242-245. She did not stop to look at any items. *Id.* Her mother and daughter assisted her to the pharmacy area a few minutes after the accident. CP 94, 110 (Dep at 25-26). The health and beauty aisle was not visible from the pharmacy area. CP 95, 110 (Dep. at 27). Accordingly, contrary to the unsupported statements in Ms. Alvarez’s brief the health and beauty aisle was within her view for no more than a few minutes.

Ms. Alvarez repeats the following factual assertion that is not supported by the stated citation or anywhere in the record: That neither Ms. Alvarez nor her family saw any customers or employees other than a single store manager in the pharmacy area where Ms. Alvarez was situated recovering from her fall. *See* Brief at 1, 9, and 30. A slight variation is the unsupported allegation that Ms. Alvarez only one saw one employee during and after her fall. *Id.* at 38.

Ms. Alvarez actually stated that she did “not recall any employees **walking by me to see what had happened.**” CP 96 (emphasis added). Ms. Alvarez’s daughter Ashton stated that “at no time during any of this did any other store employee **approach us** to either see what was going on or to ask my mom what had happened.” CP 150-151 (emphasis added).

In an effort to bolster her argument, Ms. Alvarez makes a number of unsupported statements about the nature of the health and beauty department. For example, Ms. Alvarez alleges without any supporting evidence that the health and beauty department is an area where customers routinely handle lotions, oils and gels (Brief at 38); that the area contain more lotions, oils and gels any other section (*id.* at 41-42); that “nowhere in a store such as Wal-Mart is [a spill] more reasonable foreseeable that within the health and beauty department, a section of the store containing more lotions, creams, gels and oils than any other department” (*id.* at 4); that “[i]n such circumstances, the store is considered to be on notice that spills will occur” (*id.*); that “it defies common sense to suggest that the hazard encountered by Ms. Alvarez in the health and beauty department was not reasonably foreseeable” (*id.* at 41-42); and “that the products within the health and beauty department dictate that the existence of unsafe conditions are reasonably foreseeable.” *Id.*

Such conclusory assertions are inadmissible. *West v. Thurston*

County, 168 Wn. App. at 187 *citing* RAP 10.3(a)(6), 10.4; *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999). The court will “not consider conclusory arguments that do not cite authority.” *West v. Thurston County*, 168 Wn. App. at 187 *citing* RAP 10.3(a)(6), 10.4; *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999). An appellant who makes bald assertions lacking cited factual and legal support, fails to present developed argument for consideration on appeal. *West*, 168 Wn. App. at 187.

Plaintiff has produced no evidence as she must to support these sweeping assertions. *See e.g., Arment v. Kmart Corp.*, 79 Wn. App. 694, 698, 902 P.2d 1254 (1995); *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654-55, 869 P.2d 1014 (1994). In contrast, Wal-Mart produced considerable evidence of a lack of history of accidents in that area. CP 173, 219-220, 232, 262.

Ms. Alvarez alleges without citation to the record that Wal-Mart failed to produce in discovery any records contemporaneous to the day of Ms. Alvarez’s accident. Brief at 10. The allegation is incorrect. *Cf.*, CP 62, 98, 124, 146-147.

Plaintiff makes the unsupported and speculative statement that Ms. Boston and Ms. Antcliff were absent from the store on the day of Ms. Alvarez’s accident. Brief at 12; *Cf.* CP 147. The court should not

consider this speculation. *Vacova Co.*, 62 Wn. App. at 395. Plaintiff alleges that she raised this in her response brief at CP 79. Brief at 12. In fact, plaintiff's response stated that Wal-Mart relies on declarations by "employees" who were not in the store at the time of the incident without specifying which of the four employee declarations she was referring to. CP 79; *see also* Brief at 21.

Ms. Alvarez also alleges without support in the record that her daughter returned "several minutes" after going to report the accident. Brief at 8; *cf.* CP 94, 110 (Dep. at 26), 149.

C. As a matter of law, Ms. Alvarez cannot prove the elements of her premises-liability claim.

A plaintiff who brings an action for negligence is required to prove (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089, 74 A.L.R.5th 711 (1996) (quoting *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994)). The existence and scope of a duty is a question of law reserved solely for the court. *Ford v. Red Lion Inn*, 67 Wn. App. 766, 840 P.2d 198 (1992).

In premises liability actions, a person's status, based on the common law classifications of persons entering upon real property, determines the scope of the duty of care owed by the possessor (owner or occupier) of that property. *Van Dinter v. Kennewick*, 121 Wn.2d 38, 41,

846 P.2d 522 (1993). A business invitee is one who is invited to enter or remain on land for the purpose directly or indirectly connected with the owner's business dealings. *Id.* (citing *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting Restatement (Second) of Torts § 332 (1965)). Wal-Mart does not dispute for the purposes of its motion for summary judgment that at the time of the alleged accident, Ms. Alvarez was a business invitee.

Washington has adopted the Restatement (Second) of Torts § 343 as the appropriate test for determining landowner liability to invitees. *Ford*, 67 Wn. App. at 770 (citing *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983)). It provides:

Dangerous Conditions Known to or Discoverable by Possessor.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but **only if**, he:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, **and**
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, **and**
- (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965) (emphasis added).

