

2009

Judy Price v. Smith's Food and Drug Centers, Inc..  
PYGGY, Inc., Market Source West, and John Does  
I-V : Brief of Appellant

Utah Court of Appeals

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**Recommended Citation**

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IN THE UTAH COURT OF APPEALS

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JUDY PRICE,  
Plaintiff/Appellant,

v.

SMITH'S FOOD AND DRUG CENTERS,  
INC., an Ohio Corporation, PYGGY, INC.,  
an expired Nevada Corporation, dba  
MARKET SOURCE WEST, and JOHN  
DOES I-V,  
Defendants.

Court of Appeals No.: 20090397

District Court No.: 060401509

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BRIEF OF APPELLANT JUDY PRICE

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Appeal from a judgment and order after a hearing on Defendant's, Smith's Food and Drug Centers, Inc., Motion for Summary Judgment, in Fourth Judicial District Court, Utah County, the Honorable Steven L. Hansen Presiding.

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## **LIST OF ALL PARTIES**

- (1) Judy Price: Plaintiff/Appellant
- (2) Smith's Food and Drug Centers, Inc.: Defendant/Appellee
- (3) Pyggy, Inc., is an expired Nevada Corporation, d.b.a. Market Source West: Pyggy, Inc., is not a party to this appeal. Both parties to this appeal stipulated to dismiss Plaintiff's claims against Pyggy, Inc.

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William L. Prosser, *Handbook of the Law of Torts*, § 61 (4th ed. 1971).

Black's Law Dictionary, 1139 (9th ed. 2009).

## **STATEMENT OF JURISTITION**

On April 13, 2009, the Fourth District Court issued a Decision granting defendants' Motion for Summary Judgment. R. 538. Plaintiff filed a timely Notice of Appeal from the judgment on May 4, 2009. R. 582-84. This Court has jurisdiction pursuant to Rule 3 of the Utah Rules of Appellate Procedure.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

**I. Whether the trial court erred in granting Defendant's Motion for Summary Judgment based on a determination that Plaintiff, who was injured when she slipped and fell on a puddle of water, presented insufficient evidence of the length of time the puddle was on the floor to show constructive notice.**

**A. Standard of Review:** This is an appeal from Summary Judgment, which presents a question of law to the appellate court; the standard of review is one of correctness, and the court views "the facts and all reasonable inferences drawn therefrom in the light most favorable to the [appellant]." *Matheson v. Marbec Investments, LLC*, 173 P.3d 199, 201 (Ut. C. A. 2007) (quoting *Dowling v. Bullen*, 94 P.3d 915, 917 (Utah 2004)) (internal quotation marks omitted).

**B. Preservation of Issue:** Plaintiff filed a timely Notice of Appeal (R. 584), which preserved this error for appeal. Rule 3, *Utah Rules of Appellate Procedure*. This issue was raised in Defendant's motion for summary judgment, Plaintiff's response to



Defendant's motion for summary judgment, and Plaintiff's Motion to Reconsider. R. 249, 391, & 565.

**II. Whether the trial court erred in granting Defendant's Motion for Summary Judgment when it concluded that a store-owner could not be vicariously liable for the tortious acts of an independent contractor to whom it delegated the activity of cleaning the floor.**

**A. Standard of Review:** This is an appeal from summary judgment, so the standard of review is one of correctness. The court views facts and reasonable inferences in the light most favorable to the appellant. *Matheson v. Marbec Investments, LLC*, 173 P.3d 199, 201 (Utah Ct. App 2007) (quoting *Dowling v. Bullen*, 94 P.3d 915, 917 (Utah 2004)) (internal quotation marks omitted).

**B. Preservation of Issue:** Plaintiff filed a timely Notice of Appeal. R. 584. Rule 3, *Utah Rules of Appellate Procedure*. Mrs. Price raised this issue in response to Smith's Motion for Summary Judgment which preserved this issue for appeal. R. 293.

### **APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS**

There are no applicable constitutional or statutory provisions in this case.

### **STATEMENT OF THE CASE**

This case stems from a slip-and-fall that happened in a Smith's Food and Drug Centers, Inc., supermarket (hereinafter "Smith's"). Plaintiff/Appellant, Judy Price, slipped and fell on a puddle of water and suffered injuries; including a broken arm and a

hip injury that requires surgery. Mrs. Price brought several causes of action against Smith's but appeals only in regard to two of those causes: first, that the store was negligent when it failed to inspect an area of the store where it had allowed an independent contractor to work for the day; and second, that the store should be vicariously liable for the negligence of the independent contractor for causing the hazardous puddle. The Fourth District Court for the State of Utah granted Smith's Motion for Summary Judgment on both counts mentioned above concluding as a matter of law that, under either theory of liability, Mrs. Price would be unable to recover.

The issues before this court are, first, whether Mrs. Price presented sufficient evidence of the length of time the water was on the floor to establish constructive notice; and second, whether the store can be vicariously liable for the negligence of an in-store food demonstrator (independent contractor) for harm to Mrs. Price caused by the demonstrator's failure to clean up the floor after the demonstration.

### **STATEMENT OF FACTS**

On April 2, 2005, Steven Tyler, an employee of a food demonstrator Pyggy, Inc., d.b.a. Market Source West., (hereinafter "Pyggy") spent the day handing out meat and cheese to customers in Smith's American Fork store. R. 248. Pyggy brought its own demonstration equipment and table, but purchased the food samples from Smith's. R. 247.

According to Mr. Tyler of Pyggy, he took down his demonstration table at 4:40 in the afternoon, counted the remaining meat and cheese products, paid for the product provided by Smith's, and left the store by 5:00 pm. R. 177.

