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IN THE SUPREME COURT OF THE STATE OF IDAHO

DIANE BROOKS, individually,

Plaintiff/ Appellant,

vs.

WAL-MART STORES, INC., a foreign corporation doing business in Idaho,

Defendant/ Respondent.

Supreme Court No. 44634

Ada County Case No. CV-PI-1421952

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

Honorable Lynn Norton, presiding

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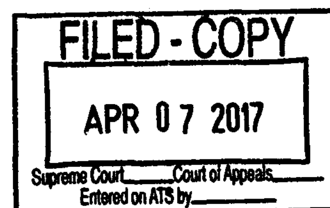

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a premises liability case arising from a slip and fall accident which occurred in a Wal-Mart store on Overland Road in Boise, Idaho. The Appellant, Diane Brooks, an invitee, slipped and fell on a puddle of water while being escorted to the garden department by a Wal-Mart employee. The accident occurred in July of 2013.

B. Course of Proceedings

Ms. Brooks filed her complaint against Wal-Mart on November 19, 2014. R. 12-16. Wal-Mart filed its Answer on December 15, 2014. R. 17-24. Discovery thereafter commenced. Wal-Mart contended in discovery that Rug Doctor, LLC may have been negligent. R. 34-36. On June 30, 2015, Ms. Brooks sought leave to file an amended complaint. R. 34-47. The district court granted Ms. Brooks permission to amend her complaint on July 2, 2015, and she did so on July 7, 2015. R. 48-58. Rug Doctor, LLC answered the Amended Complaint on July 28, 2015. R. 69-72.

On March 2, 2016, both Wal-Mart and Rug Doctor filed motions for summary judgment seeking dismissal of Ms. Brooks' claims in their entirety. R. 178-179, 266-279. The motions were briefed and oral argument was heard on March 31, 2016. R. 7. On April 11, 2016, the district court issued its *Memorandum Decision and Order Granting Summary Judgment for Wal-Mart Inc. and Denying Summary Judgment for Rug Doctor, LLC.* R. 880-902.

On April 25, 2016, Ms. Brooks filed a motion for reconsideration asking the district court to reconsider and reverse its decision to dismiss her claims against Wal-Mart. R. 955-969. On April 27, 2016, Rug Doctor filed a motion for clarification/reconsideration, again seeking the dismissal of Ms. Brooks' claims against it. R. 998-1018. On May 19, 2016, the district court heard oral arguments related to Rug Doctor's and Ms. Brooks' motions for reconsideration, among various other motions. R. 10.

On June 22, 2016, the district court issued its *Memorandum Decision and Order Denying Reconsideration* denying both motions to reconsider. R. 1187-1216. On October 7, 2016, Ms. Brooks and Rug Doctor resolved the remaining claims and stipulated to dismissal of that action. An Order of Dismissal and Final Judgment was issued by the district court on October 17, 2016. R. 11.

On November 18, 2016, Ms. Brooks timely filed her appeal of the district court's decision to dismiss Ms. Brooks' claims against Wal-Mart. R. 1226-1233.

C. Statement of Facts

1. The Rental Process of a Rug Doctor Carpet Cleaning Machine.

In August of 2011, Wal-Mart entered into a Vendor Agreement with Rug Doctor, LLC which allowed Rug Doctor to place its carpet cleaning machines into Wal-Mart stores and offer them for rent to Wal-Mart customers. R. 678-697. The record is not clear as to when the Rug Doctor machines were first introduced into the Wal-Mart store on Overland Road in Boise,

where the incident at issue in this case occurred.[1] The Vendor Agreement required the machines to be offered to customers through an automated self- serve rental process. R. 678.

Spencer Hinkle was Rug Doctor's local account manager. He serviced approximately sixty-eight accounts in the Treasure Valley area, which he described as spanning from Mountain Home to Caldwell, Idaho. Of those, nine were Wal-Mart Stores. R. 631-632 (Hinkle Depo, 15:6-17:4). Mr. Hinkle testified that the self-serve method of operation only existed at Wal-Mart. R. 632 (Hinkle Depo, 17:1-4). In other words, all other accounts, including Albertsons, Fred Meyer, Ace, and other independent store locations, a store employee was involved in the rent and return process. R. 631-632.

When renting the machine on a self-serve basis, the customer interacts with a computer screen on the kiosk which lays out the rental agreement between Rug-Doctor and the user. R. 643 (Hinkle Depo, 61:13-63:11), *see also*, R. 690. The customer electronically signs a rental agreement, pays for the machine by credit card, and then access is electronically given to one of the bins where a machine is located. R. 690. The customer is not provided a copy of the rental agreement unless they request that it be emailed to them. R. 643-644 (Hinkle Depo, 63:16-65:3); *see also,* R. 690. Upon return, the customer scans his/her credit card and an available bin opens and the customer puts the machine back. R. 690.

According to the instructions, a user of the Rug Doctor machine is directed to create their own cleaning solution by mixing a gallon of water with a cleaning agent. R. 635 (Hinkle Depo,

[1] Spence Hinkle was deposed in February of 2016. He testified that the machines were introduced into the Treasure Valley Wal-Mart Stores some 2 ½ to 3 years prior. R. 649.

30:3-31:10). The user then pours that solution into a water basin in the machine. *Id.* Each machine can hold up to two gallons of water and cleaning solution. *Id.* When turned on, the machine uses suction power to cycle the cleaning solution into the carpet (or upholstery), through various hoses, couplers, and nozzles. R. 635-637 (Hinkle Depo, 30:3-31:10, 34:23-39:2). The cleaning solution is then suctioned back out of the carpet and returned to a different catch basin. *Id.* The couplers and hoses are secured with metal fasteners. *Id.*

Mr. Hinkle was asked during his deposition about whether machines could leak or spill water. He testified as follows:

> Q. Have you ever heard of nozzles leaking from the bottom of a machine?
>
> A. Yes.
>
> Q. So it's something that does happen?
>
> A. It could.
>
> Q. Are there other places on the machine that you are aware of where water can leak?
>
> A. Yes.
>
> Q. Where would that be?
>
> A. It could leak from the tank, could leak from the bottom.

