5-26-2017

Brooks v. Wal-Mart Stores, Inc. Respondent's Brief Dckt. 44634

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

RESPONDENT'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

Stephen R. Thomas, ISB No. 2326
Tyler J. Anderson, ISB No. 6632
Mindy M. Muller, ISB No. 7983
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
999 W. Main Street, Suite 1300
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
srt@moffatt.com
tya@moffatt.com
mmw@moffatt.com
22118.0094

Attorneys for Defendant/Respondent Wal-Mart Stores, Inc.

John A. Bush
COMSTOCK & BUSH
199 N. Capitol Blvd., Suite 500
Post Office Box 2774
Boise, Idaho 83701-2774
Telephone (208) 344-7700
Facsimile (208) 344-7721
jabush@comstockbush.com

Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Page

Cases

Statutes

I. NATURE OF THE CASE

This case involves a premises liability claim that was dismissed on summary judgment for lack of evidence to support a claim for relief. Diane Brooks ("Ms. Brooks") filed suit against Wal-Mart Stores, Inc. ("Wal-Mart") after slipping and falling on July 24, 2013, on an unknown liquid substance in the front end of Wal-Mart store #2508, located at 8300 Overland Road, Boise, Idaho ("Overland store"). This was the first and only incident of its kind at the Overland store. Ms. Brooks did not submit evidence showing where the liquid came from, how long it had been on the floor, or what it was. Nor did she submit evidence establishing a prior history of liquid or a likelihood of liquid being on the particular area of the floor where she fell. Without this evidence, Ms. Brooks cannot establish that Wal-Mart had actual or constructive notice of a dangerous condition and, therefore, cannot establish that Wal-Mart owed her a duty for the purpose of the premises liability claim.

II. COURSE OF THE PROCEEDINGS

Wal-Mart filed a motion for summary judgment, asking the district court to dismiss Ms. Brooks' claim for lack of evidence that Wal-Mart had actual or constructive notice of the liquid on the floor. R. 278-79. In response, Ms. Brooks argued that the liquid on the floor *could* have come from a Rug Doctor machine and that Wal-Mart should be charged with knowledge of the liquid because Wal-Mart decided to use a self-service Rug Doctor kiosk with machines that had a theoretical potential to leak at some unknown point in the future. R. 748, 750-51. Ms. Brooks also argued that Wal-Mart should have discovered the liquid. R. 749-50. Yet she never presented evidence that the machines had ever before leaked in the Overland store

or that there were any prior incidents of liquid on the floor in the area where Ms. Brooks fell. The district court rejected Ms. Brooks' arguments and granted summary judgment in Wal-Mart's favor, concluding that the evidence was insufficient to support a finding that Wal-Mart had actual or constructive notice of the condition that caused Ms. Brooks to fall. R. 897-99.

Ms. Brooks filed a motion to reconsider, again arguing that Wal-Mart should be charged with knowledge of liquid on the floor because it decided to use a self-service kiosk with a theoretical potential to leak. R. 958-59. The district court denied the motion, finding that this is not a case where Wal-Mart created a foreseeable risk of harm by choosing to use a self-service kiosk and that Ms. Brooks failed to meet her burden of proof and present evidence that Wal-Mart had actual or constructive notice of the particular liquid on floor. R. 1195-97.

Ms. Brooks timely appealed.

III. STATEMENT OF FACTS

A. Ms. Brooks Slipped and Fell on a Liquid Substance in Wal-Mart's Overland Store.

On July 24, 2013, in the middle of the day, Ms. Brooks went to Wal-Mart's Overland store to buy some wood chips for her yard. R. 190, p. 40, L. 19 – p. 41, L. 1, p. 41, LL. 19-21; R. 191, p. 45, LL. 1-3.[1] Ms. Brooks had taken a break from work to pick up her car following an oil change, and she decided to stop at the store before returning to work. R. 191 (42:15 – 43:15). It was a hot, dry summer day, and Ms. Brooks wore flip-flops. R. 191 (43:16-23).

[1] This citation can also be written as: R. 190 (40:19 – 41:1, 41:19-21); R. 191 (45:1-3). For brevity and ease of reference, Wal-Mart will use this alternative citation form.

Ms. Brooks entered the Overland store through the main doors on the east end (the general merchandise side) and proceeded to the cash registers to ask for information about wood chips. R. 191 (45:4-10). A cashier directed Ms. Brooks to customer service for assistance. R. 190-92 (41:22 – 42:6; 45:22 – 46:5). Ms. Brooks proceeded down the action alley (aisle) at the front end of the store. R. 192-93 (49:16-25; 50:9-11), R. 213. (This action alley is perpendicular to the cash registers and connects the front two entrances. R. 192-93 (47:3 – 49:15, 50:6-10); R. 213.

Digital Video Snapshot

Capture Size: 704 x 480 pixels

At customer service, Ms. Brooks spoke with an associate who offered to help her find the wood chips. R. 193 (51:14-23). Ms. Brooks and the Wal-Mart associate then left customer service and started walking back down the front end action alley toward the entrance of the store, the route Ms. Brooks had just travelled. R. 193 (50:1-11); R. 213. While walking back down the front end action alley toward the general merchandise entrance of the store, at approximately

3:00:59 p.m., Ms. Brooks slipped and fell. R. 196 (66:9-21); R. 216; R. 219 ¶ 9. She landed on the floor in front of the Primo Water kiosk. R. 192 (48:5-12); R. 194 (54:4-13); R. 216; R. 219-20 ¶¶ 9-10. The Primo Water kiosk is adjacent to the Rug Doctor Kiosk. R. 220 ¶ 10.

B. The Source of the Liquid and How Long It Was on the Floor Are Unknown.

Ms. Brooks did not see any liquid on the floor prior to her fall. R. 193 (51:24 – 52:2). When she slipped, she was looking up and around, not at the floors. R. 193 (52:3-17). After she slipped, Ms. Brooks noticed clear liquid appearing like water on a clean floor. R. 194 (54:17-18; 56:8-21). She does not know where the liquid came from or how long it had been on the floor. R. 195 (59:6-8; 61:23-25). She looked around for the source of the liquid but was unable to find it. R. 194 (56:22 – 57:11). She saw no empty cups and nothing dripping from the Primo Water kiosk. R. 194 (54:15-22; 57:6-11).

