

2009

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

Utah Court of Appeals

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JUDY M. PRICE, :
 :
 :
 Plaintiff/Appellant, : District Court No. 060401509
 :
 :
 vs. : Court of Appeals No. 20090397
 :
 :
 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/Appellee. :

APPEAL FROM A JUDGMENT GRANTING SMITH'S FOOD & DRUG
CENTERS, INC.'S MOTION FOR SUMMARY JUDGMENT AND
ORDER OF FINAL JUDGMENT, IN FOURTH JUDICIAL DISTRICT
COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE
STEVEN L. HANSEN PRESIDING

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MAY 20 2000

IN THE UTAH COURT OF APPEALS

JUDY M. PRICE,	:	
	:	
Plaintiff/Appellant,	:	District Court No. 060401509
	:	
vs.	:	Court of Appeals No. 20090397
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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/Appellee.	:	

BRIEF OF APPELLEE SMITH'S FOOD & DRUG CENTERS, INC.

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LIST OF ALL PARTIES TO THE PROCEEDINGS

1. Plaintiff/Appellant: Judy Price
2. Defendant/Appellee: Smith's Food & Drug Centers, Inc.
3. Pyggy, Inc. dba Market Source West is not a party to this appeal. The other two parties to this appeal stipulated to dismiss Plaintiff's claims against Pyggy, Inc. dba Market Source West reserving the right to list Pyggy, Inc. dba Market Source West on the special verdict.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2010).

STATEMENT OF THE ISSUES

I.

ISSUES ON APPEAL

A. Whether the trial court correctly ruled that Appellee was entitled to summary judgment as a matter of law because there was no evidence of how long the temporary hazard was in existence prior to Appellant's incident and therefore Appellant was unable to show that Appellee had constructive notice of the temporary hazard.

B. Whether the trial court correctly ruled that Appellee was entitled to summary judgment as a matter of law because there was no evidence that Appellee delegated its duty to use reasonable care to maintain its store in a reasonable safe condition to Market Source demonstrator Stephen Tyler.

C. Whether the trial court correctly applied its discretion and avoided manifest error in granting summary judgment to Appellee.

II.

STANDARD OF REVIEW

In reviewing a Motion for Summary Judgment, an appellate court accords no deference to a trial court's legal conclusions but examines them for correctness.

Butterfield v. Okubo, 831 P.2d 97 (Utah 1992); *Schurtz v. BMW of North Am., Inc.*, 814 P.2d 1108 (Utah 1991).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Rule 56(e) of the Utah Rules of Civil Procedure. Rule 56 is attached hereto in the Addendum as Exhibit "A".

STATEMENT OF THE CASE

I.

NATURE OF THE CASE

This case arose from an injury allegedly sustained as the result of a slip and fall of Plaintiff and Appellant, Judy Price ("Price"), in a grocery store operated by Defendant and Appellee, Smith's Food & Drug Centers, Inc. ("Smith's") on April 2, 2005, in Utah County. (Amended Complaint, ¶ 9, R. 100.)

II.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

On or about May 15, 2006, Price filed her Complaint in the Fourth Judicial District Court, Civil No. 060401509 PI (Complaint, R. 5.) On or about August 3, 2006, Smith's

filed its Answer to Price's Complaint. (Answer, R. 36.) On or about May 14, 2008, Price filed her Amended Complaint. (Amended Complaint, R. 101.) On or about May 30, 2008, Smith's filed its Answer to Price's Amended Complaint. (Answer to Amended Complaint, R. 153.) On or about November 4, 2008, Smith's filed its Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment. (Defendant's Motion for Summary Judgment, R. 170; Defendant's Memorandum in Support of Motion for Summary Judgment, R. 251.) On or about November 26, 2008, Price filed her Memorandum in Opposition to Defendant's Motion for Summary Judgment, and on or about December 9, 2008, Smith's filed its Reply Memorandum. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, R. 305; Defendant's Reply Memorandum, R. 370.) Oral arguments were held on March 2, 2009. The trial court issued its decision granting Smith's Motion for Summary Judgment on April 13, 2009. (Decision, R. 538.) The trial court signed the Order granting Smith's Motion for Summary Judgment on June 3, 2009. (Order Granting Defendant's Motion for Summary Judgment and Order of Final Judgment, R. 606.)

On or about May 4, 2009, Price filed her Notice of Appeal from the Trial Court's Order. (Notice of Appeal, R. 584.) The Utah Supreme Court issued an Order on or about May 14, 2009, transferring Price's summary judgment appeal to the Utah Court of Appeals. (Order, R. 594.)

STATEMENT OF FACTS

1. This case arose out of an incident on April 2, 2005, in which Price slipped and fell on water on the floor of a Smith's grocery store located in American Fork, Utah. (Amended Complaint, ¶ 9, R. 100.)

2. Price's Amended Complaint names Smith's as a defendant and Pyggy, Inc., dba Market Source West ("Market Source") as a defendant. (Amended Complaint, ¶¶ 2-3, R. 101.)

3. In her Amended Complaint, Price brought four causes of action against Smith's: negligence, negligence - vicarious liability, negligence - failure to supervise, and res ipsa loquitur. (Amended Complaint, ¶¶ 12-22, R. 98-99.) However, on appeal, Price is only asserting two causes of action: negligence and negligence - vicarious liability. (Brief of Appellant, p. 3, attached hereto in the Addendum as Exhibit "B.")

4. On April 2, 2005, Price and her granddaughter, Judy Chance, went to the American Fork Smith's store to purchase strawberries. (Deposition of Judy Price, pp. 18-19, R. 224-225.)

5. After picking up the strawberries in the produce section of the store, the two began walking toward the check stands. As they traveled in the direction of the check stands, Price slipped and fell on a water spill that was outside of the produce section but near the bread aisle. (*Id.* at 22, 26, 29, R. 221-223.)

6. Price does not know the time of the accident, though she thinks it could have been “5 something, 5:20, 5 something.” (*Id.* at 19, R. 224.)

7. The Smith’s store manager, Chuck Brown, believes that Price fell at 5:00 p.m. or just minutes thereafter. (Deposition of Chuck Brown, p. 44, R. 427.)

8. Though Price did not notice the size of the water spill, Mr. Brown estimated that the spill was approximately eight inches in diameter. Ms. Chance thought that the spill could be as large as two 8-by-11-inch pieces of paper. (Deposition of Judy Price, p. 37, R. 216; Deposition of Chuck Brown, p. 47, R. 205; Deposition of Judy Chance, p. 32, R. 202.)

9. Price does not know how the water got on the store floor:

Q. Do you know how water got on the floor before you fell?

A. I didn’t know there was water on the floor, so how could I know how it got there?

Q. Again, you’d just be guessing on what it was and how that happened?

A. That’s correct.

(Deposition of Judy Price, pp. 36, R. 217.)

10. Price does not know how long the water had been on the floor prior to her accident:

Q. Do you know how long the water had been on the floor before you fell?

A. I have no idea. I didn’t see the water. I have no – only what people – what he said. I never – I never saw the water.

* * *

- Q. So given that you learned after you felt it was water, do you know how long that water had been on the floor before you fell on it?
- A. I have no – I have no idea, I mean –
- Q. That would just be speculation on your part?
- A. Absolutely.

(*Id.* at 33-35, R. 218-220.)

11. Price has no reason to believe that an employee knew of the water spill prior to her accident:

- Q. Do you know if any employee of the Smith's knew about the water before your slipped on it?
- A. I have no reason to believe they did. I have no idea.

(*Id.* at 35-36, R. 217-218.)

12. Price's granddaughter, Ms. Chance, does not know how the water got on the store floor. She does not know how long it had been on the floor prior to Price's accident. She does not know if any store employee knew of the water spill prior to Price's accident. (Deposition of Judy Chance, pp. 33-34, R. 200-201.)

13. When Mr. Brown initially arrived at the scene of the accident, he saw the water spill and could not figure out how the water came to be on the floor. Upon reflection, however, Mr. Brown guessed that the water spill came from a demonstrator for Market Source, Stephen Tyler, who was demonstrating meats and cheeses from 12:00 p.m. to 5:00 p.m. at the store. Mr. Brown bases this assumption on his recollection that he saw a cup of water on the demonstrator's table at approximately 4:00 p.m., that Price

slipped and fell in the area where the demonstrator had been demonstrating before leaving at 5:00 p.m., and that there are no other nearby sources of water where Price slipped and fell. (Deposition of Chuck Brown, pp. 32, 37, 44-45, R. 207-208, 426-427.)

14. If the water came from Mr. Tyler as guessed by Mr. Brown in Mr. Brown's deposition prior to Mr. Tyler's deposition, the water spill would have been on the store floor a very brief time. Mr. Brown guesses that at the longest, the water could have been present for 10 minutes. (*Id.* at 45, R. 426.)

15. No store employee was aware of the water spill prior to Price's accident. (*Id.* at 46, R. 425.)

16. In addition to a culture of cleanliness and maintenance, the store has a formal policy of inspecting its store floors at least once every hour to make certain that the store is free from temporary hazards. (*Id.* at 16-17, R. 210-211.)

17. On the day in question, the store inspected the store floors on eight separate occasions from 4:24 p.m. to 4:58 p.m., as follows:

4:24 p.m., 4:26 p.m., 4:29 p.m., 4:33 p.m., 4:34 p.m., 4:43 p.m., 4:50 p.m.,
and 4:58 p.m.

The store inspected the store floors another four times during the five o'clock hour, as follows:

5:12 p.m., 5:38 p.m., 5:55 p.m., 5:57 p.m.

(Smith's Rule 26(a)(1) Initial Disclosures, Floor Inspection Report, R. 187-193.)

18. At his deposition, Mr. Tyler testified that he arrived at the Smith's store at noon and left at 5:00 p.m. on the day of the incident. (Deposition of Stephen Tyler, p. 14, attached hereto in the Addendum as Exhibit "C.")

19. Mr. Tyler was adamant that he did not have a glass of water at his demonstration table and that he did not spill any water on April 2, 2005. (Deposition of Stephen Tyler, pp. 21-22, 28, 42, R. 171, 176, 178-179.)

20. Mr. Tyler stressed that water was not a component to his demonstration of deli meats and cheeses and that a cup or bottle of water at the demonstration table would pose a food safety risk. (*Id.* at 21-22, R. 178-179.)

21. Mr. Tyler testified that while he was demonstrating at Smith's on the day of the incident, he never saw anyone spill anything and he never saw any spill of any kind on the floors of the Smith's store. (*Id.* at 28, R. 176.)

22. Mr. Tyler was not an employee of Smith's but was a demonstrator for Market Source. (*Id.* at 6-7, R. 183-184.)

23. Mr. Tyler was not compensated by Smith's in any way. Instead, he was paid by Market Source. (*Id.* at 32, R. 175.)

24. Market Source was a demonstration company that demonstrated product at the request of the vendor or manufacturer of the product to be demonstrated. (Deposition of Chuck Brown, p. 7, attached hereto in the Addendum as Exhibit "D.")

25. The demonstration company pays Smith's for the product that is demonstrated. (*Id.* at 10, Addendum, Exhibit "D.")

26. The demonstration company demonstrators do not work for Smith's. (*Id.* at 13, Addendum, Exhibit "D.")

27. Smith's does not pay the demonstration company. Instead, the demonstration company is paid by the vendor or manufacturer that hired the demonstration company to demonstrate the product. (*Id.* at 19, Addendum, Exhibit "D.")

28. As a demonstrator for Market Source, Mr. Tyler wore a Market Source uniform consisting of a bow tie and apron and not a Smith's uniform as he demonstrated. (Deposition of Stephen Tyler, pp. 11-12, R. 181-182.)

29. As a demonstrator for Market Source, Mr. Tyler was not supervised by Smith's employees. (*Id.* at 28, R. 176; Deposition of Chuck Brown, p. 10, R. 213.)

30. As a demonstrator, Mr. Tyler did not receive assistance from Smith's employees in setting up or taking down his demonstration within the Smith's store. (Deposition of Stephen Tyler, p. 20, R. 180.)

31. As a demonstrator, Mr. Tyler was responsible for bringing his own equipment. The store did not provide anything but the product to be demonstrated, which Market Source West had to purchase. (*Id.* at 12, R. 181; Deposition of Chuck Brown, p. 22, R. 209.)

