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3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
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6 THERESA STEFFEN,

7 Plaintiff,

8 vs.

9 HOME DEPOT U.S.A., INC.,

10 Defendant.
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NO. CV-13-199-JLQ

**ORDER DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

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14 BEFORE THE COURT is the Defendant's Motion for Summary Judgment (ECF
15 No. 21) filed by Defendant The Home Depot, U.S.A, Inc., ("Home Depot"), to which
16 Plaintiff, Theresa Steffen has filed a Response (ECF No. 34) and Home Depot has filed a
17 Reply (ECF No. 35). The Motion was heard in a telephonic hearing on April 11, 2014.
18 Gregory Thatcher appeared on behalf of Home Depot and Michael Howard represented
19 the Plaintiff. After hearing oral argument, reviewing the briefs and the evidence, the
20 court herein **DENIES** Home Depot's Motion. The following Order is intended to
21 memorialize and supplement the oral rulings of the court.

22 **I. BACKGROUND**

23 In the afternoon of July 31, 2011, Theresa Steffen visited the Home Depot store
24 located at 5617 E. Sprague Avenue in Spokane Valley, Washington. The Complaint
25 alleges that "[w]hile in the Garden Department of the Home Depot Store, [she] slipped
26 on a puddle of water...and suffered serious and permanent injuries to her low back and
27 right shoulder," which necessitated two surgeries. (ECF No. 2, Ex. 1, ¶ 3.1). Plaintiff
28 commenced this personal injury action seeking compensatory damages against Home

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2 Depot in Spokane Superior Court. On May 29, 2013, the Defendant removed the matter
3 to this court pursuant to 28 U.S.C. § 1441(a) on the ground that diversity jurisdiction
4 exists under 28 U.S.C. § 1332(a). Plaintiff contends Home Depot was negligent in a
5 number of related respects: (1) failing to maintain the premises in a reasonably safe
6 condition; (2) failing to adequately warn Plaintiff of the unsafe condition; and (3) failing
7 to rectify or abate the dangerous wet floor condition where customers were foreseeably
8 going to walk. (ECF No. 2 (Complaint at ¶ 4.3-4.6)).

9 Home Depot designates just one undisputed fact in support of its Motion: that "the
10 substance [Plaintiff] allegedly slipped on was water, and only water." (ECF No. 35 at 2).
11 As premises liability cases require a fact specific-- not categorical--assessment, the court
12 provides the following additional context drawn from the summary judgment record and
13 viewed in the light most favorable to Plaintiff on this summary judgment motion.

14 The location of Plaintiff's alleged fall was an indoor plant section of the retail
15 store. Plaintiff alleges that after proceeding down an aisle past a display of plants she
16 attempted to turn the corner around the end cap and she slipped on water, falling forward
17 onto the cement floor. Minutes prior to Plaintiff's alleged fall, Home Depot employee
18 Terry Moss had completed watering plants and was squeegeeing the floor to "try to get
19 as much water off the main walk area as is possible." (ECF No. 32, Ex. 1 (Moss Depo.)
20 at 6). Moss was called away to assist a customer nearby regarding lawn mowers, when
21 the Plaintiff walked up to her and told her she had fallen. Plaintiff does not recall seeing
22 any caution or warning signs prior to her fall.

23 Plaintiff retained Joellen Gill as her liability expert. Gill is a human factors
24 engineer and certified safety professional. Her January 2, 2014 expert report sets forth
25 three main opinions: 1) the cement floor where Plaintiff fell was in a hazardous condition
26 at the time of her fall because the slip resistance of the floor fell below standard hazard
27 levels when wet; 2) Home Depot failed to abate the hazard in a timely manner due to a
28 lack of an effective safety and risk management program; and 3) Plaintiff's actions or
inactions were not a significant contributing factor to her slip and fall. (ECF No. 23 at

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2 Ex. 2).

3 Home Depot's liability expert is Edward G. Pool, a mechanical engineer. He
4 opines that it is unlikely Plaintiff fell on puddled water, and even if she had, based upon
5 his tests of Home Depot's retail floor, the floor was "a safe walking surface and provided
6 greater slip resistance when wet than when dry." (ECF No. 32, Ex. 5).

