12-29-2017

Johnson v. Wal-Mart Stores, Inc. Appellant's Brief Dckt. 45306

IN THE SUPREME COURT FOR THE STATE OF IDAHO

MICHAEL JOHNSON, Plaintiff/Appellant, vs. WAL-MART STORES, INC., a Delaware corporation, doing business as Wal-Mart Super Center and Wal-Mart; WAL-MART ASSOCIATES, INC., a Delaware corporation; and WAL-MART STORE NO. 2508. Defendants/Respondents.	DOCKET NO.: 45306 (Ada County Docket No. CV-PI-2016-13887)

ON APPEAL FROM THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE, JASON D. SCOTT, DISTRICT JUDGE PRESIDING

* * * *

APPELLANT'S OPENING BRIEF

Eric B. Swartz, ISB#6396
JONES & SWARTZ PLLC
623 West Hays Street
Boise, Idaho 83702

Attorney for Appellant

Stephen R. Thomas, ISB#2326
Tyler J. Anderson, ISB#6632
Mindy M. Muller ISB#7983
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 West Main Street, Suite 1000
Boise, Idaho 83702

Attorneys for Respondents

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STATEMENT OF THE CASE

A. Nature of the Case

This is a premises liability action based on claims of negligent failure to warn of recurring and continuous dangerous conditions on the premises and failure to exercise ordinary care to maintain the premises in a reasonably safe condition.

B. Course of Proceedings

On August 1, 2016, Appellant, Michael Johnson, filed his complaint in the Fourth Judicial District Court, Ada County, Idaho, seeking recovery for injuries to his right knee as a result of slipping on a spill at Wal-Mart Store 2508 located at 8300 West Overland Road, Boise, Idaho. In his complaint, Appellant brought claims for negligence and premises liability.[1] On August 23, 2016, Respondents filed their answer.[2]

On May 10, 2017, Respondents filed a motion for summary judgment.[3] Respondents argued, *inter alia*, that Appellant could not prove premises liability on the theory of method of business or recurring or continuous hazard, and that Respondents were not negligent for failing to warn of, or remedy, the isolated incident at the particular location and on the particular day that Appellant slipped and fell because there were no prior incidents at that exact location and because there is no evidence of how long the spill was present before Appellant encountered it.[4]

On May 25, 2017, Appellant filed an opposition to Respondents' motion for summary

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[1] R. 000006-10.
[2] R. 000011-18.
[3] R. 000019-35.
[4] R. 000019-35.

judgment.[5] Appellant presented evidence that, *inter alia*, Respondents were engaged in a method of business that they knew created a recurring or continuous spill and slip hazard; that they knew such method of business created a foreseeable risk of harm; and that they failed to warn customers, like Appellant, about such risk.[6]

On May 31, 2017, Respondents filed its reply brief.[7] Respondents argued, *inter alia*, that a dangerous business practice was not established merely because customers can carry liquids around the store.[8] Respondents also argued that a mere possibility of a spill is not sufficient for liability – but that it must be shown that Respondents knew of a greater than usual likelihood of a spill in a particular area.[9]

On June 7, 2017, a hearing was held on the Respondents' motion.[10] By order dated June 22, 2017, the Trial Court granted Respondents' motion for summary judgment.[11] The Trial Court issued a judgment on July 3, 2017, dismissing all of Appellant's claims with prejudice.[12] Mr. Johnson filed his Notice of Appeal on August 2, 2017.[13]

C. Statement of Facts

a. Wal-Mart Stores, Inc. ("Wal-Mart Corporate") owns and operates Respondent Wal-Mart Store 2508, in Boise, Idaho.[14]

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[5] R. 000084-99.
[6] R. 000084-99.
[7] R. 000175-186.
[8] R. 000180-182.
[9] R. 000180-182.
[10] Tr. (6/7/2017), 4-27.
[11] R. 000187-193.
[12] R. 000194-195.
[13] R. 000196-199.
[14] R. 000113 (Wal-Mart Rule 30(b)(6), pp. 16:18 - 17:15).

b. For about four years leading up to June, 2015, and the day that Appellant slipped on a spill at Respondent's Wal-Mart Store 2508, Respondent knew that spills were a big problem at Store 2508. In June, 2011, Respondent issued an internal warning to alert its employees about the spill problem:

> • Spills are largely responsible for slip/trip/fall accidents in the store. Slip/trip/fall accidents are included in the Big 3 accident focus and require additional focus to reduce these accident claims.

