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No. 71638-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

HELEN KATHLINE SULLIVAN

Appellant,

v.

SAFEWAY, INC.,

Respondent.

APPELLANT'S BRIEF

KING COUNTY SUPERIOR COURT
CAUSE NO. 13-2-06420-9

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INTRODUCTION

This is a “grocery store slip and fall” case. Appellant Helen Sullivan (“Sullivan”) slipped on some liquid detergent that had been spilled on the floor of the aisle of Respondent Safeway’s (“Safeway”) store.

Store video captures the customer who caused the spill apparently telling a Safeway employee about it just moments before the plaintiff’s injury. However, the video does not resolve the issue of how long after the spill occurred the customer got around to reporting it.

What the video does show is:

The customer emerging from a different aisle than where the spill occurred;

The customer continuing her shopping as she emerges, until she finds herself close enough to an employee to report the spill;

A store bustling with Safeway employees.

The trial court dismissed the case on summary judgment

ASSIGNMENT OF ERROR

The trial court erred in dismissing the case on summary judgment.

Issue: Is it foreseeable that liquid soap may be spilled on the floor of the cleaning supply section of Safeway's store, thus eliminating the requirement of "actual or constructive notice", as per Pimintel v. Roundup Co., 100 Wn.2d 39, 49, 666 P.2d 888 (1983)?

Issue: Was there sufficient evidence that a jury could reasonably find that Safeway had failed to take "ordinary care" to maintain the premises in a "reasonably safe condition"?

STATEMENT OF THE CASE

On April 9th, 2012, Sullivan entered the Safeway store on 41st in Everett. CP 45. She came through the store's right-side door, and walked "pretty much directly" to the paper supplies aisle. CP 48. She was walking from the front of the store towards the back. CP 49. She first picked up a six-pack of paper towels. Id. She then began looking for toilet paper. Id. While doing so, she slipped on dishwashing soap that was on the floor. CP 50. She did not see it before the fall. CP 52. Her

knee was injured in the fall. A Safeway employee helped her to her car.
CP 32.

Shortly before Sullivan fell, a customer reported to Safeway employee Chloe Thompson that she (the Customer) had spilled the soap. CP 29. Thompson called for clean-up over the store intercom. Id. Another Safeway employee, Cindy Ward, took cleaning materials from the mop closet and headed towards the spill. Id. Sullivan had fallen before she arrived.

Sullivan sued Safeway. CP 59-62. Safeway moved for Summary Judgment. CP 58.

As part of its Motion, Safeway submitted the Declaration of Gwynn Graika, who was the store manager the day of Sullivan's injury. CP 31-34. Attached to the Declaration was a copy of store video from the day of the accident. Id. The video does not show the fall, or even the area of the fall. Id.

The video does show the following:

- 12:56:21 Customer emerges from an aisle, continues to shop;
- 12:56:55 Customer encounters Chloe Thompson and apparently tells her of the fall;
- 12:57:05 Sullivan enters the store;
- 12:57:21 Sullivan enters a different aisle than the one from which the Customer emerged, at least one aisle “over”;
- 12:57:54 Cindy Ward heads toward the aisle which Sullivan had entered, again, a different aisle than the one from which the Customer had emerged.

The Customer was never identified or located after the accident.

Thus, the video shows prompt action by Safeway employees, once the customer finally spoke directly to Chloe Thompson, but says nothing about how long it had been since the spill, before the Customer encountered Thompson. However, since the Customer emerges from a different aisle than where the spill had occurred, a reasonable inference is that she had traversed at least that aisle after the spill.

With no disrespect intended, the somewhat portly, middle-aged-to- elderly Customer is plainly in no rush to go about her business, and

goes not one step out of her way to report the spill. The video shows her continuing to shop after she enters view, and she speaks to Chloe Thompson only as the latter is walking directly towards her.

ARGUMENT

This Court reviews a Summary Judgment *de novo*. Schroeder v Excelsior Management Group, 177 Wn. 2d 94, 104, 297, p. 3d 677 (2013)

Summary judgment is appropriate only when the evidence, with all reasonable inferences drawn in favor of the non-moving party, shows that there is no genuine issue of fact, reasonable persons could reach but one conclusion, and the moving party is entitled to judgment. Olympic Fish Products v. Lloyd, 93 Wn.2d596, 611 P.2d 737 (1980).

The *pattern jury instruction* on the duty of care owed to a business invitee is WPI 120.06, which states:

“An [owner] [occupier] of premises owes to a [business] [or] [public] invitee a duty to exercise ordinary care [for his or her safety]. [This includes the exercise of ordinary care] [to maintain in a reasonably safe condition those portions of the premises that

the invitee is expressly or impliedly invited to use or might reasonably be expected to use].”