32. Mr. Tyler had minimal interactions with store employees and operated autonomously of the store as a third-party demonstrator. (Deposition of Stephen Tyler, pp. 20, 23, 28, R. 176-177, 180; Deposition of Chuck Brown, pp. 10, 22, R. 209, 213.)

33. Because Mr. Tyler was not an employee of the store, Smith's did not have any policies or procedures that it required Mr. Tyler to follow while demonstrating within the store. (Deposition of Chuck Brown, p. 13, Addendum, Exhibit "D.")

34. As a third-party demonstrator, Mr. Tyler was never supervised by any of the various different grocery store chains such as Smith's, Wal-Mart, Macey's, and Albertson's, and the store employees of those various grocery chains never checked on Mr. Tyler to confirm that he had cleaned his demonstration area prior to his departure. (Deposition of Stephen Tyler, pp. 38-40, R. 172-174.)

SUMMARY OF THE ARGUMENT

I. The law in Utah pertaining to slip and fall cases involving an unsafe condition of a temporary nature that was neither created by the storeowner nor known to be in existence by the storeowner requires that the plaintiff show that the storeowner had constructive knowledge of the unsafe temporary condition because the condition had existed long enough that the storeowner should have discovered it. Price was unable to show that Smith's had constructive knowledge of the water spill that led to Price's incident because there is no evidence as to how long the water spill was on the floor prior

to Price's incident. Consequentially, the trial court correctly granted Smith's Motion for Summary Judgment.

II. The law in Utah makes it clear that the trier of fact cannot be permitted to speculate that a defendant is negligent. The trial court correctly granted Smith's Motion for Summary Judgment because there is no evidence that Smith's was negligent. With absolutely no evidence, Price relies exclusively on speculation and conjecture regarding the origin of the water spill on which Price slipped and fell as well as how long the water spill was present on the floor prior to her incident.

III. The trial court was correct in granting Smith's Motion for Summary Judgment because there is no evidence that Smith's ever delegated its duty to maintain its store in a reasonably safe condition to a third-party demonstrator from Market Source who was demonstrating deli meats and cheeses on the day of the incident. There is also no evidence that Market Source was an independent contractor retained by Smith's to maintain or repair Smith's premises. Finally, there is no evidence that the demonstrator was the origin of the water spill.

IV. Smith's satisfied its duty to maintain its store in a reasonably safe condition on the day of the incident. Smith's did not create the water spill on which Plaintiff slipped and fell at approximately 5:00 p.m. and was not on notice of the spill's presence prior to the incident. Furthermore, Smith's performed eight formal floor inspections from 4:24 p.m. to 4:58 p.m. and four additional formal floor inspections in the five o'clock

hour. With no evidence that Smith's failed to meet its duty to maintain its store in a reasonably safe condition on the day of the incident, the trial court was correct in granting Smith's Motion for Summary Judgment.

ARGUMENT

I.

THE TRIAL COURT PROPERLY GRANTED APPELLEE SUMMARY JUDGMENT BECAUSE THERE IS NO EVIDENCE OF HOW LONG THE TEMPORARY HAZARD WAS IN EXISTENCE PRIOR TO THE INCIDENT.

The Utah Supreme Court has held: "A major purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder." *Reagan Outdoor Advertising v. Lundgren*, 692 P.2d 776, 779 (Utah 1984). Similarly, the United States Supreme Court held in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986): "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, that are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Id.* at 327; *Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 824 (Utah Ct. App. 1989) ("Summary disposition of lawsuits is a valuable and necessary tool in a judicial system such as ours, which strives for the efficient and timely resolution of legal disputes.").

Under Rule 56 of the Utah Rules of Civil Procedure, summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions establish that

there is no genuine issue regarding any material fact and the moving party is entitled to summary judgment as a matter of law. Subsection (e) of Rule 56 further provides:

an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

UTAH. R. CIV. P. 56(e).

The United States Supreme Court has clarified this provision with respect to Rule 56 of the Federal Rules of Civil Procedure, which is identical to the Utah rule.

If the defendant in a run-of-the-mill civil case moves for summary judgment . . . based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

The Supreme Court of Utah has held "that property owners are not insurers of the safety of those who come upon their property, even though they are business invitees."

Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1140 (Utah 1977). Merely proving that an accident occurred on the store's premises is insufficient to show that the store owner is liable for the accident. *Silcox v. Skaggs Alpha Beta, Inc.*, 814 P.2d 623 (Utah Ct. App. 1991).

In *Jex v. JRA, Inc.*, the Utah Court of Appeals indicated that slip and fall cases fall under two different categories: those involving an unsafe condition of a temporary nature and those involving an unsafe condition of a permanent nature. *Jex*, 166 P.3d 655, 658 (Utah Ct. App. 2007). The Utah Court of Appeals held:

Under the temporary condition theory, a plaintiff can only recover if the defendant has notice of the dangerous condition. Specifically, the following two conditions must be satisfied: (1) “that [the defendant] 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 [(2)] that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it.”

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

In the present matter, Price has conceded that Smith’s did not create the water spill and therefore the present matter falls under the temporary condition theory framework. (Brief of Appellant, p. 10, Addendum, Exhibit “B.”) Price has also conceded that Smith’s did not have actual notice of the water spill. (*Id.*, Addendum, Exhibit “B.”) As a result, Price must show that Smith’s had constructive notice of the temporary hazard prior to Price’s incident in order to maintain her negligence claim. However, Price has failed to meet her burden of proof and therefore her claim fails as correctly decided by the trial court.

There is no evidence that Smith’s had constructive notice and should have known about the water spill prior to the incident because no one knows how long the water spill had been on the floor prior to Price’s fall. When asked how long the water had been on

the floor prior to her fall, Price testified that she had “no idea” and that it would be speculation on her part. (Deposition of Judy Price, p. 35, R. 218.) When Price’s granddaughter, Ms. Chance, was asked if she knew how long the spill had been on the floor prior to Price’s fall, she responded “no.” (Deposition of Judy Chance, p. 33, R. 201.) Similarly, Smith’s does not know how long the water had been on the floor prior to Price’s fall. (Deposition of Chuck Brown, p. 46, R. 425; p. 45, R. 426.)

It is extremely difficult to guess how long the water spill was on the floor prior to the incident because no one knows the origin of the spill. When Price was asked how the water came to be on the floor, she responded: “I didn’t know there was water on the floor, so how could I know how it got there?” (Deposition of Judy Price, p. 36, R. 217.) Ms. Chance also testified that she did not know how the water came to be on the floor. (Deposition of Judy Chance, p. 33, R. 201.) When Smith’s store director, Mr. Brown, initially saw the water spill following the accident, he too could not figure out the origin of the water spill though he later guessed that the Market Source demonstrator, Stephen Tyler, spilled the water. (Deposition of Chuck Brown, p. 32, 37, 44-45, R. 207-208, 426-427.) However, Mr. Brown’s guess that the Market Source demonstrator spilled the water was only speculation and has been eliminated as a possibility by Mr. Tyler, who testified unequivocally at his deposition that he did not even have water nor did he spill water while at the store on the day of the incident. (Deposition of Stephen Tyler, pp. 21-22, 28, 42, R. 171, 176, 178-179.)

Of course, even if Mr. Brown's after-the-fact speculation was considered adequate evidence to identify the origin of the spill, which it is not, Price still has no evidence as to how long the water spill was on the floor prior to the incident. Price must add yet another level of speculation on top of the previous conjecture. Even then, the result does not support Price's argument for constructive notice. Price again relies on the guesses of Mr. Brown who testified that if Mr. Tyler left at 5:00 p.m. and the spill was caused at that time, then at the longest, the spill would have been present on the floor for 10 minutes. (Deposition of Chuck Brown, p. 45, R. 426.) Mr. Brown did not see, hear, or in any way observe the spilling of the water. All of this speculation is strenuously denied by Mr. Tyler who adamantly testified that he did not spill any water on the day of the incident. (Deposition of Stephen Tyler, pp. 21-22, 28, 42, R. 171, 176, 178-179.)

Based on Mr. Brown's speculation, however, the 10 minute estimate is the longest period of time the water could have been present on the floor. The water in fact could have been present just minutes or even seconds before Plaintiff's incident based on the guesses made by Mr. Brown. Mr. Brown's guesses as to the origin of the water spill or the time the water was on the floor prior to Plaintiff's incident is unsupported conjecture that is inadequate in satisfying the constructive notice requirement within the temporary condition theory framework.

In her brief, Price cites to *Ohlson v. Safeway Stores, Inc.*, 568 P.2d 753 (Utah 1977) and argues that a plaintiff can still meet her burden of proof in instances where only

tenuous facts exist as to the length of time the temporary hazard has been present. In *Ohlson*, a store patron was injured from slipping and falling on dry spaghetti on the floor of a grocery store. Unlike the present matter, however, the *Ohlson* case enjoyed abundant evidence supporting a finding that the temporary hazard had been in existence for a considerable period of time prior to the incident. In distinguishing the case from others in which there was a lack of evidence that the temporary hazard had been present for any appreciable time, the Utah Supreme Court stressed:

Here, the testimony was that the spaghetti was dirty, crushed, broken into small pieces, and that it extended from aisle ten around the end of that aisle into the main aisle for five or six feet toward the cash register at the front of the store.

The only inspection of the area made by defendant's employees in the 45 minutes prior to plaintiff's injury was a casual glance down the aisle made by defendant's manager as he came on duty, even though defendant knew that the time at which the injury occurred was the busiest time for the store; that more customers were present during that time; that debris was more likely to find its way to the floor during this time; and that the debris caused the kind of injury suffered by the plaintiff here. The main aisle in which some of the spaghetti was strewn was visible from the positions of employees at the cash register.

Ohlson, 568 P.2d at 754-755.

In the present matter, Price may not cite to any of the factors identified by the Utah Supreme Court in the *Ohlson* decision to bolster her case. In *Ohlson*, the actual nature of the spaghetti at the time of the incident indicated that it had been present on the floor for a considerable period of time. The spaghetti was dirty, crushed, broken into small pieces, and spread over a substantial area of the store floor. In contrast, the water spill in the

present matter provides absolutely no hint into how long it was on the floor prior to Price's fall. There is no evidence that the water spill was dirty or had been traveled through which might imply its presence on the floor for some meaningful period of time.

In *Ohlson*, the Utah Supreme Court stressed that only a single casual glance down the aisle in which the spaghetti lay had been made in the 45 minutes before the incident. However, in the present matter, Smith's had undertaken 12 formal floor inspections from 4:24 p.m. to 5:57 p.m. on the day of the incident, which took place at 5:00 p.m. or shortly thereafter. The formal floor inspections took place at 4:24 p.m., 4:26 p.m., 4:29 p.m., 4:33 p.m., 4:34 p.m., 4:43 p.m., 4:50 p.m., 4:58 p.m., 5:12 p.m., 5:38 p.m., 5:55 p.m., and 5:57 p.m. (Floor Inspection Report, R. 187-193.) During none of these inspections was the water spill discovered. Furthermore, Mr. Tyler testified that he never saw anyone spill anything on the floor or observe any spill on the floor from noon until 5:00 p.m. when he left the store on the day of the incident. (Deposition of Stephen Tyler, pp. 28, R. 176.)

Though Price does not address opinions of her supermarket safety expert, Kent Steele, in her argument, she does refer to his opinions in the Statement of Facts section as well as the Summary of Argument section of her brief. At the time Smith's motion for summary judgment was heard, Smith's also had an outstanding motion in limine in which it requested that the trial court preclude Mr. Steele from testifying at trial. In its decision,

the trial court stated that its decision to grant Smith's summary judgment rendered moot Smith's motion in limine. (Decision, R. 538.)

In her brief, Price states that Mr. Steele opined that "demonstration areas are typical areas to anticipate spillage" and that "Smith's conduct fell below the standard of care because Smith's failed to verify that Pyggy [Mr. Tyler] left the demonstration area clean and spill free when Pyggy checked out." (Brief of Appellant, p. 5, Addendum, Exhibit "B.") However, Mr. Steele's opinions that Price cites in her brief do not change the fact that Price is unable to identify free from speculation the amount of time the water was on the floor. As a result, Plaintiff is unable to satisfy the constructive notice requirement of the temporary condition theory framework established by Utah appellate courts. As the trial court stated in its decision:

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.