(R. 000166; *see also*, R.000115 (February 28, 2017, Rule 30(b)(6) Deposition of Wal-Mart Defendants ("Wal-Mart 30(b)(6)"), p. 25:9-11, designee testifying internal policy about spills being largely responsible for slip/trip/fall accident was to educate employee about the hazard: "Q. [The internal policy is to] [e]ducate] [employees] about the hazards of the spills on the premises? A. Yes.").

c. By June, 2015, which is four years after the internal warning was first issued, spills remained a problem at Respondent's Store 2508:

> Q. So the second page in 114, the first bullet point there says spills are largely responsible for slip, trip and fall accidents in the store. Do you see that there?
> A. Yes.
>
> Q. As of June of 2015 was that statement true for Store 2508?
> A. Yes.[15]

d. Despite Respondent's knowledge of the spill hazard, and knowing it needed to warn its employees about it, Respondent is not aware of ever having warned customers about the hazard:

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[15] R. 000127 (Wal-Mart 30(b)(6), p. 75:10-17).

Q. Did Wal-Mart, in June of 2015, did Wal-Mart do anything to alert customers to that fact?
A. I'm not sure.

Q. Is there a sign that says warning, customers, spills are largely responsible for slip, trip, fall accidents in this store?
A. I'm not sure. I don't -- I'm not sure.

Q. If you don't know, is there anyone a[t] Store 2508, your store, who would know about such a warning being posted?
A. Yeah, I haven't seen a warning posted.[16]

e. Knowing that spills were largely responsible for slip, trip, and fall accidents throughout the entire Store 2508, Respondent created employment positions whose sole job it was to walk the store's action alley:

Q. Does Wal-Mart have a position where their sole job is to cruise the aisles all day looking for spills?
A. We have a strategic team that works on the floors during the high traffic hours.

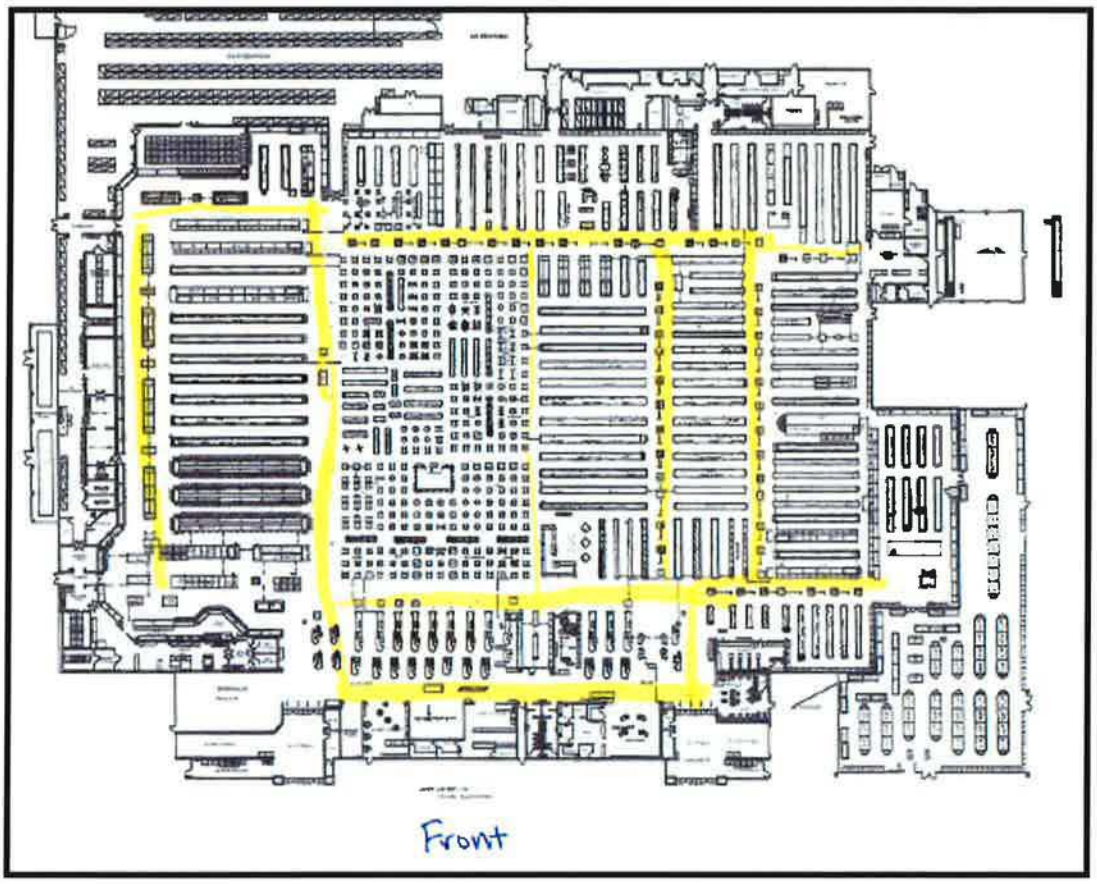
Q. What are the high traffic hours?
A. Eleven to eight.