Smith's had a policy that prior to demonstrators like Pyggy leaving the store that the demonstrator needed to check out with Smith's employees. R. 278.

Smith's does not have a safety policy in place for checking or cleaning a demonstration area after an in-store demonstration. R. 281. Smith's has a general policy of checking the floor once an hour. R. 248.

Ms. Price did not dispute allegations by Smith's that they conducted numerous regular inspections of the entire store at or around the time of her fall. R. 301.

However, no Smith's employee checked or inspected the area of the food demonstration immediately after Pyggy left to make sure it was clean or free of debris. R. 280, 295, 299, 359.

Shortly after 5:00 pm, Plaintiff Judy Price went to Smith's with her granddaughter to buy strawberries. R. 250, 303. As she was leaving the produce section of the store with her strawberries, Ms. Price fell on a puddle of water, breaking her arm and injuring her hip. R. 298-99. Ms. Price thinks the accident happened after 5:00 pm, around 5:20. R. 303.

No one knows for sure how the water got onto the floor, or exactly how long it had been there. Although Mr. Tyler is adamant that he did not have water at his demonstration table (R. 365-66), Chuck Brown, the store manager for Smith's at the time of the incident, testified that he was sure the water came from the demonstration table. R.

298. Mr. Brown concluded this because Ms. Price fell at the site of the demonstration table, and because he noticed a cup of water on the demonstration table when he went to talk to Mr. Tyler earlier in the day. R. 298. Mr. Brown stated he was almost 100% sure the water came from Mr. Tyler's table. R. 298. There is no other evidence suggesting any other source of the spilled water. R. 298, 426-27.

Mr. Brown also testified that he thought the water was on the floor for maybe 10 minutes. R. 301, 278.

Mr. Brown testified that the water was cleaned up easily with a paper towel. R. 278-279.<sup>1</sup>

After the incident in which Ms. Price slipped and fell on the puddle of water, Pyggy went out of business and was found not to have insurance. Transcript of Oral Arguments at 25.

Mrs. Price's supermarket safety expert, Kent Steele, opined that demonstration areas are typical areas to anticipate spillage. R. 254. Mr. Steele also opined that Smith's conduct fell below the standard of care because Smith's failed to verify that Pyggy left the demonstration area clean and spill free when Pyggy checked out. R. 252.

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<sup>1</sup> Page 45 of Alan Brown's deposition was attached to Mrs. Price's Memorandum in Opposition to Defendant's Motion for summary Judgment but was not numbered as part of the paginated record. However, that page of Mr. Brown's deposition fell between pages 279 and 279 of the paginated record.

## **SUMMARY OF ARGUMENT**

### **Ordinary Negligence.**

The court below dismissed Mrs. Price's claim of ordinary negligence, finding that she produced insufficient evidence of the amount of time the puddle was on the floor. Mrs. Price challenges that decision.

Storeowners are required to keep their premises reasonably safe by exercising reasonable care. A store can be liable for negligence if it had actual or constructive notice of a dangerous condition and failed to remedy it. Constructive notice can be imputed to a store if it would have had actual notice had it exercised reasonable care. In determining whether a defendant had constructive notice of a dangerous condition, evidence of the time the condition existed is relevant. Nevertheless, there is no formulaic way to determine what length of time constitutes an abuse of reasonable care. Evidence of the condition of the dangerous condition as well as circumstances giving rise to inferences of negligence are also relevant. Therefore, constructive notice can be affected by the circumstances surrounding and reasonable inferences drawn from a slip and fall.

Nevertheless, not only did Mrs. Price submit evidence of the length of time the puddle of water was on the floor, but she provided evidence that the length of time was insignificant to establish constructive notice and a lack of reasonable care. Mrs. Price's supermarket safety expert, Kent Steele, testified that Smith's conduct fell below the

standard of care when it failed to verify that the demonstrator left the demonstration area clean and spill free when the vendor checked out (i.e., a couple minutes or even seconds after the vendor checked out would have been too long for the store not to inspect the demonstration area). Therefore, there are material questions of fact for a jury and summary judgment was improper. This case should be remanded to the trial court for further proceedings.

#### Vicarious Liability.

Although Utah law has long accepted the general rule that the employer of an independent contractor is not generally liable for the tortious act of the contractor, the duty of a store to keep its premises reasonably safe is non-delegable. The fact that the duty of reasonable care is non-delegable does not change the duty in Utah in any way; it merely means that a store cannot avoid liability for dangerous conditions by delegating store maintenance to independent contractors.

Smith's delegated the maintenance activity of cleaning the floor at the food demonstration site to an independent contractor. There is evidence that the independent contractor was negligent in carrying out the cleaning duty delegated to it. Because Smith's delegated a store maintenance activity to an independent contractor who was negligent in carrying out that duty, it can be vicariously liable for the injuries caused by the independent contractor. Because there is evidence that Plaintiff was injured by the negligent acts of the independent contractor to whom Smith's had delegated store maintenance, summary judgment was improper, and the case should be remanded for further proceedings.

## ARGUMENT

### **I. Mrs. Price produced evidence of the length of time the water had been on the floor prior to her fall and for that reason the trial court improperly granted Smith's Motion for Summary Judgment.**

The trial court ignored evidence of the time the water spill was on the floor.

The job of the court ruling on summary judgment is not to weigh evidence but to determine if there are material questions of fact that preclude one party from prevailing as a matter of law. According to the Utah Rules of Civil Procedure, summary judgment "is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). *See also Silcox v. Skaggs*, 814 P.2d 623, 623 (Utah Ct. App. 1991) ("[I]ssues become questions of law only when the facts are undisputed and only one conclusion can be drawn from them.") (citation omitted).

