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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JOAN WELDON,

Plaintiff and Appellant,

v.

SAFEWAY, INC.,

Defendant and Respondent.

A131447

(Alameda County  
Super. Ct. No. RG09451308)

**I.**

**INTRODUCTION**

This personal injury lawsuit involves a quintessential supermarket slip and fall accident in which appellant, customer Joan Weldon (Weldon), slipped in a large puddle of liquid on the floor of Aisle 5 of respondent Safeway Inc.'s Concord store. The trial court granted Safeway's motion for summary judgment, concluding there was no triable issue of fact that Safeway had constructive knowledge of the dangerous condition prior to the accident.

We conclude that there was sufficient evidence, including inferences favorable to Weldon, from which a jury could conclude that Safeway's "sweep" policy was inadequate or was not followed, and thus Safeway had constructive knowledge of the liquid's presence. Additionally, a reasonable jury also could conclude that Safeway had imputed notice of the liquid's presence by virtue of evidence, reported by Safeway personnel or agents, that the refrigerator unit adjacent to where the puddle was located had been leaking for some time before the accident.

Therefore, we disagree with the trial court's conclusion that there were no disputed issues of material fact, and we reverse.

## II.

### PROCEDURAL BACKGROUND<sup>1</sup>

#### A. Safeway's Evidentiary Showing on Summary Judgment

Weldon's complaint, filed on May 8, 2009, stated a single cause of action against Safeway for premises liability resulting from her slip and fall in a puddle of water or other liquid on the floor of the cold food aisle, Aisle 5, at 6:30 p.m. on May 12, 2007, in Safeway's store in Concord. In her discovery deposition, Weldon stated that after she fell, her clothes were wet and she saw water on the floor with a skid mark from her foot, and a single wheel mark through the water. She saw nothing in the water. There was no evidence as to how long the liquid had been on the floor.

Safeway had a store policy under which it assigned a courtesy clerk to "sweep" and inspect the store floors "hourly." The clerks were expected to document their inspections by "punching" the sweep log using their employee time card after each sweep was completed.

Safeway's sweep log documented that an employee, Antonio Carrillo, was responsible for conducting sweeps during the hours of 6:00 to 10:00 p.m. on the night of the accident. Between the hours of 6:00 and 7:00 p.m., the log shows that sweeps were completed at 5:54 p.m., 6:30 p.m., and 6:54 p.m. Each sweep took about 20 minutes to complete. Based on the floor pattern of the store in question, Carrillo estimated that his sweeps took him through Aisle 5 approximately 10 minutes before the sweep was logged.

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<sup>1</sup> Because this case was decided on summary judgment, we rely on the parties' statements of disputed and undisputed facts to provide the factual underpinning for the issues raised by Safeway's motion. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, superseded by statute on another point, as stated in *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

## **B. Weldon's Evidentiary Showing in Opposition to the Motion<sup>2</sup>**

In Weldon's separate statement of disputed facts, she disputed that Carrillo's sweep of Aisle 5 occurred approximately 10 minutes before her fall. She noted that Carrillo testified at his deposition that it took him about 20-30 minutes to complete each sweep of the store, and that his typical route began with Aisle 1 and continued numerically through Aisle 19. After the aisles were inspected, he would separately sweep the pharmacy area, meat, produce, and floral departments, checkout areas, and the Starbucks kiosk area, and end by cleaning and inspecting the store restrooms before "clocking" the completed sweep. Thus, Weldon calculated that this progression supported an inference that Aisle 5 would have been inspected during the first five minutes or less of his sweep, leaving Aisle 5 without inspection for a period of 15-25 minutes.

Weldon also disputed Safeway's contention that there was no evidence of how long the liquid was on the floor in Aisle 5, pointing to evidence that another Safeway employee, Jose Perez, told her some months after the accident that the refrigeration units in Aisle 5 had been leaking around the time of her accident. A work order confirms that two days after her accident, the rubber trim on a refrigerator/freezer unit in Aisle 5 had been repaired where it had been "knocked loose from its case." Weldon argued that these circumstances supported an inference that Safeway had notice that its cooler in Aisle 5 had been leaking for some period of time prior to her accident, and that such leak was the source of the large puddle of water on the floor which caused her to slip and fall.