Q. Eleven a.m. to eight p.m.?
A. Correct.

Q. How many -- and their sole job is to cruise aisles and look for spills?
A. They cruise -- they go around the racetrack or action alley.[17]

f. The action alley circles different sections of the store. Respondent's 30(b)(6) witness identified the action alley with yellow highlighting on the map of Store 2508:

[16] R. 000127-128 (Wal-Mart 30(b)(6), pp. 75:18 - 76:5).
[17] R. 000117 (Wal-Mart 30(b)(6), p. 33:3-15).



(R. 000147 (Wal-Mart 30(b)(6), Ex. 2); R. 117-118 (Wal-Mart 30(b)(6), pp. 33:3 -37:10, designee identifying location of action alley throughout store 2508).

f. Knowing that spills were largely responsible for slip, trip, and fall accidents at Store 2508, and throughout the entire store, Respondent also requires its employee to be continuously looking out for spills in their areas when they are on the store floor:

> A. …while the associates are out on the floor doing whatever they're doing, they're supposed to be looking for, you know, things on the floor or spills while they are out there on the floor. It is not a by hour thing. It is while they are out there, they are supposed to be looking and making sure there is nothing on the floor or, you know, doesn't have to be on the floor. It could be, you know, something else that they find where they're going -- that they're making sure that -- trying to make sure that the area is safe for the customer.

Q. All the time?
A. Yeah. I mean, it could be in the back room. Making sure it is safe in the back room. It could be on the floor. While they're in the building, they are supposed to be making sure their immediate area they are in is safe for the customer.

Q. What does Wal-Mart do to make sure that every square inch of Store 2508 is getting an associate's eyes on it to make sure that it is safe?
A. It's just -- it's part of the culture. I don't know how else to explain it. It is, you know, they're taught it. There is computer-based learning that that we go through that talks about it. There is policies that they can review or reviewed with them. And then there's just the layers of people in the building that help make sure it happens.

Q. Is there a method or a policy or something that Wal-Mart has to make sure that every aisle is getting a safety sweep at least every certain number of minutes?
A. No, it's -- no. [18]

g. On June 30, 2015, Appellant was a guest of Respondent's Store 2508. Appellant was looking for motorcycle tie-down straps, and was directed by a store employee to go down the housewares aisle in the direction of the aisle containing the straps.[19] As Appellant neared the end of the housewares aisle, he slipped in a liquid.[20]

h. The end of the housewares aisle where Appellant encountered the spill was immediately adjacent to the action alley. Respondent's store manager and 30(b)(6) witness identified the action alley with yellow highlighting and the location of the spill encountered by Appellant with a red circle:

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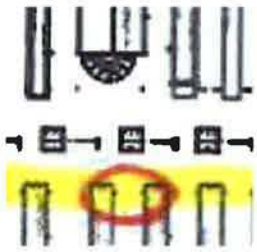
[18] R. 000116-117 (Wal-Mart 30(b)(6), pp. 30:24 - 32:9).
[19] R. 000042-43; 47-48; and 52-54 (Deposition of Michael Johnson, pp. 95:16 -96:13 (describing incident); 102:17 - 103:7 (describing incident); 112:15 - 114:23 (confirming June 30, 2015, incident statement and incident date).
[20] R. 000042-43; 47-48; and 52-54 (Deposition of Michael Johnson, pp. 95:16 - 96:13 (describing

	
R. 147 (Ex. 2 to 30(b)(6) Depo); R. 117-118 (pp. 33:3 - 37:10, designee identifying location of action alley immediately adjacent to housewares alley with highlighter)	R. 80 (Declaration of Jason Walker, ¶ 12 and Ex. A thereto, showing location of slip with red circle)

i. Another of Respondent's employees was immediately across from where Appellant encountered the spill.[21] The employee was by the front cone of the bike rack immediately across the action alley that Appellant slipped into.[22]

j. At no time during his visit to Respondent's Store 2508 was Appellant warned of the risks of spills on the premises.[23]

k. At no time during Appellant's visit to Respondent's Store 2508 did Appellant see any

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incident); 102:17 - 103:7 (describing incident); 112:15 - 114:23 (confirming June 30, 2015, incident statement and incident date)).

[21] R. 000047-48 (Deposition of Michael Johnson, pp. 102:17 - 103:7 (describing incident and employee standing near spill).