Therefore, in determining whether summary judgment should be granted, the court need only determine whether material issues of fact exist that preclude judgment as a matter of law, not whether certain evidence is weightier than other evidence. *Draper City v. Estate of Fannie Bernardo*, 888 P.2d 1097, 1100 (Utah 1995). The appellate court must evaluate whether, based upon the facts and inferences asserted by the appellant, there is any law that would entitle her to prevail, in which case summary judgment is improper. *Draper City v. Estate of Fannie Bernardo*, 888 P.2d 1097, 1101 (Utah 1995).

Because negligence cases, such as this one, are heavily fact and inference dependent, summary judgment is appropriate in limited circumstances. This Court has explained that because “negligence cases often require the drawing of inferences from facts, which is properly done by juries rather than judges, summary judgment is appropriate in negligence cases only in the clearest instances.” *Matheson v. Marbec Investments, LLC*, 173 P.3d 199, 201 (Utah Ct. App. 2007) (citations and internal quotation marks omitted). The appellant is entitled to “all reasonable inferences in determining whether there is a material issue of fact which precludes summary judgment.” *Silcox v. Skaggs*, 814 P.2d 623, 625 (Utah Ct. App. 1991) (citation omitted).

Store owners are required to keep their premises reasonably safe by exercising reasonable care. It is a well-established principle of Utah premises law that a property owner is not an insurer of the safety of his premises, even for business invitees. *Martin v. Safeway*, 565 P.2d 1139, 1140 (Utah 1977). Instead, a property-owner is required to use reasonable care to maintain his store in a reasonably safe condition. *Jex v. JRA, Inc.*, 166 P.3d 655 (Utah Ct. App. 2007), *aff’d*, 196 P.3d 576 (Utah 2008).

In explaining the two-part, notice/remedy test of slip-and-fall negligence, the *Allen* court said,

[F]ault cannot be imputed to the defendant so that liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge, or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge,



sufficient time elapsed that in the exercise of reasonable care he should have remedied it.

*Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175, 176 (Utah 1975).

Here, since it is undisputed that Smith's did not create the water spill in the present matter, nor did it have actual notice of the water spill (R. 245), this brief discusses constructive notice as the basis of Smith's liability for ordinary negligence.

The Utah Supreme Court recognizes that even where there are only tenuous facts about the length of time the dangerous condition existed, the plaintiff can still meet her burden. *Ohlson v. Safeway Stores, Inc.*, 568 P.2d 753 (Utah 1977) (where the court affirmed the trial court's determination that the jury could find constructive notice—evidence of the amount of time the dangerous condition existed—where the only evidence of the time the dangerous condition existed was the condition of the broken spaghetti on the floor).

In holding that Plaintiff's negligence claim (based on constructive notice) should fail, the trial court emphasized the importance of the time factor in determining whether constructive notice can be imputed to Smith's. R. 534. The trial court quoted the Utah Supreme Court's decision in *Jex v. JRA, Inc.*, 196 P.3d 576, 581 (Utah 2008):

To establish that a temporary condition existed long enough to give a store owner constructive notice of it, a plaintiff must present evidence that it had been there for an appreciable time. We have therefore imputed constructive notice to a store owner only when there is some evidence of the length of time the debris had been on the floor.

The trial court decided that Plaintiff's negligence claim failed because "Plaintiff has shown no evidence of the length of time the puddle was on the floor." R. 533. However, the lower court disregarded Mrs. Price's evidence of the length of time the puddle was on the floor.

Mr. Tyler took his table down at 4:40 in the afternoon, and had left Smith's by 5:00 pm. R. 177. Mrs. Price testified that she fell between 5:00 and 5:20 in the afternoon. R. 224. Therefore, there is a 40 minute window in which water could have been on floor.

Mrs. Price also presented evidence of the length of time the water was on the floor in the form of testimony from Smith's store manager, Mr. Brown.

Mr. Brown based his conclusion on the fact that Mr. Tyler did not take his table down until 5:00. He testified he thought the water would have been on the floor for 10 minutes:

It couldn't have been too long. Because [Mr. Tyler] left at 5:00 or right before that, a few minutes. He was scheduled until 5:00. He cleaned up probably right about that time. So between that time and then when Judy fell, it was probably a short interval . . . **maybe ten minutes**, maybe tops, if that.

R. 278.

Because Plaintiff presented evidence of the length of time the water was on the floor summary judgment was improper and this court should reverse the finding of the trial court.

**II. Smith’s duty to keep the store in a reasonably safe condition is nondelegable, and therefore Smith’s can be liable for the negligence of the independent contractor to whom it delegated the duty to clean its floor.**

Utah law has long accepted the general rule that the employer of an independent contractor is not generally liable for the tortious acts of the contractor. *Gleason v. Salt Lake City*, 74 P.2d 1225, 1232 (Utah 1937). Nevertheless, there is an exception to this general rule when an injury is caused “by the nonperformance of an **absolute duty** owed by the employer [of the independent contractor] to the complainant.” *Id.* (internal quotation marks and citation omitted).<sup>2</sup> The duty of a store to keep its premises reasonably safe is a therefore a “nondelegable” duty.

