No. 339858

COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

MICA CRAIG,

Appellant,

v.

WAL-MART STORES, INC.,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Mr. Craig was bitten by a rattlesnake in the Garden Center of the Clarkston, Washington Wal-Mart. This case is about a property owner's duty to protect invitees from a bite from a wild animal. Since the possessor of land is not an insurer of the safety of invitees, the duty to exercise reasonable care to protect invitees from injury caused by wild animals is not triggered until the landowner knows or has reason to know that dangerous acts by wild animals are occurring or are about to occur. Here there is no evidence that Wal-Mart, or any of its employees, knew of the presence of the snake. There is no evidence that Wal-Mart knew, or had reason to know from past experience, that there was even the slightest chance that snakes presented a danger to customers of the store. No one knows where the snake came from, how it got there, or how long it had been present. There is no evidence of notice and the trial court properly determined Wal-Mart is entitled to summary judgment.

II. STATEMENT OF THE CASE

Plaintiff's Claims

At approximately 11:00 a.m. on May 11. 2012, plaintiff was bitten by a rattlesnake in the outdoor Garden Center of the Clarkston, Washington Wal-Mart. CP 2; CP 133, ll. 23-24.

Plaintiff claims "Wal-Mart knew, or by the exercise of reasonable care should have known, that a deadly snake was located, or could have been located, in a retail garden supply section of its store, through actual or constructive knowledge." CP 4.

Store Background

The Clarkston, Washington Wal-Mart store opened for business on September 2, 2009. CP 33. Since the store opened, over 4 million customers have entered onto the premises of the Clarkston Wal-Mart store. CP 34. Prior to May 11, 2012, there were no reported incidents or sighting of snakes or rattlesnakes on the premises. Id. There have been no reported incidents or sightings of snakes or rattlesnakes since May 11, 2012. Id. The record is devoid of any evidence of the presence of snakes at the Clarkston Wal-Mart store before or after May 11, 2012.

Morning of May 11, 2012

On May 11, 2012, Anthony Torrelli was the Garden Center Manager at the Clarkston Wal-Mart. CP 98, p. 8, ll. 15-22. Mr. Torrelli is still the Garden Center Manager. CP 98, p. 8, ll. 23-25.

Mr. Torrelli arrived at the store at 7:00 a.m. on May 11, 2012. CP 104, p. 33, ll. 4-11. He parked his car at the end of the Garden

Center, and he walked into the store through the parking lot Garden Center, inspecting it and noting tasks that needed to be accomplished. Id.

After walking the Garden Center, Mr. Torrelli went into the store and punched in. CP 104, p. 33, ll. 12-16. After punching in, Mr. Torrelli met with his Garden Center team and discussed the tasks that needed to be accomplished. CP 104, pp. 33-34. Those tasks included moving pallets, restocking pallets and cleaning the Garden Center. CP 104, p. 34.

Following the team meeting, Mr. Torrelli walked the Garden Center with his team pointing out the tasks that needed to be completed, including identifying pallets that needed to be moved, pallets that needed to be down stacked and pointing out areas that needed sweeping. CP 104, p. 35, ll. 15-24. Mr. Torrelli was also looking for anything that could be a trip hazard. Id.

In addition, in 2012 regular "safety sweeps" occurred daily where employees stopped what they were doing and inspected the premises for hazards. CP 100-101, pp. 19-23.

Garden Center Associate Paul Garai started work at 5:00 a.m. on May 11, 2012. CP 117, p. 20, ll. 24-26. Mr. Garai started working at

the Clarkston Wal-Mart in 2009, the year it opened. CP 113, p. 6, ll. 6-15. His primary duty is to keep the drive through area of the Garden Center clean and free of hazards. CP 117, pp. 21 -22. This included sweeping the Garden Center with a push broom, removing broken pallets, moving pallets, and down stacking pallets so customers could reach the product on the pallets. Id. Prior to the incident, Mr. Garai was working in the same area where the bite occurred. CP 118, p. 25, ll. 3-11. Mr. Garai completed this portion of his workday between 8:00 a.m. and 9:00 a.m. CP 117, p. 22, ll. 14-17.

When Mr. Garai finished with his work, he called Mr. Torrelli and Mr. Torrelli inspected the area again between 9:00 a.m. and 10:00 a.m. CP 107, p. 44 ll. 14-20. Neither saw any snakes. CP 117, p. 23, ll. 3-8; CP 106, pp. 41-42. Mr. Garai identified the photograph of the Garden Center. CP 40; CP 120; CP 116, p. 18, ll. 19-25; CP 117, p. 22, ll. 18-25.

Both Mr. Torrelli and Mr. Garai have been working at the Clarkston Wal-Mart store since 2009 and neither ever had an incident with a snake or had reason to believe a snake would be present in the Garden Center. CP 117, p. 23, ll. 1-8; CP 106, p. 42, ll. 1-7.

The Subject Incident

On May 11, 2012, Mr. Craig went shopping at the Clarkston Wal-Mart Garden Center. He was looking for dirt for a marijuana plant, which he was licensed to grow. CP 123, ll. 12-23.