(Decision, R. 533-534.)

In the present matter, there is no evidence in support of constructive notice. There is no evidence as to who created the spill or how long the water spill was on the store floor prior to Plaintiff's incident. There is only evidence that Smith's conducted 12 formal floor inspections from 4:24 p.m. to 5:57 p.m. and never discovered the water spill,

as well as Mr. Tyler's testimony that during his stay from noon to 5:00 p.m. he never saw any spill on the store floor. The Utah Supreme Court has stressed:

The mere presence of a slippery spot on a floor does not in and of itself establish negligence. This condition may arise in any place of business for any number of reasons. Proof that a slippery or wet substance was on a floor, does not, without more, establish that defendant knew or should have known of the condition.

Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 624 (Utah Ct. App. 1991).

Having failed to produce evidence that Smith's should have known about the spill, Price is unable to meet the first prong in *Jex*, which is necessary in order for Smith's to be found negligent under the temporary condition theory framework. Therefore, the trial court was correct in granting Smith's motion for summary judgment.

II.

THE TRIAL COURT PROPERLY GRANTED APPELLEE SUMMARY JUDGMENT BECAUSE APPELLANT'S CLAIMS ARE BASED ON SPECULATION AND CONJECTURE.

The Utah Supreme Court has held that the trier of fact cannot be permitted to speculate that a defendant is negligent. In a case where there was only speculation regarding the origin of an alleged hazard, the Utah Supreme Court affirmed summary judgment in the defendant's favor. *Lindsay v. Eccles Hotel Co.*, 284 P.2d 477 (Utah 1955). In *Lindsay*, a coffee shop patron was injured after slipping on water on the coffee shop floor. Even though it was established that a waitress had delivered water in glasses to plaintiff and her companion, there was no evidence as to whether the waitress, the

plaintiff, her companion, or another patron spilled the water on the floor, or exactly when it was spilled, or whether the management knew of its existence. Under these facts, the Supreme Court of Utah ruled that:

[T]here 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.*

Lindsay, 284 P.2d at 478 (Utah 1955) (emphasis added).

Regrettably, Price was injured from slipping on a water spill found within the Smith's store. That does not automatically mean that Smith's is at fault. *See Dwiggins v. Morgan Jewelers*, 811 P.2d 182, 183 (Utah 1991) (holding that "[b]are allegations of negligence unsupported by facts . . . are insufficient to withstand a motion for summary judgment"). Price has conceded that Smith's did not cause the water spill and that Smith's was not aware of the spill's presence prior to the incident. (Brief of Appellant, p. 10, Addendum, Exhibit "B.") Without evidence that Smith's should have been aware of the spill's presence, the trial court could not permit a jury to speculate that Smith's was somehow negligent for Plaintiff's unfortunate accident. Because "a jury cannot be permitted to speculate that [Smith's] was negligent," the trial court's order granting Smith's summary judgment motion should be upheld. *Lindsay*, 284 P.2d at 478 (Utah 1955).

III.

THE TRIAL COURT PROPERLY GRANTED APPELLEE SUMMARY JUDGMENT BECAUSE SMITH'S NEVER DELEGATED ITS DUTY TO USE REASONABLE CARE TO MAINTAIN ITS STORE IN A REASONABLY SAFE CONDITION.

Smith's does not dispute that as the storeowner Smith's possessed a duty to use reasonable care to maintain its store in a reasonably safe condition. However, Smith's never delegated to Market Source a nondelegable duty to use reasonable care to maintain its store in a reasonably safe condition. In fact, Smith's did not delegate anything to Market Source, which was neither employed, retained, nor paid by Smith's to demonstrate deli meat and cheeses on the day of the incident.

Under Utah law, a storeowner possesses a duty to use reasonable care to maintain its store in a reasonably safe condition. This duty does not impose upon a storeowner strict liability for every incident that takes place within its store's walls. The Utah Supreme Court has held "that property owners are not insurers of the safety of those who come upon their property, even though they are business invitees." *Martin v. Safeway Stores, Inc.*, 565 P.2d 1139, 1140 (Utah 1977). As previously addressed, the Utah appellate courts have clarified the duty a storeowner possesses to reasonably maintain its store as it pertains to temporary hazards. The Utah Court of Appeals had held:

Under the temporary condition theory, a plaintiff can only recover if the defendant has notice of the dangerous condition. Specifically, the following two conditions must be satisfied: (1) "that [the defendant] 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 [(2)] that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it.”

Jex v. JRA, Inc., 166 P.3d 655, 658 (Utah Ct. App. 2007) (quoting *Allen v. Federated Dairy Farms*, 538 P.2d 175, 176 (Utah 1975)).

As addressed above, Price is unable to satisfy the constructive notice requirement found within the temporary condition theory framework. Price has conceded that Smith’s did not create the water spill and that it did not have actual notice of the spill prior to the incident. (Brief of Appellant, p. 10, Addendum, Exhibit “B.”) There is also no evidence that Smith’s possessed constructive notice of the water spill because there is no evidence, free of speculation, as to how long the spill was on the floor prior to the incident.

It is undisputed that Smith’s never saw the water spill despite performing 12 formal floor inspections from 4:24 p.m. to 5:57 p.m. on the day of the incident. (Floor Inspection Report, R. 187-193.) It is also undisputed that Mr. Tyler testified that he never spilled water, never saw anyone else spill anything on the floor, and that he did not see any spills on the floor while he was present at the store from noon to 5:00 p.m. on the day of the incident. (Deposition of Stephen Tyler, pp. 28, R. 176.) Based on the foregoing, Smith’s may not be found liable under the temporary condition theory recognized by Utah appellate courts.

In her brief, Price has emphasized the following statement from Prosser: “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.” Prosser, *Law of Torts*, § 395 (1971). This assertion might be of some significance if hypothetically Smith’s had retained Market Source to undertake construction, repair, or maintenance of the store’s premises. Smith’s, however, never retained Market Source to do anything and certainly did not entrust Mr. Tyler with the maintenance or repair of its floor.

Market Source’s lack of relationship to Smith’s helps clarify that Smith’s did not entrust maintenance of its floor to Mr. Tyler on the day of the incident. Market Source was not an independent contractor that Smith’s retained to perform construction, maintenance, or repair services. Instead, Market Source was a demonstration company that was retained by vendors or manufacturers of various products to demonstrate those products within grocery stores. (Deposition of Chuck Brown, p. 7, Addendum, Exhibit “D.”) Market Source was paid by the vendor or manufacture that retained Market Source to demonstrate the product. Therefore, on the day of the incident, Market Source was not paid by Smith’s to do anything. Instead, Market Source was paid by the vendor or manufacturer of the deli meats and cheeses that were demonstrated. (*Id.* at 19, Addendum, Exhibit “D.”) Akin to a customer, at the conclusion of its demonstration, Market Source paid Smith’s for the product that was demonstrated. (*Id.* at 10, Addendum, Exhibit “D.”)

Mr. Tyler was employed by Market Source and was not employed by Smith's. (Deposition of Stephen Tyler, pp. 6-7, R. 183-184.) Mr. Tyler was not compensated by Smith's in any way on the day of the incident. Instead, he was paid by Market Source. (*Id.* at 32, R. 175.) Because he was a Market Source demonstrator and was not employed or retained by Smith's, Mr. Tyler had minimal interactions with Smith's and operated autonomously of the store. (*Id.* at 20, 23, 28, R. 176-177, 180; Deposition of Chuck Brown, pp. 10, 22, R. 209, 213.) Simply put, Mr. Tyler was another customer of Smith's who paid for product that he in turn gave away to other customers patronizing Smith's. The trial court correctly concluded:

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.

(Decision, R. 532.)

Despite this relationship between Smith's and Mr. Tyler in which Mr. Tyler did not act as an employee or agent for Smith's, Price incorrectly claims that Smith's delegated the duty of maintaining or cleaning its floor to Mr. Tyler. Price relies on the deposition testimony of Mr. Brown who stated that the store expected the demonstrator to clean up after he had concluded his demonstration. (Deposition of Chuck Brown, p. 22,

R. 209.) This testimony, particularly when it is placed in context, is insufficient to support Price's claim that Smith's delegated the duty of maintaining its floor to Mr. Tyler.

Mr. Tyler was not an employee or agent of Smith's. Mr. Tyler did not work for a floor maintenance company that was retained by Smith's. Instead, on the day of the accident, Mr. Tyler was demonstrating deli meats and cheeses to Smith's customers. Mr. Brown testified that Market Source was not even hired or retained by Smith's. He certainly did not testify that Market Source had been retained to perform any maintenance on Smith's floors. There is absolutely no evidence that Smith's retained Market Source to wax, service, repair, inspect or clean Smith's floors.

Smith's did not delegate any absolute duty to Market Source. Smith's continued to use reasonable care to maintain its store in a reasonably safe condition as reflected in Smith's conduct. On the day of the incident, Smith's performed 12 formal floor inspections to check for any potential temporary hazards on its floors from 4:24 p.m. to 5:57 p.m. (Floor Inspection Report, R. 187-193.)

In her brief, Price has cited to a number of decisions within Utah in which Utah appellate courts have referred to the concept of "nondelegable duty." However, none of these decisions are relevant to the present matter because Smith's never delegated its nondelegable duty to Market Source. Furthermore, in those decisions in which Utah appellate courts found a nondelegable duty, the appellate courts proceeded to analyze the cases based on the legal framework associated with the duty in question. In the present

matter, the legal framework associated with the nondelegable duty Smith's owed to its business invitees is the temporary condition theory as outlined in the *Jex* opinion. Where Plaintiff is unable to show constructive notice, Smith's may not be found liable.

In her brief, Price also has cited to a number of cases outside of Utah in which courts have held storeowners liable for the negligence of independent contractors they have specifically retained to perform maintenance or repair work in their stores:

Lilienthal v. Hastings Clothing Co., 280 P.2d 824, 828 (Cal App. 155) (maintenance contractor charged with waxing the store's floors); *Gill v. Krassner*, 77 A.2d 462 (N.J. Super. Ct. App. Div. 1950) (maintenance contractor charged with waxing the store's floors); *Goodman v. Sears, Roebuck Co.*, 129 A.2d 405 (D.C. App. 1957) (construction company charged with performing construction work to store); *Daly v. Bergstedt*, 126 N.W.2d 242 (Minn. 1964) (altercation contractor charged with store remodel); *Lipman Wolfe & Co. v. Teeple & Thatcher, Inc.*, 522 P.2d 467 (Or. 1974) (independent contractor charged with repair of occupier's premises); *Bryant v. Sherm's Thunderbird Market*, 522 P.2d 1383 (Or. 1974) (contractor hired to install refrigeration cases in store); *Huddleson v. Lerman*, 73 A.2d 596 (N.J. Super. 1950) (contractor retained to wax store's floor); *Little v. Butner*, 348 P.2d 1022 (Kan. 1960) (*employee* of occupier created hazard through meat sample demonstration). None of the decisions are even remotely relevant to the present matter because Market Source was never retained, employed, or acted as an

agent on behalf of Smith's. Furthermore, Market Source was not charged by Smith's with performing any maintenance or repair work within the Smith's store.

If Price is successful in broadening vicarious liability of a storeowner to cover all possible negligence performed within its store by all third persons, regardless of whether the third persons are employees or agents of the store or retained to perform maintenance or repair work at the store and regardless of the store having notice of the temporary hazard created, Smith's and every other storeowner will essentially be held strictly liable for every incident that takes place within store walls. That is expressly not the law in Utah. The Supreme Court of Utah has held "that property owners are not insurers of the safety of those who come upon their property, even though they are business invitees." *Martin v. Safeway Stores, Inc.*, 565 P.2d 1139, 1140 (Utah 1977). Merely proving that an accident occurred on the store's premises is insufficient to show that the store owner is liable for the accident. *Silcox v. Skaggs Alpha Beta, Inc.*, 814 P.2d 623 (Utah Ct. App. 1991).