The Overland store has surveillance video showing that approximately 38 individuals, some with shopping carts, walked or travelled the immediate area or path of Ms. Brooks' slip and fall in the 25 minutes prior to her slip and fall. R. 220 ¶ 12; R. 227-65. Approximately 10 of these individuals walked or travelled the immediate area or path of the fall in the 7 minutes prior to the fall, after a customer lifted a Rug Doctor machine into a shopping cart. *See* R. 220 ¶¶ 11-12; R. 225, 255-65. None of these individuals slipped or gave an indication that there was liquid on the floor. *Id.* The surveillance video does not show the presence of liquid on the floor, let alone the source of liquid on the floor. R. 220 ¶ 14.

C. Wal-Mart's Overland Store Does Not Have a History of Liquid on the Floor or Other Incidents in the Area Where Ms. Brooks Fell.

The Overland store has no record of anyone reporting liquid on the floor in front of the Primo Water or Rug Doctor kiosks prior to the slip and fall on July 24, 2013. R. 183 ¶¶ 8-10; R. 220 ¶ 15. Nor does it have record of prior problems of water being on the floor in front of either of these kiosks. R. 202 (78:16 – 79:9; 80:1-5). Finally, it has no record of other accidents, including slip and falls, reportedly taking place in front of or near these kiosks before Ms. Brooks' slip and fall on July 24, 2013. R. 183 ¶¶ 8-10; R. 202 (80:6-13); R. 207 (39:21 – 40:8); R. 210-11 (45:9 – 46:16); R. 220 ¶ 15.

D. Rug Doctor Machines Rented from a Self-Service Kiosk Are Not a Source of Liquid on the Floor of Wal-Mart's Overland Store.

In July 2013, the Overland store had a self-service Rug Doctor kiosk from which customers could rent machines to clean carpet at their homes. R. 631 (14:17-19); R. 638 (43:13-19). The kiosk is considered self-service because customers go through the process of renting machines without assistance of Wal-Mart employees. R. 638 (43:13-24). To complete the rental process, a customer enters a credit card and answers questions on a screen. R. 638-39 (43:25 – 44:9; 45:1-7). After the credit card is approved, a door automatically opens, and the customer takes out the machine. R. 638 (44:10-12). Customers typically pull rented machines to transport them from the store to their vehicles. R. 650 (92:11-13).

To use the machine, a customer must first fill a basin with water and a cleaning solution. R. 635 (30:5-12). When the machine is turned on, the water and cleaning solution mixture is sent through nozzles to the bottom of the machine to the carpet. R. 635 (30:13-18).

The mixture is then suctioned up from the carpet to a different basin, called the reservoir bucket. R. 635 (30:19 – 31:10), R. 638 (41:20-23). Customers are instructed to empty any remaining water mixture when they are finished with the machine. R. 652 (99:2-10).

The Rug Doctor machines are regularly serviced by a Rug Doctor representative. R. 630–31 (12:22–13:9). The local representative who serviced the machines at the Overland store in July 2013 was Spencer Hinkle. *See* R. 641 (52:1-7, 53:1-8). Mr. Hinkle has been working for Rug Doctor for over eight years. R. 629 (5:19-21). At the time of his deposition, he was in charge of 126 accounts, e.g. stores, in Idaho and Wyoming. R. 630 (12:22-24). Approximately 68 of the accounts are in the Treasure Valley. R. 631 (15:6-8). Mr. Hinkle visits between 28 and 36 stores per week and services approximately three to six machines at each store. R. 650 (90:19 – 91:1). When he services a machine, he pulls it out of the store to his vehicle. R. 632 (17:7-8); R. 650 (91:25 – 92:3). He then cleans the brushes and reservoir bucket and wipes down the machine. R. 632 (17:5-12). He also assesses whether the machines need repair. R. 650 (89:24 – 90:3).

Machines are at times returned with water still inside the reservoir bucket. R. 652 (99:19-25). In Mr. Hinkle's personal experience, if the machine has residual water and is tilted, water would not come out "unless [the machine] is tilted on it's [sic] side or upside down or bottom tank [is] overfilled, then maybe." R. 650-51 (92:22 – 93:16); R. 797. He did not say to what degree the machine has to be tilted for water to come out. *See id.* He has seldom had water come out when the machine is tilted. R. 651 (93:23-25); R. 797. There is no evidence that Mr. Hinkle shared this information with Wal-Mart.

Mr. Hinkle testified that it is possible for Rug Doctor machines to leak liquid from various parts, but he did not testify as to the probability of machines leaking. *See* R. 637 (39:3 – 40:22). In Mr. Hinkle's personal experience, over the course of eight years in which he has serviced Rug Doctor machines, he has had approximately 20 Rug Doctor machines leak when he transported them from the store to his vehicle by pulling them. R. 650 (94:20 – 95:20). There is no evidence that Mr. Hinkle shared this information with Wal-Mart.

There is no testimony from Mr. Hinkle or any other evidence in the record that water has ever been on the floor of the Overland store from a Rug Doctor machine. Mr. Hinkle has never found water on the floor next to a Rug Doctor kiosk in a Wal-Mart, including the Overland store. R. 651 (95:21 – 96:3). The Overland store does not have a history of liquid being on the floor in front of the Rug Doctor kiosk and thus has not reported a problem of liquid on the floor to Mr. Hinkle. R. 202 (78:23 – 79:9); R. 207 (40:2-8); R. 651 (96:4-7). Because there was no history of liquid being on the floor, Wal-Mart did not put floor mats in front of the kiosk. R. 202 (78:19 – 79:25). Nor did Rug Doctor recommend to Wal-Mart that mats be placed in front of the kiosk at the Overland store. R. 653 (102:15-20).