R. 636 (Hinkle Depo, 33:3-13).

Mr. Hinkle testified that water can leak if couplers or hoses break down from normal wear and tear. Mr. Hinkle testified that residual water can leak if a hose or the return basin is not

properly attached. R. 637 (Hinkle Depo, 38:18-39:25). There are two basins that hold the liquids, one clean, the other dirty. Mr. Hinkle testified about the basins as follows:

> Q. Have there been occasions, Mr. Hinkle, when you have arrived at one of these self-service kiosks with the intent of servicing the machines and you've pulled them out and they haven't been cleaned?
>
> A. Yes.
>
> Q. Have there been times when you've pulled these machines out and there is still water in the basin?
>
> A. Yes.
>
> Q. Have you had times where there has been -- and maybe you don't notice this, I don't know what you do -- but has there been water in the hoses?
>
> A. Yes.
>
> * * *
>
> Q. Has the manner in which clean water is put into the lower basin changed since 2013?
>
> A. No.
>
> Q. And the way that that's done, as I understand it is, is there a return basin -- well, let's me ask you: What do you call that return bucket or basin?
>
> A. Reservoir bucket.
>
> Q. So the reservoir bucket is where the dirty water comes in?
>
> A. Yes.
>
> Q. And in order to put the cleaning solution into the lower basin, that dirty water reservoir has to be removed?
>
> A. Yes.

Q. And the way that that's removed is there is a -- well, how is it attached to the machine?

A. A metal bracket.

Q. So the metal bracket is removed --

A. Released.

Q. -- released, and then the reservoir basin is taken off, and then the clean-water solution is put into the lower basin, correct?

A. Yes.

Q. And then the reservoir bucket or basin is then put back on the machine and the bracket is replaced?

A. Yes.

Q. At any point in time when you've serviced machines after they've been returned have you seen machines where the bracket on the reservoir bucket has not been put back on securely?

A. Yes.

Q. Have you seen situations where it's not been put on at all?

A. Yes.

Q. I'm assuming you've seen situations where it's maybe not even been there?

A. Yes.

Q. And have you seen situations where there's been water in the reservoir bucket?

A. Yes.

R. 637-638. (Hinkle Depo, 40:11-22, 41:17-43).

In responding to questions from Wal-Mart's counsel regarding leaks, Mr. Hinkle testified as follows:

Q. (BY MS. MULLER) Now, we talked about that there's different ways that a machine could leak water. If a machine is picked up -- let's say a machine is returned to the store, and it has water that's not been completely emptied out of it, if the machine is picked up and tilted, how likely is it that water is going to come out?

MS. MAGNELLI: Object to form.

MS. MULLER: Let me ask this differently.

Q. (BY MS. MULLER) Let me first ask you this: Let's say a machine has been returned to the store, the reservoir basin -- well, all of the buckets that could contain water have been emptied, but maybe there's some residual drops of water -- if that machine is picked up and tilted, would you expect any water to come out of that machine?

MR. BUSH: Objection; lack of foundation, incomplete hypothetical.

Q. (BY MS. MULLER) You can go ahead and answer.

A. Oh, answer?

Q. Yes.

A. Yes.

Q. You would expect that water could still come out, some of the residual?

A. Yes.

Q. Have you lifted up machines and tilted them before?

A. Yes.

Q. And have you had water come out of them when you've tilted them?

A. Yes.

Q. So if there's more than just some residual water -- and let's say a customer had not emptied it after using it -- and that machine is picked up and tilted, then, again, would you expect water to come out of it?

A. Yes.

Q. Now, if the machine is not lifted up and not tilted, but is just pulled to be transported between the kiosk and a vehicle, in your experience, when you've pulled these machines, have you had any water that's ended up on the floor?

A. No.

Q. When you're servicing the machine do you look for potential leaks?

A. Yes.

Q. And when you've been servicing the machines, have you found problems that have indicated that there's a leak?

A. Yes.

Q. And on those machines when you've transported them -- and when I'm talking about "those machines," I'm talking about the ones that you've identified these potential leaks -- when you've transported them from the kiosk to your vehicle, have you noticed any water that's ended up on the floor?

A. Yes.

R. 650-651 (Hinkle Depo, 92:20-95:1).

The record reflects that the rental process of Rug Doctor machines at Wal-Mart was self-serve and unsupervised. No Wal-Mart employee had a responsibility to interact with either Mr. Hinkle or customers renting Rug Doctor machines from the kiosk. R. 594, 603 (Walker Depo, 19:12-20:4, 55:2-23). That necessarily meant that no employee would be responsible to inspect the Rug Doctor machines to determine if they were clean or dirty upon a rental return. R. 603 (Walker Depo, 55:2-23). No Walmart employee was responsible to determine if a Rug Doctor

machine still had liquid in it when rented, or returned. *Id.* No Wal-Mart employee was responsible to inspect the Rug Doctor machines to determine if they leaked. *Id.*

Rug Doctor split the rental and cleaning product fees with Wal-Mart. R. 633 (Hinkle Depo, 23:23-24:6). In the typical arrangement with other stores, Mr. Hinkle would provide training to store employees who were involved in the rental and return process. R. 642 (Hinkle Depo, 58:5-18). Training for the employee-assisted rental process included how to operate the machine, how to fill out paperwork, what chemicals to use, and how to sell the chemicals. *Id.* Mr. Hinkle testified that he provided no training to the Overland Wal-Mart personnel nor was he ever asked by anyone at that location to provide training. R. 642 (Hinkle Depo, 27:21-24, 59:13-22).