Price's nondelegable duty argument is also thwarted from the lack of evidence that Mr. Tyler created the temporary hazard. There is no evidence identifying the origin of the water spill. Price and her granddaughter both admitted that they did not know who caused the spill. (Deposition of Judy Price, p. 36, R. 217; Deposition of Judy Chance, pp. 33-34, R. 200-201.) Plaintiff is relying exclusively on the after-the-fact guess Mr. Brown made in deposition that Mr. Tyler was the source of the spill. However, Mr. Brown's

guess was mere conjecture and speculation that was resolved as incorrect by Mr. Tyler who stressed that he did not have, nor did he spill, any water on the day of the incident. (Deposition of Stephen Tyler, pp. 21-22, 28, 42, R. 171, 176, 178-179.)

With no evidence supporting a finding that Market Source was an agent for Smith's, that Smith's entrusted Market Source with the maintenance of its floors, or that Market Source was the source of the water spill, Price's nondelegable duty argument fails and the trial court was correct in granting Smith's motion for summary judgment.

IV.

SMITH'S SATISFIED ITS DUTY TO USE REASONABLE CARE TO MAINTAIN ITS STORE IN A REASONABLY SAFE CONDITION.

As a storeowner, Smith's possesses a duty to use reasonable care in maintaining its store in a reasonably safe condition. On the day of the incident, Smith's satisfied this duty and therefore may not be held liable for Price's unfortunate incident.

In addition to a culture of cleanliness and maintenance, Smith's has a formal policy of inspecting its store floors at least once every hour to make certain that the store is free from temporary hazards. (Deposition of Chuck Brown, pp. 16-17, R. 210-211.) Price's incident took place at approximately 5:00 p.m. (Deposition of Judy Price, p. 19, R. 224; Deposition of Chuck Brown, p. 44, R. 427.) From 4:24 p.m. to 4:58 p.m. on the day of the incident, Smith's performed eight formal floor inspections (4:24 p.m., 4:26 p.m., 4:29 p.m., 4:33 p.m., 4:34 p.m., 4:43 p.m., 4:50 p.m., 4:58 p.m.) during which Smith's employees walked through the entire store looking for temporary hazards on the

floor that could be remedied. (Deposition of Chuck Brown, pp. 16-17, R. 210-211; Floor Inspection Report, R. 187-193.) During the five o'clock hour, Smith's conducted another four formal floor inspections (5:12 p.m., 5:38 p.m., 5:55 p.m., 5:57 p.m.). (Floor Inspection Report, R. 187-193.)

The mere fact that an incident took place at Smith's does not mean that Smith's was negligent. The Utah Supreme Court has stressed:

As previously noted, a store owner is charged with the duty to use reasonable care in maintaining the floors of his or her establishment. This court's comments in *Long* are equally applicable to the case at hand: "[I]f [the store owner's] duty required further safety measures, we are made to wonder . . . how far the defendant would have to go in protecting the customers, both in method and in area. There does not appear to be any reasonable and practical answer to that inquiry." *Long v. Smith Food King Store*, 531 P.2d 360, 362 (Utah 1973).

As this court has often stated in other cases, it is regrettable that plaintiff suffered injuries. However, "[n]ot every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from someone. 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." *Martin v. Safeway Stores Inc.*, 565 P.2d 1139, 1142 (Utah 1977).

Schnuphase v. Storehouse Markets, 918 P.2d 476, 479-480 (Utah 1996).

On the day of the incident Smith's was cognizant of its duty to reasonably maintain the store premises in a reasonably safe condition and took consistent safety measures to satisfy its duty as evidenced by the 12 formal floor inspections undertaken from 4:24 p.m. to 5:57 p.m. While it is unfortunate that Price was involved in an incident involving a

water spill of unknown origin that had been on the floor for an unknown period of time, there is absolutely no evidence that Smith's was negligent or liable for the incident.

CONCLUSION

Based on the foregoing. Defendant and Appellee, Smith's Food & Drug Centers, Inc., respectfully requests that the Order of the Trial Court granting Smith's Motion for Summary Judgment and Order of Final Judgment be affirmed, the appeal of Price be dismissed, and Smith's be awarded its costs on appeal.

DATED this 20th day of May, 2010.

MORGAN, MINNOCK, RICE & JAMES, L.C.

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

Todd C. Hilbig

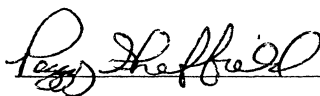
Stephen F. Edwards

Attorneys for Appellant and Defendant Smiths
Food & Drug Centers, Inc.

CERTIFICATE OF SERVICE

I certify that on this 20 day of May, 2010, I caused two (2) true and correct copies of **BRIEF OF APPELLEE SMITH'S FOOD & DRUG CENTERS, INC.** to be mailed, postage prepaid, to the following:

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

_____

ADDENDUM

EXHIBIT “A”

CWest's Utah Code Annotated Currentness

State Court Rules

☞ Utah Rules of Civil Procedure (Refs & Annos)

☞ Part VII. Judgment

→ **RULE 56. SUMMARY JUDGMENT**

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

CREDIT(S)

[Amended effective November 1, 1997; November 1, 2004.]

CROSS REFERENCES

Motion for summary judgment, see Rules Civ. Proc., Form 21.

LAW REVIEW AND JOURNAL COMMENTARIES

Learning professionalism and civility-Thoughts for new members of the bar. Judge Derek P. Pullan, 18 Utah B.J. 32 (August 2005).

Unsworn declarations in lieu of affidavits: Increasing efficiency of practice under the Utah Rules of Criminal and Civil Procedure and the Utah Rules of Evidence. John H. Bogart, Scott D. McCoy, 20 Utah B.J. 22 (July/August, 2007).

LIBRARY REFERENCES

Judgment ☞ 178 to 190.
Westlaw Key Number Searches: 228k178 to 228k190.
C.J.S. Judgments §§ 243 to 254, 260 to 274.
C.J.S. Libel and Slander; Injurious Falsehood § 183.

RESEARCH REFERENCES

Encyclopedias

Am. Jur.2d Products Liability § 1687, Answers.

Forms

EXHIBIT “B”

IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT JUDY PRICE

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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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.

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. 278-279.¹

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.

¹ 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.

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.

EXHIBIT “C”

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

--oo0oo--

JUDY M. PRICE,)
)
Plaintiff,) Civil No. 060401509
)
vs.) DEPOSITION OF:
) STEVEN TYLER
SMITH'S FOOD & DRUG CENTER,)
INC; PYGGY dba MARKET SOURCE)
WEST, and JOHN DOES, 1-5,)
)
Defendants.)
)

October 14, 2008
2:23 p.m.

TAKEN AT:
YOUNG KESTER & PETRO
75 South 300 West
Provo, UT 84601

* * *

Karen Christensen
- Registered Professional Reporter -
- Certified Shorthand Reporter -



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1 question.
2 **A. Okay.**
3 Q. And I'll assume that if you don't ask me to
4 reask the question that you understood the question. Is
5 that fair?
6 **A. Yeah. Yes.**
7 Q. Perfect. Did you review any documents in
8 preparation for this deposition?
9 **A. No.**
10 Q. Okay. I imagine that you didn't speak with
11 anyone about this deposition?
12 **A. No.**
13 Q. Okay. Steve, do you keep a journal or diary?
14 **A. No, I don't.**
15 Q. So you wouldn't have any journal or diary
16 entries regarding the event that took place on April 2nd,
17 2005?
18 **A. No.**
19 Q. Okay. Just some really quick background
20 information. Could you give me your full name?
21 **A. Yes, Steven Lee Tyler.**
22 Q. Okay. And your current address?
23 **A. 750 South 650 West, Apartment 362, Provo,**
24 **Utah 84601.**
25 Q. And, Steve, who resides there with you?

5

1 Q. Okay. How long -- could you provide me with
2 the approximate dates of your employment at Market Source
3 West?
4 **A. Oh, gosh. I'd probably been there a year.**
5 **So it would have been -- oh, I can't remember, it's been**
6 **such a long time.**
7 Q. Okay.
8 **A. 2004 sometime. I don't know.**
9 Q. So sometime in 2004 is when you began your
10 work at Market Source West?
11 **A. Yes.**
12 Q. And when did you stop your employment at
13 Market Source West?
14 **A. It was actually shortly after that because my**
15 **car got taken, so...**
16 Q. So shortly after April 2nd, 2005?
17 **A. Yeah, that is correct. I wish I had my**
18 **resume, I would have been more efficient on the dates.**
19 Q. No, no. I appreciate that.
20 Hey, Steve, have you ever been employed by
21 Smith's?
22 **A. No.**
23 Q. Okay. What was your position at Market
24 Source West?
25 **A. I was a self-employed demo-er.**

7

1 **A. My wife and my daughter and me.**
2 Q. Okay. And your date and place of birth?
3 **A. Washington -- Bellingham, Washington. I was**
4 **born October 8th, 1979.**
5 Q. Okay. Steve, could you give me your
6 educational background? Did you graduate from high
7 school?
8 **A. Yeah, that's about it.**
9 Q. Where did you graduate from high school?
10 **A. Ebo School District.**
11 Q. And then any education following that formal
12 education?
13 **A. Just my truck driver's license, which was**
14 **through Mountain West Trucking School.**
15 Q. Steve, let me ask you: Are you currently
16 employed?
17 **A. Yes.**
18 Q. Okay.
19 **A. I work for Yellow Cab of Provo.**
20 Q. How long have you been working for Yellow
21 Cab?
22 **A. Just like a month or so, not very long.**
23 Q. And, Steve, on April 2nd, 2005, were you
24 employed by Market Source West?
25 **A. Yes.**

6

1 Q. And could you tell me what your job duties
2 entailed as a demo-er?
3 **A. Just basically sample out the food that they**
4 **gave me to sample. So that day it was meat and cheese**
5 **and...**
6 Q. Okay. Now, Steve, you mentioned you were a
7 self-employed demo-er for --
8 **A. Well, yeah. We had W-9 Forms.**
9 Q. Okay. Who was your supervisor at Market
10 Source West?
11 **A. Oh, goodness. That would have been -- I**
12 **can't remember her name. It's been, I mean, a few years.**
13 Q. Understood. And the name of the supervisor
14 you had, is that a name that you could get through some
15 documentation you have at home or in some way?
16 **A. No.**
17 Q. No. Okay.
18 **A. I mean, not -- I would have to happen to just**
19 **like trip over something. That's the only way.**
20 Q. Steve, as a demo-er, what training did you
21 receive?
22 **A. Zero training.**
23 Q. Okay. So you were -- you began working on
24 behalf of Market Source West and they just sent you out
25 to demo?

8

1 **A. Basically, yeah.**
2 Q. Okay
3 **A. Because they need people really bad all the**
4 **time.**
5 Q. Was there like a brief video that you watched
6 for training, or did you train with another individual
7 briefly?
8 **A. Nothing.**
9 Q. No. In the application process or the hiring
10 process, did they provide you with a list of
11 responsibilities that you would have?
12 **A. Yeah. I think they gave us like a little**
13 **paper saying, you know, the clothes you have to wear, you**
14 **know, stuff like that.**
15 Q. Okay. Would this paper have identified
16 briefly what you're supposed to do as a demo-er?
17 **A. Yeah, very briefly. I mean, that's about it.**
18 Q. Would you have this paper?
19 **A. No.**
20 Q. No. Okay.
21 **A. I wish I did, but no.**
22 Q. Okay. Did you ever go out with another
23 demo-er to demo things so that you saw what that person
24 was doing?
25 **A. Huh-uh, no.**

9

Q. As a demo-er, would you go to various stores
or were you assigned a specific store?

A. Anywhere. I could work anywhere in Utah
County. I even worked in Salt Lake County a couple of
times. It just depends on where they need you.

Q. Okay. But, primarily, you worked in Utah
County?

A. Yeah.

Q. Were you assigned to a particular grocery
store chain?

A. No.

Q. So it could be any?

A. It could be any. I worked at Wal-Mart. I
worked at Macey's. It's just wherever they have accounts
through.

Q. Okay. Do you know how many -- let me ask:
Was there a headquarters someplace that you would go to,
or were you just simply called from your own home and
sent directly to a different location?

