STATE OF IDAHO)
County of KOOTENAI)ss
FILED 5/8/18
AT 4:25 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

MARY PETTY,

Plaintiff,

vs.

SHOPKO STORES OPERATING CO., LLC, et al.,

Defendant.

Case No. **CV 2017 2660**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants Shopko Stores Operating Co., LLC's, and Shopko Properties, LLC's (collectively Shopko) Motion for Summary Judgment.

On November 20, 2015, plaintiff Mary Petty (Petty) was shopping with her husband at a Shopko store located at 217 Ironwood Drive, Coeur d'Alene, Idaho. Aff. Michael P. Stefanic (Stefanic Aff.), Petty Dep. 12:6–9, 30:1–14, 34:11–12. At approximately 11:30 a.m., Petty was walking down a Shopko aisle when she slipped and fell. *Id.* at 22:5–6, 30:10–14, 35:7–11. Her husband had walked down the same aisle ahead of her and was about 16 feet in front of her when she fell. *Id.* at 37:5–16. Petty did not see any Shopko employees in the area where she fell. *Id.* at 42:13–16. She believes she fell as a result of a liquid substance on the floor. *Id.* at 45:9–10. She did not see the liquid substance before or immediately after her fall. *Id.* at 45:11–46:1.

Krista Schaff (Schaff) was the Shopko store manager at the time of Petty's fall. Decl. Krista Schaff (Schaff Decl.) 2, ¶ 4. She responded to Petty's fall which, according to Schaff, occurred in one of Shopko's three main traffic aisles. *Id.* at ¶¶ 5, 9. Upon responding, Schaff saw Petty lying on the floor and a liquid substance in the middle of the aisle where Petty had fallen; she did not see any debris indicating a product had been dropped on the floor and she did not observe any wheel marks from shopping carts, track marks from rolling clothing racks, or footprints in and around the liquid. *Id.* at 3–4, ¶¶ 6–8, 20. In addition, according to Schaff, prior to Petty's fall, Schaff and other employees had walked the aisle where Petty fell. *Id.* at 2–3, ¶¶ 11, 13, 17. Schaff states that she did not observe the spill and no employees reported the spill to her despite the fact that she observed employees, who were trained to spot spills, working in the area where Petty fell. *Id.* at 2–3, ¶¶ 13, 17, 18.

Marshall Rooney (Rooney) was employed by Shopko as a Loss Prevention Manager at the time of Petty's fall. Decl. Marshall Rooney (Rooney Decl.) 2, ¶¶ 2–4. Rooney also responded to the location of Petty's fall. *Id.* at 2, ¶ 5. He observed a liquid in the middle of the aisle where Petty fell; he did not see any debris indicating that a product had been dropped on the floor and he did not observe any wheel marks from shopping carts, track marks from rolling clothing racks, or footprints in and around the liquid. *Id.* at 2–3, ¶¶ 7–8, 19.

Lee Mitch (Mitch), a Price Accuracy Supervisor, was employed and working at the Shopko store at the time of Petty's fall.[1] Decl. Lee Mitch (Mitch Decl.) 2, ¶¶ 2–3. On the day of Petty's fall, Mitch was working in the girls' apparel section, which borders the same main aisle as the men's apparel department where Petty fell. *Id.* at ¶ 5. He heard a scream and turned around to see Petty lying on the floor. *Id.* at ¶¶ 4–5. Mitch saw a

liquid in the aisle, but he did not see any debris indicating that a product had been dropped on the floor. *Id.* at ¶¶ 7–8.

Schaff, Rooney, and Mitch received safety training in the course of their employment at Shopko. As part of that training, Schaff, Rooney, Mitch, and other Shopko employees were trained to keep an eye out for and respond to spills. Schaff Decl. 3, ¶¶ 12, 15–17; Rooney Decl. 3, ¶¶ 12, 15; Lee Decl. 2, ¶ 9–10. If a Shopko employee saw a spill, the employee was trained to stay with the spill and radio another employee to go to the spill station and get the necessary supplies to clean up the spill. Rooney Decl. 3, ¶ 12. On the morning of Petty's fall, Rooney and Mitch did not personally observe the spill before Petty's fall and they were not notified that a spill had occurred. Rooney Decl. 3, ¶ 13; Lee Decl. 2, ¶ 13. As previously noted, Schaff also did not observe a spill or receive a report of a spill prior to Petty's fall. Schaff Decl. 3, ¶¶ 13, 15, 17–18.

