

NO. 43099-1-II

COURT OF APPEALS STATE OF WASHINGTON

AVRILIRENE TAVAI and THOMAS TAVAI, and their marital
community,

Plaintiffs/Appellants,

v.

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

Defendant/Respondent.

BRIEF OF RESPONDENT

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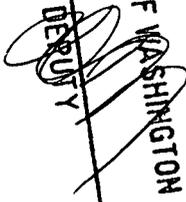
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I. INTRODUCTION

On February 8, 2008, Appellant/Plaintiff Avrilirene Tavai slipped and fell in a puddle of water on the floor of Defendant/Respondent Wal-Mart Stores Inc.'s ("Wal-Mart") business establishment in Lacey, Washington. She was accompanied by several family members, including her then-16-year-old daughter Jurene Tavai, none of whom witnessed water spilled on the floor or the accident a couple minutes later.

Mrs. Tavai and her husband filed a complaint for negligence against Wal-Mart, and the parties engaged in discovery. Following discovery, Wal-Mart moved for summary judgment of dismissal, arguing that the Tavais could not prove the essential elements of their claim. The Tavais' opposition failed to raise a question of material fact. The superior court properly dismissed the Tavais' complaint and properly denied reconsideration of that decision.

II. ISSUES PRESENTED FOR REVIEW

Assignments of Error

Wal-Mart assigns no error to the superior court's proper decisions to grant summary judgment of dismissal and deny reconsideration.

Issues Pertaining to Assignments of Error

Wal-Mart disagrees with the Tavais' statement of issues. Wal-Mart believes that this appeal presents three issues, which are more properly stated as follows:

The first issue is whether the superior court correctly dismissed the Tavais' complaint on summary judgment of dismissal, where:

1. the undisputed facts established that Mrs. Tavai did not fall in an area where spills were reasonably foreseeable under the test established in *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983);
2. the Tavais produced no evidence of actual or constructive notice of the dangerous condition to Wal-Mart before Mrs. Tavai fell; and
3. the Tavais do not have a separate cause of action for negligent choice of flooring that is slippery when wet because their proof merely establishes the element of a dangerous condition.

The second issue is whether the trial court properly denied an adverse inference of spoliation, where:

1. Wal-Mart had no duty to preserve video of activities at the entire store on the day of the accident; and

2. the Tavais failed to show that Wal-Mart's decision not to preserve video was in bad faith and prejudiced the Tavais.

The third issue is whether the Tavais failed to argue on appeal why the trial court abused its discretion in denying reconsideration and therefore abandoned their assignment of error relating to reconsideration.

III. STATEMENT OF THE CASE

A. **The water spill was a temporary condition that existed for only moments before Mrs. Tavai fell.**

On February 8, 2008, Mrs. Tavai and her family were shopping at a Wal-Mart store in Lacey, Washington. CP 32. Mrs. Tavai was accompanied by her sons, nephew, and then-16 year old daughter Jurene Tavai. CP 64, 77. Jurene testified that they were all in the cosmetics department when they decided to head to the check-out stands. CP 78. Mrs. Tavai called for them to wait, but Jurene and her brothers and cousin walked ahead to a display table in the store's main aisle. CP 78. They looked at the display of cookies and valentine gifts for two to three minutes before they heard Mrs. Tavai cry out. CP 78-79. They turned and saw her lying on her back on the floor just a few feet away. CP 78-79, 88.

Jurene Tavai testified that she and her brothers and cousin walked through the area where her mother fell and did not slip or see any water on the floor. CP 79-80. Mrs. Tavai testified that the children walked through the area where she fell, but did not say anything to her about a puddle of

water on the floor. CP 69. According to Mrs. Tavai, Jurene, and Wal-Mart Assistant Manager Shelly Pierce, the water was clear, and there were no footprints near the spill that indicated that anyone else had walked through the water. CP 67, 80, 92.

B. There is no evidence that the water spill was created by the store's methods of operation.

Mrs. Tavai had not yet walked into the cash-register aisle when she fell. CP 64. Jurene Tavai marked the location of the fall in the aisle behind cashiers near cash register number one. CP 82, 88. Mrs. Tavai stood in the location of the store where she fell during a site inspection. CP 162-3. A photograph shows her standing in the main aisle of the store, a clear distance from the nearest check-out counter. CP 162-63, 181. According to her counsel, Mrs. Tavai was approximately 15 feet away from the nearest check-out counter. CP 264. Testimony from Mrs. Tavai, Jurene Tavai, and Ms. Pierce established that there were no cups or bottles of water lying on the ground where Mrs. Tavai fell. CP 68, 71, 80, 92.

C. The Tavais' testimony failed to establish that Wal-Mart created or was aware of the water spill before Mrs. Tavai fell.

Mrs. Tavai did not have any knowledge of how long the water spill was on the floor before she fell. CP 68. She did not know whether any Wal-Mart employees were aware of the spill before she fell. CP 68. She did not know how the spill occurred. CP 68. She did not know of anyone

who has knowledge of these facts. CP 68. Jurene Tavai also had no knowledge of how long the water spill was on the floor before her mother fell. She did not know how the spill occurred. CP 83. She did not recall seeing any Wal-Mart employees in the area at the time. CP 83. She did not know if the Wal-Mart cashiers knew of the water spill or saw her mother fall. CP 68, 83-84.

D. The store was busy when Mrs. Tavai fell.

The store was busy at the time of the fall. Mrs. Tavai recalls seeing people in the aisle near the check-out stands as she was walking toward the first check-out counter. CP 63-64. The nearest employee was a cashier in the process of checking out customers. CP 84. Mrs. Tavai does not know whether any Wal-Mart employee saw her fall. CP 66. Similarly, Jurene Tavai does not know whether any employee saw her mother fall, or knew of the spill before she fell. CP 84. She also saw customers waiting in line at check-out counters. CP 84.