A. Yeah, we were called from our house and
they'd send us the paperwork.

Q. Okay.

A. But it wasn't...

Q. When they sent you paperwork, what would that
paperwork entail?

10

1 **A. Just when and where we're supposed to be.**
2 **And they'd let us know within 24 hours.**
3 Q. Would they let you know through this
4 paperwork in 24 hours or would you receive a telephone
5 call?
6 **A. We'd receive a telephone call, and then**
7 **they'd send the paperwork and we'd have it, like, the**
8 **next day.**
9 Q. Would the paperwork identify a contact at the
10 grocery store?
11 **A. No. We knew, basically, who -- we'd just**
12 **talk to the manager. So it's just -- you know. And they**
13 **know, you know, like if it's in the grocery side, talk to**
14 **the grocery manager. So it was just -- there wasn't a**
15 **certain person.**
16 Q. And with the call or the paperwork, would
17 they identify briefly what you would be demo-ing?
18 **A. Yeah.**
19 Q. Okay.
20 **A. It would say meat, cheeses or, you know,**
21 **toilet -- whatever.**
22 Q. Okay. Let me ask you: Did Market Source
23 West provide you with any equipment to take when you
24 would go demo-ing?
25 **A. An apron and bowtie. That's about it.**

11

1 Q. Okay. An apron and a bowtie. Who provided,
2 like -- I'm assuming with demo-ing that sometimes you
3 would be placing things on tables. Would that be
4 accurate?

5 **A. Yeah.**

6 Q. And who would provide the table?

7 **A. Oh, I did.**

8 Q. Okay. So would that be through Market Source
9 West or that was just your own table?

10 **A. That's my own table. Anything other than the**
11 **apron and the bowtie, we had to do ourselves. So if I**
12 **had to go buy something for it, tax write-off, but...**

13 Q. So you were responsible for everything
14 necessary for demo-ing the product except for your
15 uniform, which included a bowtie and an apron?

16 **A. Right.**

17 Q. Okay. When you would go to a grocery store,
18 was the grocery store responsible for anything but the
19 product you would be demo-ing?

20 **A. No, not usually. It would be a pretty rare**
21 **occasion if they were.**

22 Q. Okay.

23 **A. Like, say you didn't have something and the**
24 **store just happened to have it, you lucked out. But, no.**

25 Q. I see. So you were expected, as the demo-er,

12

1 to bring everything necessary to demo the product?

2 **A. Right.**

3 Q. Okay.

4 **A. And on a rare occasion I forgot something,**

5 **and they'd be kind enough to, like, lend me a tablecloth**

6 **or something like that.**

7 Q. Okay. I see.

8 **A. Nothing substantial.**

9 Q. What were the things that you would

0 generally -- what was your work equipment that you would

1 generally bring to a demo? A table? Would that be

2 standard?

3 **A. A table is always standard. A tablecloth is**

4 **always standard.**

5 Q. Okay.

6 **A. Gloves standard. That's about it.**

7 Q. Let me ask: Would you bring a cooler or

8 something to keep the product that you were demoing cool

9 if it required cooling?

0 **A. If it required cooling. Or if they had --**

1 **you know, like in the meats and cheese case, they had**

2 **their case right there, so I just stuck it in their case.**

3 **And it was just plain and simple.**

4 Q. Okay. Steve, because we're dealing with --

5 and on a telephone call that we had where I identified

13

1 the purpose for this deposition, you're aware that this

2 lawsuit involves an accident that took place at the

3 American Fork Smith's store on April 2nd, 2005?

4 **A. Right, yes.**

5 Q. Okay. Do you have an independent

6 recollection of that day?

7 **A. I know I left at 5:00, and I know I came at**

8 **12:00.**

9 Q. Okay. So you came at 12:00 and you left at

0 5:00. Do you remember anything else? I mean, do you

1 remember what you were assigned to demo?

2 **A. Yeah, it was meats and cheese. I don't**

3 **remember exactly what -- yeah, I don't. I don't remember**

4 **what meats and what cheeses I did, but...**

5 Q. Okay. Let me ask you -- so you received --

6 you received paperwork or a telephone call to go to that

7 American Fork Smith's on April 2nd, 2005?

8 **A. Yeah.**

9 Q. Had you ever worked at that American Fork

0 Smith's before?

1 **A. I don't think before then, huh-uh.**

2 Q. Had you worked at that store after this day,

3 April 2nd, 2005?

4 **A. Huh-uh.**

5 Q. So you worked at American Fork Smith's on one

14

1 occasion?

2 **A. Yeah.**

3 Q. Okay. How did you know that you arrived at

4 the store at 12:00?

5 **A. Because that's the standard time we always**

6 **arrived.**

7 Q. Oh, okay.

8 **A. And we always left -- the longest shift we**

9 **had was five hours. So it's pretty set down that we**

10 **leave -- we come at this time and we leave at this time.**

11 **It would be very rare to get a morning demo, so...**

12 Q. Okay. And so do you have an independent

13 recollection of arriving at 12:00 and leaving at 5:00, or

14 are you just assuming that that was the case because that

15 was the usual?

16 **A. No, that's when I was there. I just...**

17 Q. So you arrive at the Smith's at 12:00. What

18 do you do when you get to the store?

19 **A. We find the manager we need to do and we find**

20 **the product, we count it, and then we just start our**

21 **demo.**

22 Q. Okay.

23 **A. Set up our table.**

24 Q. Do you recall finding the manager on this

25 date?

15

1 **A. I don't think I did that date. I just went**

2 **to the meat counter. And I don't think -- I think I just**

3 **talked to the deli, and they already knew that that's**

4 **what was going to go on, so...**

5 Q. Okay. And they give you product?

6 **A. Yeah, they weigh it out.**

7 Q. Let me ask: What is it that -- why do you

8 have an independent recollection of this particular day?

9 Is there something that --

10 **A. Yeah, my car got repossessed on that**

11 **particular day.**

12 Q. Oh, okay. So your car was repossessed?

13 **A. After, on the way home.**

14 Q. Okay.

15 **A. Yeah, that's why I remember that day.**

16 Q. Okay.

17 **A. Unfortunately, that was not a good day for**

18 **me.**

19 Q. No, understood. The car was repossessed.

20 Was it repossessed in the Smith's parking lot?

21 **A. No, I was driving home and I was almost home**

22 **and -- yeah.**

23 Q. Okay. So you go to the meat counter, you're

24 given product -- meat product, then -- did you say you

25 count the product?

16

1 **A. Well, we counted the product before we**
2 **started to see how much we sell.**
3 Q. Okay And then set up On this day, do you
4 recall what you set up?
5 **A. The table and the tablecloth.**
6 Q. Okay
7 **A. There wasn't anything else, really, to set**
8 **up.**
9 Q. Would you have brought a cooler on that day?
10 **A. No, because I knew I had the cold case that I**
11 **could put the meat in.**
12 Q. Anything other than a table, tablecloth? I'm
13 wondering, do you provide like paper plates or napkins or
14 things like that?
15 **A. They give us toothpicks to sample stuff.**
16 Q. And is that provided by Smith's?
17 **A. No, that's from the demo company, I think.**
18 Q. I see
19 **A. Or we buy them ourselves. I can't remember**
20 **if they were the ones that the demo company gave me or if**
21 **I bought them myself.**
22 Q. Where did you set up -- and, you know, Tyler
23 I apologize, I didn't bring a blank piece of paper. Or
24 actually, I've got a whole stack of it
25 **MR. YOUNG:** I can get one without lines if

17

1 you need it.
2 **MR. EDWARDS:** I don't think there's a need
3 Q. **(BY MR. EDWARDS)** Would you mind drawing a
4 bird's eye view of the store? And what I'm interested in
5 is you identifying where you set up this table to demo on
6 that day Do you remember?
7 **A. It was right in front of the deli counter.**
8 **Like, here's the deli counter and then you have -- I set**
9 **my table out like a few feet from there just so it was**
10 **easy access, so I wouldn't have to move around as much.**
11 Q. So would you have sat the table where
12 customers would generally go to purchase meat or things
13 like that?
14 **A. Yeah. I was out like a foot or so from the**
15 **counter. So they could get in if they needed to buy the**
16 **meat that I was demo-ing.**
17 Q. Okay Could someone go past you and still
18 select something at the counter?
19 **A. Oh, yeah.**
20 Q. Or did you block their --
21 **A. Oh, no, I didn't block their process at all.**
22 Q. Do you recall the store enough that you could
23 just identify the rough location of where that -- of
24 where that meat counter would have been in the store, or
25 no?

18

1 **A. Gosh, I'm trying to think.**
2 Q. And we don't need you to guess If you have
3 a good idea, that would be helpful If you can't
4 remember --
5 **A. I can't remember exactly where it was at.**
6 Q. Okay
7 **A. I know it was like in the front doors**
8 **somewhere, just past the front doors.**
9 Q. So you're stationed right in front of the
10 meat counter?
11 **A. Yeah.**
12 Q. Okay And were you at the end -- were you
13 stationed in front of the meat counter, just at the end
14 of one of the meat -- my goodness, I'm rambling Let me
15 ask that question again
16 **A. No problem.**
17 Q. You were in front of the meat counter Were
18 you at one of the ends of the meat counter?
19 **A. I was basically in the center of it.**
20 Q. Okay You were in the center of it?
21 **A. Yeah.**
22 Q. When you looked out from your demo table,
23 what were you looking at?
24 **A. I think it was the produce --**
25 Q. Okay. So you're stationed --

19

1 **A. -- if I remember correctly.**
2 Q. Okay. Right in front of the meat counter far
3 enough away, though, that individuals could go --
4 **A. Yeah.**
5 Q. -- around you and order things at the meat
6 counter? And you were looking, you believe, at the
7 produce area?
8 **A. Yeah.**
9 Q. Okay. Did any Smith's employee assist in
10 setting up your demo table?
11 **A. No, they never do.**
12 Q. Okay. You talked to someone at the meat
13 counter to get the product?
14 **A. The product.**
15 Q. Okay. You didn't talk to anyone else about,
16 "Hey, I'm here. Where do you want me?"
17 **A. No.**
18 Q. Did the meat people tell you where to set up
19 the table or was that your choice?
20 **A. That's my choice.**
21 Q. Okay.
22 **A. They don't have much say in what we do, they**
23 **just give us the product.**
24 Q. Okay.
25 **A. I mean, sometimes a store manager will come**

20

1 and say, "Hey, you know, you can't be there." But, no,
2 it doesn't really happen.

3 Q. Okay.

4 A. Usually it's our say, what happens.

5 Q. Do you have a chair?

6 A. No.

7 Q. No. So you've got a table, tablecloth. Do
8 you put mats down, or no?

9 A. No.

10 Q. Steve, was there -- did you need water for
11 the demo that you were undertaking that day? Would water
12 have been a --

13 A. Not at all.

14 Q. -- component?

15 A. Not to my knowledge.

16 Q. Let me ask: When you go to these demos for
17 five hours, do you take like -- do you take like a lunch
18 or --

19 A. Yeah, we get a half-hour lunch.

20 Q. Okay.

21 A. And then...

22 Q. You don't eat the lunch right at the demo
23 station, do you?

24 A. No, no, no. That's against -- yeah.

25 Q. Is that against the rule?

21

1 A. Yeah. You can't eat -- you close up your
2 table and you go. You either can leave the store or you
3 go sit in their break room or whatever.

4 Q. Okay. Is that something that you were told
5 by Market Source West, that's something you can't do?

6 A. Yeah. Well, it's also food safety.

7 Q. Let me ask you: On that day, do you know --
8 would you have had water at your table just for yourself
9 to drink, a bottle of water?

10 A. We're not allowed to do that either because
11 it's a food safety issue.

12 Q. So is that something that Smith's told you
13 not to do, or is that something that Market Source West
14 would tell you?

15 A. That's my personal -- any food demos, I
16 didn't keep -- because I'd cooked before. And so just
17 that's my personal belief. I don't drink anything.

18 Q. So you wouldn't have had a can of soda, a
19 bottle of water or anything for water or liquid at that
20 demo table?

21 A. If I remember correctly, there's like a
22 drinking fountain somewhere around there. So I'd just go
23 get a drink when needed.

24 Q. Okay.

25 A. And that's another thing. We try to -- or I

22

1 try, personally, to be close to like a fountain or
2 somewhere where I could just get drinks.