The Overland store manager did not have a concern related to the safety of the Rug Doctor kiosk. *See* R. 202 (78:23 – 80:13); R. 603-04 (56:24 – 57:5). There is no evidence there was liquid in any Rug Doctor machine in the Overland store on July 24, 2013. There is no evidence a Rug Doctor machine was an actual source of liquid on July 24, 2013.

IV. CLARIFICATION OF ISSUES PRESENTED ON APPEAL

In the "Issues Presented on Appeal" section in Appellant's Brief, Ms. Brooks identified two issues, one of which is awkwardly framed. In the argument section of the brief, she raises two additional issues not formally presented. Accordingly, Wal-Mart takes this opportunity to clarify the issues.

The first issue presented to the Court is not properly framed because it is not presented in a fashion that invites this Court to review a district court ruling for error. Instead, Ms. Brooks presents the issue as a conceptual question of public policy: "Whether Wal-Mart is charged with knowledge of the foreseeable hazards created by the products and self-serve operations it selects." Wal-Mart will state the issue in a different way to clarify what action of the district court is at issue, taking into account the arguments raised below.

In the Argument section of Appellant's Brief, Ms. Brooks raises two additional issues, not formally presented to the Court as Issues Presented on Appeal: (A) whether "The District Court Erred in Distinguishing the Law as to Negligent Operating Methods and Holding that the Spill was an Isolated Incident," and (B) whether Idaho should adopt a new rule of law, a "Self-Service Methods of Operation" exception, to the notice requirement found in the state of Washington. Issue "A" should have been identified as a separate issue in Ms. Brooks' statement of "Issues Presented on Appeal," and Wal-Mart will treat it as if it were raised separately. Issue "B" is really a legal argument not made before the district court and, therefore, not properly raised on appeal. *Obenchain v. McAlvain Constr., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) ("Appellate court review is 'limited to the evidence, theories and arguments that were

presented . . . below.'"); *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991) ("The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal."); *Smith v. Sterling,* 1 Idaho 128, 131 (1867) ("It is manifestly unfair for a party to go into court and slumber, as it were, on [a] defense, take no exception to the ruling, present no point for the attention of the court, and seek to present [the] defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance.").

Considering the proceedings below and the arguments in Appellant's Brief, Wal-Mart offers the following framework to analyze the issues on appeal:

> 1. *Whether the district court erred in deciding that Wal-Mart cannot be charged with constructive notice of a dangerous condition based on its decision to use a self-service kiosk.*[2]
>
> 2. *Whether the district court "erred in distinguishing the law as to negligent operating methods and holding that the spill was an isolated incident."* Appellant's Brief § IV.A.3.
>
> 3. *Whether 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."* Appellant's Brief § IV.B.

Wal-Mart will address the second issue before the first issue to avoid repetition and to present argument in a logical manner.

---

[2] This is a rewording of the first issue that Ms. Brooks listed in the "Issues on Appeal" section of Appellant's brief. *See* Appellant's Brief § IV.A.

V. STANDARD OF REVIEW

In reviewing a grant of summary judgment, this Court employs the same standard as the district court. *Shea v. Kevic Corp.*, 156 Idaho 540, 543, 328 P.3d 520, 524 (2014). Summary judgment is proper under Idaho Rule of Civil Procedure 56(c) if the moving party shows that there is an absence of material facts with respect to a claim and the nonmoving party fails to show specific facts that would support the claim at trial. *Id.* The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)). "[A] mere scintilla of evidence or merely casting a slight doubt over the facts will not defeat summary judgment." *Stem v. Prouty*, 152 Idaho 590, 593, 272 P.3d 562, 565 (2012). "[T]here must be evidence upon which a jury may rely." *Id.*

VI. ARGUMENT

A. The District Court Did Not Err in Distinguishing the Law as to Negligent Operating Methods and Holding that the Spill Was an Isolated Incident.

In order for a retail store such as Wal-Mart to be liable for an injury that an invitee sustains on the premises, the injured invitee must prove: "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss

or damage." *Shea*, 156 Idaho at 548, 328 P.3d at 528.[3] To meet this burden and withstand a motion for summary judgment, the nonmoving party must present admissible record evidence creating a genuine issue of material fact as to a breach of a legally recognizable duty. *Id.*

There are two kinds of duties a landlord may owe to an invitee: (a) a duty "to warn of any concealed dangers which the landowner knows of or should have known of upon reasonable investigation of the land," and (b) a duty "to keep the premises reasonably safe," i.e., free from dangerous conditions. *Stem*, 152 Idaho at 594, 272 P.3d at 566. The duty owed by a landlord is one of ordinary care, not a heightened or special duty. *Tommerup v. Albertson's Inc.*, 101 Idaho 1, 3, 607 P.2d 1055, 1057 (1980), *overruled on other grounds by Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989). To prove the existence of a duty, an invitee must "show that the landowner knew, or in the exercise of reasonable care should have known, of the alleged dangerous condition," i.e., "actual or constructive notice." *Shea*, 156 Idaho at 548, 328 P.3d at 528. This is true regardless of whether the dangerous condition is an isolated incident or a recurring condition actively created by an operating method. *Id.* at 548-49, 328 P.3d at 528-29.

Evidence sufficient to support a finding of notice is different for a case involving an isolated incident than for a case involving a recurring condition actively created by an operating method. In an isolated incident case, there must be actual or constructive notice of the "specific condition" causing the alleged injury. *Shea*, 156 Idaho at 548, 328 P.3d at 528. In a recurring condition case, there must be actual or constructive notice that "operating methods

[3] The parties agree that Ms. Brooks was an invitee of Wal-Mart.

caused or were likely to cause a dangerous condition." *Id.* Under either theory, proof of notice is never excused because it is notice combined with a failure to act that leads to negligence.

In this case, Ms. Brooks failed to present admissible evidence that the liquid on the floor that led to her fall was a recurring condition caused by an operating method of the Overland store. There was no evidence that there had been other incidents of liquid on the floor in that particular area of the store or that a machine from the Rug Doctor kiosk was in fact the actual cause of liquid on the floor. Accordingly, the district court did not err in finding that this case involved an isolated incident, such that Ms. Brooks had the burden of proving actual or constructive notice of the specific dangerous condition.

