

No. 39575-4-II

WASHINGTON COURT OF APPEALS, DIVISION II

EDWARD DUPUY and ELVIRA DUPUY,
Appellants-Plaintiffs,

v.

PETSMART, INC.
Respondent-Defendant,

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COURT REPORT
STUDY UNIT

RESPONDENT'S BRIEF

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November 23, 2009

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INTRODUCTION

While shopping at Petsmart, Plaintiff Edward Dupuy slipped and fell after stepping on a “wet floor” sign lying in an aisle. Plaintiff¹ later sued Petsmart for damages allegedly caused by the accident.

Under the traditional rules governing premises-liability claims, Plaintiff could prevail only if he showed that Petsmart either caused the hazard, or had actual or constructive notice of the hazard before the accident occurred. But in this case Plaintiff argues the traditional rules do not apply. Instead, Plaintiff asks this court to invoke the self-service exception from *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983). Where it applies, the self-service exception permits the imposition of liability without proof that the possessor of property had either actual or constructive notice of the unsafe condition.

The self-service exception can apply only where a business’s self-service mode of operation creates a continuous or reasonably foreseeable hazard, and that hazard causes the plaintiff’s injury. In this case, Plaintiff argues the self-service exception applies because his accident arose from Petsmart’s policy of making cleaning supplies—including “wet floor” signs—available for customers to

¹ Although both Edward Dupuy and his spouse, Elvira Dupuy, are plaintiffs, for clarity and ease of reading, this brief will refer to “Plaintiff,” meaning Edward Dupuy.

use in cleaning up after their pets. The trial court correctly rejected that argument because there is no evidence that Plaintiff stepped on a “wet floor” sign placed in the aisle by a Petsmart customer, or that the “wet floor” sign was put in the aisle because of a condition caused by a visiting pet. Instead, there is no evidence at all about why the “wet floor” sign was in the aisle. Because Plaintiff cannot show that the allegedly unsafe condition arose from Petsmart’s self-service mode of operation, the self-service exception does not apply. This court should affirm the summary judgment in favor of Petsmart.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court correctly hold that the self-service exception does not apply to Plaintiff’s claim because there is no evidence that Plaintiff’s accident resulted from an unsafe condition created by a self-service mode of operation?

STATEMENT OF THE CASE

A. Procedural history.

Plaintiff has accurately described the case’s procedural history.

B. Counter-statement of facts.

Although Plaintiff’s statement of facts is largely accurate, it omits some relevant facts. Therefore, Petsmart presents this counter-statement of facts.

1. Plaintiff slipped and fell when he stepped on a “wet floor” sign at a Petsmart store.

Plaintiff went to Petsmart to shop. He eventually entered the pet-toy aisle.² He spent between five and 10 minutes in that aisle looking at merchandise.³ During that time, he saw a yellow object lying on the ground.⁴

After more browsing, Plaintiff stepped on the yellow object and fell to the ground.⁵ Plaintiff then sought out a cashier, who took him to the manager’s office, where he said that he had slipped on a “wet floor” sign.⁶

2. Both customers and customers’ pets sometimes create messes that need to be cleaned up.

Petsmart’s “pet friendly” policy allows customers to bring pets into the store.⁷ Sometimes those pets urinate on the floor.⁸ On a busy day, such accidents can occur 5-10 times.⁹

But at Petsmart stores, pet accidents are not the only events that create messes that need to be cleaned. Messes also occur when

² CP 16 (Dupuy depo. at 55:24-25, 56:1-4); CP 34 (Hackett depo. at 11:7-8).

³ CP 16 (Dupuy depo. at 56:23-25, 57:1-6).

⁴ CP 16 (Dupuy depo. at 53:22-25, 54:1-5; CP 17 (Dupuy depo. at 57:7-17).

⁵ CP 15 (Dupuy depo. at 49:3-12; Parmer depo. at 22:3-6).

⁶ CP 28 (Parmer depo. at 6:11-18; 6:21-25, 7:1-6); CP 34 (Hackett depo. at 9:11-23).

⁷ CP 37 (Hackett depo. at 30:20-22); CP 60 (Parmer depo. at 14:12-25, 15:1-4).

⁸ CP 37 (Hackett depo. at 30:20-25).