However, **landowners are not the insurers against all happenings that occur on their premises.** *Younce v. Ferguson*, 106

Wn.2d at 667, (emphasis added); *Radford v. City of Hoquiam*, 54 Wn. App. 351, 360, 773 P.2d 861 (1989); *Fernandez v. State ex rel. Dept. of Highways*, 49 Wn. App. 28, 741 P.2d 1010 (1987). Negligence cannot be inferred from a fall alone. *Merrick v. Sears Roebuck and Co.*, 67 Wn.2d 426, 429, 407 P.2d 960 (1965). The mere existence of an accident or injury is not sufficient proof to hold a property owner liable to an invitee. See *Hanson v. Washington Natural Gas Co.*, 95 Wn.2d 773, 778, 632 P.2d 504 (1981); *Kalinowski v. Y.M.C.A.*, 17 Wn.2d 380, 391, 135 P.2d 852 (1943). Washington courts have long cautioned against imposing such liability merely because an accident occurs:

It is well established in the decisional law of this state that something more than a slip and fall is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control of the floor.

Brant v. Market Basket Stores, 72 Wn.2d 446, 448, 433 P.2d 863 (1967).

The determination of what constitutes a reasonably safe condition depends upon the “nature of the business conducted and the circumstances surrounding the particular situation.” *Id.* at 451.

The liability of a premises owner does not attach the moment an unsafe condition arises. The owner must have actual or constructive notice of the unsafe condition. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994). Moreover, the plaintiff must establish

that the owner had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the plaintiff of the danger. *Id.* Finally, Ms. Alvarez must establish that the owner failed to exercise reasonable care to protect them from danger. Restatement (Second) of Torts § 343; *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 458, 805 P.2d 793 (1991).

To find Wal-Mart liable, plaintiff must establish **all three** elements of proof. This, Ms. Alvarez cannot do. Ms. Alvarez has failed to produce evidence that (1) Wal-Mart **knew** or **should have known** of an unreasonably dangerous condition; or that (2) Wal-Mart failed to exercise **reasonable care** in protecting its customers from hazards on its premises.

1. Ms. Alvarez failed to produce evidence that Wal-Mart knew or should have known of an unreasonable risk of harm.

To impose liability for failure to maintain business premises in a reasonably safe condition **requires** the plaintiff to prove (1) the unsafe condition was caused by the proprietor or its employees, or (2) the proprietor had actual or constructive notice of the dangerous condition. *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 275, 896 P.2d 750 (1995) *citing Pimentel v. Roundup Co.*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983); *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996).

Plaintiff has no knowledge of how the liquid came to be on the

floor or how long the substance was present before she fell. CP 245. Accordingly, there is no evidence from which to infer that the presence of the substance on the floor was created by Wal-Mart and plaintiff must show that Wal-Mart had actual or constructive notice of the unsafe condition. *Id.* The notice requirement ensures liability attaches to owners only after they have become or should have become aware of a dangerous condition. *Wiltse v. Albertson's, Inc.*, 116 Wn.2d at 453-54. Where the plaintiff cannot provide evidence that the defendant landowner had actual or constructive notice of the alleged unsafe condition, summary judgment for the landowner is appropriate. *Fredrickson v. Bertolino's*, 131 Wn. App. 183, 189, 127 P.3d 5 (2005).

Here there is no evidence that Wal-Mart had actual notice of the spill. CP 230, 174-175, 245. To establish constructive notice, Ms. Alvarez must prove that the dangerous condition had been present for a long enough period of time to afford the property owner a sufficient opportunity in the exercise of ordinary care, to have made a proper inspection and to have removed the hazard. *Ingersoll*, 123 Wn.2d at 652; *Wiltse*, 116 Wn.2d at 458; *Brant*, 72 Wn.2d at 451-52. An owner or occupier will not be held liable where actual or constructive notice is lacking. *Ingersoll*, 123 Wn.2d at 652.

[W]here the negligence of a storekeeper or restaurateur is predicated upon his failure to keep his premises in a reasonably safe condition, it must be shown that the condition has either been brought to his notice **or has existed for such time as would have afforded him sufficient opportunity, in the exercise of ordinary care,** to have made proper inspection of the premises and to have removed the danger.

Wiltse v. Albertson's, Inc., 116 Wn.2d at 458 (quoting *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942)).

A plaintiff must establish how long the specific dangerous condition existed in order to show that the property owner had constructive notice of the condition. *Wiltse*, 116 Wn.2d at 458. The lack of such evidence not only precludes recovery but also provides grounds for summary judgment. *Id.*

Here, there is no evidence that the condition existed for sufficient length of time for Wal-Mart to have constructive notice. Ms. Alvarez has **no knowledge** of how long the substance was on the floor before she slipped. CP 245. Accordingly, Ms. Alvarez cannot prove that Wal-Mart had actual or constructive notice of the spill.

Wal-Mart employees on the other hand conducted regular inspections of the floor; any spill was immediately cleaned up and a warning cone placed around the wet area. CP 174. Wal-Mart conducted frequent inspections of the area, at minimum every hour, for the specific

purpose of finding and cleaning up a floor spill. *Id.* In addition, Wal-Mart staff persons continually looked out for floor spills and immediately cleaned them up. Those practices were in place at the time of Ms. Alvarez's accident. CP 174-175, 230, 262.