2. <u>The Accident.</u>

On July 24, 2013, Diane Brooks went to Wal-Mart on Overland Road in Boise, Idaho to buy several bags of wood chips. R. 315 (Brooks Depo, 40:19-41:1). Ms. Brooks entered the store through the front and, upon finding the garden area of the store locked, she was directed to the customer service department for information about wood chips. R. 315-316 (Brooks Depo, 41:22-42:5). At the customer service department, a Wal-Mart employee, Johnathan Steele, agreed to assist her in finding wood chips. R. 316 (Brooks Depo, 42:5-9). As Mr. Steele escorted Ms. Brooks along the front of the store near the cashiers, Ms. Brooks slipped and fell. R. 316 (Brooks Depo, 42:10-12).

Subsequent investigation by Wal-Mart employees documented that the Ms. Brooks had slipped on puddle of water. Mr. Steele saw water on the floor. R. 579. Jamie Oster, a Wal-Mart

employee who responded to Ms. Brooks' fall, noted that "when arriving there Diane was laying on the floor in front of the Rug Doctor. Water from a Rug Doctor machine was on the floor near her legs." R. 452 (Oster Depo, 18:25-19:8). When asked how she determined where the water came from, Ms. Oster stated "[f]rom what I remember the way the water was on the floor, or the liquid substance that we're talking about, it appeared as to have come towards the Rug Doctor Machine, the way it was running on the floor." R. 456 (Oster Depo, 36:9-18). When the store manager, Jason Walker, arrived, he also noticed Ms. Brooks laying in water. R. 477 (Walker Depo, 25:2-11).

The incident was captured on video. The video reflects that approximately ten minutes before Ms. Brooks slipped and fell, another Wal-Mart customer ("the Renter") had initiated the Rug Doctor rental process. *See*, Video Excerpt, 0:00-5:35, DVD marked as Ex. A to Bush Aff. in Opp. to Defs. MSJs. The Renter pulled a Rug Doctor machine out of the bin, and then lifted, carried and tilted the machine into an empty shopping cart, albeit with some difficulty. *Id.* The Renter then left the area. *Id.*

Approximately six minutes after the Renter left the area, the video shows Ms. Brooks walking down the aisle way accompanied by Mr. Steele. *Id.* Her right foot slipped and she fell to the ground. *Id.* A screen shot photograph was made from the video showing where the Renter lifted, tilted and placed the Rug Doctor machine into the shopping cart. R. 675. A similar screen shot photograph was made of the location where Ms. Brooks' right foot first began to slip. R. 676. An overlay of those photographs reflected that the location of Ms. Brooks' incident was

essentially in the exact spot where the Renter lifted and tilted the Rug Doctor machine into the shopping cart, a fact noted by the district court. R. 895.

Ms. Brooks suffered, *inter alia*, a serious and permanent knee injury which required surgery and ultimately, a knee replacement. R. 318, 321-322 (Brooks Depo, 53:4-19, 62:1-22, 63:14-64:23, 67:4-68:21).

3. Wal-Mart Safety Policies.

Mr. Walker conceded that Wal-Mart customers had a right to expect that the Overland Wal-Mart would provide a safe environment. R. 486 (Walker Depo, 60:9-61:19). He further conceded that in doing so, it was incumbent on Wal-Mart to anticipate slip and fall areas before slip and fall accidents occurred. *Id.* Specifically, Wal-Mart's "Slip, Trip and Fall Guidelines" in place at the time of Ms. Brooks fall required Wal-Mart employees to "[l]ocate and maintain floor mats in areas where liquids can cause a slip and fall hazard such as in produce, in front of the bagged ice freezers and the vestibule." R. 487 (Walker Depo, 62:23-63:16). During his deposition, Mr. Walker elaborated on this policy as follows:

> Q. My question is this: If I read this guideline correctly, one of the things that it's asking the stores to do is to locate areas where liquids can cause a slip-and-fall hazard, correct?
>
> A. Correct.
>
> Q. And that's to locate or anticipate those areas before a slip-and-fall actually occurs, fair?
>
> A. Yes.

* * *

Q. Would you agree that the safety protocol at Walmart is to continually anticipate areas of the store which can present potential slip-and-fall hazards?

A. Yes.

Q. And that's particularly true, is it not, in what I think your policies refer to as "high-traffic areas"?

A. Yes.

R. 487 (Walker Depo, 63:17-24, 65:8-15).

Mr. Walker testified that he did not know if there was a Wal-Mart employee responsible to assess whether the Rug Doctor machines could affect the safety environment for customers. R. 482 (Walker Depo, 43:1-5). In fact, Wal-Mart stated in discovery that it had "no personal knowledge" as to how the rental process worked. R. 672-673. Mr. Walker admitted that he does not know how Wal-Mart could have assessed whether the Rug Doctor machines posed a potential slip and fall hazard without knowing if the machines could leak or spill water during the rental process. R. 489 (Walker Depo, 70:3-16).

All Wal-Mart employees are required to keep an eye out for safety type issues in areas they work and perform visual "safety sweeps." R. 481-483 (Walker Depo, 40:3-10, 44:2-9, 46:25-47:6). Among other things, Wal-Mart's maintenance associates were tasked with the specific responsibility of performing "safety sweeps" of high-traffic areas and cleaning up spills throughout the day. *Id.* All other Wal-Mart associates are tasked with the responsibility to perform visual "safety-sweeps" as they are performing their regular job duties in the areas they have been assigned by being alert and looking around. *Id.* Essentially, Wal-Mart operated on a

clean-as-you-go method with each employee being constantly vigilant for spills and other safety issues. R. 481-483, 485 (Walker Depo, 40:3-48:24, 55:19-56-23). However, Wal-Mart kept no record as to whether routine sweeps were actually done, nor is there any evidence that Wal-Mart keeps records of where spills were located and cleaned. R. 484 (Walker Depo, 50:8-11).