Weldon also disputed Carrillo's assertion that he actually completed a sweep before her fall, noting that while she was on the floor, the store's assistant manager, James Shinoda, reprimanded Carrillo that he should have been there to clean up the

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<sup>2</sup> We have omitted Weldon's unconfirmed evidence that the source of the liquid may have been from a customer who was walking through the store with a leaking container in her basket; a person she euphemistically referred to as "unidentified leaking container cart woman," or "ULCCW." We agree with Safeway and the trial court that this reference was rank speculation wholly unworthy of raising an inference as to the source of the offending liquid.

water. At this time, another employee remarked, “See[,] this is why we should be walking the aisles.” Shinoda replied, “Well, you need to do your job, too.” Weldon points to further evidence that Carrillo also performed services as a bagger for the checkout clerks and was either bagging or about to begin bagging when she fell.

In response, Safeway disputed that the refrigeration units in Aisle 5 had been leaking, and posed a hearsay objection to Weldon’s statement that Perez had told her otherwise.<sup>3</sup>

### **C. The Trial Court’s Decision**

After summarizing the evidentiary showing made by both parties and expounding on the applicable law, the trial court concluded that Weldon failed to adduce sufficient evidence to raise an inference that Carrillo failed to complete the sweep prior to her fall within the time parameters he laid out in his testimony. Shinoda’s reprimand was found to be unrelated to evidence that Carrillo had failed to do the sweep, and suggests that it might have simply been a criticism for not cleaning up the spill after the accident. Also, Shinoda’s comments about “doing their job” many have been a “debate as to whether the aisles should be walked more or less frequently.”

The court also concluded that there was no evidentiary basis from which an inference could be drawn as to the source of the water or liquid in Aisle 5. As to the leaking refrigerator unit being the source, the court concluded there was no evidence that the “freezer trim issue” caused the puddle of water on the floor.

Finding all of the offered evidence to be “unconnected tidbits” and “speculative” on the issue of constructive notice, the court granted Safeway’s motion for summary judgment. This timely appeal followed.

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<sup>3</sup> In its statement of decision, the trial court overruled this and several other evidentiary objections proffered by Safeway.

### III. DISCUSSION

#### A. Standard of Review

Code of Civil Procedure section 437c, subdivision (c),<sup>4</sup> provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).) Moving defendants can meet their burden by demonstrating that “[a] cause of action has no merit,” which they can do by showing that “[o]ne or more of the elements of the cause of action cannot be separately established . . . .” (§ 437c, subd. (o)(1); see also *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486-487.) Once a defendant meets this burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (§ 437c, subd. (p)(2).)

On appeal “[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]” (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) As this district explained in *Fisherman’s Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320: “[W]e exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff’s theories and establishing that the action was without merit. [Citation.]”

In reviewing such motions, “ ‘[w]e accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. . . .’ [Citation.]” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.) We must “ ‘view the evidence in the light most favorable to plaintiff[ ] as the losing part[y]’ and ‘liberally construe plaintiff[’s] evidentiary submissions and strictly scrutinize defendant[’s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff[’s] favor. [Citation.]” (*McDonald v.*

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<sup>4</sup> All further undesignated statutory references are to the Code of Civil Procedure.

*Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.) In doing so, we construe the moving party's evidence strictly and the opposing party's evidence liberally (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417), and resolve any doubts in favor of the party opposing the motion. (§ 437c; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

However, an "issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture. [Citation.]" (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807, citing *Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 595-596.)

### **B. Overview of Premises Liability Law on Constructive Notice**

Generally, a property owner must have actual or constructive knowledge of a dangerous condition before liability will be imposed. (See *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206 (*Ortega*)). Perhaps not articulating it as clearly as she might have, Weldon attempted to raise a triable issue of fact that Safeway had notice of the dangerous condition in two separate ways.