In *Schmidt v. Coogan*, 162 Wn. 2d 488, 173 P.3d 273 (2007) and in other cases where the court found sufficient evidence to create a question of fact on constructive notice, the plaintiff presented direct evidence that the store employee should have seen and responded to the spill or object on the floor. In *Schmidt*, the Supreme Court concluded that there was an issue of fact precluding judgment as a matter of law because the spilled shampoo was visible from the checkout stand; the store employee failed to clean up the spill even after Ms. Schmidt informed her of the spill. *Id.* at 490, 492.

While walking down the shampoo aisle, she slipped on a puddle of shampoo and injured her arm. She did not see anyone else in the aisle. Schmidt finished her shopping and proceeded to the checkout stand, where she informed a store employee of her slip and fall. She waited in line for about 10 minutes. She noticed from her position at the checkout stand that the shampoo she had slipped on was visible. The employee did not call anyone to clean the spill, and Schmidt did not see anyone checking the aisles.

Schmidt, 162 Wn. 2d at 490.

In *Presnell v. Safeway Stores Inc.*, 60 Wn. 2d 671, 374 P.2d 939 (1962) there were five different facts for the jury to consider on the issue

of constructive notice: (1) The plaintiff testified that she slipped on a banana peel near the check-out-stand; (2) the banana peel was dark suggesting that it had been on the floor a long time; (3) the store floor was dirty and cluttered with papers; (4) no one was eating a banana in the store when the plaintiff and a companion were shopping, suggesting that the peel had been on the floor before the plaintiff arrived at the store; and (5) the peel was located in direct view of several checkers from their check-out-stands. *Id.* at 673-674. Accordingly, sufficient circumstantial evidence showed “a greater probability that the accident occurred in the manner claimed.” *Cf. id.* at 673.

These type of facts from which a jury could imply that the spill was or should have been visible to the defendant do not exist here. In *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn. App. 213, 220-221, 853 P.2d 473 (1993) the Court distinguished *Presnell* because Ms. Coleman failed to present any evidence as to how long the dangerous condition existed. The Court of Appeals affirmed the trial court’s determination that there was insufficient evidence to present the case to the jury. *Id.* at 224.

All of this being so, Coleman did have to show either that Ernst (1) caused the danger, (2) actually knew about the hole and did nothing to remedy the danger, or (3) had constructive notice of the danger. *Pimentel*, 100 Wn.2d at 49, 666 P.2d 888. Constructive notice could be established by proving that (a) the strips had come loose long enough before the fall that a reasonably prudent shopkeeper with

adequate housekeeping procedures would have found the hole, or (b) there was an unreasonable risk of these strips coming up so that a reasonably prudent shopkeeper would know he had to inspect more than once a day. Coleman failed to present evidence on any of these theories of liability.

The fact that the store employees could not be counted on to observe, report, or repair loose strips, and the fact that even after Coleman fell, it was 3 hours before the carpeting was repaired begs the actual questions at issue.

Coleman v. Ernst Home Ctr., Inc., 70 Wn. App. at 224.

Here, Ms. Alvarez has failed to present any evidence as to how long the substance was present in order to raise a factual issue as to constructive notice.

The facts of this case are similar to *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. at 278, where the court affirmed summary judgment in favor of the defendant store because the plaintiff was unable to establish that the store had actual or constructive notice of the shampoo on which she slipped. *Id.* The staff testified that they generally conducted regular hourly inspections, (inspections were every two or three times in an eight or nine hour shift if they were busy). *Id.* at 278. One witness testified to annual slip-and-fall accidents. *Id.* Outside the produce area, the store stayed pretty clean. *Id.* “Two Safeway employees who performed supervisory duties both testified in their depositions that on average they found one dropped or spilled item in the store per 8- to 9-hour shift. They

both were in the habit of inspecting the store's perimeter and aisles hourly. Their best estimates of the least number of times they would physically inspect each aisle in a shift would be two or three, when they were unusually busy with other chores.” *Id.* The court held that the store “met its burden [on summary judgment] by showing an absence of evidence to prove it either created the dangerous condition or had actual or constructive notice of its existence.” *Id.* at 275.

These facts do not raise an issue that unsafe conditions are reasonably foreseeable in the area where Ms. Carlyle fell. Safeway's housekeeping practices are relevant to the issue of constructive notice, but there is **no basis** for submitting the issue to a jury unless there is some evidence from which it could infer that hourly inspections (or even two or three inspections per 8- to 9-hour shift) were not adequate because the risk of spilled shampoo in the coffee aisle required greater vigilance. *Coleman*, at 222–23, 853 P.2d 473. Ms. Carlyle presented no such evidence.

Id., 78 Wn. App. at 278.

Because there was no evidence the spill had been on the floor for a long enough time to afford Safeway a sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection and to have removed the hazard, Ms. Carlyle could not prove constructive notice. *Id.* at 275 (citing *Ingersoll*, 123 Wn. 2d at 652). Traditionally, the lack of such evidence precludes recovery. *Wiltse*, 116 Wn.2d at 458.

2. The plaintiff failed to produce evidence, as she must, to support the application of the self-service exception.

Wal-Mart has shown the absence of any evidence to support plaintiff's case, specifically a lack of evidence to prove actual or constructive notice. Accordingly, the burden shifted to the plaintiff to show the existence of a genuine issued of material fact. *Ingersoll v. DeBartolo, Inc.*, 123 Wn. 2d at 654. Like the defendant in *Ingersoll*, Ms. Alvarez has attempted to meet her burden by bringing herself within the *Pimentel* exception. However, she failed to present any evidence to support the application of this exception.