II. ISSUES PRESENTED ON APPEAL

The district court determined, in the proceedings below, that Rug Doctor machines could leak or spill liquid onto the floor of the Wal-Mart store which would create a potentially dangerous condition. The district court also found, in the proceedings below, that there were triable issues of fact as to whether it was reasonably foreseeable to Rug Doctor that the machine would or could leak or spill liquid during the self-serve rental process. The district court, however, refused to apply those findings to Wal-Mart.

The first issue on appeal is whether Wal-Mart is charged with knowledge of the foreseeable hazards created by the products and self-serve operations it selects.

The second issue on appeal is, assuming the district court properly applied the law, whether it erred by failing to find material issues of fact as to Wal-Mart's constructive notice of the particular spill in light of the evidence.

III. STANDARD OF REVIEW

On an appeal of a district court's decision granting a motion for summary judgment, the Idaho Supreme Court uses the same standard as the trial court when ruling on motions for summary judgment. *Shea v. Kevic Corp.*, 156 Idaho 540, 544, 328 P.3d 520, 524 (2014). "Under I.R.C.P. Rule 56, summary judgment is proper 'if the pleadings, depositions, and admissions on

file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting I.R.C.P. Rule 56(c)). The moving party bears the initial burden of establishing there are no genuine issues of a material fact such that it is entitled to judgment as a matter of law. *Id.* (citations omitted). If the moving party meets that burden, the burden shifts to the nonmoving party who then must be able to establish that there are indeed genuine issues of material fact. *Id.* (citations omitted). In making its decision, the reviewing court must "construe the record in the light most favorable to the [nonmoving party], [and draw] all reasonable inferences in that party's favor." *Id.* (citations omitted). However, the nonmoving party must be able to set forth specific facts establishing a genuine issue for trial, rather than merely relying on allegations from the pleadings. *Shea v. Kevic Corp.*, at 544-545, 328 P.3d at 524-525 (citations omitted). The nonmoving party may establish a genuine issue of material fact through circumstantial evidence, but may not rely upon a "mere scintilla of evidence." *Id.* at 545, 328 P.3d at 525 (citation omitted).

The reviewing court exercises "free review in determining whether a genuine issue of material fact exists." *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 776, 251 P.3d 602, 604 (Ct. App. 2011). This Court also exercises de novo review over district court decisions related to motions for reconsideration. *Shea*, 156 Idaho at 545, 328 P.3d at 525.

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IV. ARGUMENT

A. Wal-Mart is Charged with Knowledge of the Foreseeable Hazards Created by the Products and Self-Serve Operations it Selects.

1. Wal-Mart has a General Duty to Keep the Premises Safe and Exercise Reasonable Care to Discover Potentially Dangerous Conditions.

When a negligence cause of action is based on premises liability, the element of duty depends on the status of the injured person in relation to the landowner, i.e., invitee, licensee (social guest), or trespasser. *Shea v. Kevic Corp.*, 156 Idaho 540, 548, 328 P.3d 520, 528 (2014)(quotations omitted). The status of invitee is given to those persons who enter the premises of another for purposes that convey "a business, commercial, monetary, or other tangible benefit" to the owner. *Holzheimer v. Johannesen*, 125 Idaho 397, 400, 871 P.2d 814, 817 (1994). Landowners are charged with a superior knowledge of their premises and the possible dangers located there, as compared to their invitees. *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 778, 251 P.3d 602, 606 (Ct. App. 2011). As such, landowners owe invitees the highest duty of the three statuses, which is "to warn of hidden or concealed dangers and to keep the land in a reasonably safe condition." *Shea*, 156 Idaho at 548, 328 P.3d at 528. (quotations omitted). This duty extends to warning and protecting against those hidden or concealed dangers that the landowner knows of, or that the landowner should be aware of through the exercise of reasonable care. *Walton v. Potlatch Corp.*, 116 Idaho 892, 899, 782 P.2d 229, 236 (1989). The Plaintiff may present as evidence of the Defendant's negligence, evidence that a store owner

failed to follow its own voluntary safety standards. *See, Wal-Mart Stores, Inc. v. Tuck*, 671 So.2d 101 (Ala. Civ. App. 1995).

In this case, the district court erroneously accepted Wal-Mart's argument that its duty was limited to whether or not it had actual or constructive notice of the particular spill which caused Ms. Brooks to fall. The district court granted summary judgment to Wal-Mart even though it found material questions of fact as to whether the rental and use of Rug Doctor machines could lead to liquid on the floor thus creating a hazardous condition. R. 892. The district court granted summary judgment even though it also found material questions of fact as to whether the creation of the hazardous condition was a foreseeable result of the self-service rental process. R. 893. These findings were limited to Rug Doctor.

The district court rejected Ms. Brooks' argument that Wal-Mart had a duty to understand whether the Rug Doctor machines allowed into its stores could leak or spill water onto its floors during the unsupervised self-serve rental process, finding that Wal-Mart had no obligation to inform itself as to the potential risks of the very operating process which it required. R. 897-898. Appellant contends that the district court erred.

2. Under Current Premises Liability Law in Idaho, Wal-Mart must be Liable for Hazardous Conditions Which Arise From Products and Operating Methods Which It Chose.

Wal-Mart, as the store owner, necessarily controls what products and/or services will be made available to its customers within the confines of its store. There is no dispute that Wal-Mart made the choice to bring Rug Doctor carpet cleaning machines into its store. The record reflects that Rug Doctor machines are available at many retailers in the Treasure Valley. That

includes, for example, Albertson's or Fred Meyer. The typical method of delivery is through customer service where a store employee is involved in the rental process. Those employees are trained by Rug Doctor as to how the machine operates and they supervise both the rental and the return of the machine.

At Wal-Mart, however, the rental process was automated, unsupervised and self-service. No Wal-Mart employee is involved. That includes the return process. No Wal-Mart employee inspects the Rug Doctor machines before rental or upon return to ensure that it is free of residual liquid. No employee inspects or tests the machine to determine if it is leaking. This unsupervised self-service process was unlike any other retailer which offered Rug Doctor Machines for rent and it was only done at Wal-Mart.