Petty submitted to a deposition on September 21, 2017. Stefanic Aff., Ex. A. Petty testified her husband took photographs of the substance she slipped on. *Id.* at 47:21–49:6. Petty testified her husband told her it was a white liquid, and that her husband believed it to be milk. *Id.* at 49:11–50:1. Schaff, the Shopko store manager at the time, testified that the store did not sell milk on the day of the accident, November 20, 2015. Schaff Decl. 2–3, ¶¶ 4, 19. The photographs of the liquid are consistent with milk, and, given the color of Shopko's floor, the liquid is not readily detectable. *Id.* at Ex. B.

Because of her slip and fall, Petty filed an unverified Complaint against Shopko on November 29, 2016. She generally alleged that Shopko was negligent for failing to maintain the store premises in a safe condition and for failing to warn of a known danger. Compl. 3, ¶ 16(a), (c). On April 6, 2017, Shopko filed an Answer generally denying any liability.

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[1] The Court notes that the Declaration of Lee Mitch is missing page 3.

On April 3, 2018, Shopko filed a Motion for Summary Judgment. Shopko also submitted a Memorandum in Support of Defendant's Motion for Summary Judgment, Affidavit of Michael P. Stefanic, Declaration of Krista Schaff, Declaration of Marshall Rooney, and Declaration of Lee Mitch. In general, Shopko argues that it is entitled to summary judgment because there is no evidence of and Petty will be unable to prove that it breached a duty of care it owed her, i.e., that it had actual or constructive notice of the dangerous condition.

On April 23, 2018, Petty filed Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. Petty did not submit any evidence in support of her opposition. Rather, she relies on Idaho case law and evidence submitted by Shopko to argue that there is a genuine dispute of material fact regarding whether Shopko had constructive notice of the spilled liquid. Because there is a disputed material fact, Petty asks the Court to deny Shopko's Motion for Summary Judgment.

On April 30, 2018, Shopko filed Reply Brief Re: Defendant's Motion for Summary Judgment. In doing so, Shopko explains that Petty's reliance on two Idaho appellate court opinions is misplaced. Shopko contends that this case is analogous to *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 251 P.3d 602 (Ct. App. 2011), as Petty has failed to present evidence demonstrating that there is a question of material fact related to whether it had constructive notice of the spilled liquid. Shopko further contends that Petty is not entitled the inferences she requests as her inferences rely on conjecture and speculation.

Oral argument on defendant' Motion for Summary Judgment was held May 7, 2018.

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II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
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> (1) give an opportunity to properly support or address the fact;
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> (2) consider the fact undisputed for purposes of the motion;
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> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
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> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). To

do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea*, 156 Idaho at 545, 328 P.3d at 525 (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden . . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

> Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Dunnick*, 126 Idaho at 311 n.1, 882 P.2d at 478 n.1. Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994).

Heath v. Honker's Mini-Mart, Inc., 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000).

III. ANALYSIS.

Shopko seeks summary judgment on Petty's claim that it was negligent. A common law negligence claim consists of four elements: "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage." *Holdaway v. Broulim's Supermarket*, 158 Idaho 606, 610, 349 P.3d 1197, 1201 (2015) (citing *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 175–76, 804 P.2d 900, 904–05 (1991)). Shopko contends that it is entitled to summary judgment because Petty cannot show that it owed a duty to her or that it breached its duty of care to her.

A. There is no genuine dispute of material fact as to Petty's status as an invitee; therefore, Shopko owed a duty to Petty to keep its premises in a reasonably safe condition or to warn of hidden or concealed dangers.

"The duty of owners and possessors of land is determined by the status of the person injured on the land (*i.e.,* whether the person is an invitee, licensee, or trespasser)." *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 777, 251 P.3d 602, 605 (Ct. App. 2011) (citing *Holzheimer v. Johannesen*, 125 Idaho 397, 399, 871 P.2d 814, 816 (1994)). The status of the person injured on the land is generally a question of fact for a jury when the person's status is disputed. *Holzheimer*, 125 Idaho at 400, 871 P.2d at 817 (upholding the trial court's decision to instruct the jury on the definition of invitee and licensee); 65A C.J.S. Negligence § 988 (2018). However, if the facts are not in dispute, the status of the person injured on the land is a question of law for the trial court. 65A C.J.S. Negligence § 988.