Pursuant to the law of Washington, the mere fact that the area is self-service does not give rise to the self-service exception.

We note that even if the injury does occur in the self-service department of a store, this alone does not compel application of the *Pimentel* rule. Self-service has become the norm throughout many stores. However, the *Pimentel* rule does not apply to the entire area of the store in which customers serve themselves. Rather, it applies if the unsafe condition causing the injury is "continuous or foreseeably inherent in the nature of the business or mode of operation."

Ingersoll, 123 Wn.2d at 653-54 (quoting *Wiltse*, 116 Wn.2d at 461); *accord*, *Carlyle*, 78 Wn. App. at 276.

The fact that a business is a self-service operation is insufficient, standing alone, to bring a negligence claim within the self-service

exception. *Wiltse*, 116 Wn.2d at 456. “The *Pimentel* exception is a **limited** rule for self-service operations which applies **only** to **specific unsafe conditions** that are continuous or foreseeably inherent in the nature of the business or mode of operation.” *Carlyle*, 78 Wn. App. at 276 (emphasis added). See also, *Arment v. Kmart Corp.*, 79 Wn. App. at 698.

In *Carlyle*, the court refused to apply the self-service exception where an open bottle of shampoo and a spill were present a few aisles from the health and beauty section.

Under Ms. Carlyle's interpretation, all complaints arising out of slip and fall accidents in self-service establishments would be immune from summary judgment. That is clearly contrary to the narrow interpretation adopted by the Supreme Court in *Pimentel*, *Wiltse* and *Ingersoll*.

Carlyle, 78 Wn. App. at 277.

Ms. Alvarez attempts to bring herself within the exception by making a number of broad and conclusory statements in her brief about the nature of the health and beauty area of the store without citing any supporting evidence or legal authority. For example, her brief states that “it defies common sense to suggest that the hazard encountered by Ms. Alvarez in the health and beauty department was not reasonably foreseeable” and “that the products within the health and beauty department dictates that the existence of unsafe conditions are reasonably foreseeable.” Brief at 41-42. She argues again without any supporting evidence or

authority that “nowhere in a store such as Wal-Mart is [a spill] more reasonable foreseeable that within the health and beauty department, a section of the store containing more lotions, creams, gels and oils than any other department,” that customers routinely handle these lotions, and that “[i]n such circumstances, the store is considered to be on notice that spills will occur.” *Id.* at 4, 38, 41-42.

Such conclusory statements are insufficient to establish the self-service exception because plaintiff has failed to produce any supporting evidence as she must. *Vacova*, 62 Wn. App. at 395.

A plaintiff **must** present evidence that the unsafe condition in the particular location of the accident was reasonably foreseeable. *Carlyle*, 78 Wn. App. at 277; *Ingersoll*, 123 Wn.2d at 654-55. “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 (emphasis added).

[T]here may be an exception to the notice requirement in self-service operations if the plaintiff can offer **specific facts** that show the operating methods of the defendant create **continuous and foreseeable dangerous conditions**.

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 199, 831 P.2d 744 (1992).

In *Ingersoll*, 123 Wn.2d at 654-55, summary judgment was

affirmed where the plaintiff failed to produce any evidence to show that “the nature of the Mall’s business and its methods of operation” were “such that the existence of unsafe conditions is reasonably foreseeable.”

The record shows that Plaintiff has failed to produce any evidence from which the trier of fact could reasonably infer that the nature of the business and methods of operation of the [defendant] are such that unsafe conditions are reasonably foreseeable **in the area** in which she fell.

...

The record discloses only that there is more than one food-drink vendor service in the Mall, that some such vendors do not provide seating and that some patrons carry the products to benches for consumption. Even this minimal line of proof is based on the unsupported assumption that the substance came from a food-drink vendor.

The record is silent as to obviously relevant facts relating to the nature of the Mall business and its method of operation. There is no proof of (1) the actual number of food-drink vendors, other types of vendors, or what products they sell; (2) the location of such vendors in relation to the location of the fall; (3) **the methods of operation of the various vendors, particularly whether the products and their consumption resulted in debris or substances on the floor**; (4) whether patrons routinely brought products from outside the Mall into the Mall (alleged by plaintiff, but completely unsupported factually); (5) **the historical experience of slip and fall incidents prior to this event**. In short, **plaintiff failed to present evidence that the nature of the Mall’s business and its methods of operation are such that the existence of unsafe conditions is reasonably foreseeable. Without any evidence on which to make a determination that the Pimentel exception applies, plaintiff had to show actual or constructive notice, a showing she did not even attempt to make.**

Ingersoll, 123 Wn.2d at 654-55 (emphasis added).

In *Carlyle*, 78 Wn. App. at 277 the court refused to apply the exception where the plaintiff failed to produce any supporting evidence.

Ms. Carlyle, too, has failed to produce any evidence from which it could reasonably be inferred that the nature of Safeway's business and its methods of operation are such that unsafe conditions are reasonably foreseeable in the area in which she fell. The mere presence of a slick or slippery substance on a floor is a condition that may arise temporarily in any public place of business. Under *Pimentel*, *Wiltse*, and *Ingersoll*, something more is needed. Because there was insufficient evidence to apply the *Pimentel* exception, she needed to produce evidence of actual or constructive notice. *Ingersoll*, at 655, 869 P.2d 1014; *Pimentel*, at 49, 666 P.2d 888. This, too, she failed to do.