⁹ CP 61 (Parmer depo. at 19:2-25, 20:1-7).

customers drop shampoo bottles; drop fish bags; and spill dog food.¹⁰

When something needs to be cleaned up, any available Petsmart employee might take on performing the clean up, although the manager has ultimate responsibility to see that it is done.¹¹ And sometimes customers clean up after their pets.¹²

If the clean up leaves the floor wet, a “wet floor” sign is put out to mark the wet area.¹³ If a “wet floor” sign is posted, it is usually done by an employee because “wet floor” signs are used most commonly when a mop is used to clean the floor, and only Petsmart employees have access to mops.¹⁴ The sign remains out until the floor dries, and then a Petsmart employee puts it away.¹⁵ It is not unusual for a sign to be knocked over.¹⁶ If that happens, the sign is picked up before long.¹⁷

“Wet floor” signs are kept at “oops stations” found in Petsmart stores.¹⁸ Petsmart stores have four or five oops stations, which have materials available for cleaning up any type of spill or

¹⁰ CP 37 (Hackett depo. at 31:6-14).

¹¹ CP 37 (Hackett depo. at 31:15-21); CP 65 (Hackett depo. at 27:19-24).

¹² CP 61 (Parmer depo. at 18:8-12).

¹³ CP 37 (Hackett depo. at 31:22-24).

¹⁴ CP 61 (Parmer depo. at 18:8-24).

¹⁵ CP 37 (Hackett depo. at 31:25, 32:1-21).

¹⁶ CP 60 (Parmer depo. at 15:10-15, 16:12-15).

¹⁷ CP 69 (Hackett depo. at 46:4-11).

¹⁸ CP 60 (Parmer depo. at 17:12-24).

pet accident; the materials include paper towels, pick up bags, hand sanitizer, a trash can, and “wet floor” signs.¹⁹

3. No evidence supports Plaintiff’s speculation about why there was a “wet floor” sign in the aisle.

Throughout his brief, Plaintiff asserts that the “wet floor” sign that he encountered was, or could have been, placed in the aisle by a customer after cleaning up a pet accident. But that is speculation because there is no evidence of what led to the sign lying in the aisle.

Plaintiff testified that he has no knowledge about how the sign came to be in the aisle.²⁰ He has no knowledge how long the sign was in the aisle before his accident.²¹ And he has no knowledge whether any Petsmart employee saw the sign lying in the aisle before his fall.²²

Petsmart manager Linda Hackett and cashier Lana Parmer were deposed during discovery, and both parties submitted portions of Hackett’s and Parmer’s testimony in connection with Petsmart’s summary-judgment motion. The manager explained that if a “wet floor” sign is put out, it is usually because either a dog made some kind of mess that needed to be mopped up, or a customer dropped something else on the floor.²³ But Hackett’s and

¹⁹ CP 68 (Hackett depo. at 42:21-25, 43:1-11); CP 89.

²⁰ CP 22 (Dupuy depo. at 91:15-19); CP 25 (Dupuy depo. at 151:1-3).

²¹ CP 22 (Dupuy depo. at 91:25, 92:1-2).

²² CP 25 (Dupuy depo. at 151:5-8).

²³ CP 35 (Hackett depo. at 14:16-25, 15:1-2).

Parmer's depositions do not provide any evidence concerning what led to the "wet floor" sign that Plaintiff encountered being placed in the aisle. Furthermore, there is no evidence that the "wet floor" sign was placed in response to a pet accident; there is no evidence that the "wet floor" sign was put in the aisle by a customer; there is no evidence that the "wet floor" sign was knocked over by a pet; there is no evidence how long the "wet floor" sign was lying in the aisle before Plaintiff came along; and there is no evidence any Petsmart employee was aware of the sign before Plaintiff's fall. What is known is that Plaintiff stepped on a "wet floor" sign—all else is speculation.

4. Store managers inspect the floors hourly, and other Petsmart employees also check the floors.

Once an hour, managers are required to visit each of the store's departments to check on the condition of the animals.²⁴ When making those hourly rounds, managers check to be sure there is nothing on the floor and everything is OK.²⁵ And when not helping customers at the cash register, cashiers go through the store straightening the shelves and making sure everything is off the floor.²⁶

²⁴ CP 37 (Hackett depo. at 29:11-25, 30:1-8.)

²⁵ CP 37 (Hackett depo. at 30:9-12).

²⁶ CP 29 (Parmer depo. at 12:13-21).

5. Plaintiff is the only person to slip and fall at the Petsmart.

So far as the record reveals, Plaintiff is the only person to have had a slip-and-fall accident at the Silverdale Petsmart. Plaintiff presented no evidence of any falls other than his own. The manager has been employed by Petsmart for 13 years, and she cannot recall any other customer who slipped and fell at the store.²⁷ And it was the first time the cashier had been asked to respond to a fall by a customer.²⁸

ARGUMENT

A. There is no evidence to support a negligence claim based on traditional rules of premises liability.

This is a negligence action. To establish the elements of his claim, Plaintiff must show (1) duty, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). This case involves the duties owed by a possessor of real property. Generally, the legal duty owed by a possessor of property to a person entering the premises depends on whether the entrant falls under the common law category of trespasser, licensee, or invitee. *Younce v. Ferguson*, 106 Wn.2d 658, 662, 724 P.2d 991 (1986). It is undisputed that Plaintiff was a business invitee.

