IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EDWARD DUPUY and ELVIRA DUPUY, husband and wife, and the marital community thereof,	)	No. 64944-2-I
Appellants,	)	DIVISION ONE
v.	)	
PETSMART, INC., a Delaware corporation doing business in the State of Washington,	)	UNPUBLISHED OPINION
Respondent.	)	FILED: May 3, 2010

BECKER, J. — Edward Dupuy slipped and fell on a fallen wet floor sign. The trial court granted Petsmart's motion for summary judgment. We reverse. A jury could find that fallen wet floor signs were a reasonably foreseeable hazard based on evidence that Petsmart allowed pets to run free inside the store, provided wet floor signs, and knew that pets often knocked those signs over. Additionally, a reasonable jury could find that Petsmart failed to exercise reasonable care based on evidence about its mode of operation, inspection policies, and knowledge that wet floor signs get knocked over "all the time."

When reviewing a summary judgment, we engage in the same inquiry as

the trial court. Carlyle v. Safeway Stores, Inc., 78 Wn. App. 272, 277, 896 P.2d 750 (1995), review denied, 128 Wn.2d 1004 (1995). To succeed on a summary judgment motion, the moving party must first show the absence of an issue of material fact. Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 654, 869 P.2d 1014 (1994). The burden then shifts to the nonmoving party to set forth specific facts showing a genuine issue for trial. Ingersoll, 123 Wn.2d at 654. We consider all evidence and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Curtis v. Lein, 150 Wn. App. 96, 102, 206 P.3d 1264, review granted, 167 Wn.2d 1004 (2009).

According to testimony in the record of the summary judgment proceedings, Edward Dupuy went to Petsmart to shop on February 10, 2007. He spent several minutes browsing the dog toy aisle. He caught sight of something yellow on the ground, but he did not initially see what it was because he was paying attention to the objects on the shelves in front of him. He stepped on that yellow object, which was a fallen wet floor sign, and fell, injuring himself.

Petsmart allows customers to bring pets into the store. Those pets urinate and defecate on the floor about five to ten times on a busy day. Petsmart policy requires that each store have a minimum of three "Oops Stations," placed strategically throughout the store. According to Petsmart documents, an Oops Station "is a self-service clean up station for Pet Parents as well as a convenience for associates to quickly clean up a pet mess on the sales

floor." Each Oops Station is marked with a sign and contains wet floor warning signs, a trash can, paper towels, cleaning spray, pick up bags, and hand sanitizer. According to the deposition testimony of the Petsmart manager, the wet floor signs get knocked over "all the time," usually by dogs running into them or a shopping cart knocking them over. The manager testified that "it wouldn't be unusual" for a sign to be knocked over.

The manager and a Petsmart employee testified in their depositions that Petsmart does not have a formalized floor inspection process other than on opening, closing, and a manager's hourly circle of the store to check on animal well-being. During those hourly animal well-being checks, the manager will also check the floor, but there is no set procedure for walking each aisle or signing off on a floor inspection report or returning to a wet floor sign to check for continuing wetness. During the "short times in between customers," cashiers will straighten up the aisles and make sure everything is off the floor.

In an action for negligence, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). In premises liability actions, a land possessor's duty of care is governed by the entrant's common law status as an invitee, licensee, or trespasser. Tincani, 124 Wn.2d at 128. Here, both parties agree that Dupuy was an invitee. "In general, one who possesses land owes an affirmative duty to

invitees to use ordinary care to keep the premises in a reasonably safe condition." Curtis, 150 Wn. App. at 103.

Unless an exception applies, the duty to exercise reasonable care to protect invitees from harm attaches upon the invitee's showing that the premise owner had actual or constructive knowledge of the hazardous condition. O'Donnell v. Zupan Enters., Inc., 107 Wn. App. 854, 859, 28 P.3d 799 (2001), review denied, 145 Wn.2d 1027 (2002). "Such notice need not be shown, however, when the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable." Pimentel v. Roundup Co., 100 Wn.2d 39, 49, 666 P.2d 888 (1983).