Spencer Hinkle, the Rug Doctor sales representative, testified that he did not provide any training to Wal-Mart employees. Nor did Wal-Mart request that he provide any training.[2] He also testified that liquid can escape containment and leak in various ways. For example, liquid can leak from nozzles on the bottom of the machine. Liquid can leak from couplers or hoses that wear out or are not properly attached. He has seen liquid left on the floor of a retail establishment after wheeling it to his car for service. Mr. Hinkle testified that customers do not always clean the machines after use and, when returned, he has found residual water still in the basins. He testified that water will leak from the machine if tilted or turned.

[2] The Vendor Agreement requires training. The record is silent as to whether the lack of training was because Wal-Mart did not actually require it or if Rug Doctor failed to perform it.

The entire incident was captured on video, including the time period before and after. The video evidence reflects that a customer rented a rug doctor machine which was then carried, lifted and tilted into a shopping cart. Screen shot photographs of the location where the customer was putting the machine into the shopping cart were compared, on an overlay, with the location where Ms. Brooks' foot first began to slip. The locations were essentially exact.

In granting summary judgment to Wal-Mart, the district court stated that "[i]n this case, no evidence has been provided to establish that Wal-Mart knew, or *could have known*, that the Rug Doctor machines or kiosk could or would leak". R. 1196. (emphasis added). As to the whether the spill was the foreseeable result of the unsupervised self-serve rental process which Wal-Mart specifically required, the district court stated:

> Even if true, the Court is still left with the issue that the water potentially came from numerous sources. That argument could equally be stated, "the potential for liquid on the floor in the Wal-Mart store is the direct and foreseeable consequence of allowing people in the Wal-Mart store." The Court does not choose this example to be flippant, but to show how irrelevant it is to the law that is applicable. <u>The decision to use the self-serve rental model</u>, whether it be Wal-Mart's decision or Rug Doctor's decision, <u>is not what caused the water to be on the floor.</u>

R. 1195 (emphasis added).

The district court's reasoning on Wal-Mart's motion cannot be reconciled with the court's findings as to Rug Doctor. When denying Rug Doctor's motion for summary judgment, the district court clearly stated that if the liquid which caused Ms. Brooks to fall came from a Rug Doctor machine, it did so during the rental process while the machine was in the control of the renting customer. R. 892, 894-895. The district court then stated that "Rug Doctor's rental

process anticipated that third parties would be in control of the Rug Doctor machines," concluding that "[w]hile the rental and use of the machines could create a hazardous condition, a rug cleaner is not tantamount to dynamite or some other ultrahazardous activity." R. 892-893 (emphasis added).

Thus, as the district court found, if water can leak or spill from the machines during the self-service rental process, "the rental and use of the machines could create a hazardous condition." That is not an "irrelevant" consideration as to Wal-Mart because the record is undisputed that Wal-Mart required and/or approved of the self-serve rental process with specific intent that no Wal-Mart employees would be involved in the process. Whether there were other potential sources of water simply underscores the factual issues in play. Ms. Brooks put forth admissible evidence to support her theory as to how the puddle came to be on the floor and the district court agreed that a jury should determine if that evidence was persuasive. If Wal-Mart contends that the water came from some other source then it carries that burden of proof.

The relevance is apparent because it directly affects whether Wal-Mart should have known of the potential hazards associated with the self-serve operation that it chose. By focusing solely on whether Wal-Mart had notice of the specific spill, the district court failed to address the broader duty of Wal-Mart to keep its premises in a reasonably safe condition and to exercise reasonable care to discover dangerous conditions which could be hidden or concealed. *See, Shea v. Kevic, Walton v. Potlatch Corp., supra.*

Ms. Brooks contends that Wal-Mart has to be constructively on notice of hazards which arise from products which it offers to customers through self-service operations. Constructive

notice is not an unfamiliar concept in the law. This court defined the term some 85 years ago, holding that "constructive knowledge is that knowledge which reasonable diligence would have disclosed." *See, State v. Carlson*, 50 Idaho 634, 637, 298 P. 936, 937 (1931). Thus, Wal-Mart's duty to exercise reasonable care necessarily includes that it act with reasonable diligence to discover that which could be known.

Here, even though Wal-Mart brought the Rug Doctor's machines into its store, it admittedly failed to perform any assessment as to whether or not carpet cleaning machines could or would leak. Wal-Mart's failure to assess and understand the various ways in which water can spill or leak from a Rug Doctor machine so as to appreciate the risk that water can spill or leak onto the floor is not acting with due diligence. Indeed, it is evidence that Wal-Mart failed to exercise reasonable care to keep its premises safe and discover potentially hazardous conditions which it should have been aware of. [3]

Wal-Mart required that the machines be offered to customers through an automated, self-serve rental process that was wholly unsupervised by any Wal-Mart employee. Wal-Mart admits that it has "no personal knowledge" of, nor control over, the process. Thus, Wal-Mart failed to understand that the hazardous condition, i.e., water spilling or leaking onto the floor, was a foreseeable result of its chosen operating method. Again, that is evidence that Wal-Mart failed to exercise due diligence and reasonable care to keep its premises safe.

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[3] Even though Wal-Mart failed to asses if the machines could leak or spill water, common sense dictates that Wal-Mart should have appreciated the risk

Wal-Mart uses its intentional ignorance as a defense, claiming that it did not know, nor could have known, that the machines would leak and the district court agreed. However, it defies reason to hold that a retailer such as Wal-Mart does not have an obligation to understand and appreciate the potential risks and hazards associated with products it sells and operating methods it requires. In light of the facts, and given the findings already made by the district court, Ms. Brooks submits that the district court erred in granting summary judgment to Wal-Mart. A reasonable jury could conclude, based on the facts, that Wal-Mart breached its duty to keep its premises reasonably safe because it failed to educate itself, or understand the risks associated with the self-serve rental of carpet cleaning machines.