[22] R. 000157 (Respondent employee incident statement); R. 000125 (Wal-Mart 30(b)(6), pp. 66:12 - 67:22 (30(b)(6) witness identifying the employee witness standing by bike rack and bike rack being across from the housewares aisle).

signs warning of the risks of spills on the premises.[24]

l. Respondent's internal warning to employees that spills are throughout the store, and not just isolated to aisles where fluids are stored for sale, is reasonable, because liquids are permitted to come into and move around all over Respondent's store without any restriction:

> Q. At the time of Mr. Johnson's fall, did Wal-Mart prohibit customers from bringing liquids in to Store 2508?
> A. No.
>
> Q. So customers could bring in liquids of any type when they came in to shop?
> A. Yes.
>
> Q. Was there any restrictions on what the liquid was carried in?
> A. No.
>
> Q. Could it be a water bottle like you've got there with a little screw top on it, right?
> A. Yes.
>
> Q. It could be an open mug like your coffee mug there?
> A. Yes.[25]
>
> ***
>
> Q. Did the greeter check to make sure that customers bringing liquids in to the store were in containers that wouldn't spill?
> A. Not that I'm aware of.[26]
>
> ***
>
> Q. BY MR. SWARTZ: You could determine how and when beverages leave the restaurant portion of your store, right?

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[23] R. 000100-101.
[24] R. 000100-101.
[25] R. 000114 (Wal-Mart 30(b)(6), pp. 21:11 - 22:1).
[26] R. 000128 (Wal-Mart 30(b)(6), p. 79:5-8).

MS. MULLER: Referring to McDonalds?

MR. SWARTZ: Yes.

THE WITNESS: The space the McDonalds owns is leased to McDonald's.

Q. BY MR. SWARTZ: Yes.
A. So McDonalds is McDonalds. They are just leasing the space from our store.

Q. Sure. And you can stand at the line between the leased space and your store and you could tell customers, I'm sorry, but you cannot bring your beverage in to my store without having a fixed lid on it, right?
A. No, I mean I would have to get approval to do that through Wal-Mart Corporate home office.

Q. Have you ever asked about trying to put some restrictions on beverages being carried around your store?
A. I personally have not asked.

Q. Have you ever asked about putting some restrictions on what customers can bring in to the store as far as liquids go?
A. Not to my knowledge.

Q. Knowing that spills are largely responsible for slip, trip and fall accidents in Store 2508, would you agree with me that it would be a reasonable thing for you to do in restricting how customers can carry beverages around your store?

MS. MULLER: Objection. Form. Go ahead.
THE WITNESS: I have to adhere to the policies and procedures that are laid out by Wal-Mart Stores, Incorporated.

Q. BY MR. SWARTZ: And they don't have a policy or procedure for assisting customers with making sure that they're carrying their liquids appropriately?
A. Not to my knowledge.[27]

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[27] R. 000129 (Wal-Mart 30(b)(6), pp. 80:4 - 81:19).

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Q. At the time of Mr. Johnson's fall at Store 2508, did Wal-Mart Store 2508 sell products that were liquid based?
A. Yes.

Q. Did Wal-Mart, at the time of the fall, did Wal-Mart direct, prohibit, restrict in any way how a customer could move liquids within Store 2508?
A. No.[28]

II.
ISSUE ON APPEAL

Did the trial court err by granting summary judgment to the Respondents?

III.
ARGUMENT

The Trial Court Erred as Matter of Law by Granting Summary Judgment to the Respondents

A. STANDARD OF REVIEW

This Court reviews an appeal from an order of summary judgment *de novo,* and it applies the same standards used by the trial court.[29] A grant of summary judgment is warranted where it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[30]

When the party moving for summary judgment will not carry the burden of production or proof at trial, the genuine issue of material fact burden may be carried by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial.[31] Such an

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[28] R. 000114 (Wal-Mart 30(b)(6), p. 22:2-10).
[29] *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394, 224 P.3rd, 458, 461 (2008).
[30] I.R.C.P. 56(c).
[31] *Heath v. Honker's Mini-Mart Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000).

absence of evidence may be established either by an affirmative showing with the moving party's own evidence, or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking.[32] Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under I.R.C.P. 56(f).[33] "The burden of proving the absence of an issue of material fact rests at all times upon the moving party."[34]

A material fact is one upon which the outcome of the case may be different.[35] "Circumstantial evidence can create a genuine issue of material fact. ... However, the non-moving party may not rest on a mere scintilla of evidence."[36] If the evidence is conflicting on material issues, or if reasonable minds could reach different conclusions, summary judgment is not appropriate.[37] The facts must be liberally construed in favor of the non-moving party.[38] All reasonable inferences must be drawn in favor of the non-moving party.[39]