Firstly, absent evidence as to the source of the water, she attempted to raise a triable issue of fact that Safeway's premises inspection practice either was inadequate as promulgated, or as implemented. Therefore, a reasonable inference arises that the liquid was on the floor in Aisle 5 for a time sufficient to have been discovered, and constituted constructive notice to Safeway of the condition. Our Supreme Court's decision in *Ortega* is instructive on this theory of constructive notice. In that case the high court confronted the pertinent question: "If the plaintiff has no evidence of the source of the dangerous condition or the length of time it existed, may the plaintiff rely solely on the owner's failure to inspect the premises within a reasonable period of time in order to establish an inference that the defective condition existed long enough for a reasonable person exercising ordinary care to have discovered it?" (*Ortega, supra*, 26 Cal.4th at p. 1203.) It then stated its answer: "We conclude that evidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the

condition was on the floor long enough to give the owner the opportunity to discover and remedy it. [Citation.]” (*Ibid.*, fn. omitted.)

Secondly, Weldon attempted to raise a triable issue of fact that the dangerous condition was caused by Safeway’s failure to maintain its refrigeration equipment adequately, and therefore it had imputed notice of such a condition that Safeway itself created. “Where the evidence shows, as it does in this case, that the condition which caused the injury was created by the employees of [the defendant] or the evidence is such that a reasonable inference can be drawn that the condition was created by employees of [the defendant], then [the defendant] is charged with notice of the dangerous condition.” (*Oldham v. Atchison, T. & S. F. Ry. Co.* (1948) 85 Cal.App.2d 214, 218-219.); see also *Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 806 [“Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him”].)

Relying on either theory of notice, and interpreting all facts and inferences in Weldon’s favor, we conclude she raised a triable issue of fact that Safeway had imputed notice of the presence of puddled water or liquid on the floor of Aisle 5 of its store in Concord that presented an undisputed hazard to store customers like herself.

### **C. A Triable Issue of Facts Exists as to Whether Safeway Had Imputed Notice of a Dangerous Condition**

In her opposition, Weldon presented evidence that a Safeway employee reported that one or more refrigerator units in Aisle 5 had been “leaking” for some time before Weldon’s accident. In fact, documentation confirmed that a trim piece was repaired or replaced shortly after the accident. In Weldon’s deposition testimony supporting her statement of disputed facts, she noted that Jose Perez, the employee who alerted her to

the leaky refrigerator, additionally told her that “the whole store knew that that refrigerator had been leaking, and that store was notorious for not walking the aisles.”

In light of this evidence, which understandably was contested by Safeway, there is an issue of fact whether Safeway’s own conduct in failing to detect and repair a leaking refrigerator unit in a timely fashion, was sufficient to require the imputation of notice of a dangerous condition to Safeway.

We note that the trial court did not examine this proffered evidence in light of legal principles imputing notice of a dangerous condition to Safeway as owner of the premises. Instead, its entire legal analysis focused on whether Safeway had constructive notice of the condition because its inspection was inadequate. The applicable pattern civil jury instruction summarizes the state of the law on imputed knowledge:

“Knowledge of Employee Imputed to Owner [¶] If you find that the condition causing the risk of harm was created by [name of defendant] or [his/her/its] employee acting within the scope of [his/her] employment, then you must conclude that [name of defendant] knew of this condition.” (CACI No. 1012.)

The Sources and Authorities in the comment section of the instruction, in addition to citing *Oldham* and *Hatfield*, also references *Sanders v. MacFarlane’s Candies* (1953) 119 Cal.App.2d 497, 501: “When an unsafe condition which causes injury to an invitee has been created by the owner of the property himself or by an employee within the scope of his employment, the invitee need not prove the owner’s notice or knowledge of the dangerous condition; the knowledge is imputed to the owner. [Citations.]” (See also *Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381.)