Wal-Mart cashier Hillary Saleno was working at registers one and two around the time that the fall occurred. CP 100. When working at register one, Ms. Saleno faced the produce section of the store. CP 101. She did not see any water on the floor before Mrs. Tavai fell, and she does not recall ever seeing Mrs. Tavai fall. CP 100-01. Wal-Mart cashier Lori Atwood was working at register three around the time that the fall

occurred. CP 89. She also faced the produce section of the store. CP 90. She did not see any water on the floor before Mrs. Tavai fell and does not recall seeing Mrs. Tavai fall. CP 89-90.

E. Wal-Mart had policies and procedures in place to inspect for spills that could become slip hazards.

Wal-Mart employees are trained to maintain a safe place for customers. CP 93. All employees are trained to stop and clean up a spill if they see one. CP 93. In February 2008, employees carried pocket pads so that they could clean up a spill without having to leave the area to get towels or other supplies. CP 93. If a cashier became aware of a spill, they would contact the customer service manager. CP 90, 101. Additionally, several times a day, all employees performed a safety sweep of their work areas to check for hazards including spills. CP 91-94.

F. The Tavais repeatedly overstate the number of similar incidents at this Wal-Mart.

The Tavais retained Dr. Gary Sloan, who is an expert in ergonomics and studies the biomechanics of slips and falls. CP 154, 157-58. The Tavais relied exclusively on his testimony to argue that this accident was foreseeable for Wal-Mart. CP 229-30.

To support this claim, they repeatedly refer to 51 other slips at Wal-Mart and misstate that they all occurred near the check-out counter. App. Brief at 10, 16, 19. Customers indeed made 51 complaints of slips

between May 15, 2005, and December 21, 2007, but of those 51 slips, only 23 occurred inside the store. CP 165. Further, of those 23 slips inside the store, only seven slips were “in the check-out lane.” CP 165. Therefore, in the two and one-half year period, there was an average of only one slip in the check-out lanes every four months.

G. The record does not support the Tavais’ descriptions of conditions at the store.

Citing one photograph taken during the site inspection on December 13, 2011, the Tavais suggest that Wal-Mart sold “grab-and-go drinks” and allowed customers to open and drink them immediately. App. Br. at 12; CP 162, 165. But that photograph was taken over three years after the 2008 accident, and there is no testimony that it represented the conditions that existed at the time of the accident. The Tavais did not submit any evidence that customers actually opened and drank water bottles before purchasing them at the check-out counter.

H. Because the Tavais lacked evidence of liability, Wal-Mart prevailed on summary judgment of dismissal and successfully opposed their motion for reconsideration.

On January 6, 2012, Wal-Mart moved for summary judgment dismissal. In this motion, Wal-Mart admitted that Mrs. Tavai slipped on a water spill, which caused a temporary, dangerous condition. However, Wal-Mart argued that the Tavais could not establish liability as a matter of law because they could not show that: (1) Wal-Mart either created the

spill or had actual or constructive notice of the spill before Mrs. Tavai fell; or (2) Wal-Mart's inspection policies were inadequate for the risk posed in this case. CP 105-13. Wal-Mart relied on the deposition testimony of Mrs. Tavai and Jurene Tavai, CP 61-88, and declarations of three Wal-Mart employees. CP 89-101.

In opposition, the Tavais submitted the declaration of Dr. Sloan. CP 157-214. Dr. Sloan conducted resistance testing on the floor surface and opined that the floor was slip-resistant when dry, CP 164, but that it posed a slip hazard when wet. CP 165. He also summarized Wal-Mart's answers to interrogatories, listing the numbers of slip-and-fall accidents that had been reported at the store. CP 165.

The Tavais did not submit any evidence that contradicted the testimony of Ms. Pierce, who established facts relating the Wal-Mart's employee training and policies with respect to inspections for spills. CP 91-99. The Tavais did not submit any evidence contradicting the testimony of Ms. Pierce to the effect that an employee would have cleaned up the spill if they had seen it before Mrs. Tavai fell. CP 91-94. They did not submit any testimony that Wal-Mart's inspection procedures were inadequate to address the risk posed by potential water spills on the floor.

On January 6, 2012, the superior court granted Wal-Mart's Motion for Summary Judgment on January 6, 2012. CP 257-58.

On January 17, 2012, the Tavais moved for reconsideration, arguing that the superior court erred by not applying (1) the *Pimentel* exception or (2) the presumption of negligence based on spoliation of evidence. CP 334-53. The Tavais also argued for the first time that they had a separate claim of negligence for Wal-Mart's choice of flooring that became slippery when wet. CP 346-47. They relied on the supplemental declaration of expert Ken Gorton that contained testimony that had not been submitted to the court before ruling on summary judgment. CP 264, 347. The superior court denied this motion for reconsideration on February 10, 2012. CP 384-85. The Tavais filed a timely appeal.

IV. SUMMARY OF ARGUMENT

The superior court properly dismissed the Tavais' claims against Wal-Mart and properly denied their motion for reconsideration because Wal-Mart was entitled to judgment as a matter of law. The Tavais had no evidence that Wal-Mart knew or should have known of the dangerous condition that caused Mrs. Tavai to slip and fall. They had no evidence that Washington's self-service exception excused them from proving actual or constructive notice of a hazard. Nor did they present evidence that Wal-Mart's inspections of the store were inadequate based on the infrequent history of risk of slip-and-fall accidents in this location. The Tavais relied entirely on the declaration of Dr. Sloan to oppose the

summary judgment, but he did not raise a question of material fact establishing liability. Rather, his declaration merely established that a temporary dangerous condition existed, which Wal-Mart had already conceded.

In addition, the Tavais presented no legal basis for their argument that they have a separate cause of action for negligent choice of flooring that was slippery when wet. This court need not consider this argument because they raised it first in their motion for reconsideration.

Second, the superior court properly refused to invoke a presumption of negligence based on spoliation of evidence when the Tavais did not establish that Wal-Mart had a duty to retain evidence or that Wal-Mart had willfully withheld essential evidence.

Finally, the court need not consider the Tavais' assignment of error relating to reconsideration because they did not argue on appeal how the trial court abused its discretion in denying their motion.

