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No. 43099-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

AVRILIRENE TAVAI and THOMAS TAVAI,
and their marital community
Appellants,

v.

WAL-MART STORES, INC.,
a Delaware entity doing business in the State of Washington with its corporate headquarters in Bentonville, Arkansas
Respondent.

APPELLANTS' OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Appellant Avrilirene Tavai was a business invitee at a Wal-Mart store in Lacey, Washington, on February 8, 2008. While shopping, Ms. Tavai slipped and fell in a puddle of water near a checkout counter and injured her knee. She was forced to undergo surgery. She filed a lawsuit against Respondent Wal-Mart Stores, Inc. ("Wal-Mart") in Thurston County Superior Court.

Wal-Mart moved for summary judgment and convinced the trial court that there are no issues of material fact regarding Wal-Mart's liability, and that Wal-Mart should be dismissed as a matter of law. The trial court agreed and dismissed Ms. Tavai's case, finding there was no evidence to support her claim under its interpretation of long-standing Washington law. By doing so, the trial court misapplied several holdings by this Court and the Washington Supreme Court regarding premises liability, reasonable foreseeability (which is usually determined by the jury), and spoilation of evidence.

This Court should reverse because Ms. Tavai presented evidence that: (1) the danger in question was reasonably foreseeable under *Pimentel v. Roundup Co.*, 100 Wn.2d 39 (1983); (2) Wal-Mart was on notice of the unacceptably slippery nature of its flooring, admitting in argument that the floor was slippery when wet; and (3) Wal-Mart failed to preserve video

footage of the day in question because they did not believe it was "relevant" to these proceedings.

Ms. Tavai respectfully contends that the trial court misapplied the law when it failed to properly apply the *Pimentel* exception to the facts in this case, and when it relied upon the *Ingersoll* case in order to dismiss Ms. Tavai's claims. Ms. Tavai also contends that the trial court misapplied the law when it failed to provide a spoilation inference.

Ms. Tavai's separate claim of negligent use of flooring materials.

Lastly, Ms. Tavai's complaint has alleged negligence and Ms. Tavai's expert has testified that Wal-Mart's choice of flooring was negligent because it was as slippery as "ice and compact snow" when wet, which foreseeably and proximately caused Plaintiff's injuries. CP 275, 165. This is not only evidence of Wal-Mart's negligence with regard to the foreseeability of the unsafe condition (water on the floor is the first claim), but it also creates a separate claim of negligence in and of itself (the negligent use of unreasonably dangerous vinyl flooring in a public store). This second claim was not briefed and was dismissed by the trial court over the objection of Ms. Tavai's legal counsel.

Wal-Mart devotes much of its argument to incorrectly limiting the issue of as to whether the store had actual or constructive knowledge that

there was liquid on the floor prior to Ms. Tavai's fall (the common law elements prior to *Pimentel*). This attempt to inaccurately frame and limit the question should have been ineffective before the trial court and should be equally ineffective before this Court.

The question regarding notice for this separate claim (unreasonably dangerous flooring) is simply whether the Wal-Mart knew, or should have known, that its flooring was posing a danger to its business invitees because it became unreasonably slick when wet. Ms. Tavai is not required to show that water was on the floor for an extended period of time because it is the choice of flooring materials, not the presence of such a liquid, which presented the hazard.

This Court can take judicial notice of the fact that different materials have various coefficients of friction, or slipperiness, when wet. For instance, asphalt does not become slippery even when wet. However, a surface made of glass, for example, will become extremely slippery with even the smallest addition of a liquid.

Wal-Mart's notice is shown by the prior injuries and its own admission in argument. This proof, coupled with the self-service nature of the store and the failure to preserve evidence, is sufficient to reverse the decision below. Because the trial court erred in granting summary judgment

on the premises liability claim, Ms. Tavai respectfully requests that this Court reverse and remand this matter for trial.

II. ASSIGNMENTS OF ERROR

A. Assignments of error.

1. The trial court erred by granting Wal-Mart's Motion for Summary Judgment heard in open court on January 6, 2012.

2. The trial court erred by denying Ms. Tavai's Motion for Reconsideration heard in open court on February 10, 2012.

B. Issues pertaining to assignments of error.

1. Whether a hazard in a self-service store, which is within a self-service area where customers handle goods and is clearly related to that self-service operation, is reasonably foreseeable under *Pimentel v. Roundup Co.* and subsequent decisions. If *Pimentel* does not apply, did Ms. Tavai present enough evidence to survive summary judgment under the common law approach of actual and constructive notice?

2. Whether Wal-Mart's choice of flooring materials was negligent because it became as slippery as "ice and compact snow" when wet, which again is a reasonably foreseeable condition, and creates a separate claim of negligence in and of itself (the negligent use of unreasonably dangerous vinyl flooring in a public store).