The parties agree that Petty was an invitee. "An invitee is one who enters upon the premises of another for a purpose connected with the business conducted on the

land, or where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the landowner." *Holzheimer*, 125 Idaho at 400, 871 P.2d at 817 (citing *Wilson v. Bogert*, 81 Idaho 535, 347 P.2d 341 (1959)). In its Memorandum, Shopko concedes that Petty was an invitee.[2] Mem. Supp. Def.'s Mot. Summ. J. 6. Petty agrees with Shopko that she was an invitee. Mem. Opp'n Def.'s Mot. Summ. J. 4. Additionally, the undisputed facts demonstrate that Petty was on Shopko's premises to shop with her husband at the time of her fall. Stefanic Aff., Petty Dep. 30:5–14. Accordingly, because the facts related to Petty's status are not disputed, the Court concludes as a matter of law that Petty was an invitee when she was injured on Shopko's premises.

Because it is undisputed that Petty was an invitee, the issue becomes what duty Shopko, as landowner, owed Petty, as invitee. The existence of a duty is a question of law. *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 171, 296 P.3d 373, 377 (2013) (citing *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999)). Under Idaho law, "[a] landowner owes an invitee the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers." *Id.* (citing *Bates v. E. Idaho Reg'l Med. Ctr.*, 114 Idaho 252, 253, 755 P.2d 1290, 1291 (1988)). Therefore, in this case, the Court finds that Shopko owed Petty the duty to keep its store premises in a reasonably safe condition, or to warn of hidden or concealed dangers.

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[2] Shopko seems to make conflicting statements regarding Petty's status and corresponding duty. On one hand, Shopko acknowledges that Petty was an invitee. Mem. Supp. Def.'s Mot. Summ. J. 6. On the other hand, Shopko states that Petty "has no evidence that indicates that Shopko had a duty to her . . . ." *Id.* at 7. Because Shopko concedes that Petty was an invitee, it follows, as a matter of law, that Shopko owed Petty the duty to keep its

B. There is no a genuine dispute of material fact regarding whether Shopko breached the duty it owed Petty.

To establish that a landowner breached its duty of care, the injured invitee must demonstrate that the landowner had either actual or constructive notice of the dangerous condition. *Antim*, 150 Idaho at 778, 251 P.3d at 606. If the dangerous condition is nonrecurring or isolated, actual or constructive notice of the *specific* condition must be shown. *All v. Smith's Mgmt. Corp.*, 109 Idaho 479, 481, 708 P.2d 884, 886 (1985) (citing *Tommerup*, 101 Idaho at 3–4, 607 P.2d at 1057–58) (emphasis added). If the dangerous condition is recurring or continuing, "the invitee must show 'that the operating methods of the landowner or possessor are such that dangerous conditions are continuous or easily foreseeable.'" *Shea v. Kevic Corp.*, 156 Idaho 540, 548–49, 328 P.3d 520, 528–29 (2014) (explaining that proof of actual or constructive notice is still required regardless of whether the condition is nonrecurring or recurring). Here, there is no evidence in the record to suggest that the spilled liquid was anything other than an isolated incident. Therefore, the issue presented is whether Shopko has shown that there is no genuine dispute material fact as to whether it had actual or constructive notice of the spill.

1. <u>The undisputed facts demonstrate that Shopko did not have actual notice of the spill.</u>

Shopko argues that its evidence demonstrates it did not have actual notice of the spill. The Court agrees. Shopko's evidence shows that Petty testified that she did not know whether Shopko knew about spill. Stefanic Aff., Petty Dep. 52:9–12. More importantly, three Shopko employees testified that prior to Petty's fall, they did not personally observe the spilled liquid on the floor and they did not receive a report

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premises in a reasonably safe condition, or to warn of hidden or concealed dangers. *Holzheimer*, 125 Idaho at 400, 871 P.2d at 817; *Rountree*, 154 Idaho at 171, 296 P.3d at 377.

regarding a spill by any other person. Schaff Decl. 2–3, ¶¶ 11–13; Rooney Decl. 2–3, ¶¶ 9–13; Mitch Decl. ¶¶ 11–13. With this evidence, Shopko has met its initial burden of showing that there is no genuine dispute of material fact related to whether it had actual notice of the spill. Because Shopko met its initial burden, the burden shifts to Petty to provide specific facts showing there is a genuine issue for trial. Petty has not met her burden. In fact, Petty appears to concede that Shopko did not have actual notice of the spill. In her Memorandum, Petty explains that while Shopko has presented evidence demonstrating it did not have actual notice of a dangerous condition prior to her fall, Shopko "has failed to meet its required burden of establishing that it did not have constructive knowledge of the hazardous condition, and that reasonable care was exercised." Mem. Opp'n Def.'s Mot. Summ. J. 6. Petty then proceeds to argue that there is a genuine dispute of material fact related to whether Shopko had constructive notice of the spilled liquid. *Id.* at 6–11. Because Shopko has demonstrated with evidence that it did not have actual notice of the spill and because Petty has failed to challenge Shopko's evidence, the Court concludes that the undisputed facts demonstrate Shopko did not have actual notice of the spill.