B. Genuine Issues of Material Fact Exist on Respondent's Business Practices Creating a Recurring or Continuous Condition that Gives Rise to a Foreseeable Risk of Harm

The Trial Court missed or ignored and/or failed to draw reasonable inferences from the evidence showing Respondent's recurring or continuous spill problem that it failed to warn of, and failed to correct. Appellant's slip and fall on that particular day, particular spot, and particular way,

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[32] *Heath*, 134 Idaho at 712, 8 P.3d at 1255.
[33] *Heath*, 134 Idaho at 712, 8 P.3d at 1255.
[34] *Blickenstaff v. Clegg*, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004) (emphasis added).
[35] *Rife v. Long,* 127 Idaho 841, 849, 908 P.2d 143, 151 (1995).
[36] *Shea v. Kevic Corp.,* 156 Idaho 540, 545, 328 P.3d 520, 525 (2014).
[37] *Loomis v. City of Hailey,* 119 Idaho 434, 436, 807P.2d 1272, 1274 (1991).
[38] *Renzo v. Idaho State Dep't. of Agric.*, 149 Idaho 777, 779, 241 P.3d 950, 952 (2010).

may have been an isolated incident, but Respondent's continuous and recurring spill problem throughout the entire store is not isolated. Evidence shows that Respondent's business practices give rise to the foreseeable risk of a spill and resulting harm in all sections of its store. Even more significant is evidence that shows Respondent's business practices give rise to the foreseeable risk of a spill and resulting harm in the aisle immediately adjacent to the spill where Appellant slipped.

The Trial Court missed or ignored this evidence and/or failed to draw reasonable inference in Appellant's favor, and, in so doing, erred in refusing to apply the recurring or continuous hazard theory in this case. The Trial Court held it "won't impute knowledge to Walmart simply because it lets customers carry beverages about the store. That is a commonplace business practice."[40] The Trial Court also concluded that while spills "might be a fact of life, spills on the trash-can aisle ...aren't, or at least hadn't been before Johnson's accident" and on that basis concluded that Appellant's slip and fall was an isolated incident.[41]

In so doing, the Trial Court was hyper-focused on Respondent's testimony that it was unaware of a spill occurring in the houseware aisle before June 30, 2015, and the absence of any evidence of a liquid being stored in that aisle.[42] That led the Trial Court to then conclude that evidence of Respondent allowing customers to carry beverages about the store was not enough to impute knowledge of the particular spill, at the particular spot, and at the particular time of Appellant's slip on the spill.[43]

But, the Trial Court missed or ignored and/or failed to draw reasonable inferences from the

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[39] *Heath*, 134 Idaho at 712, 8 P.3d at 1255.
[40] R. 000191.
[41] R. 000191.
[42] R. 000190-191.
[43] R. 000191.

evidence that for about four years before the spill encountered by Appellant, Respondent's store operations resulted in spills being largely responsible for slip, trip and fall accidents in the store. Respondent alerted its employees to this fact in June, 2011, as part of its internal policies. The spills were a big enough problem that Respondent alerted the employees about the spills on the premises to educate the employees about the hazardous condition:

> • Spills are largely responsible for slip/trip/fall accidents in the store. Slip/trip/fall accidents are included in the Big 3 accident focus and require additional focus to reduce these accident claims.

(R. 000166; *see also* R. 000115 (February 28, 2017, Rule 30(b)(6) Deposition of Wal-Mart Defendants ("Wal-Mart 30(b)(6)"), p. 25:9-11, designee testifying internal policy about spills being largely responsible for slip/trip/fall accidents was to educate employee about the hazard: "Q. [The internal policy is to] [e]ducate] [employees] about the hazards of the spills on the premises? A. Yes.").

By June, 2015, Respondent was still warning its employees about spills largely being responsible for accidents in the store.[44] Respondent admits that by June, 2015, about four years after issuing the internal warning, spills were still largely responsible for slips/trips/falls in Store 2508.[45] In light of the internal warning being issued and staying in effect for about four years, it is reasonable to infer that spills are not isolated incidents at Respondent's Store 2508. The Trial Court failed to draw this reasonable inference.

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[44] R. 000127 (Wal-Mart 30(b)(6), p. 75:10-17).
[45] R. 000127 (Wal-Mart 30(b)(6), p. 75:10-17).

