

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Sarah Banta v. Costco Wholesale Corporation; and Does I-V

Banta · No. 3:23-cv-00054-MMD-CLB · Decided January 7, 2026

OPINION

1 2 3 UNITED STATES DISTRICT COURT 4 DISTRICT OF NEVADA 5 * * * 6 SARAH
BANTA, Case No. 3:23-cv-00054-MMD-CLB 7 Plaintiff, ORDER v. 8 COSTCO WHOLESALE
CORPORATION; 9 and DOES I-V, 10 Defendants. 11 12 I. SUMMARY 13 Plaintiff Sarah Banta
sued Defendant Costco Wholesale Corporation (“Costco”) for 14 negligence following an
undisputed slip-and-fall incident at the condiment station of a 15 Costco food court in Carson
City, Nevada.

(ECF No. 1 at 8.) The Court held a bench trial 16 (“Trial”) (ECF Nos. 60-62, 64 (minutes of
proceedings); ECF Nos. 66-69 (trial transcripts)) 17 and now makes the following findings of fact
and conclusions of law. As explained below, 18 Plaintiff fails to establish by a preponderance of
the evidence that Costco had constructive 19 notice of food debris on the floor prior to the
accident and therefore cannot show a breach 20 of duty of care.

The Court finds that Plaintiff cannot establish Costco’s liability on her single 21 negligence claim.
Accordingly, the Court directs judgment in Defendant Costco’s favor. 22 /// 23 /// 24 /// 25 /// 26 ///
27 /// 1 II. EXCLUDED TESTIMONY 2 At the Trial, the Court granted Plaintiff’s motion for
Rule 37 sanctions in part in 3 striking testimony of Costco’s employees relating to the written
floor walk and safety 4 policies and procedures that were not disclosed, including the risk
management manual 5 and the online training relating to the floor inspections.

(ECF No. 68 at 125-26, 184-85.) 6 The parties filed separate post-trial briefs to identify
testimonies that fall into this category. 7 (ECF Nos. 71, 73.) The Court agrees with the parties that
the testimonies discussing the 8 “incident report” filled out by Costco employees should be
stricken. This is not to be 9 confused with the “member report of incident” (Ex.

16) filled out by Banta, which was 10 included in the initial disclosures. (See ECF No. 68 at 107.)
In addition, the Court rejects 11 Plaintiff’s proposal to strike employee testimony relating to
Costco’s “daily floor walk-safety 12 inspection sheet” (Ex. 11). (ECF No. 73-4 at 11.)

The Court finds that the inspection sheet 13 does not fall within the policy and procedures
category. 14 III. FINDINGS OF FACT 15 The Court makes the following findings of fact based
on testimony and other evidence¹ 16 admitted during the Trial, along with the pre-trial and post-
trial briefing the parties filed in 17 this case. (ECF Nos. 50, 53, 70, 72.) 18 A. Slip-and-Fall
Incident 19 1.

Plaintiff's slip-and-fall incident occurred on April 16, 2022 at approximately 11:35:22 a.m. in the food court area of Costco Wholesale Corporation (Number 21 127) located at 700 Old Clear Creek Road, Carson City, Nevada. (Ex. 1; Ex. 16; 22 Ex. 512 at 4; see also ECF No. 66 at 21.) 23 2. Plaintiff was a Costco customer at the time of her slip-and-fall. (ECF No. 53 at 24 2.)

25 26 27 1The parties submitted exhibit lists at ECF No. 52 and ECF No. 55. "Ex." in this 1 3. Plaintiff had purchased a hot dog and was walking to the self-service condiment 2 station in the food court to obtain mustard when she fell. (ECF No. 53 at 2; see 3 also ECF No. 66 at 32, 36.) 4 4. Plaintiff slipped and fell on some food debris (ECF No. 53 at 2), which may have 5 been a piece of lettuce (id. at 4) or onion (Ex.

512 at 4, 9).2 6 5. The food debris remaining after the incident, as depicted in the only photo taken 7 (Ex. 17), is miniscule, measuring approximately one-eighth to one-quarter (see 8 ECF No. 50 at 3) of an inch. 9 6. If the concrete in-seam shown in Ex. 17 measured approximately one-eighth of 10 an inch, then the debris is roughly the same size. (ECF No. 66 at 107; ECF No. 11 67 at 172; see also ECF No. 70 at 3.)

12 7. The fall was captured on surveillance video at 11:35:22 a.m., but the video 13 shows no obvious debris or substance on the floor.3 (See Ex. 1; see also ECF 14 No. 50 at 3.) 15 8. Between 9:35 a.m. and 11:35:22 a.m., a total of 26 employees are seen entering 16 and exiting through the employee door located to the immediate left of the 17 condiment counter.