Id.

In *Schmidt v. Coogan*, 135 Wn. App. 605, 611, 145 P.3d 1216, 1218 (2006) rev'd on other grounds (namely, that there were material issues of fact whether the store had constructive notice) 162 Wn.2d 488, 173 P.3d 273 (2007) the Court of Appeals refused to hold that the self-service exception applied where spilled shampoo was in the shampoo aisle and ruled that the self-service exception did not apply:

Schmidt also reasons that a slip-and-fall is reasonably foreseeable in the shampoo aisle because a customer might open a shampoo bottle to smell it and accidentally spill it in front of the shelf. If so, most areas of modern grocery stores would be especially hazardous and qualify for the self-service exception. Yet **the courts have never intended the exception to be so broadly applied**

Schmidt, 135 Wn. App. at 611 (emphasis added).

There is no evidence to support Ms. Alvarez's bald assertion that customers routinely handle "lotions, creams, gels and oils" as she asserts. Ms. Alvarez has also failed to produce any evidence that spills from bottled items were a frequent occurrence. Ms. Alvarez has produced no evidence of frequent customer handling, inadequate packaging or any evidence that might provide sufficient evidentiary support to support such a conclusion. Thus, she has failed to meet her burden as a matter of law.

In contrast, there is no record of frequent accidents resulting from spills of beauty product in the health and beauty section of the store to put Wal-Mart on notice of a hazard. CP 173, 219-220, 232, 261-262. Here, there were only two accidents within the previous three years in the health and beauty section, only one of which involved a beauty product, and none in the twelve-month period prior to her accident. *Id.* The manager of the health and beauty section, Ms. Boston, was only personally aware of one previous accident during her ten years she was managing that section. CP 173. Ms. Antcliff who had been an assistant manager at the store where plaintiff's accident occurred for almost three and a half years on March 22, 2008, was aware of no other accidents in the health and beauty section of the store prior to that date. CP 261-262.

Ms. Alvarez objects that Ms. Antcliff and Mr. Harris rely on hearsay in testifying as to Wal-Mart's record of slip-and-falls in the health

and beauty department. *Id.*; CP 219-220. However, their managerial positions at Wal-Mart, Ms. Antcliff and Mr. Harris are competent to testify as to the lack of accidents at the store. *Id.*; CR 30(b)(6). Moreover, Ms. Antcliff and Ms. Boston are competent to testify as to their **personal** knowledge of a lack of accidents in that area, let alone frequent accidents. CP 173, 261-262.

Ms. Alvarez complains at a lack of documentation regarding other accidents. However, other than a request for production of documents relating to any slip and falls in the premises during the previous week of which there were none (CP 130) plaintiff did not demand production of documents relating to other slip and falls or of other lawsuits. *Id.*; CP 63, 141-142. Ms. Alvarez asked if a substance had been found on the floor of the health and beauty area (or any part of the premises) during the 24 hours prior to her fall and for any documents related to this; Wal-Mart had no such record. CP 124-125, 140.

Plaintiff's speculation that Wal-Mart's belief that the substance was dropped by a customer is based upon a history of spills in that area is inadmissible. *Vacova Co.*, 62 Wn. App. at 395; Brief at 20; CP 125. Based on Wal-Mart's record of falls it is also groundless.

On these facts, the self-service exception does not apply.

Ms. Hathaway works at Wal-Mart's Market office which keeps

customer statistics, including those for the Lynnwood store. CP 252. Plaintiff alleges that Ms. Hathaway and the store's field manager Brent Harris are unable to speak from personal knowledge as to the number of customers that visited Wal-Mart. These Wal-Mart employees are qualified to testify on Wal-Mart's behalf of lack knowledge of the approximate numbers of customers that visited the store. CR 30(b)(6); *Id.*; CP 219. Further, these customer numbers are introduced to provide a basis for comparison of total customers with the number of slip and falls.

In contrast, Ms. Alvarez failed to meet **her** burden to produce evidence in rebuttal to show that the self-service exception should apply. *Las*, 66 Wn. App. at 199; *Arment.*, 79 Wn. App. at 698; *Ingersoll*, 123 Wn. 2d at 654-55; *Vacova*, 62 Wn. App. at 395. Accordingly, she had to establish actual or constructive notice of a dangerous condition.

D. Wal-Mart met its burden of showing an absence of any evidence that it failed to take reasonable steps to prevent a hazard.

1. Wal-Mart met its duty to use reasonable care to maintain the safety of the premises.

Even if the self-service exception were to apply, Ms. Alvarez had still to produce evidence of the third element of the Restatement test of premises liability, that Wal-Mart failed to act reasonably to protect her against the danger. *Wiltse*, 116 Wn. 2d at 461; *Pimentel*, 100 Wn.2d at 49.

This exception merely eliminates the need for establishing notice and does not shift the burden to the defendant to disprove negligence. The plaintiff must still prove that defendant failed to take reasonable care to prevent the injury.

... We emphasized [in *Pimentel*] that this exception did not impose strict liability or even shift the burden to the defendant to disprove negligence.

... The plaintiff can establish liability by showing that the operator of the premises had failed to conduct periodic inspections with the frequency required by the foreseeability of risk.