7 Home Depot moves for summary judgment alleging Plaintiff lacks sufficient
8 evidence where she only claims to have slipped on water. Home Depot also moves to
9 strike Gill's expert opinions under *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). Home
10 Depot's challenge to Gill's opinions is also the subject of a separate pretrial Motion in
11 Limine (ECF No. 43) set for hearing at the pretrial conference on April 29, 2014. Jury
12 trial is scheduled for May 19, 2014.

13 **II. LEGAL STANDARD**

14 The court shall grant summary judgment if no genuine issue of material fact exists
15 and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The
16 moving party bears the initial burden of demonstrating the absence of a genuine issue of
17 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it
18 might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby,*
19 *Inc.*, 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the adverse
20 party must present affirmative evidence, which "is to be believed" and from which all
21 "justifiable inferences" are to be favorably drawn. *Id.* at 255, 257. When the record,
22 however, taken as a whole, could not lead a rational trier of fact to find for the
23 non-moving party, summary judgment is warranted. *See Beard v. Banks*, 548 U.S. 521,
24 529 (2006) ("Rule 56(c) 'mandates the entry of summary judgment, after adequate time
25 for discovery and upon motion, against a party who fails to make a showing sufficient to
26 establish the existence of an element essential to that party's case, and on which that
27 party will bear the burden of proof at trial .' ") (quoting *Celotex*, 477 U.S. at 322)). If
28 different ultimate inferences may be drawn, summary judgment is inappropriate.
Sankovich v. Life Ins. Co. of North America, 638 F.2d 136, 140 (9th Cir.1981).

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2 **III. DISCUSSION**

3 **A. Premises Liability**

4 In diversity actions, federal courts apply state substantive law. *Snead v. Metro.*
5 *Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1090 (9th Cir. 2001). To establish negligence, a
6 plaintiff must establish four basic elements: (1) the existence of a duty, (2) a breach of
7 that duty, (3) a resulting injury, and (4) proximate cause. *Tincani v. Inland Empire*
8 *Zoological Soc'y*, 124 Wn.2d 121, 127–28 (1994). Plaintiff contends that she is a
9 business invitee to whom Home Depot owed a duty of ordinary care, which includes an
10 affirmative duty to inspect for dangerous conditions, “followed by such repair,
11 safeguards, or warning as may be reasonably necessary.” *Tincani v. Inland Empire*
12 *Zoological Society*, 124 Wash.2d 121, 139 (1994).

13 To determine landowner liability to invitees, Washington courts apply the
14 principles contained in the Restatement (Second) of Torts § 343 (1965), which imposes
15 liability for physical harm to its invitees if the landowner:

- 16 (a) knows or by the exercise of reasonable care would discover the condition,
17 and should realize that it involves an unreasonable risk of harm to such
18 invitees, and
19 (b) should expect that they will not discover or realize the danger, or will fail to
20 protect themselves against it, and
21 (c) fails to exercise reasonable care to protect them against the danger.

22 *Tincani*, 124 Wn.2d at 138. Courts applying this analysis are mindful of the well
23 established principle that store owners are not insurers of their customers' safety.

24 What constitutes a reasonably safe versus a dangerous condition “depends upon
25 the nature of the business conducted and the circumstances surrounding the particular
26 situation.” *Messina v. Rhodes Co.*, 67 Wash.2d 19, 27, 406 P.2d 312 (1965) (quoting
27 *Shumaker v. Charada Inv. Co.*, 183 Wash. 521, 524 (1935)). Due to this fact-intensive
28 inquiry, “[n]egligence is generally a question of fact for the jury, and should be decided
as a matter of law only ‘in the clearest of cases and when reasonable minds could not
have differed in their interpretation’ of the facts.” *Bodin v. City of Stanwood*, 130
Wash.2d 726, 741, 927 P.2d 240 (1996) (quoting *Young v. Caravan Corp.*, 99 Wash.2d
655, 661, 663 P.2d 834, 672 P.2d 1267 (1983)).