V. ARGUMENT

A. **The superior court properly granted summary judgment of dismissal.**

1. **The standard of review here is de novo, and the record supports summary judgment of dismissal as a matter of law.**

This court reviews an order granting summary judgment de novo. *Green v. A.P.C. (Am. Pharmaceutical Co.)*, 136 Wn.2d 87, 94, 960 P.2d

912 (1998). Summary judgment is proper if the pleadings, depositions, and other documents show that “there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). Factual disputes must be material to survive summary judgment, and a “material fact” is one on which the outcome of the litigation depends. *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). This court construes evidence in the light most favorable to the nonmoving party. *See Pac. NW. Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006).

When the moving party is a defendant, it may meet its burden by pointing out to the court that there is a lack of evidence to support the non-moving plaintiff’s case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, n.1, 770 P.2d 182 (1989). Wal-Mart satisfied this initial burden by showing a complete lack of evidence to support the breach of duty.

Once the defendant meets its burden, the burden shifts to the plaintiff to make a prima facie showing of **all essential elements**. *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 208, 890 P.2d 469, *rev. denied*, 126 Wn.2d 1025, 896 P.2d 64 (1995). A plaintiff establishes a prima facie case by presenting evidence that supports a reasonable inference of the existence of each element. *Pelton v. Tri-State Mem’l Hosp., Inc.*, 66 Wn. App. 350, 354, 831 P.2d 1147 (1992); *see also Seven Gables Corp. v.*

MGM/UA Entm't Co., 106 Wn. 2d 1, 12-13, 721 P.2d 1 (1986) (citing CR 56(e)). Where the moving party established an absence of evidence, a non-moving party must counter with specific facts showing a genuine issue of material fact. *Young*, 112 Wn.2d at 225-26. Conclusory allegations will not suffice. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

This court may affirm a judgment on any ground established by the pleadings and supported by the evidence. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997). Washington appellate courts only consider evidence and issues called to the attention of the trial court on summary judgment. RAP 9.12; *Wash. Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993); *Riojas v. Grant County Pub. Util. Dist.*, 117 Wn. App. 694, 696 n.1, 72 P.3d 1093 (2003), *rev. denied*, 151 Wn.2d 1006, 87 P.3d 1184 (2004). Otherwise, the court would not truly engage in the same inquiry as the trial court. *Wash. Fed'n of State Employees*, 121 Wn.2d at 157.

2. The Tavais failed to present evidence that Wal-Mart breached its duty.

To defeat summary judgment in a negligence case, the plaintiff must show an issue of material fact as to each element – duty, breach of

duty, causation, and damages. *Craig v. Wash. Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999). Washington has adopted the Restatement (Second) of Torts § 343 as the appropriate test for determining landowner liability to invitees. *Ford v. Red Lion Inns*, 67 Wn. App. 766, 770, 840 P.2d 198 (1992), *rev. denied*, 120 Wn.2d 1029, 847 P.2d 481 (1993). The Restatement 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).

Although a landowner owes invitees a duty of ordinary care to maintain the premises in a reasonably safe condition, landowners are not insurers against all happenings that occur on their premises. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). Washington courts have long cautioned against imposing liability merely because a fall 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.

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

Here, the undisputed evidence before the superior court on summary judgment established that Wal-Mart did not have actual notice of the dangerous condition that caused Mrs. Tavai to fall. The deposition testimony of Mrs. Tavai and Jurene Tavai established they lacked evidence of who caused the spill, or that it had been on the floor for a sufficient length of time for Wal-Mart to become aware of it and have an opportunity to remove the hazard before Mrs. Tavai fell. CP 103. In opposition to summary judgment, the Tavais did not submit any evidence establishing that Wal-Mart had notice of the spill. They did not present any facts from which the superior court could infer that Wal-Mart's mode of operation made it foreseeable that a spill would occur where Mrs. Tavai fell. The Tavais failed to present any evidence that Wal-Mart's methods of floor inspections were insufficient to account for the risk based on the history of prior incidents. The only declaration that the Tavais submitted was that of Dr. Sloan, and it did not address whether Wal-Mart had

knowledge of the spill before Ms. Tavai fell. In fact, the Tavais did not dispute Wal-Mart's evidence.

3. The Tavais did not present evidence that a hazardous condition was continuous or reasonably foreseeable.

a. The facts do not support any inference that the water spill was a continuous condition.

Dr. Sloan's conclusion that the floor became slippery when wet does not create a question of fact on the breach of duty. Dr. Sloan admitted that the floor was not slippery when dry. CP 164. Thus, there are no facts from which a reasonable person could conclude that flooring was unsafe. To establish liability, the Tavais needed to show that the hazardous condition of the floor was continuous or reasonably foreseeable. *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991). The Tavais did neither.

Wal-Mart conceded for purposes of its summary judgment that the water on the floor caused Mrs. Tavai to fall. However, the Tavais' evidence of water on the floor does not prevent summary judgment because liability attaches only when a hazardous the condition was continuous. The undisputed facts established that the water on the floor was a temporary condition that arose suddenly while Mrs. Tavai was in the store. Just a couple of minutes before her mother fell, Jurene Tavai

and her siblings and cousin had walked through the place where the spill occurred but saw no spill. CP 79-80. There were no footprints or tracks indicating that others had passed through the spill before Mrs. Tavai fell. CP 67-68, 80, 92. These undisputed facts negate any inference that a continuously existing hazardous condition caused Mrs. Tavai to fall.

Similarly, the Tavais failed in their burden on summary judgment by failing to establish that a slip-and-fall accident where Mrs. Tavai fell was reasonably foreseeable. They argued that evidence of other spills causing falls created hazardous conditions that were reasonably foreseeable and created a question of fact for the jury.¹ The Tavais' argument conflicts with Washington law on foreseeability.

The Tavais relied on a history of accidents at Wal-Mart. Dr. Sloan summarized the data, stating that there were 23 slips inside the store from May 2005 to December 2007. Seven occurred in the check-out lanes. CP 165. The Tavais did not provide any further information to the court on about these incidents.