Also, Respondent's warning to its employees is not limited to a particular section of the store, such as the produce aisle, the beverage aisles, or other liquid products aisles. Respondent, instead, warns of spills "in the store" – as in the whole store.[46]

Respondent's warning to its employees also does not identify a particular source of spills, such as leaking products. Respondent, instead, warns of "spills" – as in all types of spills.[47]

Respondent's store-wide warning to its employees makes sense. Respondent's operations create an environment where liquids in the store are not limited to a particular type, nor are they restricted to a particular section in the store. Liquids in the store may be for sale, or may be brought into the store by customers, or may be purchased in the store and consumed in the store by customers.[48] Further, no liquid – whether for sale, or not – is restricted to a particular part of the store. There are no restrictions on how liquids may be carried or transported around the store.[49]

Even if Respondent did not know that a spill of any type can end up in any part of its store, it certainly knew that there was a greater than usual likelihood of a spill occurring immediately adjacent to the spill that Appellant encountered. Respondent has employees whose sole job it is to look for spills in the action alley.[50] The spill that Appellant encountered is where the action alley and housewares alley meet. Respondent's store manager and 30(b)(6) witness identified the action alley with yellow highlighting and the location of the spill encountered by Appellant with a red circle:

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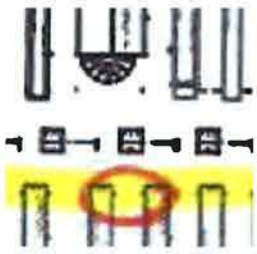
[46] R. 000166.
[47] R. 000166.
[48] R. 000114 (Wal-Mart 30(b)(6), pp. 21:11 - 22:1); R. 000128 (Wal-Mart 30(b)(6), p. 79:5-8); R. 000128-129 (Wal-Mart 30(b)(6), pp. 78:15 - 81:19); R. 000114 (Wal-Mart 30(b)(6), p. 22:2-10).
[49] R. 000114 (Wal-Mart 30(b)(6), pp. 21:11 - 22:1); R. 000128 (Wal-Mart 30(b)(6), p. 79:5-8); R. 000128-129 (Wal-Mart 30(b)(6), pp. 78:15 - 81:19); R. 000114 (Wal-Mart 30(b)(6), p. 22:2-10).
[50] R. 000117 (Wal-Mart 30(b)(6), p. 33:3-15).

	
(R. 147 (Ex. 2 to 30(b)(6) Depo); R. 117-118 (pp. 33:3 – 37:10, designee identifying location of action alley immediately adjacent to housewares alley with highlighter); R. 147 (Ex. 2 to 30(b)(6) Deposition)	(R. 80 (Declaration of Jason Walker, ¶12 and Ex. A thereto, showing location of slip with red circle)

If, as here, spills in the action alley were so foreseeable to Respondent that it created employment positions specifically to walk the action alley looking for spills, it is reasonable to infer that spills immediately adjacent to the action alley are also foreseeable. The Trial Court's conclusion that spills are only foreseeable in areas where liquids are being stored is inconsistent with Respondent's business practices – as evidenced by Respondent hiring employees whose sole job it is to walk the action alley that circles the entire store, is not exclusive to aisles with liquid products, and which runs immediately adjacent to the spill encountered by Appellant. Respondent obviously foresaw that spills can happen anywhere in its store.

Respondent does not just expect spills where liquids are stored for sale or in the action alley, either. It has its employees looking for spills throughout the entire building – they are supposed to be looking for spills wherever they are: "While [employees are] in the building, they are supposed to be making sure their immediate area they are in is safe for the customer.[51]

[51] R. 000116-117 (Wal-Mart 30(b)(6), p. 31:14-17).

Respondent's foresight about spills taking place anywhere in its store is reasonable in light of its business practices and its long history of recurring or continuous spill problem. Respondent allows customers to come into the store with beverages of their choice and in containers of their choice.[52] Respondent has an in-store McDonald's restaurant, and allows McDonald's customers to leave the restaurant with drinks.[53] Respondent also sells a large number of liquids in its store.[54] There are no restrictions on how liquids can move throughout the store.[55] This business practice is not isolated. It is recurring and continuous – so much so that Respondent continuously looks for spills throughout its whole store, including the location of the spill that Appellant encountered.

The evidence demonstrates that Respondent knew, or, by exercise of reason should have known, that its operating methods created a "continuous or easily foreseeably" dangerous spill condition, and that is a sufficient basis for liability under Idaho law. *See All v. Smith's Mgmt. Corp.*, 109 Idaho 479, 482, 708 P.2d 884, 887 (1985) (evidence of pot holes, in general, rather than a specific pot hole in a specific location, was sufficient evidence to justify submitting the case to a jury). *See also, Shea v. Kevic Corp.*, 156 Idaho 540, 549-51, 328 P.3d 520, 529-31 (2014) (liability may exist if the landowner or possessor has a habit of creating a foreseeably unsafe condition or allows an unsafe condition to develop or exist over a period of time.); *Ball v. City of Blackfoot*, 152 Idaho 673, 677-78, 273 P.3d 1266, 1270-71 (2012) (liability through showing of premises maintenance habit); and *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974) (liability where dangerous condition existed over a period of time). There are genuine issue of material fact