(ECF No. 63; ECF No. 65 at 1; see also ECF No. 66 at 89.) 18 During the same period, 141 customers—126 adults and 15 children—are seen 19 20 2Plaintiff testified that, after the fall, she believes she saw a piece of onion. (Ex. 512 21 at 4, 9.) At the Trial, a pixelated image of the food debris was admitted. (See Ex. 17.) A customer eyewitness who observed Plaintiff's fall pointed to the ground in the area of the 22 incident.

(ECF No. 67 at 164-65.) Following the accident, Costco employee, Jessica Nelson, went to the area, observed debris on the ground, and took a photograph with her 23 cell phone (id. at 108, lines 9-14; id. at 165, lines 21-25), while another employee used a broom and dustpan to sweep the area (id. at 94). At the Trial, Nelson speculated that the 24 debris may have been a piece of lettuce.

(Id. at 108, lines 6-8.) 25 3Four hours of store video surveillance were preserved before and after Plaintiff's fall, which occurred at 11:35:22 a.m. (ECF No. 53 at 2-3.) Although Plaintiff stated in 26 discovery that she slipped on an unknown liquid (see Ex. 512 at 3-4), the member incident report filed with Costco does not reference any liquid (Ex. 16), and the video footage 27 shows otherwise.

(ECF No. 70 at 3.) Moreover, as noted, a Costco employee used a broom and dustpan to sweep the area (id. at 94), further suggesting the substance was 1 in the food area. (ECF No. 63; ECF No. 65

at 1; see also ECF No. 53 at 3.) 2 Approximately 116 of those customers are seen in the general vicinity of the 3 condiment counter. (Id.) 4 9. At 11:13 a.m., Costco employee, Shannon Moats, conducted a floor-walk 5 inspection to check for hazards in the food area and found none.

(ECF No. 67 6 at 196, 201; Exs. 11-12; see also ECF No. 70 at 2.) 7 10. At 11:15:57 a.m., Moats wiped down the condiment counter. (ECF No. 65 at 1; 8 Ex. 1.) 9 11. Between the floor-walk inspection at 11:13 a.m., the counter wipe at 11:15 a.m., 10 and the time of the incident, approximately 27 customers are observed stopping 11 at the condiment station. (Ex.

1.) Dozens can also be seen eating and drinking 12 in front of or adjacent to the condiment station where the slip-and-fall occurred. 13 (Id.) The food court area contains only two tables available for customer 14 seating.⁴ (Id.) 15 12. Immediately after the fall, Plaintiff stood up on her own (ECF No. 66 at 108) and 16 continued her activities near the condiment station, including placing mustard 17 on her hot dog.⁵ (Id. at 108-09; see also Ex. 1.)

18 13. Plaintiff then spent several minutes completing a member report of the incident 19 with Costco stating that she, “slipped [sic] on a piece [sic] of something food 20 was wet and slippery.” (Ex. 16.) 21 22 4The store video was reviewed by Bill Frankmore Productions to provide a summary of the four-hour footage. (ECF No. 53 at 3; Ex. 2-001-003.) Mr. Frankmore’s summary 23 included pertinent information, such as the time of the fall, the number of employees who entered or passed through the area (26 employees), and the customers present in the 24 vicinity of the fall (141 customers).

(Id.) The summary also detailed activity near the condiment station, including its use, and identified individuals seated at the two tables 25 located in that section of the food court. (Id.) 26 5Plaintiff stood up on her own at approximately 11:35:32 a.m. and, after completing her member incident report (Ex. 16), left the premises with another individual at 27 approximately 11:50:29 a.m.

(Ex. 1.) Video surveillance indicates that roughly 15 minutes elapsed between the fall and her departure, during which time Plaintiff is seen walking in 1 14. Following the incident, Plaintiff experiences regular knee pain.⁶ (ECF No. 66 at 2 79-81.) 3 B. Defendant’s Business Model/Food Policy 4 15.

The food court area consists of a self-service condiment stand and two picnic 5 tables where members may sit to eat. (Ex. 1.) 6 16. Under Costco’s business model, the consumption of food and beverages is not 7 restricted within the store, and customers may eat and drink while shopping. 8 (ECF No. 67 at 10-11, 13, 187.) Additionally, the food sold at the service area 9 is priced affordably and is intended to incentivize members to shop.