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B. Washington's Wet Floor Jurisprudence

Home Depot contends Plaintiff's negligence claims fail because Home Depot cannot be held liable for a dangerous condition which the Plaintiff cannot prove existed. Whether an unreasonably slippery condition existed at the time and place of the Plaintiff's fall is ordinarily an issue of fact. Home Depot claims Plaintiff cannot demonstrate an unsafe condition existed in this case because she has "[n]o further evidence...showing "that this water was mixed with another substance, e.g., mud, oil, or candy wrappers" (ECF No. 35 at 2) and "water alone, as a matter of law, is not a hazard" (ECF No. 35 at 6). Home Depot relies upon Washington's wet floor jurisprudence arising in *Shumaker v. Charada Inv. Co.*, 183 Wash. 521, 530 (1935); *Merrick v. Sears, Roebuck & Co.*, 67 Wash.2d 426 (1965); *Brant v. Market Basket Stores, Inc.*, 72 Wash.2d 466 (1967); *Charlton v. Toys R Us-Delaware Inc.*, 158 Wash.App. 906 (Wash.App. Div. 3, 2010); and *Tavai v. Walmart Stores*, 176 Wash.App. 122 (Wash.App. Div. 2, 2013). These cases are readily distinguishable from the case at hand and do not support the position that water alone can never create a dangerous condition.

In Washington's first wet floor case, *Shumaker*, the Plaintiff slipped and fell in a public market on a cement aisle on which she had walked "hundreds of occasions," where she was "thoroughly familiar with the situation," where vendors of fresh vegetables would water their merchandise, and where the market floors were often damp or wet. *Shumaker*, 183 Wash. 521, 527 (1935). In a 5-4 decision, the Washington Supreme Court reversed the jury's verdict in favor of the plaintiff holding that liability may not be imposed when the hazard is readily apparent. Home Depot clings to the *Shumaker* majority's statement: "[a] wet cement surface does not create a condition dangerous to pedestrians. It is a most common condition, and one readily noticed by the most casual glance." *Id.* at 530-531. The Washington Supreme Court later explained that this statement "decisively disposed of any contention that a wet cement floor, *per se*, constitutes a dangerous condition." *Brant*, 72 Wash.2d 466, 449 (1967)(emphasis added).

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2 The state Supreme Court followed *Shumaker* in its second "water on the floor
3 case" affirming judgment of dismissal where the plaintiff employee lacked sufficient
4 evidence of a dangerous condition and the store's notice of the condition. *Merrick v.*
5 *Sears, Roebuck & Co.*, 67 Wash.2d 426, 428 (1965)(explaining where Plaintiff only
6 described the floor as "wet to the hand," "one could not infer from the plaintiff's
7 evidence that the floor had (1) an inordinate amount of water in such a quantity as to
8 render it dangerously slippery, or (2) that the wetness persisted to a dangerous degree for
9 a sufficient time to charge the store with notice of the wet and slippery condition.").

10 Two of the cases cited involved slip and falls occurring at a time of inclement
11 weather when it can be reasonably expected that water might be tracked inside a store's
12 entrance. *Brant v. Market Basket Stores*, 72 Wash.2d 446, 433 P.2d 863
13 (1967)(dismissing claim for fall within 12 feet of an entrance on a snowy day where
14 there was "no testimony as to the character of the floor" or that "water would render such
15 a floor, as then and there existed, slippery or dangerous."); *Charlton v. Toys R*
16 *Us-Delaware Inc.*, 246 P.3d 199 (Wash.App. Div. 3 2010)(dismissing Plaintiff's case
17 where the Plaintiff did not see any water on the floor, could not describe the amount of
18 water, did not know how the water got onto the floor, how long it had been there before
19 she entered the store, or when the floor had last been mopped and dried by store
20 employees). In both *Brant* and *Charlton*, the plaintiffs lacked sufficient evidence to
21 establish that a dangerous condition existed or that the property owner had any reason to
22 know that a dangerous condition existed.

23 In the most recent case cited, *Tavai v. Walmart Stores*, 176 Wash.App. 122 (2013),
24 the plaintiff slipped on water 15 feet away from a check-out counter at Walmart. There
25 was no evidence as to the source of the water. The plaintiff did not contend that Walmart
26 should have discovered the water, rather plaintiff argued Walmart was negligent in its
27 choice of flooring. The court held that merely proffering expert testimony that the floor
28 was slippery when wet was insufficient to support the theory of negligent selection of
flooring and prove Walmart had constructive notice of a dangerous condition. *Tavai*, 176

1 Wash.App. at 134.

2 The plaintiffs' low success rates in the wet floor cases outlined above should not
3 be misconstrued to suggest that the law shields businesses from liability in an entire
4 category of wet floor slip and falls. Home Depot's premise that "the alleged substance --
5 water - is not hazardous" (ECF No 35 at 4) fails to recognize that *it could be*. Just like
6 any other foreign substance, it can expose an invitee to an unreasonable risk of harm.
7 *See e.g., Harmon v. Cova*, 180 Ga. App. 805, 350 S.E.2d 774 (1986)(genuine issue of
8 fact action against bar owners in slip and fall in restroom where evidence showed that
9 overflowing toilets were a continuous problem); *Wal-Mart Stores, Inc. v. Redding*, 56
10 S.W.3d. 141 (Tex.App-Houston 2001)(dangerous condition created by wet mist just
11 inside the front door). The controlling issue in each of the above-described cases was
12 not that the substance involved was only water, but the lack of other proof *beyond* the
13 mere presence of water on the floor.