3. Whether Wal-Mart's failure to preserve video footage from any of their 200 video surveillance cameras of the day in question because it did not believe them to be "relevant" to these proceedings, requires an inference of spoilation under *Henderson v. Tyrell.*

III. STATEMENT OF THE CASE

A. Brief statement of facts.

Ms. Tavai was injured on February 8, 2008, when she slipped on a puddle of water and fell while shopping at the Wal-Mart store in Lacey, Washington. CP 10. It was ultimately determined that Ms. Tavai tore a ligament in her knee. *Id.* She was forced to undergo surgery as a result of her fall. *Id.*

Ms. Tavai was walking near a check out stand toward the front of the store when she slipped in the puddle. *Id.* She immediately felt pain in her knee and leg, and filed an incident report with a store employee. CP 320, 210, 95. The employee discovered water, took several photos and completed her investigation. CP 91-94.

B. Procedural history.

Appellants Avrilirene and Thomas Tavai filed a complaint against Respondent Wal-Mart Stores, Inc. in the Superior Court of Washington for Thurston County on August 16, 2010. CP 9.

Wal-Mart brought a Motion for Summary Judgment that was heard on January 6, 2012. CP 114; RP 1-63. The trial judge granted Wal-Mart's Motion. CP 257. The judge found that the *Pimentel* exception to the notice requirement for premises liability did not apply to the facts, because Ms. Tavai did not show that the hazard was reasonably foreseeable. Further, the court ruled in Wal-Mart's favor in addressing the issue of spoliation. Applying the *Henderson v. Tyrell* case, the trial court held that there was no duty to preserve and that there was no evidence that Wal-Mart acted in bad faith or with conscious disregard of the importance of the evidence, and that there was some innocent explanation for the destruction. RP 39 - 56.

Finally, Ms. Tavai offered expert testimony that the coefficient of friction, or slip factor of the material used in the Wal-Mart's flooring, equates to that of "ice and compact snow" when it is wet and that "the floor in the area where Ms. Tavai fell posed a serious slip hazard to pedestrians when wet." CP 275, 165. Despite this testimony and Wal-Mart admitting at oral argument that the floor created a dangerous condition when wet (RP 11, 57) the trial court dismissed this separate claim of negligence. The trial court incorrectly dismissed this claim when it dismissed "all claims" in this case.

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IV. ARGUMENT

A. Standard of review.

Summary judgment is appropriate ***only*** if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). "In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper." *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990).

When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. The appellate courts consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982). The purpose of summary judgment is to avoid a useless trial. *Moore v. Pac. NW Bell*, 34 Wash. App. 448 (1983). Summary judgment should only be granted where reasonable minds can reach but one conclusion. *White v. State*, 131 Wn.2d 1, 9 (1997).

B. Summary judgment is precluded under the *Pimentel* exception.

Washington State is subject to the *Pimentel* exception with regard to

injuries that occur in "self-service style" stores. *Pimentel v. Roundup Co.*, 100 Wn.2d 39 (1983). In *Pimentel*, the Washington Supreme Court set forth its exception to the general rule that a plaintiff must show actual or constructive notice of the specific unsafe condition in the store that caused his or her injury. *Id.* Under *Pimentel*, the Court ruled that "where the operating procedures of any store are such that unreasonably dangerous conditions are continuous or reasonably foreseeable, there is no need to prove actual or constructive notice of such conditions in order to establish liability for injuries caused by them." *Id.* at 40. In *Pimentel*, the store at issue was a Fred Meyer store. Here, the store is a Wal-Mart store, essentially the same in all but name. Therefore, *Pimentel* applies and Wal-Mart's motion must fail as a matter of law.

In *Pimentel*, the Washington Supreme Court stated in pertinent part the following:

> Accordingly, the second approach is the rule we now adopt. This does not change the general rule governing liability for failure to maintain premises in a reasonably safe condition: the unsafe condition must either be caused by the proprietor or his employees, or the proprietor must have actual or constructive notice of the unsafe condition. **Such notice need not be shown, however, when the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable**. 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.
>
> This analysis modifies our holding in Morton which assumed that either actual or constructive notice must be established in every such case. **Where the existence of unsafe conditions is reasonably foreseeable, it will now be unnecessary to establish the length of time for which the particular unsafe condition existed**.
>
> A similar result was reached by the Court of Appeals in Ciminski v. Finn Corp., 13 Wash.App. 815, 537 P.2d 850 (1975). Our decision in the present case differs from Ciminski in one important respect, however. The Ciminski decision contains language which suggests that the requirement of showing notice is eliminated as a matter of law for all self-service establishments. 13 Wash.App. at 820–21, 537 P.2d 850. This is not the conclusion we reach under the analysis adopted here; **the requirement of showing notice will be eliminated only if the particular self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable**.

Id. at 49-50 (emphasis added).

Under the above analysis, it is clear that the *Pimentel* exception only requires Ms. Tavai to show that the unsafe condition at Wal-Mart's self-service operation was reasonably foreseeable.

This is an issue of material fact for the jury, and not appropriate for summary judgment. Ordinarily, foreseeability is a question of fact for the jury unless the circumstances of the injury "are so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323 (1953); *accord*

Reynolds v. Hicks, 134 Wn.2d 491 (1998). "[T]he harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant." *Maltman v. Sauer*, 84 Wn.2d 975, 981 (1975).