Wiltse, 116 Wn. 2d at 461 (quoting *Pimentel*, 100 Wn.2d at 49).

Reasonable care requires that a landowner “inspect for dangerous conditions, ‘followed by such repair, safeguards, or warning as may be reasonably necessary for the invitees’ protection under the circumstances.’” *Fredrickson*, 131 Wn. App. at 189 (citing *Tincani*, 124 Wn.2d at 139).

Wal-Mart consistently acted reasonably to protect patrons against dangers on the premises of its Lynnwood store. CP 174-218, 262. As in *Carlyle*, 78 Wn. App. at 278, Wal-Mart has produced evidence of its housekeeping practices and testimony that those practices were in place at the time of plaintiff’s accident. *Id.* In March, 2008, Wal-Mart employees were always on the look-out for hazards, carrying “pocket pads” in their pockets so that they could clean-up spills when they encountered them. CP 174-175, 182-188, 190-193, 195-198, 262. Additionally, in March

2008, Wal-Mart employees performed frequent and regular safety sweeps and “zone” inspections. CP 128, 174-175, 262, 232. Ms. Alvarez does not dispute that these practices were adequate and describes them as “laudable.”

Ms. Alvarez suggests there is a discrepancy between the testimony of the manager of the health and beauty department in March 2008 and a section of Wal-Mart’s policy issued in 2005 because Ms. Boston testified that staff performed hourly sweeps and more extensive sweeps three or more times a day while the 2005 part of the policy states that the safety sweeps occurred three hourly. CP 174, 203. This is primarily an issue of nomenclature: Ms. Antcliffe and Ms. Boston describe the more extensive scheduled sweeps as “zoning sweeps.” CP 174, 262. As Wal-Mart’s 2008 policy point out there are three types of safety sweeps: “visual”, “dust mop or broom sweeps” and “clean as you go” sweeps. CP 192. In 2008, visual sweeps were conducted hourly. CP 174; *see also* CP 262. The policy documents also state that zoning and safety sweeps should be increased as customer traffic increases. CP 185. Wal-Mart’s frequent inspections were performed to ensure that any unreasonably dangerous conditions were corrected. CP 174, 262.

Ms. Alvarez who was in the health and beauty aisle for only a few minutes (CP 94-95, 110 (Dep. at 27), 243-44) has produced no evidence

from which it can be inferred that these practices were not carried out. Such speculation is insufficient to raise a material issue of fact on summary judgment. *Vacova Co.*, 62 Wn. App. at 395.

She has also failed to produce any evidence as to what level of scrutiny was required or that this level of inspection was inadequate particularly given her testimony that the store did not seem busy. CP 94, 149. In fact she applauds Wal-Mart's practices. Brief at 26. Accordingly, she failed to meet her burden to raise a material issue of fact that Wal-Mart failed to exercise reasonable care. *Young*, 112 Wn.2d at 225 at 225.

2. The declarations of Wal-Mart employees adequately describe the care that was taken on March 22, 2008 to prevent any hazards.

Contrary appellant's response brief, the affidavits submitted by Wal-Mart are sufficient to show the absence of a material issue of fact.

These do not contain, as Ms. Alvarez alleges conclusory statements. Ms. Alvarez argues – wrongly – that Wal-Mart has relied on “conclusory facts.” Ms. Alvarez cites *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d at 360, in support of her erroneous statement that Ms. Boston's declaration contains conclusory statements. In *Grimwood*, 110 Wn. 2d at 360, the court rightly disregarded Mr. Grimwood's conclusory statements that defendant's recitation was “petty,” a “pretext,”

“exaggerated” or “much ado about nothing” as well as assertions that he was not uncooperative and his job performance was not sub-standard. *Id.*

In contrast, the manager of the health and beauty section on March 22, 2008, Janet Boston, testified as to facts, not conclusions, in describing the procedures carried out by the associates in the health and beauty section that day. CP 174-175, ¶¶ 5, 10. Ms. Antcliff who was an assistant manager of the store on March 22, 2008 and completed the report of plaintiff’s fall also testified that there were frequent and continual safety inspections throughout the store. CP 146-145, 262, ¶¶ 5-6; *see also*, 232. Plaintiff’s allegation that there is no evidence to show these precautions were performed is contradicted by these affidavits. *Id.* The grant of summary judgment to a store has been upheld on similar evidence and a similar fact pattern. *Carlyle*, 78 Wn. App. at 275.

Ms. Alvarez cannot defeat summary judgment based on such speculation. *Vacova*, 62 Wn. App. at 395. The appellant has failed to produce any evidence that frequent inspections of the health and beauty aisle were **not** performed on March 22, 2008 to rebut Ms. Boston’s and Ms. Antcliff’s testimony, as she must. *Id.*; CR 56(e); *Grimwood*, 110 Wn.2d at 359.

Ms. Alvarez wrongly asserts that Ms. Boston’s declaration is the type of evidence that is subject to different inferences. She cites *Preston*

v. Duncan, 55 Wn. 2d 678, 683, 349 P.2d 605 (1960) for the proposition that undisputed facts may be subject to conflicting inferences as to ultimate facts such as “intent, knowledge, negligence, good faith, negligence, et cetera.”