3 Q. Okay. Over the course of that day, how many
4 communications would you have with store employees?

5 A. Probably none, except to ask for meats and
6 cheeses, if needed.

7 Q. Okay. Do you recall specifically if you had
8 any conversation that day or you --

9 A. No.

10 Q. So you don't remember?

11 A. I don't remember.

12 Q. Okay.

13 A. If -- sorry.

14 Q. No, no. That's fine. Steve, I imagine that
15 you wouldn't be able to identify or remember the name of
16 any employee that you spoke with at the meat counter?

17 A. No.

18 Q. Okay. You departed at 5:00?

19 A. Yep. I was out the doors at 5:00.

20 Q. You're out the doors at 5:00. When would
21 you -- when do you start putting down or taking the table
22 down and...

23 A. About 4:40. That gives us time to recount
24 all the meat product, go pay for the meat product or
25 cheese, whatever the product is.

23

1 Q. Okay. The table you bring, is that just a
2 folding, cardboard table?

3 A. Yeah.

4 Q. You fold up the cardboard table, you recount
5 the meat product. Is there -- when you would be cleaning
6 up, would you look to see that the area was clean of
7 debris?

8 A. Yeah. I mean, if we dropped any papers, we
9 had a little garbage can. Sometimes people kicked it
10 over or whatever, so we'd have to clean up that mess.
11 And so, yeah.

12 Q. Did Market Source West tell you when you left
13 that you needed to clean up the area?

14 A. No, that's just something that you do. You
15 don't want to leave a mess so other people have to clean
16 it up.

17 Q. And you mentioned a garbage can. Is that
18 something that you would bring?

19 A. It depends. Sometimes we would and sometimes
20 the stores would have, like, an extra garbage can sitting
21 somewhere.

22 Q. Okay. And that was fairly standard to have a
23 garbage can close to the demo table?

24 A. Yeah.

25 Q. Do you recall, on that day, whether you

24

1 brought your own garbage or whether you borrowed a
2 garbage can from the store?
3 **A. I think I just used like a paper sack with a**
4 **plastic bag in it. So it was all done by then.**
5 Q. And you would have that just next to the demo
6 table?
7 **A. Yeah.**
8 Q. People could take whatever they're eating,
9 toss the toothpick?
10 **A. Right. Or if they didn't like the product,**
11 **they'd dump it in there.**
12 Q. Okay. So you would begin cleaning up at
13 4:40, you would be out the door by 5:00?
14 **A. Um-humm.**
15 Q. You would recount the product. Was that the
16 first step of cleaning up? You'd recount the product and
17 then hand it back to the meat department?
18 **A. Usually I would actually fold up the table**
19 **first.**
20 Q. Okay.
21 **A. And then -- because that shows, "Hey, we're**
22 **done with the demo, there's no more samples."**
23 Q. Okay. And then after folding up the table,
24 what do you do?
25 **A. We go weigh the product or count the product.**

25

1 Q. Okay. And where would the table be that you
2 would fold up? Would it just be next to the --
3 **A. No, I'd take it out to my car.**
4 Q. You'd take it out, and then you weigh and
5 count the product?
6 **A. Yeah.**
7 Q. And then do you communicate with any store
8 employee before leaving the store?
9 **A. Just the manager to get the store stamp -- or**
10 **assistant manager, whatever they have, to give us the**
11 **store stamp.**
12 Q. Okay. Is there a document you fill out when
13 you leave the store?
14 **A. Yeah, and Market West gives us that.**
15 Q. Let me show you something and ask you if --
16 and I'm just going to use the first page, Tyler.
17 Let's mark this as Exhibit 1, if we can.
18 Does this look familiar to you?
19 **A. Yep, my own hand.**
20 Q. Okay. Is that the document --
21 **A. Yeah.**
22 Q. -- that you would fill out?
23 **A. The exact document that we filled out.**
24 Q. Okay. That's all your handwriting?
25 **A. Yeah. Well, except for -- let's see. I'm**

26

1 **trying -- except for the "very good." But, yeah, that's**
2 **all my handwriting.**
3 Q. The "customer response, very good" is not
4 your handwriting?
5 **A. I didn't write that.**
6 Q. Okay.
7 **A. That's done by the company.**
8 Q. Okay. At the top line you can see dates of
9 demo, Saturday, April 2nd, 2005. Next to that you see
10 time of demo, 11:00 to 5:00.
11 **A. That's weird.**
12 Q. Would 11:00 be the time that you arrived?
13 **A. Yeah, it would have to be, if that's what**
14 **this says. I was always on time or, if not, five minutes**
15 **early.**
16 Q. Okay. And so you're not thinking that you
17 were there at 12:00, I mean --
18 **A. It must be 11:00.**
19 Q. -- based on the form?
20 **A. Yeah, based on the form.**
21 Q. Okay. Steve, do you recall how busy that
22 store was on that day?
23 **A. It was actually pretty slow.**
24 Q. Okay.
25 **A. It wasn't very busy that day.**

27

1 Q. Steve, would you have left the store earlier
2 than 5:00?
3 **A. No, it takes about 20 minutes to clean up,**
4 **and that's what we give ourselves.**
5 Q. Do you recall any communications with any
6 Smith's employees that you haven't already discussed?
7 **A. No, not at all.**
8 Q. Okay. Over the course of your demo-ing, did
9 any Smith's employees supervise you?
10 **A. No.**
11 Q. Did any Smith's employees check up to see how
12 much product had been given out?
13 **A. No, not at all.**
14 Q. Steve, on that day do you recall spilling a
15 glass of water at any time in the area of the store?
16 **A. No. No.**
17 Q. Okay. During the course of that day, did you
18 see anyone else spill anything while you were demo-ing?
19 **A. Not while I was demoing or any time around**
20 **it, huh-uh.**
21 Q. Okay. Did you -- while you were demoing, did
22 you see any spill of any kind on the floors of the
23 Smith's store?
24 **A. No, not at all.**
25 Q. Okay. And is it fair to say, because you

28

Q. Different products?

A. Different products. So I'd never actually done the meat and cheese before except for at this demo.

Q. Just at Smith's?

A. Just at Smith's. And then, you know, there was, you know, every other type of product you possibly could imagine we demoed.

Q. Okay. Were your procedures different, say, if you were at Wal-Mart or Albertsons or Macey's --

A. No.

Q. -- as far as checking in and checking out?

A. No.

Q. Was it different than when you were at Smith's?

A. Same thing. Go find the manager of whatever -- you know, whatever product they're in and just set up where we want to set up --

Q. Okay

A. -- close to our product or whatever.

Q. So you would say all your answers you gave to Steven earlier with regards to checking in and checking out and the equipment you were provided with, all that stuff that you answered with regards to Smith's would apply to Albertsons --

A. That's right.

37

1 around it?

2 **A. No, not at all. It would have been nice**
3 **sometimes, but no.**

4 **MR. LARSEN:** Okay That is all the questions
5 I have I don't know if Tyler has any further

6 **MR. YOUNG:** Do you mind if I ask a few?

7 **MR. EDWARDS:** By all means

8 **EXAMINATION**

9 **BY MR. YOUNG:**

10 Q. Steve, you said sometimes - and I don't mean
11 you, in particular, but demo folks, might leave a mess
12 behind sometimes. And so you said you might see them
13 leave trash or something like that Who would clean that
14 up?

15 **A. I guess the store.**

16 Q. And can you think of a specific example of
17 that, or is it just that it seems like there were some of
18 those in your memory?

19 **A. Yeah, there's just -- I don't know any**
20 **specifics.**

21 Q. John asked you if -- when you go into these
22 other stores, stores other than Smith's, if you ever
23 remember anybody walking back to check the area where
24 you'd been after you cleaned up.

25 **A. Right.**

39

1 Q. -- Wal-Mart, all that?

2 **A. Yes.**

3 Q. So I'm just going to ask a few more specific
4 questions about that If you were at Albertsons, after
5 leaving, did they have anybody, a store employee, check
6 the floor, check the area where you were at?

7 **MR. EDWARDS:** Did you mean at Albertsons?

8 Q. **(BY MR. LARSEN)** Excuse me. Any store
9 besides Smith's

10 **MR. EDWARDS:** Thank you.

11 Q. **(BY MR. LARSEN)** Sorry. So Wal-Mart,
12 Macey's, Albertsons, did they ever have anybody come and
13 check the area where you were cleaning?

14 **A. No, no one did that. They didn't expect it**
15 **of us either.**

16 Q. So there were no policies or requirements?

17 **A. Yeah, no policies or requirements on that.**
18 **If we cleaned it up, we cleaned it up. I've seen**
19 **demo-ers leave trash behind. And that's one thing I**
20 **never did. It just not part of my habit, so...**

21 Q. So no place ever required it?

22 **A. No.**

23 Q. Okay Did any of these stores, meaning
24 Albertsons, Macey's, Wal-Mart, did any of them ever
25 provide you with a floor mat to place under your booth or

38

1 Q. Do you ever remember somebody with -- during
2 your presence, going back to an area and physically
3 checking the area you'd been at to make sure it's check
4 or clear?

5 **A. No.**

6 Q. Never remember that from another store?

7 **A. No.**

8 Q. What about if you noticed areas where other
9 people had booths set up on a Saturday? After those
10 people had left, maybe they're leaving at the same time,
11 but do you ever recall a store employee ever walking to
12 those areas and checking those areas after?

13 **A. Not to my knowledge.**

14 Q. You hadn't noticed it?

15 **A. No.**

16 Q. But that doesn't necessarily mean it wouldn't
17 happen?

18 **A. Yeah, I never seen it.**

19 Q. So maybe other stores had policies in place
20 that you just weren't aware of where they were checking
21 the area like where you're demo booth had been, but you
22 just aren't aware, one way or another, whether they did
23 that?

24 **MR. EDWARDS:** Objection. Speculation.

25 **THE WITNESS:** I'm not sure one way or

40

1 another

2 Q. (BY MR. YOUNG) Do you ever recall having a

3 mess with the demo, I mean at any store, where you just

4 needed some help cleaning it up because you didn't have

5 the supplies or whatever?

6 A. No, never. It was very light stuff. If we

7 had to do anything, it was -- yeah, there was usually not

8 a mess I couldn't clean up.

9 Q. Do you recall in other stores if there's any

10 kind of a policy or anything like that where they require

11 you to do your own cleaning after you leave? I assume --

12 you said the messes are pretty easy and you usually do

13 it But do you ever remember a policy of other stores

14 saying if you make a mess, it's your mess, you better

15 clean it up?

16 A. No.

17 Q. Nothing like that?

18 A. No.

19 Q. There's been some testimony in this case that

20 Chuck Brown, I think the store manager of the Smith's in

21 question here, says that -- I may screw this up just a

22 little bit. And Steve, you can correct me if I'm wrong.

23 But I think generally he said on the day in

24 question he remembers your booth being there and he

25 remembers seeing, I think, a cup of drinking water on

41

1 your table. And Chuck says he remembers that very

2 vividly.

3 Now, I think you testified earlier that you

4 don't remember having water, and it's generally not your

5 policy to have like a cup of water on the table

6 A. Right.

7 Q. If Chuck were to say, "No, I absolutely

8 remember that," would your -- I mean, your testimony was

9 that generally that wasn't your policy. But if there

10 were evidence to the contrary, would you say that, okay,

11 it's possible, you could have had a cup of water?

12 A. No.

13 Q. You don't think it was possible?

14 A. It's not possible at all.

15 Q. Okay. Now, why is that? Because you worked

16 for that company for a year, right?

17 A. Right.

18 Q. Okay. And so you think in a year you never

19 had a cup of water on a table or a drink of water?

20 A. No, never.

21 Q. Okay.

22 A. I didn't do that. I would go to the drinking

23 fountain.

24 Q. Okay. Is it possible there -- that's it I

25 don't have anything else?

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FURTHER EXAMINATION

1 BY MR. EDWARDS:

2 Q. Can I ask just a couple follow-up questions?

3 A. No problem.

4 Q. You mentioned earlier that you worked for two

5 different demo companies, is that correct?

6 A. Yeah, I worked for -- not at the same time.

7 Q. Okay. But --

8 A. That's illegal. You can't do that.

9 Q. And let me ask you what was the other name of

10 other company?

11 A. Classic Demos.

12 Q. Did you work for Classic Demos before or

13 after?

14 A. It would have been before that time.

15 Q. How long did you work for Classic Demos?

16 A. I don't even know. I'm not sure. It wasn't

17 very long.