Here, Ms. Tavai has obtained an expert in human factors, Dr. Gary Sloan, who has authored a report on this incident with photographs and exhibits. CP 267-320,157-210. Ms. Tavai respectfully requests that the Court review the report, in which Dr. Sloan sets forth several opinions that raise genuine issues of material fact, including his opinion that "the floor in the area where Ms. Tavai fell posed a serious slip hazard to pedestrians when wet." *Id.* at 275, 165. Dr. Sloan explained that the coefficient of friction, or slip factor of this particular material, equates to that of "ice and compact snow" when the vinyl floor is wet. *Id.* Accordingly, for this reason alone, genuine issues of material fact exist as to whether Wal-Mart breached its duty to provide a safe, slip-resistant floor to its customers. This is especially true considering the presence of water on a shopping center floor is reasonably foreseeable, particularly given the large amount of products being sold that can cause leakage, and the 51 other occurrences of slip-and-fall injuries reported at this store between 2005 and 2007. *Id.*

In sum, expert testimony exists in this case that it was reasonably

foreseeable that water could be on Wal-Mart's vinyl floor and cause a customer to slip and fall, therefore raising material issues of fact that preclude summary judgment.

1. Requirements under subsequent case law limiting the *Pimentel* exception were satisfied by Ms. Tavai.

The *Pimentel* exception has been narrowly interpreted and limited in subsequent cases. Courts have found that there must be a relation between the hazardous condition and the self-service mode of operation of the business. *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452 (1991). In *Wiltse v. Albertson's Inc.,* the plaintiff slipped in water that had dropped from a leak in the roof. The court found that even though the plaintiff was in a self-service area, the hazard was in no way related to the store's self-service operation, it was not foreseeable as a result of the self-service operation, and therefore *Pimentel* did not apply. *Id.* at 461.

In *O'Donnell v. Zupan*, a Division II case decided in 2001, the court created a three part test stating that the *Pimentel* exception applies if the plaintiff can show that (1) the area was self-service, (2) it inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous condition that caused the injury was within the self-service area. *O'Donnel v. Zupan*, 107 Wash. App. 854 at 856, 28 P.3d 799 (2001).

Examining the facts of the case, the court held that "the check-out

aisle of a grocery store where customers are responsible for unloading their own groceries is a self-service area, and thus, the proprietor is charged with knowledge of the reasonably foreseeable risks inherent in the self-service mode of operation. *Id.* at 858-9. The court went on to state that customers "handle and transfer grocery items from one place to another, presenting an inherent risk of items dropping on the floor and creating a hazard." *Id.*

Although the *Zupan* court noted that the defendant store had knowledge that grocery items occasionally fell from carts during the check-out process, this evidence was not necessary to the court's holding. Rather, as noted above, the court found that there is an inherent risk of items dropping to the floor wherever customers handle and transfer goods from one place to another. Because of this inherent risk, the court concluded that spills in the check-out aisle are reasonably foreseeable, and summary judgment was reversed.

Ms. Tavai met the requirements of all of the cases limiting the *Pimentel* exception. Ms. Tavai was within a self-service area where customers handle goods - she was within 15 feet of the check outs, in an area where customers can choose from a variety of grab-and-go drinks and either place them in a shopping cart or open them to drink immediately and carry them away by hand. CP 88. Furthermore, the hazard causing Ms. Tavai's

injuries, that is the water puddle in which she slipped, are obviously related to that particular self-service operation.

2. Additional proof of foreseeability or notice is required only when the hazard is not in a self-service area, or not related to the self-service operation.

In its analysis, the trial court relied primarily upon two cases, *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649 (1994) and *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452 (1991) when finding that Wal-Mart is not liable because it did not have "actual or constructive notice" of the dangerous condition that caused Ms. Tavai's injuries.

First and foremost, *Ingersoll* does not overrule the law set forth in *Pimentel, supra,* which applies a "reasonably foreseeable" standard with regard to self-service operations such as Wal-Mart's store. To the contrary, the court in *Ingersoll* set forth the following:

> 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." Wiltse v. Albertson's Inc., supra at 461, 805 P.2d 793. There must be a relation between the hazardous condition and the self-service mode of operation of the business. *See Wiltse, at 461, 805 P.2d 793.*
>
> When defendants moved for summary judgment it was their initial burden to show the absence of a genuine issue of

> material fact. *Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 770 P.2d 182 (1989).* They met this burden by showing an absence of evidence to support plaintiff's case, specifically a lack of evidence to prove actual or constructive notice. It then became plaintiff's burden to show the existence of a genuine issue of material fact. *Young, at 225, 770 P.2d 182.*
>
> Plaintiff attempts to meet that burden by bringing herself within the self-service exception holding of Pimentel by alleging that the Mall is a self-service operation. As stated above, "self-service" is not the key to the exception. **Rather, the question is whether "the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable." Pimentel, at 49, 666 P.2d 888.** [Emphasis added.]

Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 653-4 (1994).