Ms. Alvarez relies on *Preston* and other cases that were decided before *Young*, 112 Wn. 2d 216, 770 P.2d 182, 187 (1989) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

Wal-Mart met its burden of showing the lack of evidence that it exercised reasonable care because these inspection practices were in place on the date of plaintiff’s accident. CP 174-175, 261-62. It also showed a lack of evidence of actual or constructive notice. (CP 245) or evidence to support the self-service exception. CP 173, 231-232, 261-62, 219-220. The inquiry therefore shifted to Ms. Alvarez to show “by affidavits or as otherwise provided in this rule,” “specific facts showing that there is a genuine issue for trial” as to each element of her claim. *Young*, 112 Wn. 2d at 225-226 .

Young superseded the *Preston* case. In *Preston* the moving party had not filed any affidavits in support of its motion, but relied only upon the plaintiff’s deposition testimony to show there was a lack of issue of material facts. *Id.* at 680, 682-683. In rebuttal, the plaintiff failed to file

affidavits that raised an issue of material fact but instead argued that she might produce such evidence at trial. The court reluctantly denied summary judgment but stated it would have been better if plaintiff had produced evidence to rebut defendant's motion. *Id.* at 683. The 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." *Id.*¹

After *Young* and *Celotex* a plaintiff can no longer rest on her pleadings when faced with a motion for summary judgment; she must produce evidence that shows there is a genuine issue of material fact as to every element upon which she meets the burden of proof at trial. The defendant is entitled to summary judgment as a matter of law when the plaintiff fails to do so. *Young*, 112 Wn. 2d at 225, citing *Celotex*, 477 U.S. at 322. The nonmoving party's evidence must set forth **specific**, detailed, and disputed facts; speculation, argumentative assertions, opinions, and conclusory statements will not suffice. CR 56(e); *Grimwood*, 110 Wn.2d at 359.

It is noteworthy that the dissent in *Young*, 112 Wn. 2d at 235 relied

¹ It is notable that *Preston* was decided before CR 56 in its present form was adopted. CR 56 was adopted in 1967 as part of the original Civil Rules for Superior Court. 4 Wash. Prac., Rules Practice CR 56 (5th ed.).

on *Preston*, in arguing that summary judgment should not be granted even if the opposing party failed to put forward an affidavit showing there was a genuine issue of material fact on each element. However, that is not the rule upheld by our Supreme Court.

3. Plaintiff failed to produce evidence impeaching the credibility of Wal-Mart employees.

Ms. Alvarez also cites *Sanders v. Day*, 2 Wn. App. 393, 396, 468 P.2d 452, 454 (1970), another case that was decided before *Young, Anderson* and *Celotex*, as an illustration of when the court should not draw inferences. *Sanders* has no application to the circumstances here. In *Sanders*, 2 Wn. App. at 396-397 Ms. Alvarez produced witness testimony in opposition to the defendant's motion for summary judgment that raised an issue of fact as to whether the defendant was acting in the course of his employment by trying to elicit potential customers when he made a defamatory statement about her. Here, plaintiff has produced no evidence that impeaches Wal-Mart's witnesses or raises a material issue of fact as to the elements of her claim.

Ms. Alvarez also cites *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963) where the court ruled that an issue of credibility is presented when there is contradictory evidence or the movant's evidence is impeached. In *Space Needle v. Kamla*, 105 Wn. App. 123, 130, 19

P.3d 461 (2001) *aff'd in part, rev'd in part on other grounds*, 147 Wn. 2d 114, 52 P.3d 472 (2002), the court doubted (without deciding) whether *Balise* remained good law:

Balise appears to be inconsistent with more recent cases regarding the proper standard for granting motions for summary judgment. Under *Young v. Key Pharmaceuticals, Inc.*, a defendant who does not have the burden of proof at trial may move for summary judgment based on nothing more than the absence of evidence to support the nonmoving plaintiff's case.

Id.

Nevertheless, Ms. Alvarez has failed to produce evidence that impeaches the evidence presented by Wal-Mart. She argues that inconsistencies between her own account of the incident and Wal-Mart's interrogatory answers raise an issue of fact **and** impeach Ms. Boston's credibility. The appellant points out that Wal-Mart's contemporaneous record and interrogatory answers refer to a few dots of liquid on the floor while she testified almost four years later that there was more liquid present. CP 146. Wal-Mart did not contest at summary judgment the amount or the appearance of the alleged substance on which plaintiff allegedly slipped because Ms. Alvarez's testimony would have been accepted. For purposes of its motion Wal-Mart accepted Ms. Alvarez's recent account as true and did not rely on its own investigation or its interrogatory answers, which were prepared before Ms. Alvarez was

deposed. *Cf.* CP 144, 146, 236. Ms. Alvarez cannot meet her burden even if her description of the substance is accepted.

Ms. Alvarez also attempts to create an issue of fact and impeach the credibility of Wal-Mart's declarations by referring to an interrogatory answer from Wal-Mart describing what occurred **after** Ms. Alvarez slipped and fell. Wal-Mart's interrogatory answer stated that Ms. Alvarez and her son met with the cosmetics manager Tracy Pappenheim and then with assistant manager Quang Phung after the accident, while Ms. Alvarez stated in her deposition that she only met with Mr. Phung.

However, whether Ms. Alvarez met with Wal-Mart managers Ms. Pappenheim and Mr. Phung or only with Mr. Phung after the accident is not a material fact on which either Wal-Mart's pending motion or this litigation depend either in whole or in part. Ms. Alvarez objects because Wal-Mart did not present affidavits disputing her testimony but for purposes of its motion Wal-Mart does not dispute her account.