(Id. at 13.) 10 C. Defendant’s Sweep Practices 11 17. Defendant’s practice involves conducting hourly floor walks and daily safety 12 inspections.⁷ (See, e.g., Ex. 11; see also ECF No. 67 at 122,

line 18, 136.) 13 These inspections include checks for trash, spill, and trip hazards in the food 14 court patio area. (See, e.g., Ex. 11; see also ECF No. 67 at 122, 134, lines 3- 15 16, 136.)

16 /// 17 /// 18 19 6The Court questions Plaintiff's credibility regarding the circumstances of the fall 20 and, particularly, her testimony concerning subsequent falls. Plaintiff admitted at her August 10, 2023 deposition that she had not experienced any falls since the incident at 21 Costco. (ECF No. 66 at 69-70.)

However, during direct examination at the Trial, Plaintiff testified to several subsequent incidents in which she lost stability. She described 22 instances including stumbling while walking to physical therapy when her legs gave way (id. at 64), a snow-shoveling incident in which she did not fall (id. at 65), and an occasion 23 when she tripped over her dog and bumped her leg on an object (id.).

24 7At the Trial, multiple witnesses testified to the existence of floor walk and safety inspection practices; however, the Court struck trial testimony concerning Costco's written 25 sweep and inspection policies and procedures (e.g., the risk management manual, the online training relating to the floors, and the floor walk and safety procedure that witnesses 26 testified to) as a sanction for Defendant's Rule 26 disclosure violation.

(See ECF No. 68 at 125-26, 185.) As mentioned above, the Court rejects Plaintiff's proposal to strike 27 employee testimony relating to Costco's "daily floor walk-safety inspection sheet" (Ex. 11; ECF No. 73-4 at 11) since the inspection sheet does not fall within the policy and 1 18. Defendant also cleans its floors before the store opens (ECF No. 67 at 73-74), 2 and employees are instructed to clean any hazards observed on store floors (id.

3 at 17, line 25; id. at 18). 4 19. Assistant Manager, Laura Gumina, testified that she personally follows a "don't- 5 walk-by" rule⁸, which embodies the principle of "see something, say something." 6 (ECF No. 67 at 156.) That is, if an employee observes a foreign substance (e.g., 7 spill; trash) on the floor, then they are required to address it and clean it up.

(See 8 also ECF No. 62-1 at 9.) 9 20. Defendant's daily Floor-Walk/Safety Inspection Sheet indicates that, on April 10 16, 2022, Costco employees conducted 11 inspections beginning at 8:08 a.m., 11 9:00 a.m., 10:05 a.m., 11:13 a.m., and 12:22 p.m.⁹ (Ex. 11.) 12 21. Costco employee Shannon Moats performed the floor inspection of the food 13 court on April 16, 2022 at 11:13 a.m. to check for hazards.

(ECF No. 67 at 196, 14 201; Exs. 11-12.) Moats testified as to her routine visual inspections of the food 15 court, stating: "I'm looking at everything. I'm looking at the floor. I'm looking at 16 the tables. I'm looking to see the trash, around the trash can." (ECF No. 67 at 17 196, lines 22-24.) According to Moats, she "did not observe any issues" during 18 her inspection of the food court floor.¹⁰ (Ex.

12 at 2.) 19 /// 20 /// 21 22 8Gumina clarified that no formal written Costco policy called the “don’t-walk-by” 23 policy exists. (ECF No. 67 at 156.) The Court notes that it previously ruled that testimony relating to Costco’s oral policy is admissible and will not be stricken. (See ECF 68 at 185.) 24 Therefore, the Court considers the “don’t-walk-by” rule to be an oral policy and will consider the evidence.

25 9The Court excluded evidence of subsequent remedial measures over Plaintiff’s 26 objections. Therefore, the Court does not consider evidence of floor walks occurring after 12:22 p.m. 27 10Video footage also shows the Costco employee inspecting the food court for 1 22. There was one wipe-down of the condiment station counter before the slip-and- 2 fall, performed by Moats with a rag at approximately 11:15:57 a.m.

(ECF No. 65 3 at 1; see Ex. 1.) 4 IV. CONCLUSIONS OF LAW 5 Plaintiff asserts a single claim for negligence. Plaintiff argues that Defendant 6 breached a reasonable standard of care by failing to adequately inspect the floor for 7 hazardous conditions, including food debris, and by failing to perform floor sweeps near 8 the condiment stand prior to the incident.

(ECF No. 53 at 11.) Defendant counters that it 9 owed Plaintiff only a “duty to keep the premises in a reasonably safe condition,” which it 10 satisfied because it lacked “actual or constructive notice of the onion (or other foreign 11 substance)” on the floor. (ECF No. 50 at 4-5.)