As the *Ingersoll* court pointed out, such cases turn on whether the nature of the business and methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable. In other words, the *Ingersoll* court relied upon the "reasonably foreseeable" test in *Pimentel.*

The *Ingersoll* court then went onto find that the plaintiff did not present evidence to show the unsafe condition was reasonably foreseeable and, therefore, that the plaintiff did not satisfy the requirements of the *Pimentel* exception. In the absence of such evidence, the court then fell back upon the common law "actual or constructive notice" standard and dismissed

the claim as follows:

> 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 Mall are such that unsafe conditions are reasonably foreseeable in the area in which she fell.

Id. at 654.

Therefore, it is clear that the *Ingersoll* court upheld the *Pimentel* exception, but simply found that the plaintiff in *Ingersoll* failed to provide any evidence to support that the dangerous condition was reasonably foreseeable. The court then lists several types of evidence that would have been relevant in determining whether the condition was reasonably foreseeable, including what products were sold in the area, the location of the fall, and whether there were slip and fall incidents prior to this one. *Id.* at 654-55. The *Ingersoll* court found that the record was "silent" and constituted a "dearth of evidence." *Id.* at 654-56. The court specifically stated that, "plaintiff has failed to produce any evidence from which the trier of fact could reasonably infer" that the nature of business and operations are such that unsafe conditions are reasonably foreseeable. *Id.* at 654.

The instant case, however, is notably different than the facts in *Ingersoll.* In *Ingersoll,* the plaintiff was a customer at a mall who slipped on some unknown substance and fell. Unlike the instant case, the plaintiff in

Ingersoll had no idea what the substance was, and could not articulate why it was in the immediate area. *Id.* at 651-52. However, in the instant case, it is uncontested that Ms. Tavai slipped on a puddle of water. Ms. Tavai not only filed an incident report immediately following the accident, but the store employee investigated the scene and discovered a puddle of water on the floor. CP 91-92. Moreover, it is uncontested that Wal-Mart's self-service operation has bottled water and groceries at its location. CP 264.

Furthermore, unlike the instant case, the defendant in *Ingersoll* did not have a record of prior reports of spills or debris at the location where the plaintiff fell. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652 (1994). Here, however, it is uncontested that there were 51 other occurrences of slip-and-fall injuries reported at this location (near the check out counters) between 2005 and 2007. CP 275, 165. Accordingly, it was foreseeable that water or other slippery materials could exist at this location.

At the hearing, Wal-Mart argued that the location of Ms. Tavai's fall was "remote" and not close to the checkout counter. RP 8. However, as is shown in Dr. Sloan's report, the fall location was approximately 15 feet from the checkout counter. CP 290,180. This was pointed out to the trial court during oral argument and ultimately admitted by opposing counsel, who was present with Ms. Tavai's counsel when the location was inspected. CP 264.

Furthermore, unlike in *Ingersoll* where the plaintiff presented no evidence that the store's methods were negligent, here, Ms. Tavai has shown through expert testimony that "the floor in the area where Ms. Tavai fell posed a serious slip hazard to pedestrians when wet." CP 275,165. Dr. Sloan explained that the coefficient of friction, or slip factor of this particular material, equates to that of "ice and compact snow" when the vinyl floor is wet. *Id.* This is uncontested. In fact, at the hearing, Wal-Mart's counsel admitted that the floor was slippery when wet. RP 11,57. Accordingly, unlike *Ingersoll*, genuine issues of material fact exist as to whether Wal-Mart's methods/operations of selecting an exceptionally dangerous vinyl floor were negligent, especially when coupled with the 51 previous slips in the local area. In sum, Ms. Tavai has provided ample testimony and evidence of the kind sought by the *Ingersoll* court.

As demonstrated above, *Ingersoll* directly applied the *Pimentel* exception. It did not modify it in any way. The *Ingersoll* court simply found that its plaintiff did not present "any" evidence to support her argument. The instant case, however, is filled with evidence of the exact same type sought by the *Ingersoll* court. Accordingly, the trial court erred in two ways. First, it misapplied the *Ingersoll* decision as support that the *Pimentel* exception had been modified and/or did not apply to the facts in this case. Second, it

failed to take note of Ms. Tavai's testimony and evidence, which created material issues of fact that must be determined by a jury in this case.

Under the above analysis, it is clear that the *Pimentel* exception still only requires Ms. Tavai to provide evidence that the unsafe condition at Wal-Mart's self-service operation was reasonably foreseeable. Once such evidence has been presented, as in this case, this is an issue of material fact for the jury, and not appropriate for summary judgment. Ordinarily, foreseeability is a question of fact for the jury unless the circumstances of the injury "are so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323 (1953); *accord Reynolds v. Hicks*, 134 Wn.2d 491 (1998). "[T]he harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant." *Maltman v. Sauer*, 84 Wn.2d 975, 981 (1975).

Likewise, the trial court's reliance upon *Wiltse, supra,* is misplaced. In *Wiltse*, the plaintiff slipped at an Albertson's store because water had leaked through the roof. The *Wiltse* court upheld the *Pimentel* exception and applied it to the facts of the case. However, the trial court then found that a leaking roof is not the same type of condition one reasonably expects to be associated with a self-service operation: "But here we have admittedly a

condition which really doesn't result from the self-service operation as such, but something entirely different, namely, a leaky roof ..." *Id.* at 456-57.