18 Q. Would it have been less than a year?

19 A. Yeah.

20 Q. Did Classic Demos provide training as to what

21 one does?

22 A. Same -- basically, the same thing.

23 Q. Okay. But by the time you went to Market

24 Source West, you had already been a demo-er before so you

25

43

1 kind of knew the process?

2 A. Right, yeah.

3 Q. Okay.

4 A. I mean the paperwork was a little different,

5 but that's about it.

6 Q. Okay. And then let me ask. On the day in

7 question, April 2nd, 2005, did you see any water spills

8 next to the meat coolers?

9 A. Not that I could recall.

10 MR. EDWARDS: Okay. That's all I have.

11 Anything else?

12 MR. YOUNG: No more

13 MR. EDWARDS: We appreciate you coming in and

14 having your deposition taken. You have the right to

15 review the deposition transcript. Everything that we've

16 said is written up, and there's a deposition transcript.

17 You have the right to review it just to make sure that

18 everything is correct, or you can waive that right. What

19 would you like?

20 THE WITNESS: It doesn't matter to me. I

21 guess I'll waive that right.

22 MR. EDWARDS: Okay.

23 THE WITNESS: I don't need to look at it.

24 MR. EDWARDS: Okay. Well, listen, we

25 appreciate you coming in

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EXHIBIT “D”

CONDENSED TRANSCRIPT

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

--oOo--

JUDY M. PRICE,)	Deposition of:
)	CHUCK BROWN
Plaintiff,)	
)	Case No. 060401509
vs)	
)	Judge Steven L. Hansen
SMITH'S FOOD AND DRUG)	
CENTERS, INC., an Ohio)	
Corporation; PIGGY, INC.))	
A Nevada Corporation,)	
dba MARKET SOURCE WEST,)	
and JOHN DOES I-V,)	
)	
Defendants.)	

--oOo--

August 8, 2007, 1:00 p.m.

Location:

Offices of Young, Kester & Petro
75 South 300 West
Provo, Utah 84601

Reporter: Tamra J. Berry, CSR, RPR
Notary Public in and for the State of Utah



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<p>5</p> <p>1 A. They're like a Wal-Mart. They were here 2 in Utah for a while, a Wal-Mart type set-up. 3 (Door opens, Mr. Allen Young enters.) 4 Q. BY MR. TYLER YOUNG: All right. So you 5 worked for Gibson Discount after college how long? 6 A. I was with them 35 years -- excuse me 13 7 years, sorry. 8 Q. I was going to say, you didn't look that 9 old. 10 A. No. 13 years. 11 Q. All right. And did you have any other 12 jobs while you were with them? 13 A. No: I didn't, huh-uh (negative). 14 Q. Okay. What was your next job after 15 working with Gibson? 16 A. After that I worked for Smith's. I've 17 been with Smith's 20 years. 18 Q. Okay. When you were with Gibson Discount, 19 what were your duties? I guess we could start at the 20 beginning. What did you do when you started working 21 there? 22 A. Total store operation. I was also a buyer 23 for them. I went overseas a couple times a year, 24 went to Dallas, went to Chicago to do buying for 25 them. But I managed the store in Murray.</p>	<p>7</p> <p>1 goodies on Saturdays that I've seen. In this case I 2 know we've had some discussion with the other 3 attorneys that there's been one of these companies 4 that's been involved. I don't know if you've had a 5 chance to talk with your attorney about that or 6 anything. But can you tell me generally what you 7 call these companies? Are they vendors? 8 A. They're called demo companies. And I 9 believe the way they operate, basically is the 10 vendor -- the manufacturer, say if it was 11 Lynn Wilson's or Nalley's or whoever, they probably 12 pay the demo agency monies. And then the demo agency 13 employs people. And then they're the ones that go 14 out to the stores and do the demos for the products. 15 And then I would think that from that point the demo 16 company ekes out their profit, pretty much. 17 Q. Okay. 18 A. That's how they operate. They're -- they 19 handle that pretty much that way. 20 Q. So the demo companies generally aren't the 21 companies that are making the food products or 22 whatever they're doing there in the stores -- 23 A. Correct. 24 Q. -- they're just demoing it? 25 A. Correct.</p>
<p>6</p> <p>1 Q. Okay. Were you always in Murray? 2 A. I was. 3 Q. All right. So 13 years with them. Did 4 Smith's hire you away or did you just -- 5 A. No. Gibson's actually went out of 6 business. 7 Q. Okay. 8 A. Then I went to work for Smith's right 9 after. 10 Q. All right. What are your duties with 11 Smith's? What do you do there? 12 A. Total store operation. We have 70 13 employees and just total store operation. Sales, 14 profit, expenses, total operation of the store inside 15 and outside the store are my responsibility. 16 Q. Okay. Has that always been your 17 responsibility there or have you moved up? 18 A. It's always been that, uh-huh 19 (affirmative). 20 Q. Okay. Now, what store is it that -- 21 A. I manage a store in American Fork on 240 22 Northwest State Road, American Fork, Utah. Store 23 number 67, that's our store number. 24 Q. Okay. I want to talk just for a minute 25 generally about stores that set up booths and kind of</p>	<p>8</p> <p>1 Q. Okay. Can you just generally kind of tell 2 me what the business of demoing encompasses? 3 A. Demoing actually is -- they're, like I 4 say, the demo company has them come in on behalf of 5 the manufacturer. And they demo -- it could be 6 Nalley's Chili. It could be -- in this case we're 7 talking about, it was cheese and lunch meats for a 8 company. It could be a variance. And on Saturdays, 9 we might have, you know, one or two demos, three. It 10 just depends. We may have none, you know. 11 Q. All right. 12 A. It's all pre-set by Smith's though. I 13 don't set it up. It's pre-set by the company. They 14 have to go out to certain stores and demo for a 15 certain period of time. 16 Q. Okay. I want to talk about that just for 17 a minute, the pre-setting. How were those contracts 18 negotiated? Are they negotiated with Smith's 19 corporate office? 20 A. They are negotiated with Smith's corporate 21 office. I don't have anything to do with that. 22 Other than they call me and tell me I'm going to be 23 in your store on Saturday afternoon. I say, fine. 24 Usually the only other question they would ask you 25 would be if you have the product. We would say yes</p>

<p>SHEET 2</p> <p>9</p> <p>1 or no. You know, normally we do.</p> <p>2 Q. Who is it at the corporate office that</p> <p>3 deals with that?</p> <p>4 A. That I don't know. Because it varies.</p> <p>5 You would have to probably check with corporate on</p> <p>6 that how it's set up. It's pre-set because it's</p> <p>7 various departments. It could be a grocery item. It</p> <p>8 could be a meat item. It could be a service deli</p> <p>9 item. It varies, you know. I'm sure we have</p> <p>10 somebody at corporate that could answer that. They</p> <p>11 set all that up with the demo company. They're set</p> <p>12 up in advance. And they go to different stores on a</p> <p>13 weekly basis.</p> <p>14 Q. Do you know who it would be that could</p> <p>15 tell us who would be in charge of that, who would be</p> <p>16 in charge of negotiating the contract?</p> <p>17 A. Boy, I don't know. I don't. You'd have</p> <p>18 to call the corporate -- if you call the corporate</p> <p>19 number, they could connect you. There's an operator</p> <p>20 there at corporate. 974-1400 is our corporate</p> <p>21 number, area code 801. And then they could connect</p> <p>22 you. The operator on the phone is the corporate</p> <p>23 operator. They could connect you to the proper</p> <p>24 person that does that.</p> <p>25 Q. All right. Who is in charge of overseeing</p>	<p>11</p> <p>1 If it's a product like, say, Nalley's Chili or Hormel</p> <p>2 Chili, they will scan the empty canisters, like we</p> <p>3 would a sale, and everything scans off a UPC. And</p> <p>4 then they just pay us.</p> <p>5 Q. Do you have somebody in charge of that or</p> <p>6 do you do it yourself?</p> <p>7 A. They just go to the checkstand usually.</p> <p>8 It's an honor system with them.</p> <p>9 Q. Yeah. They just grab the product and walk</p> <p>10 it up to the checkstand and run it through --</p> <p>11 A. Or we'll give it to them. Sometimes we</p> <p>12 have product in the back and we'll give it to them to</p> <p>13 make sure they've got plenty of product. Not only</p> <p>14 the fact they sample it out, but they have to have</p> <p>15 product there with them if people wanted to buy chili</p> <p>16 or stewed beef or whatever it is. We have it there</p> <p>17 and they could buy it. Usually we set them up close</p> <p>18 to the product they're demoing.</p> <p>19 Q. I just want to narrow down the "we" just</p> <p>20 so I can be specific with this if I get there later</p> <p>21 on. Do you tell them where to go in the store?</p> <p>22 A. They usually check in with me, and then</p> <p>23 ask me where should we set up. I'll try to give them</p> <p>24 a location that's got, you know, high visibility by</p> <p>25 the customer and it's close to the product. In this</p>
<p>10</p> <p>1 these folks at your store generally?</p> <p>2 A. At our store, pretty much they're on their</p> <p>3 own. I just know when they're coming. They will ask</p> <p>4 me where to set up pretty much. They'll set up close</p> <p>5 to the product. And then they will tell me what time</p> <p>6 they're going be there. And that's pretty much it.</p> <p>7 It's pretty much pre-set. Our main concern is just</p> <p>8 that we -- we have the product to demo.</p> <p>9 Q. So you provide the product?</p> <p>10 A. Uh-huh (affirmative).</p> <p>11 Q. And they demo it?</p> <p>12 A. Right. Then they pay for the product that</p> <p>13 they -- the product they sample to the customer, they</p> <p>14 pay for that usually when they leave. Because the</p> <p>15 store, the inventory is charged to me. So if they're</p> <p>16 going to say, in this case it was hams and cheeses,</p> <p>17 if they sampled and gave away, say, ten pounds of</p> <p>18 product, that would be shrinked to me in my store.</p> <p>19 But they'd track what they sample, and then they just</p> <p>20 pay for it like a regular -- they pay retail.</p> <p>21 Q. Who tracks what they give away?</p> <p>22 A. We pretty much work -- we do, with them.</p> <p>23 Then they just pay us for it. Usually a lot of times</p> <p>24 if it's canned items, they will just show us the</p> <p>25 cans, then they will go scan them out the front end.</p>	<p>12</p> <p>1 case we're talking about, it was service deli items,</p> <p>2 cheeses and meats, sliced meats. And those items we</p> <p>3 have to slice them ourselves because they have to be</p> <p>4 sanitary with gloves and all that. The sampling he</p> <p>5 did that day, he had a platter that he cut up</p> <p>6 product. And I believe he had it on some crackers.</p> <p>7 And that's how he was giving it to the customer.</p> <p>8 Then he'd have some napkins there and a waste can.</p> <p>9 Q. These guys that come in and demo, are they</p> <p>10 ever store employees?</p> <p>11 A. No.</p> <p>12 Q. Do you ever have employees --</p> <p>13 A. I've never had -- I don't know. They're</p> <p>14 not my store employees. I doubt it. I think it's a</p> <p>15 private enterprise that handles that. I'm not saying</p> <p>16 that they might not hire one of our people to do it</p> <p>17 part time or on the side. I don't know. I'm not</p> <p>18 aware of it. I've not -- I've never recognized</p> <p>19 anybody there that's been with Smith's. They're</p> <p>20 usually outside people.</p> <p>21 Q. Are there things that you require of these</p> <p>22 folks in your store? Are there policies or</p> <p>23 procedures they have to follow in your store?</p> <p>24 A. Well, usually they're pre-trained from</p> <p>25 their company. They have to be sanitary. They have</p>