The Court finds that Plaintiff has not shown 12 by a preponderance of the evidence that Defendant knew or should have known of the 13 presence of food debris on the food court floor adjacent to the condiment station and 14 therefore cannot establish liability.

Accordingly, the Court does not reach the issue of 15 damages. 16 A. Negligence: Burden of Proof and Elements 17 1. A plaintiff bears the burden of proof to establish a cause of action for 18 negligence. See, e.g., *Sims v. General Tel. and Electric*, 815 P.2d 151, 154 19 (Nev. 1991).

The burden of proof is preponderance of the evidence. See, 20 e.g., *States Marine Corp. v. Producers Co.-op. Packing Co.*, 310 F.2d 206, 21 212 (9th Cir. 1962). 22 2. To state a claim for negligence, a plaintiff must show “(1) that the defendant 23 had a duty to exercise due care with respect to the plaintiff; (2) that the 24 defendant breached this duty; (3) that the breach was both the actual and 25 proximate cause of the plaintiff’s injury; and (4) that the plaintiff was 26 damaged.” *Joynt v. Cal. Hotel & Casino*, 835 P.2d 799, 801 (Nev.

1992) 27 (citation omitted). 1 3. “The owner or occupant of property is not an insurer of the safety of a person 2 on the premises,” but a business owner does have a duty to its patrons to 3 keep the premises reasonably safe. See, e.g., *Sprague v. Lucky Stores, Inc.*, 4 849 P.2d 320, 322 (Nev. 1993) (citation omitted). 5 4.

As a business owner, Defendant owed Plaintiff a duty to keep Costco reasonably safe. 7 5. A temporary hazardous condition on the premises triggers a duty of care 8 depending on its cause. See *Eldorado Club v. Graff*, 377 P.2d 174, 176 (Nev. 9 1962); see also *Asmussen v. New Golden Hotel Co.*, 392 P.2d 49, 50 (Nev. 10 1964) (“The presence of a foreign substance on a floor generally is not 11 compatible with the standard of ordinary care.”).

12 6. A business owner breaches its duty of care if a hazardous condition causes 13 a slip-and-fall accident, and the business owner or one of its agents caused 14 the hazardous condition. See *Asmussen*, 392 P.2d at 50; see also *Sprague*, 15 849 P.2d at 322 (“Where a foreign substance on the floor causes a patron 16 to slip and fall, and the business owner or one of its agents caused the 17 substance to be on the floor, liability will lie, as a foreign substance on the 18 floor is usually not consistent with the standard of ordinary care.”) (citation 19 omitted).

20 7. Alternatively, if the business owner or its agents did not cause the hazardous 21 condition, the business owner breaches its duty of care if it had actual or 22 constructive notice of the hazardous condition and did not remedy it.¹¹ See 23 *Asmussen*, 392 P.2d at 50. 24 25 11 “[T]here is a modern trend toward modifying this traditional approach to premises 26 liability to accommodate newer merchandising techniques, such as the shift that grocery stores have made from clerk-assisted to self-service operations.” See *FGA, Inc. v. Giglio*, 27 278 P.3d 490, 496 (Nev.

2012) (internal citation omitted). The “mode of operation” approach, which “focuses on the nature of the business at issue,” is discussed below. See 1 8. Constructive notice of a hazardous condition exists if the defendant should 2 have known about the hazard. See *Sprague*, 849 P.2d at 322-23 3 (citation omitted). 4 9. Constructive notice may be established from the nature of how a business 5 manages hazardous conditions.

See *FGA, Inc. v. Giglio*, 278 P.3d 490, 496 6 (Nev. 2012). A plaintiff must show that there was a recurrent risk on the 7 premises even with the nature of the business’s mode of operation to prevent 8 hazards. See *id.* at 497, n.5. 9 10. Absent any additional evidence, the mere presence of a hazardous condition 10 is not sufficient to establish constructive notice.

See *Linnell v. Carrabba’s 11 Italian Grill, LLC*, 833 F. Supp. 2d 1235, 1238 (D. Nev. 2011). 12 11. “[W]here an owner’s chosen mode of operation makes it reasonably 13 foreseeable that a dangerous condition will occur, a store owner could be 14 held liable for injuries to an invitee if the plaintiff proves that the store 15 owner failed to take all reasonable precautions to protect invitees from 16 these dangerous conditions.” *Giglio*, 278 P.3d at 496.

17 12. Under the mode of operation approach, “the plaintiff’s burden to prove 18 notice is not eliminated. Instead, the plaintiff satisfies the notice 19 requirement if he establishes that an injury was attributable to a reasonably 20 foreseeable dangerous condition on the owner’s premises that

is related to 21 the owner's self-service mode of operation.” Giglio, 278 P.3d at 496 22 (quoting Sheehan v. Roche Bros. Supermarkets, Inc., 863 N.E.