Again, the *Wiltse* court reiterated the "continuous or reasonably foreseeable" standard from the *Pimentel* exception, but simply found that it did not apply to the facts at hand. Here, however, as set forth above, there is ample evidence that the water on the floor is of a type one expects at a self-service operation with groceries, produce (with irrigation) and grab-and-go bottled water. Indeed, there were 51 other slips at this Wal-Mart location, many on a floor that has been scientifically shown to have a dangerous coefficient of friction equivalent to snow and ice. For all of these reasons, the Court should reconsider its order and permit a jury to make this determination.

C. Even without the *Pimentel* exception, the trial court inappropriately granted summary judgment because Wal-Mart had notice of its dangerous condition.

The question of notice is one for the jury. *Schmidt v. Coogan,* 162 Wn.2d 488, 492, 173 P.3d 273 (2007). Viewing evidence in the light most favorable to Ms. Tavai, there is sufficient evidence to create a question of fact, particularly on the issue of notice, which is almost always a question for the fact finder, not the court. *Id.* (Holding that "[w]hether a defective condition existed long enough so that it should have reasonably been

discovered is ordinarily a question of fact for the jury.")

1. Ms. Tavai proffered sufficient evidence of notice.

The *Ingersoll* case, *supra*, sets forth a two part test. First, the court is to look at the facts to see whether the *Pimentel* exception applies, that is, whether the facts show that the condition was reasonably foreseeable. If a plaintiff fails to make this showing, then the court applies the common law approach, that is, whether the defendant had actual or constructive notice. *Id.* The "actual or constructive notice" standard goes back to *Morton v. Lee*, 75 Wn.2d 393 (1969), which defines this standard as a condition that "must either have been brought to the actual attention of Defendant" or "must have existed for a sufficient length of time and under such circumstances that Defendant ... should have discovered it in the exercise of ordinary care." *Id.* at 401. The second definition is the constructive notice standard. On summary judgment, a plaintiff does not have to prove his or her case, only show that there are facts which–when viewed in a light most favorable to the plaintiff–create genuine issues of material fact as to whether a defendant had constructive notice.

One method for establishing that a landowner had notice of a dangerous condition is through the use of other incidents. Since as early as *Slaton v. Chicago, Minneapolis & St. Paul Railroad Co.*, 97 Wash. 441, 166

P.644 (1917), Washington courts have acknowledged that reports of prior accidents similar to the one at issue are one way to establish notice. In *Slaton,* the plaintiff offered evidence of prior fires along a railroad to show the defendant's knowledge of the danger and the defendant's negligent toleration of the danger. Our Supreme Court affirmed, reasoning:

> Evidence of other fires along the right of way at other times, and, as it is alleged, under other conditions, was admitted ... *we think it was proper to admit the testimony as tending to show knowledge of a condition and a negligent toleration of it.* We find no error.

Id. at 443-44 (emphasis added)

In this set of circumstances, Ms. Tavai has offered testimony of their expert, Dr. Gary Sloan, PhD. Dr. Sloan sets forth several opinions that raise genuine issues of material fact, including his opinion that "the floor in the area where Ms. Tavai fell posed a serious slip hazard to pedestrians when wet. CP 275, 165. Dr. Sloan explained that the coefficient of friction, or slip factor of this particular material, equates to that of "ice and compact snow" when the vinyl floor is wet. *Id.* This is especially true considering the presence of water on a shopping center floor is reasonably foreseeable, particularly given the large amount of products being sold that can cause leakage, and the 51 other occurrences of slip-and-fall injuries reported at this location between 2005 and 2007. *Id.*

Despite this evidence, the trial court ruled that Ms. Tavai failed to show in any way that Wal-Mart had actual or constructive notice of the dangerous condition (a puddle of water on the floor). However, given that there had been 51 other occurrences in this area, and given Wal-Mart's choice to use vinyl flooring that was as slippery as "ice and compact snow," a reasonable jury could find that Wal-Mart knew this was a problem area and knew the flooring it selected was particularly dangerous when wet.

Wal-Mart admits as much at oral argument, in describing Dr. Sloan's evaluation, Wal-Mart's counsel testified:

> He was there to test the slipperiness of the floor. He did that. He determined it was slippery when wet. We are not disputing that it's slippery when wet. The fact that it's slippery when wet doesn't even come into question because the issue is, "Well, even if it was slippery when wet, we didn't know about it. We didn't create it. We had no notice or constructive notice so it doesn't matter.

RP 11. and later on states:

> Your honor, for the purpose of Summary Judgment, we admit that the floor was slippery when wet.

RP 57.

Just as the plaintiff in *Sloan* was able to use the prior fires along the railroad to establish notice and the railroad's unreasonable toleration of a dangerous condition, so should this Court allow Ms. Tavai to use the Wal-Mart's statements during oral argument, Dr. Sloan's testimony regarding the

coefficient of friction of Wal-Mart's flooring and the 51 other occurrences, to demonstrate that Wal-Mart knew or should have known that its floor was unreasonably slippery and that they were negligent for tolerating that condition.