14 **C. Plaintiff's Evidence of a Dangerous Condition**

15 The sole question here is whether Plaintiff's evidence of a dangerous condition
16 goes beyond water on the floor. The cases do not precisely demarcate what showing a
17 Plaintiff must make, as what constitutes a reasonably safe condition is a highly fact
18 specific inquiry depending upon "the nature of the business conducted and the
19 circumstances surrounding the particular situation." *Messina v. Rhodes Co.*, 67 Wash.
20 19, 27 (1965). The court concludes that here, there are special circumstances of this case
21 which explain why it is for the jury to decide whether an unreasonable risk of harm
22 existed. This includes Plaintiff's evidence of: 1) the timing of her alleged fall (July
23 afternoon during business hours); 2) the location of the alleged fall (interior space where
24 an invitee's attention is on looking at displayed goods); 3) the identification of the
25 substance (water); 4) the description of the flooring (smooth cement), 5) an identifiable
26 source of the water having been applied by Defendant's employee ; 6) multiple
27 descriptions regarding of the presence and amount of water before and after the fall; and
28 7) Plaintiff's expert testimony that Home Depot's smooth cement floor is dangerously

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2 slippery when wet. This evidence, which Home Depot has largely ignored in its focus
3 upon the nature of the substance, distinguishes this case from the wet floor cases cited by
4 Home Depot.

5 The court rejects Home Depot's claim that Plaintiff's claims should fail because
6 like in *Tavai*, 176 Wash.App. 122 (2013), Plaintiff's expert offers "no opinion on
7 alternative flooring that would be slip resistant, or less slippery, when wet or that Home
8 Depot's selection of its flooring was otherwise negligent." (ECF No. 35 at 4). *Tavai* is
9 inapposite as Plaintiff does not contend the negligent act occurred in Home Depot's
10 process of selecting the flooring. Rather, Plaintiff's theories asserted in the Complaint are
11 that Home Depot negligently failed to *maintain* the premises (§§ 4.3, § 4.4), failed to *warn*
12 (§§ 4.3, 4.6), and failed to *rectify/abate* a dangerous condition its employee created (§§
13 4.4, 4.6). Expert opinion on alternative flooring options would not be absolutely
14 necessary to support any one of these theories.

14 **D. Defendant's Motion to Strike**

15 Home Depot includes in its Motion a *Daubert* challenge to the opinions of Joellen
16 Gill. The narrow scope of the Defendant's Motion for Summary Judgment challenging
17 only the element of the presence of a hazardous condition only calls only for the court's
18 review of that portion of her first opinion that the floor was "in a hazardous condition at
19 the time of her slip and fall." (ECF No. 23 at Ex. 2 at 2). Home Depot's challenges to
20 her other opinions will be reviewed at a later date in the context of its Motion in Limine.
21 Gill's hazardous condition opinion is based upon her coefficient of friction testing using
22 a tribometer on the area of the Home Depot floor where Plaintiff alleges she fell and the
23 following conclusions:

- 24 1. The lower the slip resistance of a surface, the more likely a slip and fall
25 incident will occur.
- 26 2. "In general, the coefficient of friction for a walking surface must exceed 0.5
27 to be considered safe."; "A slip resistance of 0.3 or lower is generally
classified as very hazardous."
- 28 3. "[T]he average slip resistance [of Home Depot's floor in the location nearest
her slip and fall] when wet was 0.28 +/- .02."

(ECF No. 23 , Ex. 2 at 6).

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2 District courts have broad discretion to determine the admissibility and
3 qualification of experts pursuant to Federal Rule of Evidence 702. Rule 702 provides:

4 If scientific, technical, or other specialized knowledge will assist the trier of fact to
5 understand the evidence or to determine a fact in issue, a witness qualified as an
6 expert by knowledge, skill, experience, training, or education, may testify thereto
7 in the form of an opinion or otherwise.