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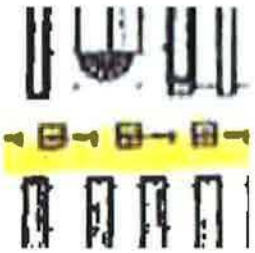
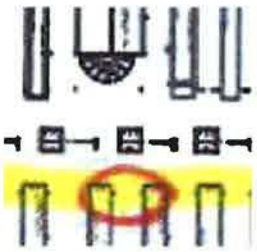
[52] R. 000114 (Wal-Mart 30(b)(6), pp. 21:11 - 22:1).
[53] R. 000128-129 (Wal-Mart 30(b)(6), pp. 79:9 - 81:19).
[54] R. 000114 (Wal-Mart 30(b)(6), p. 22:2-5).
[55] R. 000114 (Wal-Mart 30(b)(6), p. 22:2-10).

about Respondent's spill-prone business operations that only a jury can answer. Summary judgment in Respondent's favor was granted in error.

As the *All v. Smith's Mgmt. Corp.*, case makes clear, evidence of generally recurring or continuously hazardous conditions is sufficient evidence to present to a jury. In *All*, the Plaintiff presented evidence of the general condition of a proprietor's parking lot forming pot holes over a period of time. The Idaho Supreme Court held that the Plaintiff's evidence of the general condition was sufficient, and that the Plaintiff need not show evidence of the proprietor's knowledge of the specific pot hole in which Plaintiff fell:

> In the instant case, Mrs. All presented sufficient evidence to establish that the dangerous condition of the parking lot was a continuous and foreseeable consequence of Shelby's and Smith's operating methods. The formation of the specific hole into which Mrs. All fell was not an isolated incident. Therefore, it was unnecessary for Mrs. All to show that Shelby's and Smith's had actual or constructive knowledge of the specific pothole involved. It was enough to show that they were aware of the continuous formation of potholes in the parking lot through the winter and spring of 1982.

All v. Smith's Mgmt. Corp., 109 Idaho 479, 482, 708 P.2d 884, 887 (1985). As with the pot holes in *All*, spills at Store 2508 are not isolated incidents. They were a big enough problem throughout the whole store that Respondent warned its own employees about spills for about four years before the spill encountered by Appellant. Spills in the action alley immediately next to where Appellant encountered the spill were a big enough problem that Respondent created positions whose sole job it was to look for spills there. And, the action alley and the location where Appellant encountered the spill are not separated by a bright line or barrier, but merge into one another.

	
(R. 147 (Ex. 2 to 30(b)(6) Depo); R. 117-118 (pp. 33:3 – 37:10, designee identifying location of action alley immediately adjacent to housewares alley with highlighter); R. 147 (Ex. 2 to 30(b)(6) Deposition)	(R. 80 (Declaration of Jason Walker, ¶12 and Ex. A thereto, showing location of slip with red circle)

Given the lack of separation between the action alley and the exit of the housewares aisle where Appellant encountered the spill, this case is also analogous to *Shea v. Kevic Corporation*, 156 Idaho 540, 328 P.3d 520 (2014). The Plaintiff in *Shea* presented evidence of a recurring dangerous condition of ice build-up, generally, at the exit of a car wash, but not at the specific location of her slip within the general exit area. The Idaho Supreme Court held such evidence was sufficient to create a genuine issue of material fact:

> Although Shea has not shown that Kevic had actual knowledge of the specific ice buildup in front of Shea's car, and that it had existed for a sufficient time to allow warning or correction, this Court concludes that Shea has offered more than a scintilla of evidence to prove that Kevic had actual or constructive notice of operating methods that could cause a dangerous condition of ice buildup when and where Shea fell.

Shea v. Kevic Corp., 156 Idaho 540, 550, 328 P.3d 520, 530 (2014).

The reasonable inference to be drawn in Appellant's favor here is that spills were, or should have been, reasonably foreseeable in the general area of the action alley just as much as they were in the action alley. This is particularly true where, as here, the spill at the housewares aisle exit merges into the action alley without any physical separation and are, effectively, one-in-the-same general

area.