Although Utah cases explaining this principle are rare, it is well settled in American jurisprudence that a store can be vicariously liable for the tortious acts of an independent contractor when the safety of a store is at issue. William L. Prosser explains, in his *Handbook of Law of Torts* §61 (4th ed. 1971), “It is generally agreed that the obligation as to the condition of the premises is of such importance that it cannot be delegated, and that the occupier will be liable for the negligence of an independent contractor to whom he entrusts maintenance and repair.” *Id.* at 395. Indeed, a storeowner cannot discharge responsibility for his duty to maintain his store in a reasonably safe condition by delegating the care of the premises to an independent

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<sup>2</sup> Although the court in *Gleason* used the term “absolute duty,” Utah courts in other decisions have used the term “nondelegable duty.” See e.g. *Sullivan v. Utah Gas Service Co.*, 353 P.2d 465, 466 (Utah 1960); *Hogge v. Salt Lake & O. Ry. Co.*, 135 P. 585, 589 (Utah 1915); *Rose v. Provo City*, 67 P.3d 1017, 1022 (Utah Ct. App. 2003).

contractor. *Lilienthal v. Hastings Clothing Co.*, 280 P.2d 824, 828 (Cal. App. 1955); *see also Gill v. Krassner*, 77A.2d 462, 464 (N.J. Super. Ct. App. Div. 1950; Thomas E. Miller, Annotation, *Storekeeper's Liability for Personal Injury to Customer Caused by Independent Contractor's Negligence in Performing Alterations or Repair Work*, 96 A.L.R.3d 1213, 1223-25 (1979) (discussion about liability based on vicarious liability and nondelegable duty). Therefore, a storeowner can exercise reasonable care and still be vicariously liable for negligent acts of an independent contractor.

Having a nondelegable duty to keep a store reasonably safe is not the same as being an insurer of the safety of property. It is a well established principle of Utah premises law that a property owner is not an insurer of the safety of his premises, even for business invitees. *Martin v. Safeway*, 565 P.2d 1139, 1140 (Utah 1977). Instead, a property-owner is required to use reasonable care to maintain his store in a reasonably safe condition. *Jex v. JRA, Inc.*, 166 P.3d 655 (Utah Ct. App. 2007), *aff'd*, 196 P.3d 576 (Utah 2008). The fact that the duty of reasonable care is nondelegable does not change the duty in any way. It merely means that a store cannot avoid liability for dangerous conditions by delegating store maintenance to independent contractors. *See Gill*, 77A.2d at 464.

A store is liable for the tortious acts of an independent contractor when it delegates maintenance and repair activities to the contractor. *See Prosser* at 395. There are many cases in which storeowners were held liable for the negligent *repair* activities of independent contractors. *See e.g. Goodman v. Sears Roebuck Co.*, 129 A.2d 405 (D.C. 1957) (plaintiff fell on temporary covered); *Daly v. Bergstedt*, 126 N.W.2d 242 (Minn.

1964) (plaintiff tripped on masonite molding); *Lipman Wolfe & Co. v. Teeples & Thatcher, Inc.*, 522 P.2d 467 (Oregon 1974) (plaintiff fell on slippery tile-laying substance); *Bryant v. Sherm's Thunderbird Market*, 522 P.2d 1383 (Oregon 1974) (plaintiff fell in uncovered ditch in supermarket aisle); *see also* 96 A.L.R.3d 1223-25.

There are also cases dealing with storeowner liability for general *maintenance* activities negligently conducted by independent contractors, such as cleaning or waxing the floor. *See e.g. Lilienthal v. Hastings Clothing Co.*, 280 P.2d 824, 828 (Cal. App. 1955) (plaintiff slipped on newly waxed floor); *Gill v. Krassner*, 77A.2d 462, 464 (N.J. Super. Ct. App. Div. 1950) (plaintiff fell on excessively waxed floor); *Huddleston v. Lerman*, 73 A.2d 596 (NJ Super 1950) (plaintiff fell on slippery floor); *Little v. Butner*, 348 P.2d 1022 (Kan. 1960) (plaintiff slipped and fell on meat samples); *see also* Annotation, *Liability of Proprietor of Store, Office, or Similar Business Premises for Fall on Floor Made Slippery by Waxing or Oiling*, 63 A.L.R.2d 591, 641-42 (1959) (discussing acts of persons other than employees).

Floor cleaning is a maintenance activity. Black's Law Dictionary defines maintenance as "the care and work put into property to keep it operating and productive; general repair and upkeep." Black's Law Dictionary 1139 (9th ed. 2009). The American Law Institute makes a distinction between *repair* activities and general *maintenance* activities, such as cleaning, mopping, or waxing floors, and discusses them as separate topics. *See* 96 A.L.R.3d at 1216, n. 5 ("Not covered herein are cases involving injuries to a customer caused by negligence in such *general maintenance* or janitorial procedures as *cleaning*, mopping floors, scrubbing walls, and woodwork, or oiling, waxing, or

polishing floors.”) (emphasis added); *cf* 96 A.L.R.3d at 1223-25 (discussing a store’s liability for the repair activities of independent contractors) *with* 63 A.L.R.2d 641-42 (discussing a store’s liability for the acts of independent contractors for causing a floor to be slippery). Cleaning a store’s floor clearly falls within the parameters of the general upkeep of a store and can rightly be considered a maintenance activity.

Here, Smith’s delegated its floor cleaning maintenance activity to an independent contractor by delegating the duty of cleaning the floor of the demonstration area to the food demonstrator (Mr. Tyler). Chuck Brown, the Smith’s manager at the time of Ms. Price’s accident, testified that it was store policy to have the food demonstrator clean up after the demonstration. R. 281 (deposition of Mr. Brown stating, “Our policy with [food demonstrators] is that they clean up their area”); *see also* R. 278. Mr. Brown further testified that not only was it not store policy to clean up after a demonstration, it was not general store procedure either. R. 277. Mr. Brown explained that the person who signed out the food demonstrator would probably have been too busy with customers or produce to check the demonstration area following the demonstration. R. 277.