2d 1276, 23 1283 (Mass. 2007)). 24 13. The rationale underlying the mode of operation approach is “that an owner 25 of a self-service establishment has, as a cost-saving measure, chosen to 26 have his customers perform tasks that were traditionally performed by 27 employees.” Giglio, 278 P.3d at 496 (citation omitted). 1 14. If a customer who is performing such a task negligently creates a 2 hazardous condition, the owner is “charged with the creation of this 3 condition just as he would be charged with the responsibility for negligent 4 acts of his employees” because it was the owner's choice of mode of 5 operation that created the risk.

Giglio, 278 P.3d at 496. 6 B. Cause of Food Debris on the Floor 7 15. The Court finds by a preponderance of the evidence that the substance on 8 the food court floor was food debris—either lettuce or onion. 9 16. To establish a breach of duty, Plaintiff must prove that Costco or its agents 10 caused the food debris that resulted in the slip-and-fall incident; or, 11 alternatively, that Costco or its agents had actual or constructive notice of 12 the food debris and failed to remedy it.

13 17. Plaintiff has not met her burden of establishing by a preponderance of the 14 evidence that Costco or its agents caused the food debris to be on the food 15 court floor. 16 18. While the evidence presented indicates that some debris was on the floor, 17 Plaintiff failed to prove that Defendant or its agents caused its presence. 18 19.

Accordingly, the Court finds that neither Defendant nor its agents caused the 19 hazardous condition that led to Plaintiff’s fall. Plaintiff may thus only recover 20 if Defendant had actual or constructive notice of the food debris and failed 21 to remedy it. 22 C. Actual or Constructive Notice 23 20. Plaintiff has also not met her burden to show that Defendant had actual or 24 constructive notice of the food debris and failed to remedy it.

25 /// 26 /// 27 /// 1 21. Plaintiff provides no evidence that Defendant had actual notice of the 2 hazardous condition and failed to remedy it.12 And the Court finds no such 3 evidence of actual notice. 4 22. Plaintiff may, therefore, only prove breach through constructive notice. 5 However, Plaintiff fails to establish by a preponderance of the evidence that 6 a recurrent risk of food debris existed in the incident area, even with Costco’s 7 hourly-sweeps policy.

Nor does Plaintiff prove that Costco’s hourly-sweeps 8 policy fell below a reasonable standard of care. 9 23. Moreover, Plaintiff offers no evidence that other patrons fell on the premises, 10 reported a recurrent risk, or that any Costco employee or agent knew of a 11 recurrent risk on the food court floor. 12 24. Defendant mitigated hazards through its policy of performing hourly floor 13 walks and multiple daily inspections.

14 25. An employee conducted a floor walk of the area of the incident at 11:13 a.m. 15 to check for hazards, did not notice any, and continued her inspection of 16 other areas of the store. This

timing is in accordance with Costco's sweeping 17 and inspection policies and does not indicate that Defendant fell below the 18 appropriate standard of care. 19 26.

Moreover, in the time leading up to and following the accident, other patrons 20 walked near or through the incident area without falling. 21 27. Plaintiff, therefore, has not established by a preponderance of the evidence 22 that Defendant had actual or constructive notice of the food debris on the 23 floor. Employees complied with Costco's hourly sweep and daily inspection 24 25 12 On the day of the incident, Costco employees conducted 11 inspections of the 26 incident area, which included checking for trash, spill, and trip hazards in the food court patio.

Costco employees also conducted hourly floor walks of the incident area to check for and clean any debris that could pose a hazard to patrons. Moreover, an employee performed a floor walk between 11:13 a.m. and 12:02 p.m. and did not observe any hazard policies, and no evidence demonstrates that they could have otherwise known of the food debris.

Moreover, there was not a recurrent risk of slip- 3 and-fall incidents in spite of the sweep and inspection policy. 4 28. The Court therefore finds that Defendant did not breach its duty of care to 5 Plaintiff because it did not have actual or constructive of the food debris that 6 caused Plaintiff to slip and fall. 7 || □□ CONCLUSION 8 The Court notes that the parties made several arguments and cited to several cases 9 || not discussed above.

The Court reviewed these arguments and cases and determines 10 || that they do not warrant discussion as they do not materially affect the outcome of 11 || this case. 12 It is therefore ordered that Plaintiff fails to establish liability on her single claim for 13 || negligence. 14 The Clerk of Court is directed to enter judgment in Defendant's favor and close this 15 || case.

[illegible]