We necessarily disagree with the trial court’s conclusion that “to infer the refrigerator was leaking is entirely speculative on this record.” In reaching this conclusion the court necessarily ignored the statement of Perez, which the court found to be admissible, that the refrigerator was leaking around the time of the accident. From this, it is reasonable to infer that the leaking refrigerator was the source of the water hazard. Accordingly, because the knowledge of Safeway employees may be imputed to Safeway, it was error to grant summary judgment to Safeway.

#### **D. A Triable Issue of Facts Exists as to Whether Safeway Had Constructive Notice of a Dangerous Condition**

Alternatively, we conclude that a triable issue of fact existed whether Safeway had constructive notice of the dangerous condition under proper application of *Ortega* and related cases.

As we have already noted, *Ortega* holds that where the source of the dangerous condition is unknown, as in this case the puddle of water in Aisle 5, a failure by the owner to inspect the premises within a reasonable time “is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it. [Citation.]” (*Ortega, supra*, 26 Cal.4th at p. 1203, fn. omitted.)

The focus of the trial court’s analysis was on the absence of credible evidence indicating precisely when the last sweep had been conducted before the accident occurred by Safeway employee Carrillo, the court noting that no inference could be drawn “as to whether the spill was shortly after [Carrillo] passed that aisle or moments before the fall.” Firstly, again indulging the evidence presented in a light most favorable to Weldon, we agree with her that the pattern used by Safeway to conduct the sweeps raises a reasonable inference that the employee passed down Aisle 5 as much as 20 minutes or more before the accident.

Secondly, the trial court gave insufficient weight to Weldon’s evidence suggesting the sweeps were not performed in accordance with Safeway policy. Perez said that the sweeps were notoriously lax, and Carrillo was reprimanded by the store’s assistant manager, Shinoda, for not having detected and cleaned up the water before the fall.<sup>5</sup> This

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<sup>5</sup> Similarly, we disagree that the only inference to be drawn from this reprimand is that it was “simply” criticism of the delay in cleaning up the spill *after the fall*. The statement attributed by Weldon to the assistant manager was “he should have been there to clean up the water.” That reprimand came almost immediately after the Carrillo came to Weldon’s aid, and then had left briefly to find the assistant manager. It seems implausible that upon arriving at the scene shortly after the accident, the assistant manager would reprimand Carrillo for not cleaning up the water *after* the fall, when there was clearly insufficient time to have done so.

is sufficient to raise an inference as to whether the pre-accident sweep testified to by Carrillo actually occurred during the timeframe he outlined.

Perhaps more importantly, even if Safeway's "hourly" sweep policy was followed by Carrillo, it was for a jury to determine if the inspection interval, under all the circumstances, was adequate. As we have observed, the record supports an inference that Aisle 5 may have gone without inspection for a period of 20 minutes or so. Determining if the inspection interval was reasonable or gives rise to an inference of constructive notice was for a jury to decide. "Whether a dangerous condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury, and the cases do not impose exact time limitations. Each accident must be viewed in light of its own unique circumstances. (*Louie [v. Hagstrom's Food Stores (1947)]* 81 Cal.App.2d [601,] 608.) The owner must inspect the premises or take other proper action to ascertain their condition, and if, by the exercise of reasonable care, the owner would have discovered the condition, he is liable for failing to correct it. (*Id.* at p. 606.)" (*Ortega, supra*, 26 Cal.4th at p. 1207.)

Therefore, quite apart from the disputed question of whether Safeway's sweep policy was being followed on the day of the accident, the jury similarly will have to decide, under all of the attendant facts, if a policy requiring "hourly" sweeps of this large store was adequate to have discovered and cured the dangerous condition that caused Weldon's fall.<sup>6</sup>

For this reason too, we conclude that the trial court erred in granting Safeway summary judgment finding no triable issue of fact as to constructive notice.

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<sup>6</sup> Indeed, we find curious the trial court's comment in its decision that the post-accident discussion among Safeway employees as to whether the inspection had been properly made was "a debate as to whether the aisles should be walked more or less frequently."

**IV.**  
**DISPOSITION**

The judgment is reversed. Weldon is entitled to recover her costs of appeal.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.\*

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\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A131447, *Weldon v. Safeway, Inc.*