There is evidence that the independent contractor was negligent in carrying out the cleaning duty delegated to him. Mr. Brown testified that the spilled water came from the food demonstration table, that he saw the water on the table, that the water most likely got spilled when Mr. Tyler took down the demonstration table, and that there was no other way for water to have gotten on the floor where it was when Judy Price fell on it. R. 426-27. Mr. Tyler, in contradiction to Mr. Brown’s testimony, testified that he had no water on his table. R. 365-66. Nevertheless, it is not for the court to weigh the evidence

presented to it, but rather, it is a jury's job to determine what evidence it finds more persuasive. *Draper City v. Estate of Fannie Bernardo*, 888 P.2d 1097, 1100 (Utah 1995).

Because Smith's delegated a store maintenance activity (cleaning the floor) to an independent contractor, Smith's can be vicariously liable for the injuries caused by the negligent acts of the independent contractor.

### CONCLUSION

Mrs. Price respectfully requests that the Court reverse the District Court's ruling granting Smith's Motion for Summary Judgment because evidence was presented about the length of time the dangerous condition was on the floor, and because Smith's can be liable for the negligence of their independent contractor. Mrs. Price respectfully requests that the Court remand this matter to the trial court for further proceedings.

YOUNG, KESTER & PETRO

By: \_\_\_\_\_

Tyler S. Young  
Attorney for Plaintiff

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### CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing, Brief of Plaintiff/Appellant Judy Price, and an electronic copy of the brief on a computer disc were mailed U.S. Mail, postage paid, to the following this 21st day of April, 2010:

Todd C. Hilbig  
MORGAN, MINNOCK, RICE & JAMES, L.C.  
Kearns Building, Eighth Floor  
136 South Main Street  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to be "Todd C. Hilbig", written over a horizontal line.



## **ADDENDUM**

Memorandum Decision of the Honorable Steven L. Hansen dated August 13, 2009.....1-10

Order Granting Defendant's Motion for Summary Judgment and Final Judgment.....11-15

FILED  
APR 13 2009  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

JUDY PRICE,  Plaintiff,  v.  SMITH'S FOOD AND DRUG et al.,  Defendants.	<b>DECISION</b>  Date: April 13, 2009 Case No. 060401509 Judge Steven L. Hansen Division 2
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The matter before the court is the motion for summary judgment filed by defendant Smith's Food and Drug ("Smith's") on November 5, 2008, with supporting memorandum. Plaintiff Judy Price ("Plaintiff") filed an opposition on November 26, 2008. Smith's filed its reply memorandum on December 9, 2008, along with a motion in limine and supporting memorandum to strike the report and affidavit of Kent Steele ("Mr. Steele"), Plaintiff's purported negligence expert. The motion in limine also requested that the court preclude Mr. Steele from testifying at trial. Plaintiff filed an opposition to the motion in limine on January 9, 2009 and requested oral arguments. Smith's filed a reply on January 22, 2009 and a request to submit both motions for decision on January 23, 2009. Oral arguments were held on March 2, 2009. The court now issues this decision granting the motion for summary judgment on all four causes of action alleged by Plaintiff against Smith's. This decision renders moot the motion in limine, so the court does not discuss it further.

### **FACTUAL BACKGROUND**

On April 2, 2005, Plaintiff and her granddaughter Judy Chance went to the American Fork Smith's store. When they were walking from the produce section of the store toward the check stands, Plaintiff slipped and fell on a water spill that was outside of the produce section but near the bread aisle. Plaintiff thinks the accident occurred around 5:00 p.m. or shortly thereafter, and the Smith's store manager, Chuck Brown ("Mr. Brown"), believes that Plaintiff fell at 5:00 p.m. or minutes thereafter. Plaintiff does not know how the water got on the floor, how long it had been there prior to her fall, or if any of the employees of Smith's knew about the water spill. No employee of Smith's was aware of the water spill prior to Plaintiff's fall. On the day of the accident, employees had inspected the store floors ten times between 4:24 p.m. and 5:38 p.m.

Mr. Brown stated at his deposition that he was almost certain that the water came from a demonstrator for Market Source, Stephen Tyler ("Mr. Tyler"), who was demonstrating meats and cheeses in that general area of the store from 12:00 p.m. to 5:00 p.m. on that day. In his deposition, Mr. Brown stated that he remembered seeing a cup of water on Mr. Tyler's table at approximately 4:00 p.m. Mr. Brown also stated that Plaintiff slipped and fell in the area where Mr. Tyler had been demonstrating before leaving at 5:00 p.m. and there are no other nearby sources of water where Plaintiff slipped and fell. At his deposition, Mr. Tyler denied having any water at his table, stressing that it would pose a food safety risk. Mr. Tyler was not an employee of Smith's, but was a demonstrator for Market Source, wore a Market Source uniform, and was

compensated by Market Source. Mr. Tyler was not compensated by Smith's. Mr. Brown testified at his deposition that Smith's checked Mr. Tyler in when he got there and out when he left by essentially signing paperwork to verify the amount of time Mr. Tyler spent there. In addition, Mr. Brown testified that, as a matter of course, he would help a demonstrator find an appropriate area to set up their demonstration and then leave them to do the demonstration.