Wal-Mart confused this issue by focusing on whether it had notice of the actual puddle of water, but ignored Ms. Tavai's argument that the vinyl flooring itself was to blame. Given Wal-Mart's admission at the hearing that this flooring was slippery when wet, Wal-Mart has already conceded to Ms. Tavai's argument, that is, Wal-Mart has admitted there are genuine issues of material fact concerning the degree of slipperiness of the flooring and whether Defendant was negligent.

In sum, Ms. Tavai's claim must survive summary judgment. Wal-Mart bore the burden of showing there are no material issues of fact. Wal-Mart started by arguing an absence of evidence and, in response, Ms. Tavai presented ample evidence in the form of expert testimony and other facts revealed through discovery. In reply, Wal-Mart admitted the vinyl floor was slippery. Once Ms. Tavai presented evidence, summary judgment was precluded. Accordingly, summary judgment cannot be had as a matter of law.

2. Issues of material fact remain regarding whether Wal-Mart took adequate precautions in light of the risks

In a self-service area where hazards are inherently foreseeable, a plaintiff can establish liability by showing that the owner failed to exercise reasonable care in light of the foreseeable risks. "In the exercise of reasonable care, a store proprietor must inspect for dangerous conditions and provide such repair, safeguards, or warning as may be reasonably necessary to protect its customers under the circumstances." *O'Donnell v. Zupan,* 107 Wash. App. 854, 860 (2001). The reasonableness of a proprietor's methods of protection is a question of fact. *Id.,* citing *Ciminski v. Finn Corp.,* 13 Wash. App. 815, 819, 537 P.2d 850 (1975).

In this matter, Wal-Mart has submitted evidence as to their safety precautions concerning slip and falls (CP 97-98) and testimony regarding how it is employed at Wal-Mart. CP 93. By the very nature of this testimony, Wal-Mart admits to the continuing awareness and constructive notice of spills. However, the testimony that policies are in place do not prove the fact that the policies are followed and the necessary repairs are made. This is highlighted by the fact that in the time it took for Ms. Tavai to fall in a puddle of water, report the incident, fill out an accident report, and the employee to investigate the incident, that same puddle of water had still not been cleaned. CP 91 - 92. Despite Wal-Mart's safety precautions and

training, the puddle remained. Because Wal-Mart has destroyed all video surveillance of the scene, Ms. Tavai is unable to demonstrate how long the puddle was present before she fell. However, reasonable minds could differ on whether Wal-Mart's periodic inspections and sweepings were not simply reasonable precautions, but whether they were actually being followed; therefore, summary judgment was inappropriate.

D. Ms. Tavai is entitled to a spoliation inference in this case.

In response to Wal-Mart's Motion for Summary Judgment, Plaintiff requested a spoliation inference from the Court pursuant to *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86 (1977) (Where a party controls evidence and failed to preserve it without satisfactory explanation, the only inference the finder of fact may draw is that such evidence would be unfavorable to that party). The trial court ruled in Wal-Mart's favor on this issue, relying upon the standards set forth in *Henderson v. Tyrrell*, 80 Wash. App. 592, 610 (1996).

1. Facts surrounding Wal-Mart's intentional destruction of video evidence.

It is undisputed that Ms. Tavai filed an incident report with a store employee directly after her slip-and-fall incident. CP 95, 320, 210. The store employee investigated the puddle of water, found water, and took several photos. CP 91-92. However, to date, Ms. Tavai has disclosed only four

photos that do not show anything recognizable. CP 321-324.

Furthermore, Ms. Tavai has over 200 security cameras in its facility. CP 264. Dr. Sloan discusses these cameras at length in his report, and provides photographs of the cameras, the control system, and some of the many camera angles that survey Ms. Tavai's facility. CP 276-282. Dr. Sloan also discusses the importance of video footage, including how it would help determine issues of liability in this case. *Id.*

Ms. Tavai has served multiple requests for production of video footage of the slip-and-fall incident only to be told no such footage ever existed or that it was determined not to be "relevant" to this lawsuit and, therefore, destroyed long ago. CP 264. Wal-Mart has stated that no footage of Ms. Tavai was preserved in any way whatsoever, including of her entering and leaving the store, even though she filed an incident report immediately after her injury. *Id.* By virtue of the filing of the incident report, Wal-Mart was on immediate notice that Ms. Tavai was a potential litigant. As a potential litigant, the store has a duty to preserve video surveillance from incidents occurring within the store, particularly where, as in this case, they are made immediately aware of the incident.

Wal-Mart's position that Ms. Tavai's fall (as well as her shopping, coming and going) was not caught on tape strains credibility, particularly

given the large number of cameras in Wal-Mart's store and the fact that a store employee investigated the incident while Ms. Tavai was still at the scene. It would be almost impossible to enter, shop, fall, and leave Wal-Mart's facility without being caught on video tape. Wal-Mart's position that it determines what is "relevant" and, therefore, what should be destroyed is untenable.