¹ The Tavais' argument tracks the rationale for liability stated by the appellate court in *Wiltse v. Albertson's Inc.*, 52 Wn. App. 641, 762 P.2d 1170 (1988), which the Washington Supreme Court reversed. *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 805 P2d 793 (1991).

b. Proof of reasonable foreseeability requires evidence of a negligent practice.

The Tavais argued that the location and timing of water on the floor where Mrs. Tavai fell was reasonably foreseeable and that they did not need to show actual or constructive notice under the *Pimentel* rule. *Pimentel*, 100 Wn.2d at 49. *Pimentel* creates a limited exception for self-service operations and applies to specific unsafe conditions that are continuous or inherent in the nature of the business or mode of operation. *Id.* The fact that a business is a self-service operation is insufficient, standing alone, to bring a claim for negligence within this exception. *Wiltse*, 116 Wn.2d at 461; *Arment v. Kmart Corp.*, 79 Wn. App. 694, 698, 902 P.2d 1254 (1995).

This narrow “self-service” or *Pimentel* exception to the notice requirement applies where a proprietor’s business incorporates a self-service mode of operation and **this mode of operation inherently creates an unsafe condition that is continuous or reasonably foreseeable in the area where the injury occurred.**

O'Donnell v. Zupan Enters., Inc., 107 Wn. App. 854, 858, 28 P.3d 799 (2001) (emphasis added).

c. The Tavais did not present evidence of a negligent practice that would make a water spill foreseeable where Mrs. Tavai fell.

In order to bring the case within the *Pimentel* exception, a plaintiff must present testimony that the store employees were aware of **the**

specific risk involved in the case. *Id.* at 859. In *O'Donnell*, the plaintiff slipped and fell in the check-out aisle of the store. In opposition to summary judgment, the plaintiff established that the defendant's customers were responsible for unloading grocery items from their grocery carts onto the conveyor belt at the check-out stand and that it was not unusual for items, such as grapes and blueberries, to fall on the floor. The defendant was aware that debris on the floor could be hazardous. There was also evidence that cashiers inspected the check-out aisles only when they had the opportunity to do so, generally between customers, rather than complying with store policy requiring hourly checks. The janitor did not have a sweeping or inspection schedule other than the once-a-day cleaning. Finally, although the defendant required all employees to pick up any debris on the floor, employees could not easily see fallen debris in the check-out aisles. *Id.* at 857. The court found these facts sufficient to bring the case within the *Pimentel* exception.

Here, in stark contrast to the evidence in *O'Donnell*, the Tavais did not present any testimony about the knowledge and practices of Wal-Mart as it related to the risk of spills or slip-and-fall accidents in the area where Mrs. Tavais fell. Although Mrs. Tavais argues that she was "close enough" to the check-out aisle, App. Br. at 12, Mrs. Tavais did not present evidence that past falls "in the check-out aisle" made it reasonably foreseeable that

Mrs. Tavai would fall 15 feet from the check-out aisle. The *O'Donnell* court emphasized testimony that prior customers unloading their grocery items created a risk of injury to the plaintiff. Based on her own testimony, Mrs. Tavai was not in an area where persons would unload merchandise at check-out. CP 162-63, 181. There was no testimony from anyone that debris were known to fall to the floor in the area where Mrs. Tavai fell.

There was not a shred of evidence presented to the superior court that suggested customers at Wal-Mart would unload merchandise from their carts in the area where Mrs. Tavai fell. The record is completely devoid of testimony that would have established (1) an inference that Wal-Mart employees were aware of spills regularly occurring in the area where the Mrs. Tavai fell; (2) that the employees were not following company procedures to perform scheduled inspection; or (3) that cashiers or other employees could not easily see debris in the area where Mrs. Tavai fell. Mrs. Tavai did not present any evidence to support her argument that persons would open and drink water bottles before taking them to the check-out aisle for purchase. The Tavais have zero foundation in the record to suggest this occurred. App. Br. at 12. In sum, they did not present any evidence from which a reasonable mind could conclude that the location where Mrs. Tavai fell was an area of the store where water or other liquid spills historically occurred.

This case is most like *Arment*, where the plaintiff was shopping in the clothing department of K-Mart and slipped on soda pop that another customer had apparently spilled. *Arment*, 79 Wn. App. at 697-98. The plaintiff argued that the *Pimentel* exception should apply because K-Mart had a cafeteria inside the store. The court disagreed, holding that a soda pop spill in the clothing department was not the type of inherently-dangerous condition that fell within the *Pimentel* exception. Explaining the rationale for dismissing Arment's complaint, the court distinguished another case, stating:

Unlike Arment, Jackson produced evidence that Kmart allowed or encouraged patrons to remove food and drink from the in-store cafeteria and consume it in the retail area. Without similar evidence, Arment cannot show that the unsafe condition in the retail area was a reasonably foreseeable risk inherent in Kmart's mode of operation, an element she must establish to fall within the *Pimentel* exception.

Id. at 699-700 (citation omitted).

This case also resembles *Carlyle v. Safeway Stores Inc.*, 78 Wn. App. 272, 896 P.2d 750, *rev. denied*, 128 Wn.2d 1004, 907 P.2d 297 (1995), in which the plaintiff slipped and fell on shampoo spilled in the coffee aisle of a grocery store. In support of its motion for summary judgment, the defendant submitted testimony about the store inspections by employees. The plaintiff submitted nothing to contradict the

employees' testimony or to establish that more frequent inspections were necessary given the history of incidents. In holding that the *Pimentel* exception did not apply, the *Carlyle* court stated that:

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. This, too, she failed to do.

Id. at 277 (citations omitted). The court held that plaintiff had to show that defendant's inspections were insufficient, and the dismissal of plaintiff's complaint on summary judgment was upheld on appeal. *Id.* at 277-79.