²⁷ CP 64 (Hackett depo. at 5:10-21); CP 68 (Hackett depo. at 45:1-20).

²⁸ CP 28 (Parmer depo. at 7:18-25, 8:1-5).

A business may be liable for injuries to an invitee caused by an unsafe condition on its premises if either (a) the unsafe condition was caused by the business, or (b) the business had either actual or constructive notice of the unsafe condition. *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983); *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 189, 127 P.3d 5 (2005), *rev. den.*, 157 Wn.2d 1026, 142 P.3d 608 (2006). Constructive notice arises where the condition has existed long enough to afford the business sufficient opportunity, in the exercise of ordinary care, to have properly inspected the premises and discovered and removed the hazard. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994).

As Plaintiff concedes, there is no evidence to support a claim based on these traditional principles of premises liability. There is no evidence that Petsmart created the condition because there is no evidence any Petsmart employee had anything to do with the sign being in the aisle. There is no evidence that Petsmart had actual notice the sign was lying in the aisle before Plaintiff's fall. And, finally, there is no evidence Petsmart had constructive notice that the sign was lying in the aisle. "The constructive notice rule requires the plaintiff to establish how long the specific dangerous condition existed in order to show that the proprietor should have noticed it." *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 458, 805 P.2d 793 (1991). "[T]he lack of such evidence precludes recovery." *Id.*;

Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 896 P.2d 750, *rev. den.*, 128 Wn.2d 1004, 907 P.2d 297 (1995) (“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, [plaintiff] could not prove constructive notice.”). Because there is no evidence of how long the sign was in the aisle before Plaintiff’s fall, a jury could not find that Petsmart had constructive notice.

Because there is no evidence either that Petsmart caused the sign to be lying in the aisle, or had either actual notice or constructive notice of the condition, Plaintiff cannot prevail on a negligence claim based on the traditional rules of premises liability.

B. The self-service exception does not apply in this case.

Recognizing that he cannot prevail based on traditional principles of premises liability, Plaintiff argues for application of a rule of law variously known as the “self-service,” “mode of operation,” or “*Pimentel*” exception. This brief will use the “self-service” designation.

The self-service rule is a “narrow” and “limited” exception to the traditional rules of premises liability. *Wiltse*, 116 Wn.2d at 461 (“limited rule for self-service operations”); *Carlyle*, 78 Wn. App. at 275 (“narrow exception”). Its applicability is a question of law.

Coleman v. Ernst Home Center, Inc., 70 Wn. App 213, 218, 853 P.2d 473 (1993).

Under the self-service exception, “if the business where an injury occurs is a self-service operation, the plaintiff is relieved of her burden of establishing a proprietor’s actual or constructive knowledge of an unsafe condition if she can show that the business’ operating procedures are such that unreasonably dangerous conditions are continuous or reasonably foreseeable.” *Arment v. Kmart Corp.*, 79 Wn. App. 694, 696, 902 P.2d 1254 (1995). Thus, where the self-service exception applies, the plaintiff need not prove that the business had actual or constructive notice of the unsafe condition; instead, the plaintiff can “establish liability by showing the operator of the premises had failed to conduct periodic inspections with the frequency required by the foreseeability of the risk.” *Carlyle*, 78 Wn. App at 277-78.

“The fact that a business is a self-service operation is insufficient, standing alone, to bring a claim for negligence within the [self-service] exception.” *Arment*, 79 Wn. App. at 698. Instead, the self-service exception applies only if each of the following requirements is met:

- The business must be a self-service establishment.
Fredrickson, 131 Wn. App. at 191.
- The plaintiff’s claim must involve a type of self-service operation that continuously or foreseeably

creates unsafe conditions in the self-service area.

Wiltse, 116 Wn.2d at 456; *Coleman*, 70 Wn. App. at 218.

- The unsafe condition must exist in a self-service area. *Fredrickson*, 131 Wn. App at 193; *Arment*, 79 Wn. App. at 698. A “self-service department” is an area where customers serve themselves. *Coleman*, 70 Wn. App at 219.
- The unsafe condition must be related to the self-service mode of operating the business. *Ingersoll*, 123 Wn.2d at 654; *Fredrickson*, 131 Wn. App. at 191. It is not enough that an accident arises from a hazard existing in a self-service area. Instead, for the self-service exception to apply, the hazard must be located in a self-service area and must have been caused by the business’s self-service mode of operation.

Ingersoll, 123 Wn.2d at 653-54.