3. The District Court Erred in Distinguishing the Law as to Negligent Operating Methods and Holding that the Spill was an Isolated Occurrence.

When Ms. Brooks asked the district court on reconsideration to review a line of cases that held premises owners liable for the their flawed operating methods, the district court chose to distinguish the case law as follows:

> However, this case is not like either *McDonald* or *Jasko* where there was evidence the owner of the premises had a business method or model in place whereby it was foreseeable that slippery detritus could be on the floor, causing a dangerous condition. In this case, no evidence has been provided to establish that Wal-Mart knew, or could have known, that the Rug Doctor machines or kiosk could or would leak. The fact that Wal-Mart did not ask or was not informed about that potential by Rug Doctor does not put this case in the same category as *McDonald*, *Jasko* or *Shea v. Kevic*. (citation omitted). There is insufficient evidence in the record at summary judgment to establish that this case is anything other than an isolated incident, and Wal-Mart had no knowledge of the substance on the floor. "Even with a recurring or continuing

> condition, the invitee must show that the landowner had actual or constructive knowledge of the dangerous condition." (citation omitted). Wal-Mart had no knowledge of the substance, and Plaintiff has not put forward a scintilla of evidence that Wal-Mart did or should have known, or that any operating method created the puddle. Arguments are not evidence.

R. 1195-1196. The district court went to state that it "still has not been provided with any evidence of what caused the slippery substance to pool on the floor, or when the substance was introduced to the floor." R. 1196.

Again, the district court's reasoning as to Wal-Mart cannot be reconciled with its findings as to Rug Doctor. First, the district court already found, at least as to Rug Doctor, that it was for the jury to determine if the liquid on the floor came from the Rug Doctor machine during the self-serve rental process. The video evidence reflected how and when the leak or spill would have occurred. Thus, the district court was clearly provided with "evidence as to what caused the slippery substance to be on the floor" as well as evidence as to "when the substance was introduced to the floor." That evidence was apparently sufficient to find material issues of fact as to Rug Doctor. Ms. Brooks cannot reconcile why that same record was determined, by the district court, to be no evidence at all as it related to Wal-Mart.

Moreover, the district court incorrectly interpreted the operating method cases as requiring proof that Wal-Mart had actual knowledge of the specific substance. Where an operating method creates a dangerous condition, the court looks to whether the condition is continuous <u>or an easily foreseeable result of the process</u>. In *All v. Smith's Management Corp.*,

109 Idaho 479, 481, 708 P.2d 884, 887 (1985), this Court cited cases from Wyoming and Colorado for the following proposition:

> "The basic notice requirement springs from the thought that a dangerous condition, when it occurs, is somewhat out of the ordinary . . . . In such a situation the storekeeper is allowed a reasonable time, under the circumstances, to discover and correct the condition, unless it is the direct result of his (or his employees') acts. However, when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves. Then, actual or constructive notice of the specific condition need not be proved."

All, 109 Idaho at 481, 708 P.2d at 886. (quoting *Buttrey Food Stores Division v. Coulson*, 620 P.2d 549, 552-53 (Wyo.1980); *Jasko v. F.W. Woolworth Co.*, 177 Colo. 418, 494 P.2d 839, 840 (1972); *Mahoney v. J.C. Penney Co.*, 71 N.M. 244, 377 P.2d 663, 673 (1962). (emphasis added). The *All* Court then stated that the Plaintiff did not have to prove that the Defendant had actual or constructive notice of the specific condition that caused her injury. *Id.* at 482, 708 P.2d at 887. Rather, the burden was to prove actual or constructive notice of the general condition (formation of potholes) which were continually occurring. *Id.*[4]

The district court's interpretation of the case law, and *Shea v. Kevic*, was that Ms. Brooks still needed to prove notice of the actual injury producing condition. R. 1196. However, in *Shea,* this Court stated that "[i]f Shea is able to establish that Kevic had knowledge that ice generally forms at the car wash exit on cold days, she does not need to prove that Kevic had knowledge of the specific ice buildup that caused her fall. *Id.* at 551, 328 P.3d at 531. While the Court also

[4] The Court did not define "easily foreseeable" nor has Ms. Brooks found any Idaho cases that do so.

said that the distinction between an isolated and continuing condition does not eliminate the invitee's burden to establish the landowner's knowledge, *Shea*, 156 Idaho at 548-549, 328 P.3d at 528-529, that related to the general condition rather than the specific condition which caused the injury.

The general condition at issue here is that Rug Doctor machines can and do leak or spill liquid which may end up on the floor during an unsupervised self-serve rental process. Again, Ms. Brooks argued that Wal-Mart was charged with constructive notice of those facts because it chose the product and delivery method.

The facts showing that Wal-Mart made no effort to understand the foreseeable risk of harm were before the district court. For example, as noted, Ms. Brooks provided the following interrogatory answer:

> INTERROGATORY 17: Please describe the process that existed in July of 2013 for rental of a Rug Doctor machine. This interrogatory seeks information about how a customer would rent a Rug Doctor machine and the process for returning the machine, including whether any rental agreements were required.
>
> ANSWER NO. 17: Wal-Mart objects to this interrogatory on the grounds that it is unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objections, <u>Wal-Mart does not have personal knowledge of the process for renting a machine. Wal-Mart did not design the rental process, did not facilitate the rental process, and had no control over the rental process</u>.

R. 672-673.

This is a significant admission. The district court found material questions of fact as to whether the operating process created a foreseeable risk of harm. Wal-Mart has conceded that it

had no knowledge of, or control over, the very process which it required and/or approved. Thus, it plainly failed to exercise reasonable care to discover the foreseeable risk.