1. This case does not involve a recurring or easily foreseeable dangerous condition actively created by an operating method.

This Court has recognized that a duty may arise from an operating method where there is evidence that the landowner had a habit of creating a foreseeably unsafe condition or allowing an unsafe condition to develop or exist over a period of time. *See Shea*, 156 Idaho at 549-51, 328 P.3d at 529-31; *Ball v. City of Blackfoot*, 152 Idaho 673, 677-78, 273 P.3d 1266, 1270-71 (2012); *All v. Smith's Mgmt. Corp.*, 109 Idaho 479, 481, 708 P.2d 884, 886 (1985); *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 308, 707 P.2d 416, 419 (1985); *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974). In these cases, the dangerous condition is not a singular and unexpected event. Rather, it is something that has been recurring or is reasonably likely to be recurring over a period of time, thereby creating a reasonable likelihood that the landowner had notice of the type of condition causing injury.

For example, in *Shea*, an invitee brought a premises liability claim against the operator of a car wash, Kevic Corp., alleging injury after slipping on ice at the exit of the car wash. 156 Idaho at 543, 328 P.3d at 523. In response to a motion for summary judgment, the injured invitee presented evidence demonstrating that the operator had "knowledge of the '***continuous formation***' of ice buildup at the car wash exit at certain times during the winter months." *Id.* at 551, 328 P.3d at 531 (emphasis added). This Court found this evidence sufficient to create an issue of fact, holding that the invitee could establish liability by showing that ice "generally forms" on cold days when vehicles track water out of the car wash, and that the car wash operator knew of this recurring condition. *Id.*

In *Ball*, an invitee brought a premises liability claim against the City of Blackfoot after slipping and falling on ice that had accumulated on a sidewalk between a municipal swimming pool and parking lot. 152 Idaho at 674, 273 P.3d at 1267. In response to a motion for summary judgment, the injured invitee presented evidence that the city had a "***habit*** of plowing parking lot snow onto the grass beside the sidewalk caus[ing] excess snow melt to run onto the sidewalk where it subsequently froze, creating especially icy sidewalk conditions." *Id.* at 678, 273 P.3d at 1271 (emphasis added). The invitee also presented evidence that another patron had advised the pool manager of the icy conditions and not seeing subsequent application of ice melt. *Id.* This Court concluded that the invitee had created an issue of fact as to whether the city breached a duty to maintain the sidewalk in a reasonably safe condition. *Id.*

In *All*, an invitee brought a premises liability claim against a retailer, Smith's Management, Inc., and the owner of a parking lot, Shelby's Park Center, after falling in a pothole

in a store parking lot. 109 Idaho at 480, 708 P.2d at 885. At trial, the invitee presented evidence that the parking lot owner was aware of the deteriorating condition of the parking lot and had been filling in holes with gravel until the lot could be repaved. *Id.* This Court found this evidence sufficient to withstand defendants' motion for directed verdict, concluding that the invitee did not need to prove constructive knowledge of the specific pothole causing the fall. *Id.* at 482, 708 P.2d at 887. Because potholes were a continuous and foreseeable consequence of operating methods, the invitee could establish liability by proving constructive knowledge of the "***continuous formation***" of potholes. *Id.* (emphasis added).

In *McDonald*, an invitee brought a premises liability claim against a retailer, Safeway Stores, Inc., alleging injury after slipping on melted ice cream in a store. 109 Idaho at 306, 707 P.2d at 417. She supported her claim with evidence that the store conducted an ice cream demonstration on a busy day with abnormally large crowds and that it handed out ice cream cones to customers, including children and infants. *Id.* at 307, 707 P.2d at 418. This Court concluded that the melted ice cream was not an isolated incident but was instead a foreseeable risk of harm "***actively created***" in the store's course of business of handing out ice cream cones to kids, who consumed them there on the premises. *Id.* at 308, 707 P.2d at 419 (emphasis added).

In reaching its decision in *McDonald*, this Court looked to a case from Colorado for guidance, *Jasko v. F.W. Woolworth Co.*, 494 P.2d 839 (Colo. 1972). The Colorado Supreme Court concluded that pizza on the ground was not an isolated incident where the food came from a company's method of selling individual slices of pizza, delivered on wax paper, for customers

to consume immediately while standing. *Jasko*, 494 P.2d at 840. The practice of distributing food in that manner was held to create a "***reasonable probability***" that food would drop to the floor, as further evidenced by porters "constantly" sweeping up debris from the floor. *Id.* (emphasis added). Just as pizza being sold for immediate consumption actively created a risk of food on the ground, so too ice cream being handed out for immediate consumption actively created a risk of food on the ground. *McDonald*, 109 Idaho at 308, 707 P.2d at 419. In other words, food on the ground is ***likely to be a recurring condition*** when it is being distributed for immediate consumption, especially to infants.[4]

Although the facts of the *McDonald* case place it in the "operating methods" category rather than the "isolated incident" category, this categorical placement did not negate the invitee's obligation to prove actual or constructive notice. To support a finding of

---

[4] In § IV.C of Appellant's Brief, Ms. Brooks asks this Court to define "easily foreseeable" as requiring a retailer to assess and understand risk associated with products and operating methods. Such a definition is nonsensical. Every product and operating method arguably has some risk, and the mere potential for something to go wrong does not automatically make a dangerous condition easily foreseeable. For example, there is a possibility that the tops on certain shampoo bottles will pop open and that shampoo will spill on the floor. If the possibility of shampoo ending up on the floor of a coffee aisle is unlikely, a retailer's understanding of the possibility does not make shampoo on the floor of the coffee aisle easily or reasonably foreseeable. What is easily foreseeable, as illustrated in the *McDonald* and *Jasko* cases, is when there is a likelihood that the dangerous condition will be recurring, that it will happen more than once. As noted in the opening paragraph of this brief, Ms. Brooks' incident was the first and only one of its kind at the Overland store.