Generally, a possessor of premises is liable for a temporary unsafe condition only if there was either actual or constructive notice. Coleman v. Ernst Home Center, Inc., 70 Wn.App. 213, 853 P.2d 473 (1993); Mathis v. H.S. Kress Co., 38 Wn.2d 845, 232 P.2d 921 (1951); Smith v. Manning's, Inc., 13 Wn.2d 573, 126 P.2d 44 (1942).

However, in Pimentel v. Roundup Co., d/b/a Fred Meyer, 100 Wn.2d 39, 49, 666 P.2d 888 (1983), our Supreme Court did away with the “actual or constructive notice” requirement in premises liability cases, “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 would seem to be a classic “Pimentel” case.

It seems difficult to argue with the proposition that the very products being sold in a store’s particular aisle may be spilled or dropped onto the floor. In Pimentel, a can of paint fell off a shelf onto the

Plaintiff's foot, while she was looking at magazines. The paint can was "overhanging" the shelf unstably.

Even in the days when "actual or constructive notice" was required in grocery store cases, the actual time a condition had been present was not dispositive. In Morton v. Lee, 75 Wn.2nd 393, 397, 450 P.2d 957 (1969), where the evidence was that the injured person's husband had seen an apricot on the floor of the grocery store about five minutes before she fell, the Court had this to say:

Ordinarily, it is a question of fact for the jury, whether under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care. Presnell v. Safeway Stores, Inc., 60 Wash.2d 671, 374 P.2d 939 (1962). The permissible period of time for the discovery and removal or warning of the dangerous condition is measured by the varying circumstances of each case. To a large extent, it depends upon the opportunity for discovery open to the defendant's employees by reason of their number, their physical proximity to the hazard, and, in general, the likelihood they would become aware of the condition in the normal course of duties. The decisive issues, therefore, are the length of time the condition is present and the opportunity for discovery under the circumstances proved. Deagle v. Great Atlantic & Pacific Tea Co., 343 Mass. 263, 178 N.E.2d 286 (1961). While the plaintiff must prove that the defective condition existed long enough so that by the use of reasonable care it should have been discovered and remedied, that fact, like other facts, may be proved by circumstantial as well as by direct evidence. Presnell v. Safeway Stores, Inc., *Supra*; Louie v.

Hagstrom's Food Stores, Inc., 81 Cal.App.2d 601, 184 P.2d 708 (1947).

Mr. Morton saw the apricot only about 5 minutes Before the accident, but that is only one circumstance to be considered. To hold for appellants on the issue, as a matter of law, would compel us to ignore entirely the issue of whether appellants' housekeeping procedures and practices, with respect to the display stand and the surrounding area, met the standard of care that an ordinarily careful and prudent store owner would have deemed reasonably adequate under the same circumstances. The resolution of that issue was for the jury, not this court.”

Here, the Supplemental Declaration of Gwynn Graika (CP 7-8) stated that “Aisle 9”--the aisle in which Sullivan fell---contained “paper products such as toilet paper, Kleenex, and paper towels.” Importantly, the Declaration also states that “Aisle 9” also contained “some cleaning products such as liquid soap, Windex, and mops and brooms”.

(emphasis added)

Graika’s Supplemental Declaration goes on to say:

“While I was manager of the store employees were instructed to pay attention to the floors and look for any foreign objects on the floor as they went about their work in the store. Employees were instructed to pick up or clean up any foreign objects on the floor immediately when they saw them. On average through the day, an employee would be on Aisle 9 at least 1-2 times per hour during the course of their work, either helping customers find products, stocking products, or traveling from one part of the store to another. In addition, at the time of Ms. Sullivan’s accident we had

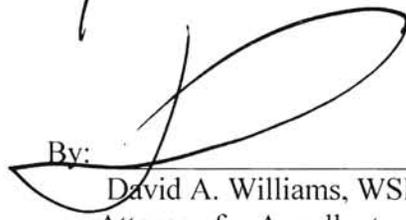
employees do an inspection of the entire store approximately twice per hour, checking for cleanliness and for any potential safety hazards, including foreign objects on the floor”.

This testimony alone, which should have been construed in the light most favorable to non-moving party Sullivan, allows the inference that the soap had been on the floor for up to half an hour or more!

CONCLUSION

The judgment should be reversed.

DATED this 7 day of July, 2014.

By: 

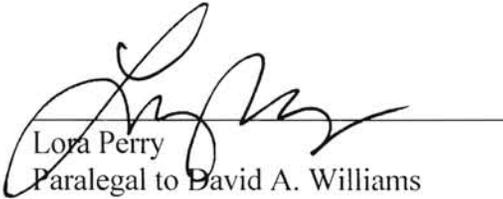
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I hereby certify that a copy of the Appellant's Brief, was forwarded
for service upon the counsel of record:

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DATED this 7 day of July, 2014.


Lora Perry
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