Here, the superior court properly required the Tavais to establish with testimony, rather than accusations, that Wal-Mart's mode of operation created a specific risk of injury at a specific location in order to meet the *Pimentel* exception. Mrs. Tavai presented not one shred of evidence that: (1) anyone had ever fallen in the location where she fell; (2) Wal-Mart was aware of prior falls in the area where she fell; (3) there was a continuous risk of spills in the area where she fell; (4) Wal-Mart's mode of operations made it foreseeable that persons would fall in the area

where Mrs. Tavai fell; or (5) Wal-Mart's inspection procedures were insufficient given the history of prior falls. Therefore, the superior court properly dismissed this case on summary judgment when the Tavais' evidence failed to bring the case within the *Pimentel* exception, and they submitted no other evidence of negligence to the court.

d. The issue of foreseeability is not necessarily a jury question.

The Tavais argued that any issue of foreseeability is a jury question, relying on *McLeod v Grant County School District No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1952). App. Br. at 9. *McLeod* is distinguishable because it did not address liability for a slip-and-fall incident, but whether teenagers' actions constituted intervening acts that eliminated the school's potential liability. Raising the issue of foreseeability does not, by itself, create a jury question. Washington courts have repeatedly upheld summary judgment dismissals of slip-and-fall cases, even when the plaintiffs argued that the dangerous condition was reasonably foreseeable. See *Ingersoll v. DeBartolo Inc.*, 123 Wn.2d 649, 655-56, 869 P.2d 1014 (1994); *Charlton v. Toys "R" US-Del., Inc.*, 158 Wn. App. 906, 912, 246 P.3d 199 (2010); *Fredrickson v. Bertolino's Tacoma Inc*, 131 Wn. App. 183, 188, 193, 127 P.3d 5 (2005), *rev. denied*, 157 Wn.2d 1026, 142 P.3d 608 (2006); *Arment*, 70 Wn. App. at 699-700.

e. **The Tavais need more than proof that a store is self-service to avoid proof of actual or constructive notice.**

The Tavais correctly stated the rule summarized in *Ingersoll*, that plaintiffs must produce evidence from which a fact-finder could infer that the nature of a defendant's methods of operation made unsafe conditions reasonably foreseeable. *Ingersoll*, 123 Wn.2d at 653-54. Just as in *Ingersoll*, the Tavais did not produce any evidence to establish that Wal-Mart's methods of operation made spills in the area where Mrs. Tavai fell reasonably foreseeable. There was no testimony that Wal-Mart sold drinks in open containers that would account for spills throughout the store. There was no testimony that customers opened bottled water before purchasing it at the check-out counter. There was no evidence of slip-and-fall accidents in the area where Mrs. Tavai fell.

The Tavais claim that the mere fact that Wal-Mart sold bottled water and that the spill was one of water, is sufficient to create a question of fact under *Ingersoll*. App. Br. at 16. Yet *Ingersoll* established that self-service in a store is not enough to create a question of fact. *Ingersoll*, 123 Wn.2d at 654. By relying on the presence of water for sale near where Mrs. Tavai fell, the Tavais do nothing more than establish the Wal-Mart is a self-service store. Selling water does not make slips on water reasonably foreseeable. *Arment*, 79 Wn. App. at 687-98.

f. The Tavais did not establish facts showing that Wal-Mart's inspection practices were insufficient.

In those limited instances where the *Pimentel* exception applies, liability is not presumed. Even if Wal-Mart's history of other incidents met the *Pimentel* exception, the Tavais' evidence is still insufficient to survive summary judgment. Although they would be excused from showing actual or constructive notice, they must still show the property owner's negligence. Commenting on the *Pimentel* holding, the Washington Supreme Court stated:

We emphasized that this exception did not impose strict liability or even shift the burden to the defendant to disprove negligence. Rather, where the operation of a business is such that unreasonably dangerous conditions are continuous or reasonably foreseeable, it is unnecessary to prove the length of time that the dangerous condition had existed. 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 (emphasis added). Also, in *Fredrickson*, the court found that a plaintiff who was injured when the chair he was sitting on broke could not defeat summary judgment without showing that the defendant's chair-inspection procedures did not meet industry standards. *Fredrickson*, 131 Wn. App. at 190.

Citing *O'Donnell*, the Tavais argue that the reasonableness of Wal-Mart's inspection procedures are questions of fact. *O'Donnell*, 107 Wn.

App. at 860. However, a question of fact arises only if there is evidence to create one. Here, the Tavais did not present any evidence regarding the frequency of spills where Mrs. Tavai fell from which a fact-finder could question the reasonableness of Wal-Mart's inspections. When a plaintiff presents no evidence that the defendant's procedures are inadequate, no question of fact arises. *Fredrickson*, 131 Wn. App. at 190. Put another way, the plaintiff must show that a defendant's inspection procedures were insufficient to raise a question of fact. *Carlyle*, 78 Wn. App. at 277-79. The Tavais must also show some history of falls in the area where Mrs. Tavai fell. *Arment*, 79 Wn. App. at 698.

In this case, the Tavais did not present any evidence that the type and frequency of Wal-Mart's inspections did not meet industry standards. The unrefuted testimony of Ms. Pierce established that all Wal-Mart employees were trained to stop and clean up spills whenever they saw them, and that they carried clean-up supplies with them at all times. CP 92-99. She testified that employees engaged in specific safety inspections throughout the day to look for spills. CP 93. The fact that falls occurred on average only once every four months in the check-out aisle is not sufficient to raise a question of fact that the inspection practices were insufficient where Mrs. Tavai fell.

The information the Tavais submitted about prior incidents at Wal-Mart supports only speculation about what was spilled, where they occurred, and whether a customer or the store's method of operation caused the spill. The Tavais have not cited any authority that evidence of prior slips alone, with no factual connection to Mrs. Tavai's incident, creates a question of fact for trial. Where circumstantial evidence leads only to speculation, a verdict cannot be based on inferences drawn from the evidence. *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn. App. 213, 220, 853 P.2d 473 (1993).

Just as summary judgment of dismissal was appropriate in *Fredrickson and Wiltse*, it is appropriate here because Mrs. Tavai did not present any evidence to show that Wal-Mart's inspection procedures are insufficient to meet the risk posed by water spills in the main aisle of the store.

g. The Tavais did not present evidence that Wal-Mart had actual or constructive knowledge of the spill before Mrs. Tavai fell.