To further put it in perspective, any retail store like Wal-Mart would have, at any one time, thousands upon thousands of vessels (products) containing liquid in its store—bottles, cans, tubes, jugs, tubs, which might fall, break, or leak. Its customers bring in still hundreds more, e.g., water bottles for drinking. The mere possibility that something might fall, break, or leak is an insufficient predicate for legal liability.

constructive notice, the plaintiff presented evidence that it takes "an hour or two" for ice cream to fully melt, thereby indicating that the melted ice cream had been on the floor for a substantial period of time. *Id.* at 310, 707 P.2d at 421. This Court concluded that a jury could find that the store had constructive knowledge of the dangerous condition and affirmed the district court's denial of summary judgment and the motion for directed verdict. *Id.*

This case is distinguishable from each of the above cases because it does not involve a recurring or likely to be recurring dangerous condition that was actively created by the Overland store. There is no evidence that the Overland store had a business operation or habit of doing something that caused a continuous formation of liquid on the floor. There is no evidence that the Overland store was handing out or selling liquids in open containers for immediate consumption or use in the vicinity where Ms. Brooks fell. There is no evidence of a recurring problem with liquid on the floor from customers' handling of Rug Doctor products.

Notwithstanding this lack of evidence, Ms. Brooks tries to force this case into the operating methods category of cases, pointing to Mr. Hinkle's deposition for evidence that Rug Doctor machines might possibly leak. Mr. Hinkle, who serviced the Rug Doctor machines at the Overland store, as well as machines at approximately 125 other stores in and outside the Treasure Valley, only had about 20 machines leak over the course of eight years. R. 630 (12:22-24); R. 631 (15:6-8); R. 651 (94:6-20). Considering that Mr. Hinkle visits between 28 and 36 stores per week and services approximately three to six machines at each store, the

number of machines that have leaked is *de minimis*. R. 650 (90:19 – 91:1).[5] The only conclusion that can be drawn from this testimony is that there is an extremely remote possibility of a Rug Doctor machine leaking at any one of 126 stores. Notice of this mere possibility is not tethered to Wal-Mart on this record. Ms. Brooks has not offered any authority, either in law or fact, to impute the knowledge of Rug Doctor or Mr. Hinkle to Wal-Mart. *See Stem*, 152 Idaho at 594, 272 P.3d at 566 (affirming summary judgment in favor of a landowner in the absence of evidence that he "had any knowledge of the weight bearing capacity of the water meter covers, or any training or experience that would give him such knowledge.").

The mere possibility of a Rug Doctor machine leaking is not evidence that a leak is likely to occur even once, let alone multiple times, in the Overland store.[6] No retailer is an absolute guarantor that remote events will never happen on their premises. Wal-Mart's use of the Rug Doctor kiosk only leads to liability if the use results in a recurring or likely to reoccur

[5] If Mr. Hinkle serviced an average of 7,800 machines per each of his eight years, as indicated by his route at the time of his deposition, Mr. Hinkle's experience of approximately 20 machines leaking while being transported out of a store indicates a .00032% chance of a machine leaking during transport.

[6] Whether Ms. Brooks was able to create an issue of fact as to Rug Doctor's liability with evidence of a possibility is irrelevant to the analysis of whether the evidence supports a finding that Wal-Mart owed Ms. Brooks a duty related to use of the Rug Doctor kiosk. Ms. Brooks tries to make the possibility of a leak relevant by arguing that the district court found material questions of fact as to whether the operating process created a foreseeable risk of harm. Appellant's Brief at 24. The district court actually found, in relation to the negligence claim against Rug Doctor, a material issue of fact as to whether it was foreseeable that a Rug Doctor machine could cause an injury and whether Rug Doctor LLC exercised its duty to use reasonable care to avoid Plaintiff's injury. R. 893. The standard the district court used for determining whether Plaintiff has a non-premises liability negligence claim against Rug Doctor is different from the standard that determines whether Wal-Mart, as a retailer, owed Ms. Brooks a duty. Accordingly, the finding as to Rug Doctor is irrelevant.

dangerous condition. Ms. Brooks did not establish that a Rug Doctor machine ever leaked in the Overland store or that there was an actual likelihood of a Rug Doctor machine leaking.

Beyond arguing that a duty should arise because a possibility of a leak existed, Ms. Brooks goes a step further and seeks to impose a duty on Wal-Mart based on unsubstantiated allegations that Wal-Mart should have known the operation details of Rug Doctor's self-service kiosk. Nothing in Idaho law conditions premises liability on what a retailer knew or should have known about the operations of a self-service kiosk. Ms. Brooks has not provided any legal authority to support a change in the law. In reality, whether Wal-Mart knew or should have known about the operations of and remote risks associated with the Rug Doctor business is irrelevant because it does not evidence whether the machines rented from the kiosk at issue here resulted in or were actually likely to result in a dangerous condition.

Trying to fit this case into the operating methods category is like trying to put a square peg in a round hole. It does not fit. Because Ms. Brooks does not have admissible record evidence that incidents of liquid on the floor in the action alley had occurred in the past, or were likely to occur in the future, as a result of Wal-Mart's decision to use a self-service kiosk, the district court did not err in deciding that this case is not in the same category as *McDonald*, *Jasko*, and *Shea*, which involved a recurring or likely to recur dangerous condition from an operating method.

2. This case involves an isolated dangerous condition.

Where there is no evidence that a condition is recurring or likely to recur as a result of an operating method, then the case is placed in the isolated incident category.

Dangerous conditions "may arise temporarily in any place of business," and the mere existence of a temporary condition is not evidence that it has resulted from an operating method. *Tommerup*, 101 Idaho at 4, 607 P.2d at 1058 (quoting *Jasko*, 494 P.2d at 840-41).