Dupuy did not attempt to show Petsmart's actual or constructive notice. Instead, he argues that he presented sufficient evidence to show that Petsmart's mode of operation made it reasonably foreseeable that unsafe conditions, such as the fallen sign, would exist. Specifically, Dupuy contends that it is reasonably foreseeable that wet floor signs will be knocked over in a store where customers are allowed to use those signs and pets are allowed to run free.

Petsmart argues that Dupuy lacked evidence about the actual cause of the fallen sign and whether that cause was related to Petsmart's self-service mode of operation. "There must be a relation between the hazardous condition and the self-service mode of operation." Ingersoll, 123 Wn.2d at 654; see also

Wiltse v. Albertson's Inc., 116 Wn.2d 452, 461, 805 P.2d 793 (1991) (The actual cause of the hazard is relevant in establishing "whether the unreasonably dangerous condition was continuous or reasonably foreseeable because of the specific self-service operation.").

In Pimentel, a shopper was injured when a paint can fell from a shelf where it had been placed by an employee in a self-service area of the store. The Pimentel court recognized that the logical basis for the actual or constructive notice requirement "dissolves" when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable. Pimentel, 100 Wn.2d at 47-48. The trial court should have instructed the jury on this exception to the plaintiff's burden of showing actual or constructive notice. Pimentel, 100 Wn.2d at 50.

In Wiltse, the injured invitee slipped on a pool of water that came from a hole in the roof of Albertson's self-service grocery store. Wiltse, 116 Wn.2d at 453. Because the risk of water dripping from a leaky roof was not inherent in the store's self-service mode of operation, the Washington Supreme Court held that the Pimentel exception did not apply. Wiltse, 116 Wn.2d at 461. In Ingersoll, a person walking past a shoe store in a mall slipped on something, but had no evidence linking that slippery spot to a food-drink vendor's method of operation. Ingersoll, 123 Wn.2d at 654. In Carlyle, the court held that the hazardous condition created by a leaking shampoo bottle in the coffee aisle was not related

to the store's self-service mode of operation and that the injured invitee did not offer sufficient evidence to show that the hazard was reasonably foreseeable in the coffee aisle. Carlyle, 78 Wn. App. at 277.

However, in O'Donnell, a shopper slipped and fell on a piece of lettuce in the check out aisle of a store where customers were responsible for moving their grocery items from their shopping cart to the conveyor belt. The record established that it was not unusual for items to fall in the aisle during the unloading process. O'Donnell, 107 Wn. App. at 857. The court held that the hazard—debris in the check-out aisle—was related to the mode of operation in the area where O'Donnell fell. O'Donnell was not required to show that a customer unloading groceries in fact caused that particular piece of lettuce to be on the floor. Unlike the injured invitee in Carlyle, who was unable to show the foreseeability of shampoo in the coffee aisle, the plaintiff in O'Donnell satisfied the foreseeability element by showing that the store knew that grocery items occasionally fell from the cart during checkout. O'Donnell, 107 Wn. App. at 859-60, distinguishing Carlyle, 78 Wn. App. at 276-77.

This case is more like O'Donnell than Carlyle. Dupuy's evidence shows the foreseeability of fallen wet floor signs related to Petsmart's mode of operation based on the deposition testimony from the Petsmart manager that the signs in fact get knocked over "all the time," usually by dogs running into them. Although a juror might discount the weight of this testimony without further

clarification as to what "all the time" means, at the summary judgment stage we consider the evidence in the light most favorable to Dupuy, the nonmoving party. And here, like in O'Donnell, Dupuy's evidence establishes a basis for a finding that the hazard was foreseeable by showing that the hazardous condition happened in the past, was not unusual, and was known by the store to have occurred. Unlike in Wiltse, where the water dripping from the ceiling was not inherently related to self-service dairy cases, the sign here was related to the self-service Oops Station and the hazard of a fallen sign was related to the store's pet friendly mode of operation. The manager's testimony about dogs knocking signs over ties the actual cause of Dupuy's injuries—the fallen sign—to the store's mode of operation.