### ANALYSIS

As noted by both parties, Rule 56 of the Utah Rules of Civil Procedure governs motions for summary judgment and establishes that summary judgment shall be granted if the party shows 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." Utah R. Civ. Pro. 56(c) (2008). Paragraph (e) of Rule 56 requires that affidavits made to support or oppose a motion for summary judgment "shall be made on personal knowledge" and "must set forth specific facts showing that there is a genuine issue for trial." *Id.* at (e).

In determining whether there are genuine issues of material fact presented in the pleadings and the affidavits, the courts "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *Matheson v. Marbec Investments, LLC*, 2007 UT App 363, ¶5, 173 P.3d 199 (original quotation marks and citation omitted). In addition, the Utah appellate courts have noted that "because negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than

judges, summary judgment is appropriate in negligence cases only in the clearest instances.” *Id.* (original quotation marks and citation omitted). Applying these standards to this case, the court concludes that, viewing the facts and the inferences in the light most favorable to Plaintiff, there are no genuine issues of material fact and Smith’s is entitled to judgment as a matter of law.

#### A. Negligence

Plaintiff’s ordinary negligence claim against Smith’s must fail as a matter of law because there is no evidence that Smith’s or its employees or agents created the dangerous condition, or that Smith’s had actual or constructive notice of the dangerous condition. The Utah Supreme Court recently decided *Jex v. JRA, Inc.*, 2008 UT 67, 196 P.3d 576, and clarified Utah premises liability law. The court explained,

To recover under a temporary unsafe condition theory, a plaintiff must show that (1) the defendant had knowledge of the condition, that is, either actual knowledge or constructive knowledge because the condition existed long enough that he should have discovered it; and (2) after obtaining such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it. We have also held that the variant of this rule is that if the unsafe condition or defect was created by the defendant himself or his agents or employees, the notice requirement does not apply.

*Id.* at ¶16 (original quotation marks, brackets, and citations omitted). Plaintiff has not argued, nor is there any evidence, that Smith’s or its employees or agents created the dangerous condition of water on the floor. Plaintiff also seems to concede that Smith’s had no actual knowledge of the water on the floor, and again, there is no evidence showing that Smith’s had actual knowledge, nor are there any genuine issues of material fact regarding actual knowledge of

Smith's or its employees.

Plaintiff relies on the imputation of constructive knowledge to Smith's for her negligence claim. Plaintiff asserts, through her purported expert Mr. Steele, that the failure of Smith's to check the vendor's area immediately upon his departure warrants the imputation of constructive notice. However, Plaintiff's interpretation of constructive notice is much broader than the interpretation given by the Utah Supreme Court in *Jex*, in which the court explained "the importance of the time factor" in determining whether constructive notice can be imputed in a given case. *Id.* at ¶18. The court further explained,

To establish that a temporary condition existed long enough to give a store owner constructive notice of it, a plaintiff must present evidence that would show that it had been there for an appreciable time. We have therefore imputed constructive notice to a store owner only when there is some evidence of the length of time the debris has been on the floor.

*Id.* at ¶19. The court concluded that constructive notice has not been imputed by that court in cases like *Jex*, "where there is no evidence regarding the amount of time the unsafe condition has existed." *Id.* The court affirmed the holding of the Utah Court of Appeals that "conjecture and speculation is the only way to determine the length of time the puddle was on the floor, and thus it would be improper to impute constructive notice to Defendants." *Id.* at ¶21 (citing *Jex v. JRA, Inc.*, 2007 UT App 249, ¶16, 166 P.3d 655) (original quotation marks omitted).

The lack of evidence regarding the length of time the puddle had been on the floor when Plaintiff slipped is analogous to that of *Jex*. The fact that Mr. Steele believes that Smith's should

have inspected Mr. Tyler's area upon his departure does not overcome the fatal flaw that Plaintiff has shown no evidence of the length of time the puddle was on the floor. In the absence of any such evidence, this court is unable to impute constructive notice to Smith's regarding the presence of the water puddle on the floor. Therefore, Smith's has shown that it is entitled to judgment as a matter of law on Plaintiff's negligence claim.

#### **B. Negligence-Vicarious Liability**

Smith's is entitled to summary judgment as a matter of law on Plaintiff's vicarious liability claim. Plaintiff attempts to bypass the elements of a premises liability case as they have been established by the Utah appellate courts and create a new test, claiming that Smith's owed Plaintiff an absolute duty which was breached when Mr. Tyler allegedly spilled his water. Asserting that Smith's owed an absolute duty to Plaintiff or any of its customers contradicts the statement made repeatedly by the Utah Supreme Court in the context of slip and fall cases that "the owner of a business is not a guarantor that his business invitees will not slip and fall[.]" *Jex*, 2008 UT 67, ¶25 (quoting *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 478 (Utah 1996)); *Long v. Smith Food King Store*, 531 P.2d 360, 362 (Utah 1973); *Koer v. Mayfair Markets*, 431 P.2d 566 (Utah 1967).

The court in *Jex* went on to explain that a business owner is nonetheless "charged with the duty to use reasonable care to maintain the floor of his establishment in a reasonably safe condition for his patrons." 2008 UT 67, ¶25 (quoting *Schnuphase*, 918 P.2d at 478). In

interpreting the extent of this duty, the courts have created the framework described above, requiring a person who has been injured by a temporary dangerous condition to show (1) that the store owner had actual or constructive notice of a dangerous condition created by a third party or that the dangerous condition was created by the store owner herself, her agents or employees; and (2) that the store owner had sufficient time to remedy the temporary dangerous condition but failed to do so. *Jex*, 2008 UT 67, ¶16 (citations omitted). Therefore, the only way that Smith's could be liable for Mr. Tyler's actions is if Mr. Tyler was an agent or employee of Smith's at the time the accident occurred since it is undisputed that Smith's had no actual or constructive notice of the water spill.