In *Tommerup*, an invitee brought a premises liability claim against a retailer, Albertson's, after allegedly slipping and falling on a cupcake wrapper that was deposited directly outside the doors of the store. 101 Idaho at 2, 607 P.2d at 1056. However, the plaintiff did not provide any evidence that the operations of the store were such that a cupcake wrapper was an inescapable mishap, like pizza on the floor in *Jasko*. *Id.* at 4, 607 P.2d at 1058. There was no evidence in the case that cupcakes were being handed out or sold for immediate consumption. This Court concluded that the condition was nothing more than an isolated incident, such that the plaintiff had the burden to prove notice of the dangerous condition. *Id.*

This case is more like *Tommerup*. This was the first and only incident of its kind in the front action alley at Wal-Mart's Overland store. The self-service kiosk had been in place in the front action alley for approximately two years before Ms. Brooks' injury. Wal-Mart had no reason to expect liquid on the floor in the area of the fall, as there had been no other incidents of liquid from a Rug Doctor machine or any other source in that area. There is no evidence that the liquid on the floor of the front action alley was an inescapable result of Wal-Mart's business practices. Accordingly, the district court did not err in deciding that this case involves an isolated incident of liquid on the floor, such that Ms. Brooks has the burden of proving that Wal-Mart had actual or constructive notice of the liquid.

B. The District Court Did Not Err in Deciding that Wal-Mart Cannot Be Charged with Constructive Notice of a Dangerous Condition Based on Its Decision to Use a Self-Service Kiosk.

Ms. Brooks argues that Wal-Mart should be charged with notice of liquid on the floor because the liquid was in the general area of a self-service kiosk from which machines could be rented that had a possibility, not a likelihood, of leaking. By urging that Wal-Mart be charged with notice, Ms. Brooks in essence asks this Court to create new law: to create an exception to the requirement that she prove actual or constructive notice. Ms. Brooks made this argument to the district court relying solely on Idaho law and the Colorado case this Court has used as a guide (*Jasko*). R. 956-65, 1177-81. The district court rejected the argument, concluding that Wal-Mart's decision to use a self-service kiosk, in and of itself, did not put it in the same category as *McDonald*, *Jasko,* and *Shea*. R. 1195-96. As explained above, the district court did not err in finding that this case is not an "operating methods" case under Idaho law. Nor did the district court err in declining to abandon Idaho law and charge Wal-Mart with constructive notice based merely on its operating method.

To circumvent the district court's decision and Idaho law, Ms. Brooks now asks this Court to adopt her proposed exception to the notice requirement, and thereby change existing Idaho law, based upon Washington law. Appellant's Brief at 26-29. The argument based on Washington law is new to this appeal, raised here for the first time. Ms. Brooks did not ask the district court to adopt Washington law and, therefore, should be precluded from asking this Court to adopt Washington law. Further, the exception that Ms. Brooks asks this Court to apply in this case does not align with the self-service operation exception recognized in

Washington, and the facts of this case do not support the application of the exception recognized in Washington.

1. Ms. Brooks asks this Court to apply an exception to the notice requirement that is not recognized in Idaho or Washington.

The courts in Washington recognize an exception to the notice requirement for self-service operations. This exception applies "only if the particular self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable" in a particular area. *Pimentel v. Roundup Co.*, 666 P.2d 888, 893 (Wash. 1983); *Arment v. Kmart Corp.*, 902 P.2d 1254, 1256 (Wash. Ct. App. 1995). "There must be a relation between the hazardous condition and the self-service mode of operation of the business." *Ingersoll v. DeBartolo, Inc.*, 869 P.2d 1014, 1016 (Wash. 1994).

Merely using a self-service method of merchandising is not in itself a "mode of operation" that triggers the application of the self-service rule, thereby dispensing with traditional notice requirements. *Ingersoll v. DeBartolo, Inc.*, 869 P.2d 1014, 1016; *see also Fisher v. Big Y Foods, Inc.*, 3 A.3d 919, 933 (Conn. 2010). To impose liability based solely on the use of a self-service method would "ignore the modern day reality that all retail establishments operate in this manner, and given competitive considerations and customer demands, they have no other choice." *Fisher*, 3 A.3d at 934. "Self-service has become the norm throughout many stores[, so the exception] does not apply to the entire area of the store where customers serve themselves." *Ingersoll*, 869 P.2d at 1016.

The self-service operation exception to the notice requirement "is meant to be a narrow one." *Fisher*, 3 A.3d at 934. It applies only to those areas where the unsafe condition, i.e., risk of injury, is "***continuous or foreseeably inherent*** in the nature of the business or mode of operation." *Id.* (emphasis added); *Ingersoll*, 869 P.2d at 1016. Accordingly, a plaintiff must show that a dangerous condition was foreseeable in the particular or specific area of the fall. *Arment v. Kmart Corp.*, 902 P.2d 1254, 1256 (Wash. Ct. App. 1995); *Fisher*, 3 A.3d at 934. It is not enough to show that the store sells items that could result in dangerous conditions if dropped or spilled. *See, e.g., Carlyle v. Safeway Stores, Inc.*, 896 P.2d 750 (Wash. Ct. App. 1995) (declining to apply the self-service operations exception for lack of evidence that shampoo on the floor of the coffee aisle was reasonably foreseeable). "If the mode-of-operation rule applied whenever customer interference was conceivable, the rule would engulf the remainder of negligence law." *Hembree v. Wal-Mart of Kansas*, 35 P.3d 925 (Kan. Ct. App. 2001). "[N]early every business enterprise produces some risk of customer interference." *Id.*

What Ms. Brooks proposes here is not adoption of the narrow self-service exception outlined above. Rather, Ms. Brooks proposes a *complete elimination of the notice requirement* when a retail store uses a self-service operation, such as a self-service kiosk, that has a mere remote possibility of a dangerous condition resulting in the vicinity of the operation. This proposed "exception" (i.e., elimination) to the notice requirement would, in essence, result in near strict liability for retailers as numerous retail stores in the United States have self-service operations with some remote possibility that customers might cause something to go askew, triggering a dangerous condition in some area of the store. This Court has previously recognized

that landowners are not insurers of invitees and are not strictly liable simply because an injury occurs on the land. *Tommerup*, 101 Idaho at 3, 607 P.2d at 1057. That time honored rule makes good sense, and there is no reason to change it here.