In arguing for application of the self-service exception, Plaintiff focuses on (a) Petsmart’s pet-friendly policy of allowing pets to enter the store; (b) the risk that visiting pets will urinate or otherwise cause a mess on the floor; and (c) the availability of “oops stations” that customers can use to clean up after their pets. Plaintiff argues that because pet accidents can happen anywhere inside a Petsmart, everywhere inside a Petsmart is a self-service area. And Plaintiff argues that the availability of cleaning supplies

that customers may use to clean up pet accidents is a self-service mode of operation that creates a continuous or reasonably foreseeable risk of an unsafe condition (*i.e.*, a fallen “wet floor” sign). But Plaintiff’s argument fails because the evidence in the record does not allow application of the self-service exception in this case.

The self-service exception can apply only if there is a relationship between the unsafe condition and the self-service mode of operation. That is missing here because there is no evidence how the “wet floor” sign came to be in the aisle. Plaintiff’s theory is that the relevant self-service mode of operation is providing cleaning supplies to be used by customers. But there is no evidence that a customer put down the “wet floor” sign that Plaintiff stepped on. Thus, there are no facts linking the alleged hazard with Petsmart’s policy of providing cleaning supplies that customers may use.

Similarly, there is no evidence linking Petsmart’s pet-friendly policy and Plaintiff’s accident. Plaintiff suggests that the pet-friendly policy makes it reasonably foreseeable that customers will use the cleaning supplies available at the oops stations, including the “wet floor” signs, resulting in floor signs lying in the store’s aisles. The flaw with this argument is that there is no evidence that Plaintiff encountered a “wet floor” sign that was in the aisle because of a pet accident. The store manager testified that

customers spill products such as pet shampoo and dog food on the floor, requiring clean up. Therefore, the presence of a “wet floor” sign does not mean there was a pet accident as opposed to a spill caused by a customer. The cause of the condition that led to the presence of the “wet floor” sign is important because Plaintiff does not argue that the self-service exception would apply if the “wet floor” sign were there because of a spill caused by a customer; instead, Plaintiff focuses solely on a pet accident as the reason the “wet floor” sign was put out. But since there is no evidence about what led to placing the “wet floor” sign in the aisle, Plaintiff cannot establish the self-service exception applies.

Similarly, Plaintiff argues that Petsmart’s pet-friendly policy made it foreseeable that a visiting pet would knock down a “wet floor” sign. But, again, there is no evidence why the “wet floor” sign was lying on the ground, and there is no evidence that it was knocked over by a pet, or even that it was knocked over at all.

In arguing that the entire Petsmart store was a self-service area, Plaintiff notes that visiting pets might be found anywhere in the store. That argument is unpersuasive. Anywhere people go there is the risk they might spill something and cause a hazard. But cases addressing the issue have rejected the argument that hazards are reasonably foreseeable anywhere that people might be found. For example, in *Ingersoll*, 123 Wn.2d 649, the plaintiff slipped and fell on some kind of food substance as she walked through a

common area of a shopping mall. The court rejected the argument that because the mall had food vendors, and customers might carry food products—and drop them—anywhere in the mall, the entire mall was a self-service establishment subject to the self-service exception. *Id.* at 654-55. *See also Arment*, 79 Wn. App. 694 (presence of in-store cafeteria selling soft drinks to customers did not create continuous or foreseeable risk that customers would spill soft drinks in the store’s menswear department). Therefore, the fact that pets might be found anywhere in a Petsmart does not convert the entire store into a self-service area for purposes of applying the self-service exception.

In summary, the evidentiary record does not permit holding that the self-service exception applies in this case. There is no evidence linking the presence of the “wet floor” sign to either Petsmart’s pet-friendly policy, or its policy of providing cleaning supplies for customers to use. Plaintiff’s argument for applying the self-service exception is predicated on raw speculation. Consequently, summary judgment was proper.

CONCLUSION

The judgment should be affirmed.

Dated: November 23, 2009.

Respectfully submitted,

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By

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R. Daniel Lindahl, WSBA 14801

and

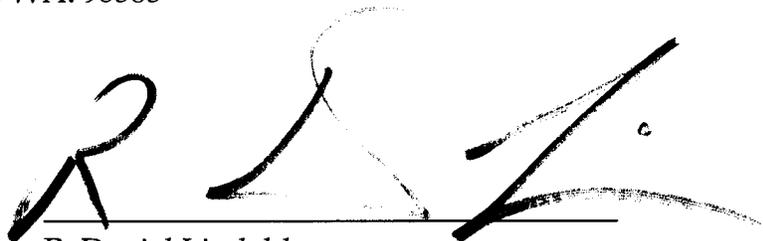
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CERTIFICATE OF SERVICE

I certify that on November 23, 2009, I mailed a copy of the foregoing Respondent's Brief to the persons listed below, at the addresses indicated, postage prepaid.

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