2. <u>The undisputed facts demonstrate that Shopko did not have constructive notice of the spill.</u>

Shopko also argues that its evidence shows it did not have constructive notice of the spilled liquid. Mem. Supp. Def.'s Mot. Summ. J. 8–13. In response, Petty contends that this case is analogous to *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 707 P.2d 416 (1985), and *Brooks v. Walmart Stores, Inc.*, No. 44634, 2018 WL 1872059 (Idaho Apr. 19, 2018), and asserts that when assertions and inferences are construed in her favor, a jury could find that Shopko's "ignorance of the hazard was due to [Shopko's] failure to exercise due care." Mem. Opp'n Def.'s Mot. Summ. J. 5–11.

The Court again agrees with Shopko. Constructive notice "is that knowledge which reasonable diligence would have disclosed." *Brooks v. Walmart Stores, Inc.*, No. 44634, 2018 WL 1872059, at * 4 (Idaho Apr. 19, 2018) (citing *State v. Carlson*, 50 Idaho 634, 637, 298 P. 936, 937 (1931)). Idaho appellate courts have considered whether a store had constructive notice of a dangerous condition in *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 707 P.2d 416 (1985), *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 251 P.3d 602 (Ct. App. 2011), and *Brooks v. Walmart Stores, Inc.*, No. 44634, 2018 WL 1872059 (Idaho Apr. 19, 2018).

The facts in *McDonald* are as follows: At approximately 1:00 p.m., a customer entered a Twin Falls Safeway Store to make a purchase and subsequently slipped and fell on a cream-colored substance. *McDonald*, 109 Idaho at 306, 707 P.2d at 417. The store "had been conducting an ice cream demonstration since 10:00 a.m. that day," and the substance the customer slipped on appeared to be melted ice cream. *Id.* The customer sued the store generally alleging that the store had negligently dispensed the ice cream and allowed the ice cream to remain on the floor longer than was reasonable. *Id.* at 307, 707 P.2d at 418. The store subsequently moved for summary judgment, which the trial court denied. In doing so, the trial court distinguished the facts before it from the typical supermarket slip and fall case. It explained that "[i]n most supermarket slip and fall cases the plaintiff merely slips on an item or slick spot, the presence of which cannot be explained by anyone. Normally, the hazard exists during the normal business operation of the supermarket." *Id.* Conversely, in the case before it, the store was handing out ice cream on a very busy day. The trial court explained that the "mode of operation of the ice cream demo on a very busy Good Friday, combined with the abnormally large crowds and other demos, in and of itself could constitute an act of

negligence on the part of the defendant." *Id.* On appeal, the Idaho Supreme Court affirmed the trial court. It reasoned that there was a question of fact as to whether the store should be charged with having actively created a foreseeable risk of danger in its mode of operation, i.e., in dispensing ice cream in the manner that it did. *Id.* at 308, 707 P.2d at 419.

In *Antim*, the Idaho Court of Appeals held that the customer failed to present any evidence showing the store had constructive notice of the dangerous condition. *Antim*, 150 Idaho at 781, 251 P.3d at 609. The customer was shopping at the store when her foot caught on something and she fell to the ground. *Id.* at 775, 251 P.3d at 603. The customer looked at her feet to see what she tripped over and noticed a folded floor mat. *Id.* The customer sued the store for negligence alleging the store had breached its duty of care because a third-party employee left the folded mat in an aisle directly in the path of customers. *Id.* at 776, 251 P.3d at 604. The store moved for summary judgment, which the trial court granted. *Id.* On appeal, the Idaho Court of Appeals affirmed the trial court's decision. With regard to constructive notice, the Idaho Court of Appeals explained that the customer failed to present any evidence to show "when the mat was folded in order to establish how long it remained in such a dangerous position prior to her fall." *Id.* at 781, 251 P.3d at 609.