This Court should reject a rule that would result in strict liability and should reject Ms. Brooks' request to adopt and apply the exception to the notice requirement used in Washington. Idaho has not adopted an exception to the requirement that an invitee prove actual or constructive notice of a dangerous condition in order to maintain a premises liability claim. It need not do so, especially not on these facts. In cases where an invitee can establish that the dangerous condition was recurring or easily foreseeable, i.e., likely recurring, as a result of a mode of operation, Idaho law already allows invitees to prove actual or constructive notice of a *type of* condition rather than the *specific* condition. *See Shea*, 156 Idaho at 548-49, 328 P.3d at 528-29; *McDonald*, 109 Idaho at 308-10, 707 P.2d at 419-21. In other words, Idaho law already recognizes an exception to the requirement that a plaintiff prove actual or constructive notice of the specific condition. This case does not warrant a change in Idaho law, especially when that change is being offered as a substitute for Ms. Brooks' lack of proof.[7]

[7] A plaintiff's difficulty in proving knowledge is not a reason to alleviate the plaintiff from that burden and create a different, easier to prove, standard for liability. *Tommerup*, 101 Idaho at 3, 607 P.2d at 1057 ("The knowledge requirement did not arise out of consideration of the parties' respective difficulties in proving the facts at trial."). Liability is premised on a proprietor's "superior knowledge" of a dangerous condition. *Id.*

2. Ms. Brooks does not adduce evidence to support the application of Washington's self-service operations exception to the notice requirement, even if Idaho were to adopt it.

The self-service operations exception is narrow and has limited application. Ms. Brooks focuses on a single case from Washington where the exception was applied to support her argument for the application of the exception in this case. The case Ms. Brooks relies upon is distinguishable from this case. There are other cases from Washington and one from Connecticut where the exception has been applied, and these cases have greater relevance to the facts of this case.

The case upon which Ms. Brooks relies for application of the self-service operations exception is one decided by the Washington Court of Appeals, *O'Donnell v. Zupan Enterprises, Inc.*, 28 P.3d 799 (Wash. Ct. App. 2001). In that case, the plaintiff slipped and fell on a piece of lettuce in a check-out aisle. *Id.* at 800. The store was aware that grocery items occasionally fell from carts during the check-out process where customers were responsible for unloading their own groceries. *Id.* at 801. To protect against this hazard, the store had maintenance policies designed specifically for check-out areas. *Id.* Because the store had knowledge of the potential hazard and had policies to address the hazard, the court found sufficient basis to apply the self-service exception to the notice requirement. *Id.*

O'Donnell is distinguishable from the facts of this case for several reasons. First, unlike *O'Donnell*, this case does not involve a self-service operation where people handle loose produce at a check-out. The self-service operation of the Rug Doctor kiosk does not involve the handling of water. Customers fill and empty rented Rug Doctor machines at home, not at the

store. Second, there is no evidence in this case of a history of liquid being on the floor, let alone that there had ever been liquid on the floor in the area where Ms. Brooks fell. Third, because there is no evidence of a history of liquid on the floor, Wal-Mart had no reason to implement special procedures, i.e., floor mats, to guard against a possibility of liquid on the floor. R. 607 (69:19 – 70:21); R. 609 (78:19 – 79:1). Wal-Mart applied the same safety policies to the front end of the store, including the area where Ms. Brooks fell, as to the rest of the store. *See* R. 603 (56:11 – 23); R. 609-10 (80:22 – 1).

There are two other cases from Washington that have greater application to this case than *O'Donnell*. The first case is one decided by the Washington Supreme Court, *Ingersoll*, 869 P.2d 1014. In that case, the court refused to apply the self-service operations exception because the plaintiff failed to produce evidence that the business and methods of operation of a mall were such that unsafe conditions were reasonably foreseeable in the common area where she fell. 869 P.2d at 1016. Although there was evidence that the mall had food/drink vendors and that some vendors did not provide seating, there was no evidence that there was a vendor near the area of the fall or that the operations of the vendors resulted in debris on the floor. *Id.* at 1016-17.

The second Washington case is *Tavai v. Walmart Stores, Inc.*, 307 P.3d 811 (Wash. Ct. App. 2013). In that case, the plaintiff fell approximately 15 feet away from a check-out counter that had "grab-and-go" drinks for sale at the end of it. *Tavai*, 307 P.3d at 817. There was no evidence that the drinks, which were sold in sealed bottles, were intended for immediate consumption or that customers spilled liquid on their way to check-out counters in the area

where the plaintiff fell. *Id.* The court refused to apply the self-service operations exception based solely on evidence that Wal-Mart sold liquids, finding no evidence of a relationship between the hazardous condition and the self-service mode of operation of the business. *Id.*

Another relevant case was decided by the Connecticut Supreme Court, *Fisher*, 3 A.3d 919. In that case, the plaintiff established that she slipped on fruit cocktail syrup in an aisle where fruit products were sold. *Id.* at 922, 935-36. However, she offered no evidence to contradict the testimony of the store supervisor, who testified that "spills similar to the one at issue were uncommon and that he would not expect the fruit products in aisle seven to break open if dropped." *Id.* at 923. The court refused to apply the self-service operations exception because there was no evidence "to show that there was anything particularly dangerous about the defendant's method of offering packaged fruit products for sale, making their spillage inherently foreseeable or regularly occurring." *Id.* at 936.

Just as the plaintiffs in *Ingersoll*, *Tavai,* and *Fisher* failed to present evidence that a retail operator had reason to expect a hazard in the areas of the plaintiffs' falls, so too has Ms. Brooks failed to present evidence that Wal-Mart had reason to expect a hazard in the area where Ms. Brooks fell. There is no evidence that Rug Doctor machines would be returned to the store with an amount of water that was likely to be spilled out of a container on the machine. Nor is there evidence that a Rug Doctor machine had previously leaked or been tilted in such a manner that it caused liquid to be on the floor in the Overland store. And, the fact that this kiosk was in place for approximately two years without prior spills underscores this lack of evidence. Accordingly, there is insufficient evidence to apply the self-service operations exception to the

notice requirement and thereby allow Ms. Brooks to proceed to trial without evidence proving that Wal-Mart had notice of the liquid on the floor.