The Tavais did not present any evidence that any Wal-Mart employee knew or should have known of the spill before it occurred. CP 68, 83-84. Yet they argue that there is a question for the jury on the issue of constructive notice because there is a question whether the

defective condition existed long enough for the store employees to notice it. The Tavais' reliance on *Schmidt v. Coogan*, 162 Wn. 2d 488, 173 P.3d 273 (2007), to support their argument is misplaced because the facts in *Schmidt* are clearly distinguishable from the facts in this case.

Schmidt involved a legal malpractice case wherein the plaintiff had to prove she would have prevailed in an underlying slip-and-fall case. The plaintiff presented evidence that the spill in which she slipped had been visible to cashiers before she fell, and none of the employees made an effort to clean it up. The Washington Supreme Court held that the testimony establishing that the spill had been visible to employees for a certain length of time was enough to create a question of fact in that case. *Schmidt*, 162 Wn. 2d at 492. In contrast, not only did the Tavais fail to produce any evidence that any cashier was in position to have seen the spill, but Wal-Mart produced evidence that the cashiers were busy with customers during the relevant time period. CP 89-90, 100-01. Wal-Mart's evidenced showed that the closest cashier faced the produce section of the store, CP 101, whereas Ms. Tavai fell in an area which was not in the cashier's line of vision. CP 181. Also, the testimony from Jurene Tavai leads to the inescapable inference that the spill was on the floor for just a minute or so before Mrs. Tavai fell. CP 103-04. The evidence here is

clearly insufficient to create a question of fact on the issue of actual or constructive notice relating to the existence of the water spill.

B. The Tavais do not have a separate cause of action because the floor becomes slippery when wet.

1. This court should disregard the Tavais' new legal theory raised first in their motion for reconsideration.

A party may not raise new legal theories on a motion for reconsideration. In *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005), *rev. denied*, 157 Wn.2d 1022, 142 P.3d 609 (2006), the appellate court held that CR 59 does not allow a party to pose new legal theories that could have been raised in opposition to the original motion for summary judgment. Rejecting a plaintiff's attempt to do so, the court stated:

[T]he motion for reconsideration arguments were based on new legal theories with new and different citations to the record. *Wilcox* offers no explanation for why these arguments were not timely presented. CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.

Id.

In this case, the Tavais' opposition to Wal-Mart's motion for summary judgment raised only two legal arguments: (1) the *Pimentel* exception applied; and (2) the facts supported a spoliation inference. CP 228-32. However, in their motion for reconsideration, the Tavais also

argued that they had a separate cause of action for the choice of flooring. CP 345-47. Because they raised this theory too late, this court need not consider it. *Wilcox*, 30 Wn. App. at 241.

2. The Tavais do not have legal authority supporting a claim for a separate cause of action.

The Tavais argued that Wal-Mart's choice of flooring was negligent because the floor became slippery when wet, and thus any fall was foreseeable. App. Br. at 4, 17. Yet Dr. Sloan's testimony that the floor became slippery when wet is not proof of any negligence in the selection of flooring, but merely proof of one element of the test for a possessor's liability. More to the point, Dr. Sloan never opined that Wal-Mart's choice of flooring was negligent. CP 162-66.

Because water on the floor does not always create a dangerous condition, the plaintiff must prove that a dangerous condition existed as one element of the tort claim. *Charlton*, 158 Wn. App at 913-15. In upholding summary judgment of dismissal, the *Charlton* court stated:

Ms. Charlton complains that in dismissing her claim, the trial court erroneously held that a wet floor is never a dangerous condition, as a matter of law, and contends that this position is "absurd." But Ms. Charlton has it backwards—the trial court did not hold that water on a floor is **never** a dangerous condition; it rejected her position that a wet floor is **always** a dangerous condition, and that she was therefore excused from presenting evidence of an unreasonable risk created by this particular wet floor. She failed to present any evidence that the floor

in the entryway of the Toys R Us store presented an unreasonable risk of harm when wet. For that reason alone, summary judgment was proper.

Id. at 915 (emphasis in original and citation omitted). Accordingly, by presenting evidence that the floor at Wal-Mart became slippery when wet, the Tavais did nothing more than prove what Wal-Mart had already conceded in its original motion – that Mrs. Tavai fell due to a temporarily dangerous condition of water on the floor.

The Tavais’ opening appellate brief lacks any authority that a possessor is negligent for using a floor that is safe when dry but slippery when wet. Therefore, the court may assume that counsel, after diligent search, has found no such authorities. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Further, this court need not consider arguments that do not rely on legal authority. RAP 10.3(a)(6); *Olympic Pipe Line Co., v. Thoeny*, 124 Wn. App. 381, 398 n.20, 101 P.3d 430 (2004), *rev. denied*, 154 Wn.2d 1026, 120 P.3d 577 (2005).

C. The superior court properly denied the motion to apply a presumption of negligence based on spoliation of evidence.

1. This court reviews a ruling on spoliation for an abuse of discretion.

This court reviews a superior court’s decisions on evidentiary issues, such as spoliation, for an abuse of discretion. *Homeworks Const.*,

Inc., v. Wells, 133 Wn. App. 892, 898, 138 P.3d 654 (2006). Here, the superior court did not abuse its discretion when it concluded that a presumption of negligence, arising from spoliation of evidence, could not be applied in this case when: (1) Wal-Mart had no duty to preserve video evidence for the entire store on the date of the accident, or (2) there was no showing that intentional destruction of relevant evidence occurred after suit was filed.

2. The Tavais did not prove that Wal-Mart had a duty to preserve all video of the entire store on the day of the incident.

The Tavais argue that Wal-Mart had a duty to preserve all the video from the store on the date of the accident, yet they do not support that contention with any legal authority. App. Br. at 26. They presented evidence that Wal-Mart has multiple video cameras which would have shown such things as Mrs. Tavai entering the store, meeting with Wal-Mart personnel, the volume of customers in the store, and movements of Wal-Mart personnel. CP 170-71. The Tavais had the burden to present evidence that Wal-Mart knew that this particular evidence would be relevant to some issue at trial and had an obligation to preserve it. *Henderson v. Tyrrell*, 80 Wn. App. 592, 609-10, 910 P.2d 522 (1996).