2. The trial court's reliance upon *Henderson* is misplaced.

At the hearing, the trial court stated that the Division II holding in *Henderson*, *supra,* has since modified the Washington Supreme Court's holding in *Pier 67, Inc. v. King County*, *supra,* regarding a spoilation inference. The trial court determined that such questions now turn on whether the defendant acted intentionally when destroying evidence. The trial court also determined that *Henderson*, as well as *Homeworks Construction, Inc. v. Dryvit Systems, Inc.*, 133 Wash. App. 900 (2006), also stand for the proposition that a party does not have a duty to preserve evidence. RP 39-42. This is an incorrect interpretation of these cases.

A careful reading of *Henderson* reveals that it bears almost no similarity to the instant case. In *Henderson*, the court was faced with a motor vehicle collision, and the destruction of the car by the owner who later testified that he did so because it reminded him of the accident. *Id.* at 534.

The court recognized there were questions about who was driving the car, but then considered expert testimony that any blood evidence still present would not have been helpful because it would have degraded by then. *Id.* at 533. Moreover, the court considered the fact that the owner did not know he was supposed to retain the car, as well as the fact that over 65 photographs of the car were already admitted into evidence. *Id.* at 533. In sum, the court determined that the car itself had very little, if any, evidentiary value, and the owner did not appear to have a duty to preserve it.

In the instant case, at the hearing, the trial court focused on the wording in *Henderson* that spoliation is defined simply as "the intentional destruction of evidence." *Id.* at 531, *quoting* Black's Law Dictionary 1401 (6th ed. 1990). First and foremost, Wal-Mart admitted to destroying the video evidence because it believed it was not relevant to these proceedings. CP 264. Whether evidence is relevant is not for a party to determine and, therefore, there can be no question that Wal-Mart intentionally destroyed the evidence by erasing the surveillance videos on the day in question.

Nevertheless, this is not the holding in *Henderson,* just the beginning of the discussion of several cases that lead to the *Henderson* court to conclude that this issue turns on whether the destroying party has a "satisfactory explanation" for doing so. In *Henderson*, the car owner did.

Here, Wal-Mart does not. The *Henderson* court specifically reiterated the Washington Supreme Court's standards in *Pier 67, Inc., supra*, then set forth its own "satisfactory explanation" test, as follows:

> Of the few Washington cases that address the problem, the most prominent is *Pier 67, Inc. v. King County, 89 Wash.2d 379, 573 P.2d 2 (1977)*. The county had not preserved records to explain its valuation techniques, even though it was on notice, through the lawsuit, that the corporation was challenging the assessment. *Pier 67, 89 Wash.2d at 384-85, 573 P.2d 2.* The Supreme Court held:
>
>> We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. In so holding, we have noted, " '[t]his rule is uniformly applied by the courts and is an integral part of our jurisprudence.' " British Columbia Breweries (1918) Ltd. v. King County, 17 Wash.2d 437, 455, 135 P.2d 870 (1943) (quoting with approval 20 Am.Jur. § 183, at 188). See Bengston v. Shain, 42 Wash.2d 404, 255 P.2d 892 (1953); Krieger v. McLaughlin, 50 Wash.2d 461, 313 P.2d 361 (1957). Pier 67, 89 Wash.2d at 385-86, 573 P.2d 2; see Lynott v. National Union Fire Ins. Co., 123 Wash.2d 678, 871 P.2d 146 (1994).
>
> Subsequent cases have not clarified what "satisfactory explanation" will avoid the *Pier 67* inference. Nevertheless, the phrase certainly anticipates circumstances in which a party's actions are not so serious as to require a judicial remedy. In deciding whether to apply a rebuttable presumption in spoliation cases, the Alaska Supreme Court examined two general factors: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the

> adverse party. Sweet, 895 P.2d at 491; see Baliotis v. McNeil, 870 F.Supp. 1285, 1289-93 (M.D.Pa.1994) (balancing plaintiffs' fault with prejudice to Defendants in destruction of evidence). We will address these factors in some detail.

Id. at 532. The *Henderson* court then listed several cases where a spoliation inference was appropriate, most of them involving records from an agency or company with retention policies similar to Wal-Mart in this case.

The *Henderson* court then went onto perform its "satisfactory explanation" test by addressing the specific facts in its case, including the questionable value of the car as evidence because of the 65 photographs and the expert testimony that blood evidence is no longer viable (importance standard). The *Henderson* court also considered the fault of the destroying party, who did not destroy the car until after two years of discovery and did not know he was supposed to keep it (culpability standard).

In the instant case, when the same test is applied, Wal-Mart cannot provide a satisfactory explanation. It is beyond question that video of Ms. Tavai's fall would help to establish what happened. Moreover, such video would also show whether Wal-Mart's staff checked the area before the fall occurred, and may even provide how the water ended up on the floor in the first place. Accordingly, unlike the car in *Henderson*, this video is particularly <u>important</u> to Ms. Tavai' case (especially given the fact no one can prove what the video shows, or did not show, because it has been erased).