8 Fed.R.Evid. 702. Under *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court
9 set forth four non-exhaustive factors to determine the reliability of an expert's reasoning
10 or methodology: (i) whether the theory or technique relied on has been tested; (ii)
11 whether the theory or technique has been subjected to peer review and publication; (iii)
12 whether there is a known or potential rate of error and the existence and maintenance of
13 standards controlling the technique's operation in the case of a particular scientific
14 technique; and (iv) whether the theory or method has been generally accepted by the
15 scientific community. 509 U.S. 579, 593–94(1993). “[T]he trial judge must ensure that
16 any and all scientific testimony or evidence admitted is not only relevant, but reliable.”
17 *Id.* at 589. The factors set forth in *Daubert* are not exhaustive and are applied flexibly,
18 especially where the testimony is based on “technical” or “other specialized knowledge,”
19 as is the case with engineers. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

20 Home Depot does not challenge Gill’s qualification to render an opinion regarding
21 coefficients of friction. It claims that the methodology used by Gill is unreliable because
22 1) the device she used to conduct her tests was an English XL tribometer; and 2) “[s]he
23 presents no evidence that [a] 0.5 a [sic] coefficient of friction is the accepted threshold
24 for slip resistance - especially for a wet cement surface in a retail store.” (ECF No. 43 at
25 5).

26 **1. Reliability of the Device (English XL Tribometer)**

27 Home Depot challenges the device utilized by Gill relying upon a 2010 article
28 published in the Journal of Forensic Sciences documenting a study of one tribometer of
11 different models, tested on four different surfaces (granite, porcelain, tile, and vinyl
composite). The article concludes that “different tribometers yield different COF values
for a given surface” and that “care should be taken in the interpretation of tribometer

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2 measurements in determining the safety of various walkway surfaces.” (ECF No. 22, Ex.
3 3). Of the 11 model tribometers tested in the study, the English XL was one of seven
4 failing to meet the test criteria and produce acceptable results. This study does not
5 support the conclusion that all English XL model tribometers are unreliable (in fact the
6 study suggests otherwise) or that Gill’s use of this device in this case necessarily yielded
7 unreliable results.

8 **2. Coefficient of Friction Value of 0.5**

9 Home Depot challenges the foundation for Gill’s claim that a value of 0.5 for
10 the coefficient of friction “has long been established as the minimum threshold for safe
11 walking.” Home Depot claims that because Gill has not demonstrated this is the standard
12 for wet cement surface in a retail store, it should be excluded. Home Depot analogizes to
13 a case where the court excluded expert testimony because nothing in the record
14 demonstrated that the coefficient of friction standards pertained to cruise ship pool
15 decks. *Sorreles v. NCL (Bahamas) Ltd*, 2013 WL 6271522(S.D.Fla. 2013). However,
16 Gill does not opine that industry standards required Home Depot to have a minimum slip
17 resistance of 0.5 when wet. Gill's general reference to industry authority utilizing the 0.5
18 value is used to only to bolster her ultimate conclusion that the measured value of .28 is
19 dangerously slippery. As Home Depot does not challenge the methodology used by Gill
20 to reach her ultimate conclusion that a floor with a coefficient of friction of .28 would
21 present an unsafe slipping hazard, the court should reject Home Depot’s *Daubert*
22 challenge as to Gill’s hazardous condition opinion. Indeed, Home Depot’s own expert
23 opines that “a dynamic coefficient of friction of below 0.3 is generally considered unsafe
24 for normal pedestrian traffic.” (ECF No. 32, Ex. 5 at 44).

25 **V. CONCLUSION**

26 For the foregoing reasons, **IT IS HEREBY ORDERED:**

27 1. Defendant’s Motion for Summary Judgment (ECF No. 21) is **DENIED**.

28 2. Home Depot's *Daubert* challenge to the opinion of Joellen Gill concerning the
hazardous condition of the floor is rejected. The court will consider Home Depot's other

1 challenges to the admissibility of Ms. Gill's remaining opinions in ruling upon Home
2 Depot's Motion in Limine.

3 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
4 furnish copies to counsel.

5 Dated April 16, 2014.

6 s/ Justin L. Quackenbush
7 JUSTIN L. QUACKENBUSH
8 SENIOR UNITED STATES DISTRICT JUDGE
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