He pulled his car up to the outdoor Garden Center. CP 124. He got out of his car and looked down at the price tag. CP 124. At his deposition, Mr. Craig stated there was "garbage, a stick or something" blocking the price tag. CP 124, ll. 13-15. He testified that he reached down to move it so he could see the price tag and he was bitten by the snake. CP 124, ll. 16-21. Mr. Craig has no idea where the snake came from or how long it had been present. CP 125-126. He also has no evidence that Wal-Mart had actual notice. Id.

He stated to multiple people on the day of the incident that when he discovered the snake before the bite, he thought it was a stick. CP 42-43 (Craig's Customer Statement); CP 88 (Hanson dep. p. 32, ll. 23-25); CP 118 (Garai dep.p. 25, ll. 3-11); CP 136 (Geffre dep. p. 33, 12-13); CP 61 (Logan dep. p. 37, ll. 4-7).

Craig wrote in his interrogatories that "something was blocking the price tag on the end palette, so I walked over to the pallet and bent over to brush the debris out of the way so that the price would be visible.

As I reached down, I realized that debris was actually a partially coiled snake, and it struck before I could pull my hand away." CP 45 (Craig's Response to Interrogatory No. 15).

The Aftermath

When Mr. Craig was bitten, Mr. Garai was 30-40 feet away. CP 115, p. 12, ll. 4-7. Mr. Garai heard someone yell and he went to the scene. CP 114-115. He found Mr. Craig on the ground; he stated that he'd been bitten by a rattlesnake. Id. Mr. Craig stated he thought the snake was a stick, which Mr. Garai found odd because he had previously swept that area and it had been clean. CP 118, p. 25, ll. 3-11. Mr. Garai helped Mr. Craig to his feet and offered to call 9-1-1 and Mr. Craig declined. CP 115, p. 12, ll. 17-19.

Another witness, Maria Geffre, was also present after the bite. CP 138. Ms. Geffre was shopping in the Garden Center before Mr. Craig arrived in his car. CP 137-138. Moments prior to Mr. Craig's arrival, Mrs. Geffre was in the same vicinity where the bite occurred and she did not see a snake. Id. Ms. Geffre does not know where the rattlesnake came from or how long it had been present. CP 138.

Right before Mr. Craig arrived, Ms. Geffre moved from the same vicinity where the bite occurred around the pallets and was

approximately 10 feet from Mr. Craig's car when he stopped and got out. CP 134, ll. 20-24.

After the bite, Ms. Geffre found Mr. Craig on the ground next to his car. CP 135, ll. 10-17. She asked Mr. Craig if the car was his and he answered it was. CP 135, ll. 5-9. Mr. Craig got in the passenger seat and Ms. Geffre got in the driver's seat. CP 135, ll. 10-17. She drove Mr. Craig to the medical center across the street. CP 115, p. 13, ll. 3-10.

At the medical center, they were told that the medical center could not treat snake bites, so Ms. Geffre drove Mr. Craig to St. Joseph Medical Center. CP 57, p. 20-21.

Wal-Mart's response

On May 11, 2012, Shift Manager Matthew Logan was on duty, along with Assistant Managers Neils Hanson and Keith Moore. CP 60, p. 33, ll. 14-25. A Code White was called, which is a signal that an injury occurred on the premises. CP 34. Matthew, Neils and Keith all responded to the Garden Center. CP 74, p. 33, ll. 14-25.

Matthew arrived at the Garden Center and found Mr. Garai with the dead snake in a shovel. CP 57, p. 20, ll. 14-25.

Matthew learned the injured customer had left in a private car, which was driving away from the store. Id. Matthew ran after the car and contacted Mr. Craig. Id. Craig stated to Matthew that he was sorry but that he had been bit by a rattlesnake. Id. at p. 21, ll. 1-11. Matthew encouraged Craig to get to the hospital. Id.

Matthew then went back to the Garden Center and initiated the customer accident process. Id. This included photographing the area and obtaining statements from any witnesses. Id. at p. 21, ll. 13-25. Keith had the accident forms and a camera. CP 74, p. 34, ll. 5-21.

Matthew instructed Keith to take a photograph of the area where the bite occurred. CP 61, p. 36, ll. 8-14; CP 40.

Mr. Garai had the snake in a shovel and was carrying it to the disposal. CP 74, p. 34, ll. 5-16. The decision was made to dispose of the snake under the belief that even a dead rattlesnake can pose a hazard. CP 87, p. 31, ll. 13-25. Keith instructed Mr. Garai to place the snake on the ground so he could take a picture of it. CP 74, p. 34, ll. 5-16; CP 40. Mr. Garai also showed Keith the location of the bite and Keith took a picture of the area. Id.

Later, Craig called the store and talked to Matthew. CP 57, p. 23. He stated he was impressed with how Matthew ran across the street

to check on him and Craig promised that once released from the hospital he was going to return to the store to shake Matthew's hand. Id.