Furthermore, Wal-Mart admitted that its policies are to preserve video when there is an accident. CP 264. Wal-Mart admitted that it viewed the videos from that day, then intentionally destroyed them because it could not find anything that was "relevant" to these proceedings. *Id.* In other words, Wal-Mart admitted that rather then preserve the video for the trial court to make a relevancy determination, it intentionally destroyed this evidence in violation of its own policies. This is a far cry from the innocent destruction of a valueless car after two years of discovery have passed, as was the case in *Henderson.* Therefore, Wal-Mart is culpable for destroying evidence.

It was incorrect for the trial court to interpret *Homeworks Construction, Inc., supra,* as setting forth the proposition that litigants do not have a duty to preserve evidence. This is a misinterpretation of the holding therein. In *Homeworks Construction, Inc.*, the court analyzed whether a party was culpable for destroying evidence (the second part of the *Henderson* test), and held that it was not culpable because it did not have control of the evidence. However, in the instant case, it would be absurd to suggest Wal-Mart did not have control of the video evidence. In fact, Wal-Mart had sole control of the evidence and intentionally destroyed it.

The court in *Homeworks* reasoned as follows:

> The crux of this case is the second factor of the Henderson test: the extent of Homeworks/State Farm's culpability in allowing the

> house to be repaired and evidence destroyed. With regard to this factor, the Henderson court indicated that in determining the adverse party's culpability, the trial court can consider the party's bad faith, whether that party had a duty to preserve the evidence, and whether the party knew that the evidence was important to the pending litigation. *Henderson, 80 Wash.App. at 609–10, 910 P.2d 522.* In Henderson, the court noted that "for a direct sanction to apply the spoliation must be in some way connected to the party against whom the sanction is directed." *Henderson, 80 Wash.App. at 606, 910 P.2d 522.* **Homeworks/State Farm argue that because they did not control the house, they cannot be connected to the spoliation. We agree.** Homeworks/State Farm had no control over the Luceys and because they did not know the Luceys were going to repair the house, they are not at fault for destroying evidence.
>
> ...
>
> We hold that the spoliation was not connected to Homeworks or its insurer: Neither was aware that the Luceys had commenced repairs before suing Wells and Thompson; and neither had any control over the premises or the Luceys. Thus, the trial court's decision that Homeworks/State Farm had engaged in spoliation was manifestly unreasonable and based upon untenable grounds.

Id. at 900-02 (emphasis added).

Nowhere in *Homeworks* does it say that litigants do not have a duty to preserve evidence. This was adopted by Wal-Mart in its brief from a dicta line in the *Homeworks* opinion that analyses the holding in *Henderson*:

> Significantly, in Henderson, the court did not suggest that potential plaintiffs have a general duty to preserve all evidence. Instead, the Henderson court looked to other sources for duty such as the duty of a partner to preserve records or the

> duty of a medical provider to save medical information. *See Henderson, 80 Wash.App. at 610, 910 P.2d 522.* Thus, Henderson does not hold that a potential litigant owes a general duty to preserve evidence.

Id. at 901. The *Homework* court's analysis above was discussing what *Henderson* did not stand for, in response to an argument by the moving party, and must be read with the rest of the *Homework* opinion that then adopts the two part *Henderson* test (the importance of the evidence and the culpability of the destroying party). *Henderson* simply applies the same test, and determines that a party who is not in control of the evidence cannot be culpable for its destruction. Again, Wal-Mart was in full control of the video and, therefore, is culpable for its destruction.

V. CONCLUSION

The Washington Supreme Court has made it clear that in premises liability cases involving self-service operations, a plaintiff need only show that the danger in question was reasonably foreseeable, which, once evidence is presented, is a question of material fact for the jury. Here, Dr. Sloan has shown that the vinyl floor, when wet, is as slippery as ice or hardened snow and that multiple slip-and-falls had occurred on this surface in nearby areas in the past. Moreover, Wal-Mart has admitted that the floor was slippery when wet. Lastly, Wal-Mart has destroyed important video evidence in violation of its own policies, and justified doing so by stating the evidence

was not relevant. The court must make this decision, not a defendant in a lawsuit. Otherwise, the court is setting forth a dangerous policy that a store can simply maintain video if it supports its defense, and destroy video when it does not.

The trial court's decision granting the Wal-Mart's Motion for Summary Judgment should be reversed and remanded to Superior Court for trial on the issues, as should the trial court's decision denying the Ms. Tavai's Motion for Reconsideration.

DATED: June 18, 2012

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

AVRILIRENE TAVAI and THOMAS TAVAI,
and their marital community
Appellants,

v.

WAL-MART STORES, INC.,
a Delaware entity doing business in the State of Washington with its corporate headquarters in Bentonville, Arkansas
Respondent.

DECLARATION OF SERVICE

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STATE OF WASHINGTON
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. APPELLANT'S OPENING BRIEF; and
2. DECLARATION OF SERVICE.

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Washington State Court of Appeals
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DATED this 18 day of June, 2012, at Lacey, Washington.

Alexis Grieco, Paralegal