C. Whether 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.

The law is well settled in Idaho that a retailer is not liable for injuries resulting from an isolated incident unless the injured invitee can show that the retailer "knew, or by the exercise of reasonable care should have known, of the existence of the dangerous condition." *Tommerup*, 101 Idaho at 3, 607 P.2d at 1057. There is ***no "presumption of negligence*** on the part of an owner or occupier merely upon the showing that an injury has been sustained by one while rightfully on the premises." *Id.* (emphasis added). Rather, there must be a real opportunity for the retailer to gain knowledge of the hazard in order for the retailer to have constructive knowledge of the specific hazard. *Antim*, 150 Idaho at 780-81, 251 P.3d at 608-09. Mere speculation as to how and when a hazard is created does not establish a basis for liability. *Id.*; *Hansen v. City of Pocatello*, 145 Idaho 700, 184 P.3d 206 (2008) (holding that the negligence claim was not removed from the "realm of speculation" because none of the explanations for how a lid became askew were "more plausible than another").

In *Tommerup*, the plaintiff sought to hold Albertson's liable for an injury she sustained after slipping on a cupcake wrapper in a parking lot. 101 Idaho at 4, 607 P.2d at 1058. However, she failed to present evidence as to who deposited the cupcake wrapper near the door or ***when*** the wrapper was deposited. *Id.* The court concluded that there was insufficient

evidence to support a finding of constructive notice, declining to impose liability where the hazardous condition may have been created by another customer shortly before the accident. *Id.*

In *Antim*, an invitee sought to hold Fred Meyers liable for an injury she sustained after tripping on a folded mat in a coffee aisle. 150 Idaho at 776, 780-81, 251 P.3d at 604, 608-09. However, the invitee admitted that she did not know when the mat was folded, and she did not present any evidence actually establishing ***when*** the mat was folded or ***how long*** it remained in a dangerous position prior to her fall. *Id.* at 781, 251 P.3d at 609. Although she argued that the mat had been folded for approximately 25 minutes—the time between her fall and the prior inspection of that area by the store manager—the district court and the Idaho Court of Appeals concluded that the evidence was too speculative to support a finding that the mat had been turned over long enough that Fred Meyer should have been aware of the mat's condition. *Id.* at 776, 781-83, 251 P.3d at 604, 609-11.

Like the invitees in *Tommerup* and *Antim*, Ms. Brooks failed to present evidence that supports a finding as to the source of the liquid and how long the liquid was on the floor prior to the fall. Ms. Brooks does not have personal knowledge of what the substance was, where it came from, or when it appeared. She assumes that the liquid came from a Rug Doctor machine because Wal-Mart's surveillance video shows a customer lifting a Rug Doctor machine into a cart in the area of the fall approximately seven minutes before the accident. However, the surveillance video does not show liquid coming out of the Rug Doctor machine or from any other source. Rather, the video shows approximately 37 other individuals walk in the area of the fall in the 25 minutes before Ms. Brooks' accident, and any one of these individuals could have

been the cause of liquid on the floor. In the absence of evidence as to where the liquid came from and how long it had been on the floor, Ms. Brooks cannot establish that Wal-Mart had constructive notice of the liquid.

Even assuming *arguendo* that Ms. Brooks could prove that the liquid came from a Rug Doctor machine approximately seven minutes before the fall, a worst case scenario, she does not have evidence to support a finding that Wal-Mart should have discovered the liquid on the floor in this seven minutes. First, more than ten customers travelled through this area during the seven minute interval, and none gave any indication that there was anything on the floor. *See* R. 220 ¶¶ 12-13; R. 255-65. Second, no one brought the matter to Wal-Mart's attention, i.e., no one told the store associate who was near but not in the specific area of the fall.[8] Third, there is no evidence of a history of liquid on the floor and thus no reason for Wal-Mart associates to suspect that clear liquid would be on the floor.

Ms. Brooks further argues that store employees should have seen the liquid on the floor in the seven minute interval because they are trained to keep a look for safety hazards. However, in making this argument, Ms. Brooks makes an assumption that the liquid was discoverable and that the associates would have seen it if they were keeping a look out for hazards. The argument is simply that, an argument. It is not supported with admissible evidence

---

[8] Plaintiff alleges that approximately five and a half minutes before the fall, a Wal-Mart employee passed through the area where Ms. Brooks fell. This allegation is misleading. Although the video does show an employee walk in the front action alley, the employee walked close to the cash registers, not in the area close to the Primo Water kiosk and the Rug Doctor kiosk. Plaintiff did not take this employee's deposition to find out what this employee was doing or whether she was following Wal-Mart's policy that she keep a look out for hazards.

that employees were not keeping a look out or that the clear liquid could have been discovered by keeping a look out. Thus, the argument cannot be used to create an issue of fact.

The record evidence is insufficient to support a finding of constructive notice, which is needed to prove the existence of a duty. Thus, the district court did not err in finding that Ms. Brooks did not present evidence to create an issue of fact and meet her burden of proving an element of her claim.

VII. CONCLUSION

For the foregoing reasons, Wal-Mart respectfully requests that this Court affirm the district court's decision granting summary judgment in favor of Wal-Mart and the decision denying Ms. Brook's motion for reconsideration.

DATED this 26th day of May, 2017.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____

Stephen R. Thomas
Tyler J. Anderson
Mindy M. Muller
Attorneys for Defendant/Respondent
Wal-Mart Stores, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May, 2017, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served by the method indicated below, and addressed to the following:

John A. Bush
COMSTOCK & BUSH
199 N. Capitol Blvd., Suite 500
P.O. Box 2774
Boise, ID 83701-2774
Facsimile (208) 344-7721
jabush@comstockbush.com
Attorneys for Plaintiff/Appellant

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Mindy M. Muller