> [The customer] did not claim to know when the mat was folded and did not argue that evidence could be produced at trial to indicate the length of time during which the hazard existed. [The customer's] contention that the mat remained folded for twenty-five minutes is not based on facts or personal observation. Rather, her contention is based on pure speculation that the mat *could have* been folded over soon after the manager's inspection. [The customer's] suggestion that the mat was folded for at least twenty-five minutes prior to her fall is not supported by the record and is not sufficient to demonstrate that [the store] . . . should have been aware of the mat's unsafe condition.

Id. at 781, 251 P.3d at 609.

In *Brooks*, the Idaho Supreme Court reversed the trial court's decision granting summary judgment to the store because it, in part, found a material issue of fact regarding whether the store had constructive notice. *Brooks*, 2018 WL 1872059 at *1. In that case, the store allowed a third-party vendor, the Rug Doctor, "to place its carpet cleaning machines into Wal-Mart stores and offer them for rent to Wal-Mart customers." *Id.* On July 24, 2013, the customer entered a Boise Wal-Mart Store to purchase some items. While walking down an aisle, the customer slipped and fell near a self-serve Rug Doctor kiosk. *Id.* at *2. The customer "slipped on a puddle of water that had apparently originated from the Rug Doctor kiosk." *Id.* The customer sued the store for failing to maintain the premises and to adequately warn the customer of the dangerous condition, as well as for negligent mode of operation. *Id.* The store ultimately moved for summary judgment, which the trial court granted. *Id.* The customer appealed, and the Idaho Supreme Court reversed. With regard to whether the store should have known of the existence of the dangerous condition, the Idaho Supreme Court held that a genuine issue of material fact exists whether or not the store should have known of the existence of a dangerous condition by choosing a self-service operating method which required no employee involvement by the store. *Id.* at *4–6. Specifically, the Idaho Supreme Court explained that the store's conduct may be negligent because it

> fail[ed] to even inquire, in any way, regarding the Rug Doctor machines' potential to leak or otherwise create an unreasonable risk of harm to Wal-Mart's customers. Whether Wal-Mart should have exercised due care to familiarize itself of these risks in its chosen, self-service operation is a triable question of fact that the jury must resolve.

Id. at *4.

The Court concludes that the facts in this case are analogous to the facts in *Antim* and is an example of a typical supermarket slip and fall case mentioned by the

trial court in *McDonald.* The evidence shows that Petty was shopping at Shopko when she slipped and fell on a liquid substance. The liquid substance, or hazard, arose during Shopko's normal business hours. Neither Shopko nor Petty knows how or when the substance spilled on the floor. There was no debris where the liquid had spilled and the size of the spill was relatively small. Petty states she did not see the substance before slipping and her husband didn't see the substance either. There is no evidence that any other person reported the spilled liquid to a Shopko employee. Shopko employees are trained to look for and remedy spills, and there is no evidence that a Shopko employee spotted the spill prior to Petty's fall. Altogether, Shopko's evidence demonstrates that there are no facts that should have or would have put it on notice of the spill.

Nevertheless, Petty argues that Shopko would have known about the spilled liquid if it had exercised reasonable care and that there is a genuine dispute of material fact regarding whether Shopko exercised reasonable care. Petty contends that the Court should infer that Shopko employees only inspected the aisle for spills twice that morning, and she further asserts because only two inspections occurred, there is a question of fact regarding whether Shopko exercised reasonable care in maintaining its premises. Mem. Opp'n Def.'s Mot. Summ. J. 8–9. However, as argued by Shopko, such an inference is unreasonable in light of Shopko's evidence. The evidence presented by Shopko demonstrates that it exercised reasonable care in maintaining its premises, and Petty has not submitted any contrary evidence. For example, Shopko trained its employees to look for and remedy spills, it was highly or fully staffed on the day of Petty's fall, and two of its employees testified that they personally inspected the aisle on the morning of Petty's fall and did not observe a spilled liquid. In addition, three Shopko employees testified that they did not receive any reports of a spilled liquid

prior to Petty's fall. Schaff, Shopko's store manager, testified that she observed other employees in the area who are trained to scan the floor for spills. After responding to Petty's fall, two Shopko employees testified that they did not see any track marks leading away from the liquid. Altogether, this evidence shows that Shopko exercised reasonable care in maintaining its premises, and it also shows that Shopko did not "stick its head in the sand" or try to remain purposefully ignorant of possible dangers. Despite exercising reasonable care, a danger arose at Shopko's store. However, the fact that a danger arose does not establish negligence. *McDonald*, 109 Idaho at 308, 707 P.2d at 419.