<p style="text-align: right;">13</p> <p>1 to be safe. They have to have good customer 2 relations. And usually they do, within reason. 3 Q. So you don't have any policies or 4 procedures either, you and your stores, Smith's? 5 Overall do you have any policies or procedures they 6 need to follow while they're there? 7 A. No. They don't work for us. So it's 8 assumed they're pre-trained. 9 Q. All right. 10 A. To some degree I'm sure they are. 11 Q. But if they're in your store, you don't 12 have any policies to say, look, when you're in our 13 store, you've got to do these things? 14 A. No. 15 Q. I'm going to come back to that in just a 16 minute. Do you know if Smith's corporate requires 17 these folks to carry insurance? 18 A. I don't know for a fact. But usually our 19 rule is they have to be insured and bonded before 20 they will ever come into our store, anybody. Even 21 our floor crew, janitors. We have outside floor 22 service in all of our stores, and they all have to be 23 bonded. I would think so. I would -- not for sure, 24 but knowing our company, I would say they have to be 25 insured or bonded before they even let them. Even</p>	<p style="text-align: right;">15</p> <p>1 when they're demoing and make sure we have the 2 product. They usually don't give us the time. They 3 usually a make sure we have the product. 4 Q. Do you either call corporate or does 5 corporate ever call you and say these folks are 6 bonded and insured and meet all the requirements, or 7 pretty much when they call you, you assume they're 8 ready to the come to the store? 9 A. We just assume they are. I've got to 10 think that corporate has really checked it out. 11 Q. Once a vendor is set up in your store 12 there in American Fork, is there anybody in your 13 store that oversees the operation of the vendors 14 while they're conducting business? 15 A. Not really. I walk the store quite often. 16 And I might just chat with them for a minute, you 17 know, how is it going, are you selling product. You 18 know, sometimes it may -- maybe the location isn't 19 right for them, maybe we've got to move to a 20 different location to give them some more traffic. 21 But generally it's, how are you doing, are you 22 selling the product, you know. They're pretty much 23 on their own because they're on instruction from 24 their company on what to do. 25 Q. For example, I've seen them before that</p>
<p style="text-align: right;">14</p> <p>1 people doing work on our stores, maintenance work 2 outside. We do a lot of our own maintenance. But 3 people we hire on the outside maintenance to do 4 things, they check them out pretty close to make sure 5 they're insured and everything. So in case something 6 does happen, they're responsible, you know. So we're 7 pretty carefully I think as a company. 8 Q. Who makes sure that they're bonded before 9 they come into your store? 10 A. That would be somebody at corporate, 11 whoever sets up the demo. Whoever is working with 12 the demo people and that, I'm sure they're checking 13 that they have insurance and everything. I'm sure 14 they would require that. 15 Q. I just want to jump back just for a 16 minute. If the corporate office calls you and says 17 we've got some folks that want to demo meats or 18 cheeses, or whatever product it is, they call you and 19 tell you they're going to come in. Do they tell you 20 to expect a phone call from the demo person or how do 21 you know -- 22 A. Usually the demo person calls usually four 23 to five days in advance. They're usually in the 24 store Friday or Saturday, usually a weekend. That's 25 when they're the busiest. They call and let us know</p>	<p style="text-align: right;">16</p> <p>1 will cook stuff, and they'll have a little fire 2 going. Do you or does somebody in the store try to 3 check on that fire to make sure they're not going to 4 burn your store down or -- 5 A. We never usually have that kind of demo. 6 The worst scenario for us would be a fry pan, they 7 put a fry pan in and they're doing something that 8 way. I've never seen a fire or anything like that. 9 Like I say, the worst scenario is fry pan. A lot of 10 demos are not even that. It could be something cold 11 or a canned product or whatever. In this case it was 12 just hams and cheeses, you know. But fry pans are 13 probably the worst scenario. 14 Q. What about other things like water, 15 grease, that kind of thing? Do you ever walk around 16 and make sure they're not spilling stuff on the 17 floor? Does anybody in your store do that? 18 A. Yes. We have -- what we do, we inspect 19 our floors once to twice per hour. I have a person 20 that goes around. We have to punch a clock saying 21 that we are going to walk the store. And we actually 22 go beyond that. We're required once per hour to 23 inspect our store. We sometimes will go as much as 24 twice, it depends. And that's just one of our store 25 clerks walking around and then looking for spills or</p>

<p>SHEET 3</p> <p>17</p> <p>1 sweeping or anything, you know, picking up. It's 2 just walking the perimeter of the store, plus the 3 aisles. And we punch -- we call it a sweep. We 4 punch it in, so legally we've actually walked our 5 store. And we have a time and a person that's done 6 that.</p> <p>7 And then the store has got a lot of floor 8 cones, paper towels down the aisles that we put up if 9 there is something. We can put it up and take care 10 of the issue. Sometimes the customer will call us. 11 Usually we notice it ourself or an employee will take 12 care of it. We have precautionary cones and paper 13 towels on all the aisles.</p> <p>14 Q. I think you've already answered a couple 15 of these I was just about to go over. I apologize if 16 I didn't get your answer on these the first time 17 around originally. So when the vendors get to your 18 store, they usually check in, you said, and you'll 19 help them find the location they need to go?</p> <p>20 A. Correct.</p> <p>21 Q. If it's meats and cheeses, you put them by 22 the meats?</p> <p>23 A. In this case it was by the service deli, 24 and that's where we put them.</p> <p>25 Q. They just walk right into the store and</p>	<p>19</p> <p>1 paid from the vendors, I believe. I don't think 2 Smith's pays the demo company. I think the vendors, 3 like Nalley's and Kraft and those people, pay the 4 demo company because they're demoing their product as 5 part of their advertizing allowance. And then the 6 demo company pays these people that work for them. 7 And then between that they eke out their profit. I'm 8 sure that's how it works.</p> <p>9 Q. Usually there's a table that they set up. 10 Do you know who provides that table?</p> <p>11 A. Sometimes they have a table, and sometimes 12 we'll help them out. If they don't have a table, 13 then we've got some tables that we furnish for them 14 if they want to use them.</p> <p>15 Q. What are their --</p> <p>16 A. Generally they have their own table, 17 though.</p> <p>18 Q. What about their other equipment, like if 19 they're cooking or knives or --</p> <p>20 A. They furnish all their equipment. 21 Everything is furnished by them. Fry pans, all that 22 stuff is furnished by their company.</p> <p>23 Q. In this case you said they were giving out 24 meats. So was it your deli that was actually cutting 25 the meat?</p>
<p>18</p> <p>1 say I'm looking for Chuck?</p> <p>2 A. They ask for the person in charge usually. 3 Then they direct them to me, and I'll talk to them 4 and help them get set up.</p> <p>5 Q. Is there any paperwork they fill out?</p> <p>6 A. Usually there's paperwork when they get 7 done. They have paperwork that they sign off that 8 they're done.</p> <p>9 Q. What's that paperwork?</p> <p>10 A. Basically what the paperwork is for, it 11 just -- most of it is just the time they were there, 12 make sure they're not cheating their demo company of 13 time. So their sign-out time, their signing-out time 14 that they were there.</p> <p>15 Q. And I think you said this is a corporate 16 thing, but do you know how they get paid, the demo 17 folks?</p> <p>18 A. I don't. I would think the demo company 19 pays them. They work for the demo company. That's 20 how they get paid.</p> <p>21 Q. Those are the folks that are in the stand?</p> <p>22 A. The demo company, they work for that 23 company. They're a demo person that just works for 24 that company. Then they come in and work in the 25 store. The demo company itself, I think they get</p>	<p>20</p> <p>1 A. I think what we were doing, we were 2 probably slicing the meats and cheeses in large 3 pieces. And then they would take it probably on 4 their own platter, cut it up into smaller pieces, and 5 put it on crackers. Then they bring their own 6 napkins and they pretty well do it that way. Then we 7 charge them for whatever product they ask us to 8 slice.</p> <p>9 Q. What about coolers, if they need coolers 10 to keep their food cool? I assume at Smith's, they 11 usually get their food from Smith's --</p> <p>12 A. A lot of them have these little portable 13 coolers they bring. Sometimes they have their own. 14 Sometimes we furnish ice. They have their cooler and 15 put everything in there.</p> <p>16 Q. Do you know --</p> <p>17 A. Usually they'll slide it under their 18 table, and they'll operate out of that.</p> <p>19 Q. Do you know what this company had, in this 20 case?</p> <p>21 A. I don't remember. It's been a couple 22 years since we've had this case, this issue. So I 23 don't remember on this one. I actually don't think 24 he had anything because he was getting product from 25 us as he needed it. We were just selling it to him.</p>

<p style="text-align: right;">21</p> <p>1 Then they would cut it up and put it on crackers, and 2 then they were putting it out for customers to 3 sample. 4 Q. In the times where the folks come in and 5 they're actually doing cooking on the frying pan, do 6 you provide the frying pan? 7 A. No. They have their own. 8 Q. Do vendors like this often bring in their 9 own water and coolers and things? 10 A. They do. Well, the coolers, they have 11 their own coolers. If they needed water or 12 something, they'd ask us and, you know, we'd do 13 whatever they need, you know. 14 MR. HILBIG: Counsel, in this question you 15 were asking about a vendor -- 16 MR. TYLER YOUNG: Yeah, I'm sorry, demos. 17 I could be more clear. 18 Q. BY MR. TYLER YOUNG: Is that still your 19 answer, with the demo company? 20 A. They have their own, pretty much have 21 their own. 22 Q. What about lubricants? 23 A. They would have their own. Usually if 24 it's Pam or something they had to spray on the fry 25 pan or something, they have their own stuff. If they</p>	<p style="text-align: right;">23</p> <p>1 have to clean up their area, yeah. Because it's 2 clean when they come, and it's clean when they leave. 3 If they have any trash or anything on the floor, you 4 know, whatever, it has to be clean. 5 Q. What about cleaning supplies and things? 6 A. That would be -- that would be them 7 entirely. I mean if they needed paper towels or 8 something, we'd furnish it to them if they asked us, 9 you know. We're good that way. 10 Q. Have you ever actually seen them bring 11 their own cleaning supplies in? 12 A. No. Usually they don't have a mess. It's 13 usually they have a table cover on their table and 14 usually it's like a paper table cover. So they will 15 just throw it away and it's done, you know. They 16 will have a garbage can under their table, and they 17 will bring their own garbage can. They will just 18 clean up that way. In the worst scenario they ask us 19 where the trash is, the trash area. They will 20 deposit their trash in the trash area of the store 21 and be gone. So usually it's just a matter of taking 22 the table cover off and emptying their trash and 23 picking up themselves and they're done. That's 24 usually how it works. I've never had an instance in 25 20 years where they had an issue when they left, you</p>
<p style="text-align: right;">22</p> <p>1 needed stuff, they'd just buy it. They give them 2 money to buy. 3 They don't have an account or anything. 4 We used to do that, years ago. They had some kind of 5 account thing. It ended up not getting paid, and 6 then Smith's would end up losing. So we make sure 7 they have their own stuff. They have to have all 8 their own everything, fry pans and lubricants, 9 everything when they come in there. They actually 10 just purchase it. I think the demo person just gives 11 your a receipt and then they just get reimbursed from 12 their company, which is the demo company. 13 Q. Does Smith's have a policy that when these 14 folks pick up their booth and leave or they pick 15 everything up, when I say these folks I mean the 16 folks doing the demos, do they go inspect that area? 17 A. No. Huh-uh (negative). We don't. 18 Q. All right. Who generally cleans up after 19 the demo people leaves? 20 A. Our policy with them is they clean up 21 their area. And it's never been a problem, you know. 22 Q. Is that a written policy? 23 A. I would think that -- now, I didn't write 24 the policy. But I'm sure when they set it up at the 25 corporate level, that's probably their agreement they</p>	<p style="text-align: right;">24</p> <p>1 know. 2 Q. Can you remember any time that somebody 3 said, oh, hey, we've had a spill, can you send your 4 people over to clean it up? 5 A. Usually they'll clean it up. If there's 6 an issue, it's usually a small issue. They're just 7 working off a table in an area right there. Yeah, 8 they know they're responsible for their area. 9 Q. Other than in this case, have you ever had 10 an experience where somebody from one of these booths 11 has actually made a mess or something that somebody 12 has slipped on or ever -- 13 A. I have not. I have not. 14 Q. Okay. Now, I just want to talk about 15 general Smith's store policies for a minute. Are you 16 the safety person in charge at your store, or is 17 there somebody else that's in charge of that? 18 A. My assistant manager is our safety person. 19 But I'm over my assistant, so I'm really responsible 20 for the entire store. 21 Q. Who's the assistant manager? 22 A. At that time it was B.J. Phillips. 23 Q. Thank you. 24 A. He's now located at the Saratoga store, 25 Saratoga Smith's. He's been transferred to that</p>