The undisputed facts establish as a matter of law that Mr. Tyler was neither an employee nor an agent of Smith's at the time of the accident. In her memorandum in opposition, Plaintiff conceded for purposes of this motion that Mr. Tyler was not an employee of Smith's and that he was not compensated by Smith's in any way. However, even if Plaintiff had not conceded this point, it is clear from the depositions of Mr. Brown and Mr. Tyler that Mr. Tyler was employed by Market Source at the time of the accident and has never been employed by Smith's. Nor is there any evidence that Mr. Tyler had apparent or actual authority to act in behalf of Smith's, thereby becoming its agent.

However, even if Mr. Tyler were Smith's agent, Plaintiff would then have to provide evidence that Smith's had sufficient time to remedy the temporary dangerous condition but failed



to do so. As noted above, there is absolutely no evidence regarding the length of time the water remained on the floor before Plaintiff fell. This case is substantially similar to *Lindsay v. Eccles Hotel Co.*, 284 P.2d 477 (Utah 1955), and the cases that follow therefrom. As noted by Smith's, in *Lindsay* the Utah Supreme Court upheld the trial court's grant of summary judgment in a premises liability case, explaining that "there was no evidence as to how the water got onto the floor, by whom it was deposited, exactly when it arrived there or that the defendant had knowledge of its presence. Under such circumstances, a jury cannot be permitted to speculate that the defendant was negligent." *Id.* at 478. Because there is no evidence of how long the water was on the floor in this case, a jury cannot be permitted to speculate that Smith's was negligent in failing to remove the water. Therefore, Plaintiff's claim for vicarious liability fails as a matter of law, and Smith's is entitled to summary judgment.

### **C. Negligence- Failure to Supervise**

Smith's is likewise entitled to summary judgment as a matter of law on Plaintiff's failure to supervise claim. The same analysis applies here as that regarding the claim for vicarious liability—the only way that Smith's could be responsible for Mr. Tyler spilling water on the floor is if Smith's had actual or constructive notice of the spill or if Mr. Tyler were an employee or agent of Smith's. As discussed above, there is no evidence that Smith's had notice of any kind, that Mr. Tyler was an employee or agent of Smith's, or how long the water had been on the floor prior to Plaintiff's accident. Therefore, Plaintiff's claim for negligent supervision must fail as a

matter of law.

#### **D. Res Ipsa Loquitur**


Plaintiff's res ipsa loquitur claim fails as a matter of law. The doctrine of res ipsa loquitur does not apply in this case. In *Walker v. Parish Chemical Co.*, the Utah Court of Appeals explained, "[B]ecause an instruction on res ipsa loquitur allows a jury to infer negligence from the type of accident itself, there must be a basis either in common knowledge or expert testimony that when such an accident occurs, it is more probably than not the result of negligence." 914 P.2d 1157, 1161 (Utah Ct. App. 1996) (original quotation marks and citation omitted). Utah appellate courts have established that a slip and fall is not the type of accident that justifies an inference that it is more probably than not the result of negligence. Indeed, the Utah Supreme Court has stated that "negligence will not be presumed" in slip and fall cases, *Jex*, 2008 UT 67, ¶26 (citation omitted), and that "[t]he mere proof of injury within a store...does not raise, without more evidence, an inference that the defendant had control or any notice of the object causing the injury within the store nor does it presume that he was negligent." *Koer*, 431 P.2d at 569. Additionally, in *Schnuphase*, which also concerned a slip and fall accident in a grocery store, the Utah Supreme Court explained, "Thousands of accidents occur every day for which no one is liable in damages, and often no one is to blame, not even the ones who are injured." 918 P.2d at 479-80 (quoting *Martin v. Safeway Stores Inc.*, 565 P.2d 1139, 1142 (Utah 1980)).

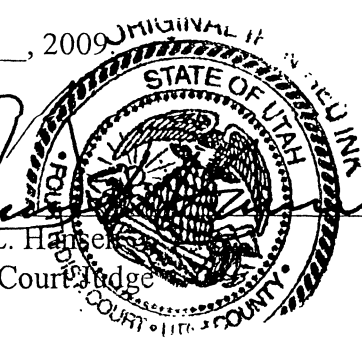
These cases are directly on point and controlling in this case. In the absence of any evidence that Smith's or its employees were negligent, the law will not allow an inference of negligence simply because Plaintiff was injured in the Smith's store. Therefore, the court concludes, and the case law mandates, that res ipsa loquitur is not applicable in this case and that Smith's is entitled to summary judgment as a matter of law on Plaintiff's res ipsa loquitur claim.

### CONCLUSION

The motion for summary judgment is granted. Plaintiff has provided no evidence of the length of time the puddle of water was on the floor. In the absence of such evidence, the court cannot impute constructive notice of the water, nor can it allow a jury to speculate that Smith's negligently failed to remedy the situation in a reasonable amount of time. In addition, because a slip and fall is not the type of accident that is more probably than not the result of negligence, res ipsa loquitur does not apply in this case. Therefore, Smith's is entitled to summary judgment on all claims. Counsel for Smith's shall prepare an appropriate order consistent with this decision for signature by the court.

DATED this 13 day of April, 2009

  
Steven L. Hansen  
District Court Judge



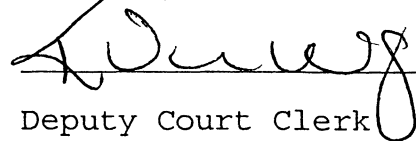
Case No. 060401509

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060401509 by the method and on the date specified.