Ms. Brooks pointed the district court to the testimony of Mr. Walker, the store manager, who agreed, in his deposition, that Wal-Mart had an obligation to provide a safe environment to its customers. He agreed that in discharging that obligation, Wal-Mart needed to anticipate locations where a potential hazard, such as liquid on the floor, might occur. R. 486- (Walker Depo, 61:5-15-19). He agreed, consistent with Wal-Mart policy, that assessing such areas should be done prior to a slip and fall occurring. R. 486-487 (Walker Depo, 61:20-63:24), *see also*, R. 669. Yet, there is no evidence that Wal-Mart undertook an assessment of the product or the operating method. To the contrary, it took a hands off approach and simply "cleaned up" if spills occurred. [5]

Wal-Mart's own policies are consistent with Idaho law in that they recognize the duty to keep premises safe, and to discover hazardous conditions. For retailers, that has to include an assessment of products which it brings into the store and the operating method by which those products will be offered. If this Court compares Mr. Walker's testimony to Wal-Mart's admission that it had no "personal knowledge" of the rental process, it seems like a logical if not easy conclusion that genuine issues of fact exist as to whether Wal-Mart *should have known* about risks associated with its chosen operating method.

[5] As discussed later in this brief, Wal-Mart has a clean as you go policy. In other words, periodic sweeps are done and employees are trained to clean spills immediately if they see them. However, no record is kept by Wal-Mart as to where liquid or other spills occur or whether sweeps are actually done. Ms. Brooks argued that she was entitled to challenge the credibility of Wal-Mart's position that there were no spills in the area because Wal-Mart cannot document that its policy was actually enforced or applied.

There is enough evidence for a jury to charge Wal-Mart with constructive notice of the dangerous condition stemming from its selected method of operation.

a. Self-Service Methods of Operation

While Idaho courts have addressed the method of operation scenarios, Appellant's counsel has found no Idaho law directly on point for purely self-service methods of operation. Nor has counsel identified any Idaho cases which define liability where the self-serve operating methods of a proprietor are such that dangerous conditions are "easily foreseeable." *See, McDonald v. Safeway Stores, Inc.,* 109 Idaho 305, 707 P. 2d 416 (1985) (regarding the employee-assisted serving of ice cream to customers as its method of operation); *Shea v. Kevic Corp.,* 156 Idaho 540, 328 P.3d 520 (regarding a car wash operating method leading to the continuing and/or recurring formation of ice from water dripping off a recently washed car); *compare, All v. Smith,* 109 Idaho 479, 708 P.2d 884 (1985) (regarding the continuing and/or recurring condition of pothole formation, rather than method of operation).

However, the state of Washington some years ago addressed the modern techniques of merchandising and agreed that some modification of the traditional rules of premises liability was necessitated. In *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (Wash. 1983), the Washington Supreme recognized the changing environment and ultimately carved out an operating method exception which is similar to and based upon the same line of authority and reasoning utilized by this Court in *All v. Smith's Management Corp.*, 109 Idaho 479, 481, 708 P.2d 884, 887 (1985). What is pertinent about the *Pimental* decision is the courts discussion of the various applications of the operating method rule and the rationale or reasoning behind it.

The *Pimentel* court first discussed and rejected an approach which essentially transferred the burden to the defendant to disprove negligence where the plaintiff proves a substantial risk of injury related to the business method. It then addressed two other approaches found in other jurisdictions:

> The second approach is more moderate in that it does not shift the burden of disproving negligence to the defendant. It does, however, eliminate the requirement that the plaintiff establish actual or constructive notice of a specific unsafe condition. The rationale for this rule was explained in *Jasko v. F.W. Woolworth Co.*, 177 Colo. 418, 420-21, 494 P.2d 839 (1972).
>
> The basic notice requirement springs from the thought that a dangerous condition, when it occurs, is somewhat out of the ordinary. . . . In such a situation the storekeeper is allowed a reasonable time, under the circumstances, to discover and correct the condition, unless it is the direct result of his (or his employees') acts. However, when the operating methods of a proprietor are such that dangerous conditions are continuous <u>or easily foreseeable</u>, the logical basis for the notice requirement dissolves. Then, actual or constructive notice of the specific condition need not be proved.

Pimentel v. Roundup Co., 100 Wn.2d 39, 46-49, 666 P.2d 888, 892-893. (emphasis added).

The *Pimentel* Court adopted a new rule call the "Pimentel" exception, noting:

> 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.

Id.

In a case reversing a grant of summary judgment, and applying the *Pimentel* rule, the Washington Court of Appeals defined self-service areas as locations where customers serve themselves, goods are stocked, and customers handle the grocery items, or where customers otherwise perform duties that the proprietor's employees customarily performed. *O'Donnell v. Zupan Enters., Inc.*, 107 Wn. App. 854, 859, 28 P.3d 799, 801 (2001), review denied, 145 Wn.2d 1027 (2002)); (citations omitted).

The court summarized the "self-service," or *Pimentel* exception, as applying 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. If the exception applies, the law charges the proprietor with actual knowledge of the "foreseeable risks inherent in such a mode of operation;" the proprietor must take "reasonable precautions" against the creation of hazardous conditions that this mode of service might cause. The court then identified the elements required to apply the exception, to wit: (1) the check-out operation 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. *Id.* at 107 Wn. App. 858, 859, citing *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 653, 654, 869 P.2d 1014 (1994); *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 456, 805 P.2d 793 (1991); *Arment v. Kmart Corp.*, 79 Wn. App. 694, 698, 902 P.2d 1254 (1995).