Petsmart argues that Dupuy failed to prove that a customer and not an employee deployed the particular wet floor sign that tripped Dupuy. But none of the cases cited by Petsmart support the necessity of such proof. In fact, Pimentel itself rules out Petsmart's proposed standard. There, the evidence showed that the hazardously overhanging paint can was placed on the shelf by an employee, not a customer. Pimentel, 100 Wn.2d at 41. Here, like in Pimentel, Dupuy presented sufficient evidence for a fact-finder to reasonably conclude that the fallen sign was a foreseeable hazard given Petsmart's mode of operation.

The Pimentel exception "merely eliminates the need for establishing

notice" where it applies. Therefore, the plaintiff must also prove "that defendant failed to take reasonable care to prevent the injury." Pimentel, 100 Wn.2d at 49. In exercising reasonable care, a store proprietor must inspect for dangerous conditions and provide such repair, safeguards, or warning as may be reasonably necessary to protect its customers under the circumstances. O'Donnell, 107 Wn. App. at 860. This standard of care applies regardless of the mode of operation; however, the type of precautions that are reasonable depends on the nature and the circumstances surrounding the business conduct, including the mode of operation. O'Donnell, 107 Wn. App. at 860. "The self-service mode of operation might require a proprietor to implement protections that are not necessary under other circumstances, such as installing special types of flooring or implementing housekeeping or inspection procedures that reduce the risk of harm and enable the proprietor to discover and remove hazardous conditions customers create." O'Donnell, 107 Wn. App. at 860. "The reasonableness of a proprietor's methods of protection is a question of fact." O'Donnell, 107 Wn. App. at 860.

Here, the trial court found Carlyle "very instructive" and characterized that case as holding that "there is no basis for submitting the issue to a jury unless there is some evidence from which it could infer that the hourly inspections were not adequate because the risk of spilled product—in that case it was shampoo in the coffee aisle—required greater vigilance." In response to Dupuy's argument

that Petsmart employees did not follow a set cleaning or inspection schedule, the trial court further stated that "there's no evidence in this record that an hour is appropriate, that six hours is appropriate, that eight hours is appropriate. . . . I have nothing that tells me quote, unquote what is reasonable."

Carlyle is indeed instructive for the proposition that the nonmoving party must present some evidence from which a jury could infer that a store's inspection policies and protection measures are not adequate. But the facts of this case are closer to O'Donnell than Carlyle. In Carlyle, the store's mode of operation resulted in one or two spilled objects per eight hour shift and the employees were in the habit of inspecting the store's perimeters and aisles hourly. Because the injured invitee did no more than allege that those inspection policies were inadequate, the Carlyle court affirmed summary judgment. Carlyle, 78 Wn. App. at 272, citing Coleman v. Ernest Home Center Inc., 70 Wn. App. 213, 223, 853 P.2d 473 (1993) ("[T]here would have to be evidence from which to find that once a day is *not* enough."). However, O'Donnell held that the injured invitee raised an issue of material fact relating to reasonable care by offering evidence showing that the store knew that grocery items fell into the check-out aisle, that few employees could actually see into the check-out aisle, and that the store policy required hourly checks but employees followed no set cleaning or inspection schedule. O'Donnell, 107 Wn. App. at 861.

Here, like in O'Donnell, Dupuy's evidence shows that Petsmart knew that the wet floor signs get knocked over "all the time," usually by dogs running into them. And like in O'Donnell, where employees followed no set cleaning or inspection schedule, Petsmart's employees did not follow a set inspection schedule other than conducting hourly animal well-being checks. Unlike the store in Carlyle, Petsmart's mode of operation led to as many as 10 spills per day and Petsmart allowed customers to deploy wet floor signs. Finally, unlike the grocery store in Carlyle, Petsmart's mode of operation allowed animals to run free in the store and Petsmart knew those animals knocked over signs. We conclude Dupuy introduced sufficient evidence from which a reasonable jury could find that Petsmart failed to exercise reasonable care by not implementing a wet floor sign inspection policy or by failing to provide wet floor signs that did not get knocked over "all the time."

Reversed.

Becker, J.

WE CONCUR:

Spearman, J.

Schindler, J.