In *Henderson*, the defendant argued that the plaintiff wrongfully destroyed a vehicle that would have provided evidence in a civil suit

relating to how the plaintiff's injuries occurred. The car was destroyed two years after the incident, after the defendant requested it be preserved. Yet defendants could not cite any case or statute that created a legal duty for the plaintiff to have preserved the vehicle, and so the court found that plaintiff did not have legal duty to preserve the vehicle despite having been requested to do so. *Henderson* holds that a potential litigant does not owe a general duty to preserve all evidence. See *Homeworks Constr. Inc.*, 133 Wn. App. at 901. Just as in *Henderson*, the Tavais did not present any legal authority that required Wal-Mart to preserve all video of the store on any day that an accident occurred. Therefore, the superior court properly exercised its discretion against a presumption of negligence.

3. An adverse inference of spoliation requires the trial court to find that evidence was willfully withheld or destroyed.

The rule that “missing” evidence leads to an adverse inference is a limited one. In *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977), the Washington Supreme Court stated that, when relevant evidence within the control of a party whose interests it would naturally be to produce it is not produced without satisfactory explanation, the fact finder must infer that the evidence would be unfavorable. More recent courts have held that the inference arises “only where, under all the circumstances of the case, such unexplained failure to call the witnesses

creates a suspicion that there has been a willful attempt to withhold competent testimony.” *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991) (quoting *State v. Baker*, 56 Wn.2d 846, 859-60, 355 P.2d 806 (1960)). The inference is also not permitted when the witness is unimportant, or the testimony would be cumulative. *Id.* at 489. If a witness’s absence can be satisfactorily explained, no inference is permitted. *Id.* Finally, if there is no violation of a duty to preserve evidence, the inference does not apply. *Henderson*, 80 Wn. App. at 610.

4. The Tavais did not show that significant evidence was willfully withheld or destroyed.

The Tavais argue that because of the sheer number of surveillance cameras in the Wal-Mart store, the incident must have been caught on tape, and that Wal-Mart should have preserved video of other areas of the store. The Tavais did nothing more than present this contention in their opposition to summary judgment and cite *Pier 67* without analysis for the proposition that they should be entitled to an inference of some unspecified fact. CP 230-31. The Tavais did not present facts to support the application of the rule to this case.

The Tavais ignore the fact that the incident occurred in an area of the store that was not covered by a surveillance camera, as established by Ms. Pierce’s unrefuted testimony. CP 92-93. Ms. Pierce’s testimony is

supported by a comparison of screen shots from nearby cameras, CP 240-41, which establish that the cameras did not show the area where Mrs. Tavai said she fell. CP 170, 181. Given that video evidence of the fall never existed, no adverse inference can be drawn from the failure to produce the evidence. *Henderson*, 80 Wn. App. at 610.

5. Not all potential evidence requires preservation.

In an attempt to demonstrate relevance, the Tavais rely on Dr. Sloan's statement that evidence from other areas of the store would help his investigation, CP 10-171. But the Tavais must do more than show potential evidence might be "helpful" in order to be entitled to an adverse inference for failure to produce evidence.

In *Wright v. Safeway Stores*, 7 Wn.2d 341, 348, 109 P.2d 542 (1941), the Washington Supreme Court considered the application of the spoliation rule in a slip-and-fall case. The plaintiff sued Safeway because she fell on the floor in a store. The Court held that the trial court erred in giving a jury instruction allowing a presumption that the testimony of several of Safeway's potential witnesses would be adverse to Safeway because they were not called as witnesses. The Court specifically noted that the inference for failure to call witness was limited:

"But these rules do not require the production of the greatest amount of evidence, which it is in the power of the party to produce, as to any given fact. All the law

requires is sufficient proof, and a litigant is not bound to produce and examine all the witnesses who know anything of the transaction, or, failing to do so, to have the presumption indulged against him that such witness, if produced, would not support his right.”

Id. at 348 (emphasis added) (quoting *Fulsom-Morris Coal & Mining Co. v. Mitchell*, 37 Okla. 575, 132 P. 1103, 1105 (1913)).

In *Williams v. Kingston Inn, Inc.*, 58 Wn. App. 348, 792 P.2d 1282 (1990), the plaintiff alleged that the defendant negligently served alcohol to plaintiff’s deceased wife. The court considered the plaintiff’s argument on summary judgment that the defendant’s failure to produce a declaration from a waitress at the bar should raise an adverse inference to defeat summary judgment. The defendant relied on a non-employee eyewitness to state that the plaintiff was not being served alcohol while in the bar to support the bartender’s testimony. The court noted that the defendant had presented competent testimony of an eyewitness to the events with relevant evidence, and that no inference would be attributable from the failure to present declarations for other employees present. *Id.* at 355-56.

As the holdings of both *Williams* and *Wright* demonstrate, the mere failure to produce every possible piece of evidence is insufficient to warrant an adverse inference.

6. The Tavais did not show that the alleged evidence was important.

The Tavais rely on Dr. Sloan's statements that video of other areas of the store would "help determine issues of liability." CP 230-01. Dr. Sloan is an expert in ergonomics. CP 157-58. He studies the biomechanics of slips and falls. CP 154. He is not an expert in managing retail stores, or determining how they should investigate accidents. Nothing in Dr. Sloan's curriculum vitae suggests he has expertise to opine on Wal-Mart's inspection or investigation procedures. CP 173-77. He does not testify that the lack of a video of the areas of the stores, outside the accident scene, prevented him from expressing the opinions in this case. The missing video certainly did not prevent him from testing the floor for slipperiness. Dr. Sloan does not say that the video of areas outside the accident scene would have provided him any information that could have supported any opinion he could express as a human factor's expert.