Petty also argues that because late November was a busy season, there was a heightened risk for spills and Shopko had a corresponding heightened duty of reasonable care. Petty relies on *McDonald* and *Brooks* to support her argument. There are two problems with this argument: (1) *McDonald* and *Brooks* are not analogous to this case, and (2) Petty did not support her argument with evidence. First, unlike in *McDonald* where the store was selling ice cream and in *Brooks* where the store allowed self-serve Rug Doctor kiosks to be placed on its premises, there is no evidence here that Shopko's operations on the day of Petty's fall were such that its operations alone created an unreasonable risk of harm to its customers. As noted by Shopko, there is no evidence that it was handing out samples of a liquid to its customers that day, thereby creating a heightened risk that a spill might occur. The only evidence is that the liquid was milk, as observed by Petty's husband. Shopko does not sell milk at this store. Similarly, there is no evidence of any product being placed in the area of Petty's fall that might have leaked or otherwise caused a spill. Instead, Shopko points out, and the Court agrees, that the evidence shows Petty's fall occurred in an aisle between the men's apparel and girl's apparel. Because the facts in this case

are distinguishable from *McDonald* and *Brooks*, the Court is not persuaded by Petty's argument.

Second, Petty's assertion that November was a busy season with a heightened risk for spills was not supported by evidence. Petty's assertion relies on a declaration from a Shopko employee, who states that November was a busy season and Shopko was highly or fully staffed at the time of Petty's fall in anticipation of Black Friday. *Id.* at 6–7. Yet, this single statement does not establish that Shopko was overly crowded on the day of Petty's accident such that Shopko created an unreasonable risk of harm to its customers. Petty is speculating that because a Shopko employee describes November as a busy season and because she was shopping the Friday before Black Friday, Shopko must have been extra-busy, and because Shopko was extra-busy, Shopko created a heightened risk for spills to occur. Because Petty has submitted no evidence in support of her argument, the Court concludes her argument does not raise a genuine issue of material fact.

Petty further contends that because "no time of inspection has been established," the Court must infer that the spill could have occurred up to several hours before Petty actually fell. Mem. Opp'n Def.'s Mot. Summ. J. 9. The inference Petty requests is the same type of inference the customer in *Antim* requested, and it is the same type of inference the appellate court declined to give the customer in *Antim*. The customer in *Antim* asserted that the mat *could have* been folded over soon after the manager's inspection, or approximately 25 minutes before the customer's fall. The Idaho Court of Appeals concluded that the customer's suggestion that the mat was folded for at least 25 minutes was pure speculation. Similarly, Petty asserts that the spill *could have* occurred up to "several hours" before her fall because, in her review of

Shopko's evidence, only two inspections occurred that morning. However, her assertion, like the customer's assertion in *Antim*, is pure speculation and is not based on any evidence in the record. While Petty is entitled to have all reasonable inferences drawn in her favor, the inferences must be based on something more than speculation.

Finally, the busy nature of the store on the day of the accident cuts against Petty's argument that the spill was on the floor for a prolonged period of time. There were no tracks or footprints through the spill of what appeared to be milk; and the store was very crowded that day. The only inference that can be made from those facts is that it is likely the spill hadn't occurred long before Petty's fall.

In summary, the Court concludes that Shopko met its burden of showing that there is no genuine dispute of material fact as to whether Shopko should have known about the spill. Because Shopko met its burden, Petty was required to come forward with evidence demonstrating there was a genuine issue for trial. Petty did not present the Court with any evidence. Rather, Petty argues that after the Court construes all inferences in her favor, Shopko's own evidence creates a genuine issue of material fact which precludes summary judgment. As discussed above, the Court concludes that the case law Petty relies on is not analogous to her case and the inferences Petty wants the Court to make are unreasonable in light of the evidence in the record. Therefore, because there is no genuine issue of material fact, Shopko is entitled to summary judgment on Petty's negligence claim.

IV. CONCLUSION AND ORDER.

Based on the above, the Court grant the defendant's Motion for Summary Judgment.

For the reasons stated above,

IT IS HEREBY ORDERED defendant's Motion for Summary Judgment is GRANTED. This case is DISMISSED. Counsel for defendant to prepare an appropriate judgment.

Entered this 8th day of May, 2018.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 8 day of May, 2018, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
James E. Dorman	208-489-6404	Michael P. Stefanic/Mark D. Sebastian	208-344-5510

#62329

Jeanne Clausen, Deputy Clerk