Ms. Brooks would respectfully submit that the record before the Court establishes all of the noted elements. The rent/return process was plainly self-service. The district court has already determined that questions of fact exist as to whether the process could create a reasonably foreseeable hazardous condition, and the hazardous condition that caused the injury was within the self-service area. The issue here is what does the Court do with a retailer who chooses not to understand or assess the foreseeable risks associated with the product it offers and the self-serve method of delivery. There is no dispute that the self-serve method is Wal-Mart's selected business operation. It was approved by Wal-Mart and arguably required as a condition of allowing Rug Doctor to offer its machines for rent. Wal-Mart clearly profits from the process as it retains a percentage of both the machine rental and the chemical purchase. Ms. Brooks would simply contend that conscious ignorance is a choice Wal-Mart made which reflects it failed to exercise reasonable care. As in the *O'Donnell* case, Wal-Mart should be charged with knowledge of the foreseeable risks inherent in its selected self-serve mode.

B. **The District Court Erred by Failing to Find Material Issues of Fact as to Wal-Mart's Constructive Notice of the Particular Spill in Light of the Evidence.**

1. **Even if the District Court Correctly Concluded that this was an Isolated Incident, it Erred by Not Finding Questions of Fact as to Wal-Mart's Actual or Constructive Knowledge.**

When the dangerous condition is an isolated incident, it is the Plaintiff's burden to show the Defendant had actual or constructive notice of the specific condition causing injury. *Shea*, 156 Idaho at 548-549, 328 P.2d at 528-529. Constructive knowledge of the dangerous condition

may be shown by demonstrating that an employee of the store defendant was in the immediate vicinity of the fall and had an opportunity to correct the hazardous condition. *See, Benefield v. Tominich*, 708 S.E.2d 563 (Ga. Ct. App. 2011).

Wal-Mart does not keep records of when and where employees see and clean up spills that occur. Wal-Mart does not keep records as to when routine sweeps of the store are conducted, if at all. Mr. Walker testified, however, that Wal-Mart employees are trained and tasked to be alert and watch for spills and/or safety type issues such as water on the floor.

At the time of her fall, Ms. Brooks was being escorted by a Wal-Mart employee, Jonathon Steele. Mr. Steele was presumably trained to be alert and constantly look for safety type issues. However, he did not notice the spill, or, if he did, he did not warn Ms. Brooks prior to the slip and fall. R. 364 (Brooks Depo, 154:16-19). In addition, the video of the incident shows at least one Wal-Mart employee pass through the area where Ms. Brooks slipped and fell approximately five and a half minutes before the incident. This is reflected at 00:6:50 – 00:7:02 on the excerpt of the video. *See*, DVD marked as Ex. A to Bush Aff. in Opp. to Defs. MSJs. The employee does not appear to scan the floor looking for hazards and she did not notice the spill, or, if she did, she did not clean it up.

Thus, when looking through the lens of Wal-Mart's heightened-vigilance policy, a jury could reasonably conclude that the Wal-Mart employee who walked by the area of the spill prior to the fall should have seen the liquid and cleaned it up. In addition, Mr. Steele, who accompanied Ms. Brooks, should have seen the liquid on the floor and warned Ms. Brooks about that condition.

Because of Wal-Mart's policy, and because at least two Wal-Mart employees were in the immediate vicinity of the dangerous condition, there is enough evidence for a jury to conclude that Wal-Mart had constructive knowledge of the specific dangerous condition.

C. This Court Should Define Easily Foreseeable To Require Retailers Such as Wal-Mart to Assess and Understand The Risks Associated with Products and Operating Methods They Choose.

If the current state of Idaho law is such that one cannot conclude, under the circumstances of this case, that Wal-Mart is constructively charged with knowledge of the hazards and foreseeable risks associated with products and operating methods it allows into its store, then it is time to revisit, yet again, whether modern merchandising methods require traditional common law to be modified. Idaho law needs to address the issues which surround the unassisted, self-serve, automated business method. Retailers who invite customers onto their premises, and profit from that invitation, should not be encouraged to plead conscious ignorance as a defense when their chosen method of operation leads to injury.

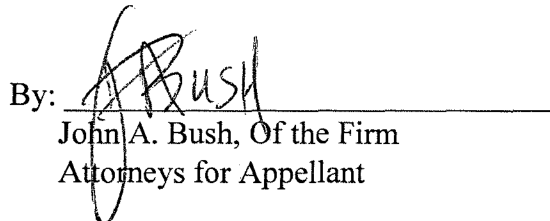
Ms. Brooks has found no Idaho case law which addresses what the "easily foreseeable" term means as it relates to flawed operating methods. Nor has Ms. Brooks found any Idaho case law which addresses the inherent hazards of pure self-serve operating methods. Idaho law should hold that a premises owner is charged with knowledge of the risks associated with the self-serve operating methods he or she chooses. That is consistent with the general duty to provide a reasonably safe premise. That is consistent with the obligation to exercise reasonable care to identify and protect against those hazards which may be concealed or hidden.

V. CONCLUSION

For all the reasons discussed above, there is enough evidence for a jury to charge Wal-Mart with constructive knowledge that its chosen operating method could create a dangerous condition. Additionally, there is enough evidence available for a jury to charge Wal-Mart with constructive knowledge of the specific dangerous condition that caused Ms. Brooks to slip and fall. As such, there are genuine issues of material fact that should have precluded the district court to grant Wal-Mart's motion for summary judgment and dismiss it from the case. Ms. Brooks respectfully requests that this Court reverse the district court's decision to grant Wal-Mart's motion for summary judgment.

RESPECTFULLY SUBMITTED this 7th day of April, 2017.

COMSTOCK & BUSH



By: ______________________
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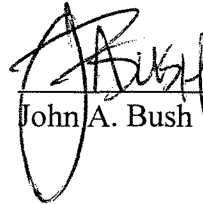
CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2017, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Stephen R. Thomas Mindy M. Willman Moffatt, Thomas, Barrett, Rock & Fields, Chartered 101 S. Capitol Blvd., 10th Floor Boise, ID 83702 *Attorneys for Respondent*	☐ U.S. Mail ☑ Hand Delivery ☐ Facsimile (208) 385-5384 ☑ Email: srt@moffatt.com mmw@moffatt.com



John A. Bush