C. GENUINE ISSUES OF MATERIAL FACT EXISTS ON RESPONDENT'S FAILURE TO KEEP THE PREMISES IN A REASONABLY SAFE CONDITION AND WARN OF THE DANGEROUS SPILL CONDITION

As a landowner or possessor of land, Respondent owed its customers, including the Appellant, a duty: (a) "to keep the premises reasonably safe" and (b) "to warn of any concealed dangers which the landowner knows of or should have known of upon reasonable investigation of the land." *Stem v. Prouty*, 152 Idaho 590, 594, 272 P.3d 562, 566 (2012). The duty to warn of a dangerous condition is premised upon the proprietor's "superior knowledge" of the perilous instrumentality and the danger therefrom to persons going upon the property. *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). In this case, Respondent did not warn of the spill danger its business practices created and which Respondent was aware of for about four years before the day Appellant encountered a spill, and Respondent did not keep the premises in a reasonably safe condition.

Respondent's knowledge of the recurring and dangerous spill condition at its Store 2508 is obvious. Spills were such a serious recurring and continuous hazard at Store 2508 that Respondent warned its employees about it, and it did so for about four years leading up to the day that Appellant slipped in Respondent's store. It is undisputed that the Appellant was not warned.[56] And, Respondent presented no evidence that it warned its customers about the recurring and continuous spill condition. Instead, Respondent states that it was not aware of any warning given to its customers about the recurring and continuous spill condition:

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[56] R. 000100-101.

Q. Did Wal-Mart, in June of 2015, did Wal-Mart do anything to alert customers to that fact [- that spills are largely responsible for slip, trip and fall accidents in the store]?
A. I'm not sure.

Q. Is there a sign that says warning, customers, spills are largely responsible for slip, trip, fall accidents in this store?
A. I'm not sure. I don't -- I'm not sure.

Q. If you don't know, is there anyone a[t] Store 2508, your store, who would know about such a warning being posted?
A. Yeah, I haven't seen a warning posted.[57]

As the moving party, Respondent has the burden of showing an absence of genuine issue of material fact on this point, and it failed to do so. Summary judgment in Respondent's favor was inappropriate.

A genuine issue of material fact also exists as to whether Respondent kept its premises in a reasonably safe condition. If, despite its efforts to address the recurring and continuous spill hazard, the spill hazard existed for about four years, it is reasonable to infer that Respondent is not keeping its premises in a reasonably safe condition. It is not even entirely clear that Respondent performed the measures it had in place to keep the premises safe on the day Appellant encountered a spill. At least two employees were in the area of the spill that Appellant encountered. One employee directed Appellant down the aisle where Appellant slipped in the spill.[58] Another employee was across the action alley and at the bike cone immediately across from the spill that Appellant encountered.[59]

The facts are undisputed that Appellant left one employee who directed Appellant to walk

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[57] R. 000127-128 (Wal-Mart 30(b)(6), pp. 75:18 - 76:5).
[58] R. 000042-43; 47-48; and 52-54 (Deposition of Michael Johnson, pp. 95:16 - 96:13 (describing incident); pp. 102:17 - 103:7 (describing incident)).
[59] R. 000047-48 (Deposition of Michael Johnson, 102:17 - 103:7 (describing incident and employee standing near spill); R. 000157 (Respondent employee incident statement); R. 000125 (Wal-Mart 30(b)(6), pp. 66:12 - 67:22 (30(b)(6) witness identifying the front bike rack cone across from spill)).

down the housewares aisle, only to slip and fall just feet away from another employee immediately across the aisle from where the spill was located. And, in between the two employees was the action alley where other employees were supposed to be looking for spills. If, as Respondent testifies, its employees are supposed to be looking around their immediate area to make sure it is safe for customers, it is reasonable to infer that Respondent's employees did not perform their duties on the day Appellant encountered the spill. Given these facts and the reasonable inferences that must be drawn from them, it was inappropriate for the Trial Court to grant summary judgment in Respondent's favor.

IV.
CONCLUSION

The Trial Court missed or ignored evidence that creates a genuine issue of material fact preventing summary judgment in Respondent's favor. Drawing all reasonable inferences in a light most favorable to Appellant, a jury must decide whether Respondent knew or should have known about the continuous or recurring spill hazard at Respondent's Store 2508. Drawing all reasonable inferences in a light most favorable to Appellant, a jury must decide whether Respondent warned of the continuous and recurring spill hazard at Respondent's Store 2508 and whether Respondent maintained the area where Appellant encountered the spill in a reasonably safe manner.

RESPECTFULLY SUBMITTED this 29th day of December, 2017.

JONES & SWARTZ PLLC

By: _____
Eric B. Swartz
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December, 2019, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Stephen R. Thomas, ISB#2326
Tyler J. Anderson, ISB#6632
Mindy M. Muller ISB#7983
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 West Main Street, Suite 1000
Boise, Idaho 83702

[ ] U.S. Mail
[ ] Fax:
[X] Messenger Delivery
[ ] Email:

ERIC B. SWARTZ