MAIL: TODD C HILBIG 136 S MAIN 8TH FLR SALT LAKE CITY, UT 84101  
MAIL: TYLER S YOUNG 75 S 300 W PROVO UT 84601

Date: 4-13-09

  
Deputy Court Clerk

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FILED  
JUN 3 - 2009  
STATE OF UTAH  
UTAH COUNTY

Attorneys for Defendant Smith's Food and Drug Centers, Inc.

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IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

---

JUDY M. PRICE,

Plaintiff,

vs.

SMITH'S FOOD & DRUG CENTERS  
INC., an Ohio Corporation, PYGGY, INC.,  
a Nevada Corporation, dba MARKET  
SOURCE WEST, and JOHN DOES I-V  
inclusive,

Defendants.

:  
:  
: **ORDER GRANTING DEFENDANT'S**  
: **MOTION FOR SUMMARY JUDGMENT**  
: **AND ORDER OF FINAL JUDGMENT**

:  
:  
:  
: Civil No.: 060401509

:  
:  
: Judge Steven L. Hansen

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THIS MATTER was before the Court on March 2, 2009, on the Motion for Summary Judgment of Smith's Food & Drug Centers, Inc., a Defendant in the above-entitled action, with Tyler S. Young appearing as attorney for Plaintiff, and Stephen F. Edwards appearing as attorney for Defendant; and

After reading the Motion for Summary Judgment, the Memoranda in Support Thereof, the Memorandum in Opposition Thereto, and after oral argument on March 2, 2009, and being fully advised in the premises and for good cause appearing,

IT IS ORDERED AND ADJUDGED that:

1. The Defendant's Motion for Summary Judgment is hereby granted on all four causes of action alleged by Plaintiff against Smith's Food & Drug Centers, Inc. on the grounds set forth in the Parties' Memoranda and attached pleadings, affidavits, deposition testimony, and other evidence, on the grounds that there are no genuine issues of material fact and that the Defendant is entitled to summary judgment as a matter of law as set forth in this Court's Decision of April 13, 2009. Summary Judgment is granted on the following grounds:

- a. There is no evidence Defendant created or had actual or constructive notice of a water hazard prior to the alleged slip and fall incident.

In order to recover under a temporary unsafe condition theory where the defendant did not create the dangerous condition, the case of *Jex v. JRA, Inc.*, 196 P.3d 576 (Utah 2008) and other Utah law require that a plaintiff must show that the defendant had actual or constructive knowledge of the dangerous condition and that after obtaining such notice, sufficient time elapsed that in the exercise of reasonable care, the defendant should have remedied the unsafe condition. There is no evidence that Defendant or its agents created the dangerous condition at issue. There is no evidence that Defendant had actual notice of the dangerous condition. Constructive notice of the dangerous condition may not be imputed because there is no evidence regarding the length of time the dangerous condition had been present prior to Plaintiff's incident.

- b. Plaintiff's claim for vicarious liability fails as a matter of law.

Utah law provides that an owner of a business is not a guarantor that the owner's business invitees will not slip and fall. In order to recover under a temporary unsafe condition theory where the defendant did not create the dangerous condition, Utah law requires that a plaintiff must show that the defendant had actual or constructive knowledge of the dangerous condition and that after

obtaining such notice, sufficient time elapsed that in the exercise of reasonable care, the defendant should have remedied the unsafe condition. In the present matter, Defendant did not owe Plaintiff an absolute duty that could have been breached even if Mr. Stephen Tyler allegedly spilled the water on which Plaintiff slipped and fell. Mr. Tyler was not an employee or agent of Defendant but was employed by Market Source. Furthermore, there is no evidence regarding how long the dangerous condition was present prior to Plaintiff's incident.

c. Plaintiff's claim for negligent supervision fails as a matter of law.

Plaintiff's negligent supervision cause of action fails because Defendant did not have actual or constructive notice of the dangerous condition and because Mr. Tyler was not an employee or agent of Defendant but was employed by Market Source.

d. Res ipsa loquitur does not apply to this case.

Utah law does not permit the presumption of negligence in slip and fall cases. Utah law precludes an inference that the defendant had control or any notice of the cause of injury within the store without more evidence than the mere proof of injury within a store. Therefore, Plaintiff's res ipsa loquitur cause of action fails as a matter of law, and Defendant is entitled to summary judgment.

3. The granting of Defendant's Motion for Summary Judgment is dispositive of the case.

4. Plaintiff's Complaint and all causes of action asserted therein are hereby dismissed with prejudice as to Defendant Smith's Food & Drug Centers, Inc.; and,

5. Defendant Smith's Food & Drug Centers, Inc. is awarded its costs as are allowed by law.

DATED this 3 <sup>June</sup> day of May, 2009.

BY THE COURT IF IN RED INK  
ORIGINAL  
STATE OF UTAH  
HONORABLE STEVEN L. HANSEN  
FOURTH JUDICIAL DISTRICT COURT JUDGE  
FOURTH DIST. COURT # 8TH COURT

APPROVED AS TO FORM:

YOUNG, KESTER & PETRO

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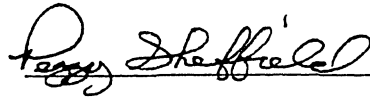
Tyler S. Young  
Attorneys for Plaintiff



**CERTIFICATE OF MAILING**

I hereby certify that on this 22 day of April, 2009, I caused a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER OF FINAL JUDGMENT** to be mailed, postage prepaid, to the following:

Tyler S. Young  
YOUNG, KESTER & PETRO  
75 South 300 West  
Provo, Utah 84601

  
\_\_\_\_\_