Similarly, Wal-Mart did not rely on Ms. Pappenheim's account that Ms. Alvarez had fallen the day before her fall at Wal-Mart because this is disputed by Ms. Alvarez and it is immaterial to Wal-Mart's motion. Ms. Alvarez, not Wal-Mart, introduced this evidence into the record. Wal-Mart has not disputed the appellant's alleged damage for the purposes of its motion for dismissal which is based on an absence of evidence of

liability; whether Ms. Alvarez fell the day before is not relevant to the issues before the court.

Although factual disputes may exist, they must be material to preclude summary judgment; a “material fact” is a fact on which the outcome of the litigation depends in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

These discrepancies do not impeach the credibility of Wal-Mart’s witnesses who do not testify as to the amount of the substance or the persons with whom Ms. Alvarez spoke after the incident.

Ms. Boston’s declaration describing the hourly and more extensive scheduled sweeps three times a day that took place at the store in March, 2008 is not inconsistent with the 2005 policy referring to three hourly inspections. CP 174, 192, 203, 262. When the policy documents are viewed as a whole, including the 2008 updates, it is apparent that there are different types of safety sweeps, this is consistent with Ms. Boston’s and Ms. Antcliffe’s testimony. *Id.*

In *Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn. 2d 96, 102, 929 P.2d 433 (1997), the court held there were issues of credibility as to Ms. Neely’s testimony that she drank two or three cognacs between 10:15 p.m. and 10:45 p.m. at the Empress of China restaurant after leaving her work function because the owner of the Empress of China restaurant

testified that the restaurant regularly closed at 10 p.m., that she did not recall a party of the size of Neely's group and that her bar records were insufficient to support Neely's testimony.

Lan's testimony that the Empress of China lounge closes at 10:00 p.m. is sufficient to raise an issue as to whether Neely could have had three drinks there after 10:00 p.m. as she claims. It is clearly reasonable to infer that a business closes at its regular time on any given night and that it does not serve customers after closing.

Fairbanks, 131 Wn. 2d at 102.

Further, based on her testimony Ms. Neely would have had insufficient time to arrive at the scene of the accident. *Id.* Thus, Lan's and Neely's testimony raised clear issues of credibility unlike Ms. Alvarez's speculative claims.

The appellant complains that neither Ms. Antcliff nor Ms. Boston mention her fall in their declarations. However, she contends that she only spoke with Mr. Phung, not with Ms. Antcliff and Ms. Boston. It can be assumed that Ms. Alvarez would find fault if they had spoken of her accident.

Ms. Alvarez makes the arbitrary criticism that documentation relating to (1) her injury and (2) the other fall in the health and beauty area should be attached to Ms. Boston's declaration. However, there was no reason why this documentation should be attached to her declaration.

Brief at 25. Wal-Mart had previously produced documentation relating to Ms. Alvarez's fall in discovery. *Cf.*, CP 62, 98, 124, 146-147.²

In sum, Ms. Alvarez failed to produce contradictory evidence or prior inconsistent statements with which to impeach the evidence presented by Wal-Mart on summary judgment.

E. Wal-Mart did not assert Ms. Alvarez's contributory negligence in its motion for summary judgment.

Ms. Alvarez denies that she was at fault. Although Wal-Mart reserves the right to contend in future that she was at fault, Wal-Mart's motion did not address Ms. Alvarez's contributory negligence or make that argument which is not material to its motion. It is not necessary to prove fault by a business invitee to show an absence of evidence to support her premises liability claim. Restatement (Second) of Torts § 343 (1965); *see also, Hanson v. Washington Natural Gas Co.*, 95 Wn.2d at 777. Further, the absence of fault by the invitee is not an element of this claim. Restatement (Second) of Torts §343 (1965).

VI. CONCLUSION

Ms. Alvarez points to an alleged injury and attempts to expand the scope of Wal-Mart's duty to its invitees by making it the guarantor of all happenings on its premises. The law in our state does not impose such a duty.

² Plaintiff claims that the only document produced by Wal-Mart relating to her fall was a claim form generated by "Wal-Mart's insurer." This is incorrect. *Cf.*, CP 62, 98, 124, 146-147. The referenced document was one of several documents relating to the incident and it was the report generated by Ms. Antcliff, not an insurer. CP 124, 146-147.

Ms. Alvarez failed to show that there is a material issue of fact as to each element of her premises liability claim. She failed to introduce **specific**, detailed, and disputed facts to rebut Wal-Mart's motion as she was required to do in accordance with Washington authority; instead she relied on speculation, opinions, and conclusory assertions that are not supported by the record. Ms. Alvarez cannot prove that Wal-Mart knew or should have known of a potential hazard or that the self-service exception applies. Nor can she prove that Wal-Mart failed to exercise reasonable care in protecting its customers from hazards on its premises. The absence of one element alone would warrant summary judgment. Therefore the Court should affirm the trial court's dismissal of Ms. Alvarez's complaint as a matter of law.

Respectfully submitted this 28th day of February, 2013.

LEE SMART, P.S., INC.

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Of Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on February 28, 2013, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. John M. Macdonald
1001 Fourth Avenue, Suite 3200
Seattle, WA 98154

DATED this 28th day of February, 2013 at Seattle, Washington.



Jennifer A. Jimenez, Legal Assistant