The fact that the videotape may have been "helpful" is not sufficient to impose any sanction for the failure to retain evidence. The real issue is whether missing evidence results in an investigative advantage to one party over another. *Henderson*, 80 Wn. App. at 607-08. When both parties are at an equal disadvantage because neither has access

to evidence, no inference of spoliation should apply. The Tavais have sources of evidence, other than the store videotape of Mrs. Tavai, to obtain information about where she and Wal-Mart employees were before and after the incident. They have the testimony of Mrs. Tavai and her family members. They could have deposed Wal-Mart's employees to obtain this information. These alternative sources of information establish that a videotape is not an indispensable evidence of the events before and after Mrs. Tavai's fall. *Homeworks*, 133 Wn. App. at 899.

7. The Tavais did not establish the failure to preserve the video was in bad faith.

There is no testimony in the record below about the manner and method that Wal-Mart used to preserve evidence relating to incidents at the store. A party seeking a spoliation inference must show that the adverse party failed to preserve the evidence in bad faith. *Henderson*, 80 Wn. App. at 609. The Tavais' argument that Wal-Mart must present "a satisfactory explanation" for not preserving evidence presumes that they have presented evidence sufficient to create a duty and raise a presumption in the first place. App. Br. at 30. They argue that Wal-Mart cannot determine what is relevant. *Id.* at 28. Yet Washington courts have held that the party seeking this inference must prove that the evidence was not only relevant, but significant to an element of the case. *Blair*, 117 Wn.2d

at 488. The Tavais did not submit testimony from any Wal-Mart employees establishing that: (1) they believed the videotape of Mrs. Tavai in areas other than where she fell was relevant; (2) that they believed that they had a duty to preserve the video of her in other areas of the store; or (3) that the Tavais had asked employees to preserve all videotape. The Tavais did not provide testimony that evidence of what occurred in other areas of the store is material to issues of liability or damages. Wal-Mart admitted that Mrs. Tavai slipped and fell because of water on the floor of the store. CP 91-94. Therefore, the videotape of where she was before and after she fell is not relevant to prove liability. They never argued that videotape showing where she or store employees were in the store before or after was relevant to damages. Because there are no facts in the record supporting a finding of bad faith, the Tavais did not and cannot sustain their burden of proof on this issue.

D. The Tavais failed to argue why the court's denial of reconsideration was an abuse of discretion.

The Tavais' second assignment of error stated that the superior court erred when it denied their motion for reconsideration. App. Br. at 4. Yet none of the issues pertaining to the assignments of error address the superior court's ruling on the motion for reconsideration. *Id.* at 4-5. The Tavais did not devote any section of their brief to a discussion of the

motion for reconsideration, a decision which this court reviews for a manifest abuse of discretion, not de novo. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 100, 220 P.3d 229 (2009). Instead, the Tavais lump this argument in with others made in opposition to summary judgment.

A court abuses its discretion if a decision is “manifestly unreasonable” or based on untenable grounds. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 583, 220 P3d 191 (2009). A decision is “manifestly unreasonable” if the court adopts a view no reasonable person would take. *Id.* A decision is based on untenable grounds if relies on unsupported facts or applies the wrong legal standard. *Id.* The Tavais did not establish any abuse of discretion by the superior court when it reached its determination that there was no error of law committed when granting Wal-Mart’s motion for summary judgment.

Under RAP 10.3(a)(6), citations to legal authority and reference to relevant portions of the record must be included in support of issues raised on appeal. Washington courts do not ordinarily consider assignments of error without supporting argument. *In re Det. of Mitchell*, 160 Wn. App. 669, 675 n.6, 249 P.3d 662 (2011). Accordingly, the court should affirm the superior court’s order denying the motion for reconsideration.

VI. CONCLUSION

The superior court properly dismissed the Tavais' claims against Wal-Mart. There was no genuine issue of material fact. The Tavais' argument that Wal-Mart's flooring was slippery when wet does not create a separate cause of action relating to the choice of flooring, but merely provides proof of the initial element of the Tavais' burden of proof of negligence – that a dangerous condition existed. Wal-Mart assumed this fact for the purpose of summary judgment. Wal-Mart produced undisputed evidence that it had inspection procedures in place to identify and clean up water spills and that the water spill in question was a temporary condition of which Wal-Mart had no knowledge. The Tavais failed to meet their burden that Wal-Mart's mode of operation made water spills where Mrs. Tavai fell reasonably foreseeable. The testimony about the spill's location and duration did not create a question of fact on actual or constructive notice. The undisputed evidence established that Wal-Mart did not create the spill. The superior court correctly concluded that the Tavais failed to create a question of fact with respect to Wal-Mart's negligence.

The Tavais also failed to show that Wal-Mart had a duty to retain all the videotape from the day of the accident, or that they would were prejudiced by the missing information that might have been on that

videotape. This court should affirm the superior court's decision to deny an inference of negligence based on spoliation of evidence.

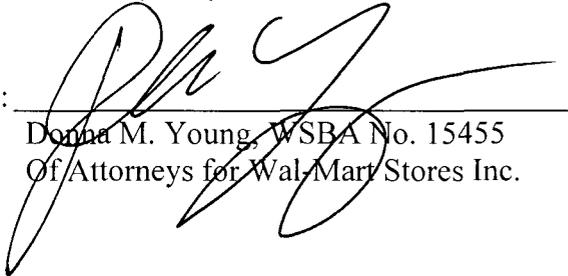
Finally, this court does not need to consider the Tavais' assignment of error relating to the motion for reconsideration, because they did not submit an argument establishing abuse of discretion by the superior court.

The superior court did not err in any way. Accordingly, this court should affirm the superior court's rulings.

Respectfully submitted this 16 day of July, 2012.

LEE SMART, P.S., INC.

By: _____


Donna M. Young, WSBA No. 15455
Of Attorneys for Wal-Mart Stores Inc.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on July 16, 2012, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

Ron Meyers
Ken Gorton
Zoe Wild
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DATED this 16th day of July, 2012 at Seattle, Washington.



Wendy Larson, Legal Assistant

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COURT OF APPEALS
DIVISION II
2012 JUL 17 PM 1:11
STATE OF WASHINGTON
BY  **DEPUTY**