After being discharged from the hospital that afternoon, Craig returned to Wal-Mart. Matthew, Neils and Keith met Craig when he returned. CP 88 (Hanson dep. p. 32, ll 6-9); CP 57-58 (Logan dep. pp. 23-24); CP 74 (Moore dep. p. 34, ll. 17-21). Craig shook Matthew's hand and thanked him for his concern about Craig's well-being. CP 57-58, p. 23-24. He told them that he bent over to pick up a stick to unblock the price sign. CP 88, p. 32, ll. 23-25.

Craig also stated that as a child, he used to catch rattlesnakes in the field across the street from the store. CP 61, p. 37, ll. 16-21.

Keith had Mr. Craig fill out a customer statement. CP 74, p. 34, ll. 17-21. In the customer statement, Craig wrote that he mistook the snake for a stick. CP 42-43. Following that, Keith completed an incident report and keyed it into the computer system. CP 74, p. 34, ll. 17-21.

Craig called the store twice after the day of the bite. The first time he called he spoke with Matthew Logan. CP 58, p. 25, ll. 8-17. In that conversation, Craig stated that someone had called him and accused

him of staging the whole thing. Id. Matthew denied making any such call. Id.

The second time he called back he spoke with Neils. CP 88, p. 34, ll. 10-18. He asked for the snake back so he could make a hat band out it. Id. Neils explained they disposed of the snake. Id.

At the time of the incident, Wal-Mart had a pest control company called EcoLab who performed monthly inspections for pest control. CP 34. At no time prior to this incident did EcoLab ever report any instance involving snakes or report any evidence or suspicion that snakes were present on the premises. Id.

Dr. Kenneth Kardong is a rattlesnake behavior expert. CP 281-283. It is his opinion that based on the documented lack of rattlesnake activity at the Clarkston, Washington Wal-Mart prior to this incident, there was no reason for Wal-Mart to expect or anticipate the presence of a rattlesnake in the Garden Center. Id. Wal-Mart's operation of its Garden Center did not create or worsen any risk of rattlesnake activity, rather Wal-Mart's conduct of sweeping the Garden Center as described in the deposition testimony lessened any such risk, to the minimal extent it existed. Id.

III. LEGAL ARGUMENT

To establish the elements of his claim, Craig has to show "(1) ... duty ..., (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994) (citing Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984)).

A. Without Actual or Constructive Notice, a Property Owner Does Not Owe a Duty to Protect Invitees From Wild Animal Bites.

The threshold determination of whether a duty exists is a question of law. Tincani, 124 Wn.2d at 128.

The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee. See Younce v. Ferguson, 106 Wn.2d 658, 662, 724 P.2d 991 (1986). The parties do not contest that Craig was an invitee.

In terms of a landowner or possessor's duty to invitees, our Supreme Court defined this duty in Iwai v. State[1], adopting the Restatement (Second) of Torts § 343, which states:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

[1] Iwai v. State, 129 Wn.2d 84, 915 P.2d 1089 (1996).

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

The Supreme Court of Washington, in the case of Nivens v. 7-11 Hoagy's Corner,[2] also adopted Restatement (Second) of Torts § 344, which states:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.

Washington courts are quite clear that a landowner is not an insurer of an invitee's safety, and the mere occurrence of an injury does not give rise to an inference of negligence. Iwai, 129 Wn.2d at 92.

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[2] Nivens v. 7-11 Hoagy's Corner, 133, Wn.2d 192, 943 P.2d 286 (1997).

The cases cited by Craig support and reinforce the proposition that notice, constructive or actual, is required before liability for a wild animal bite can be imposed on a landowner. For instance, in DeLuce, the court concluded that negligence could not attach for a rat bite absent a showing that the landlord knew or should have known of such dangerous conditions. DeLuce v. Fort Wayne Hotel, 311 F.2d 853 (1962). Testimony was offered that an employee often saw rats in an alley adjacent to the hotel and on the sidewalk in front of the hotel, and the employee had actually chased them off the sidewalk. Id. at 855. The appellate court over-turned the trial court's determination to impose absolute or strict liability and remanded the case for trial to determine if the landlord had actual or constructive notice. We can only surmise how the case turned out after remand.

Similarly, in Carlson, the Supreme Court of Alaska determined "if the land owner knows that a wild animal is creating a dangerous situation on his property, he has a duty to either remove the danger or warn the people who may be threatened by the danger." Carlson v. State, 598P.2d 969, 973 (1979). In Carlson, the Supreme Court of Alaska determined that factual issues remained as to the extent of the State's knowledge of the presence of bears at the site of the injury. The

Carlson court found a Florida case particularly helpful. See Wamser v. City of St. Petersburg, 339 So.2d 244 (Fla. App.1976). Wamser involved a lawsuit against a city by a swimmer who had been attacked by a shark at a city-owned beach. The court held that, because the danger was not reasonably foreseeable, the City had no duty to guard the swimmer against a shark attack or to warn him of the possibility of such an attack. The City was also found to have had no duty to seek information about the frequency of sharks in the beach area, since no shark attacks had ever occurred at the beach so as to indicate the necessity for obtaining such information. Similarly, in Mann v. State, 47 N.Y.S.2d 553 (Ct.Cl.1944), the State of New York was found not liable for damage to a car caused when a deer ran across a highway. The court held that the State could not be liable for failure to erect fences or post warning signs where plaintiff did not prove that the state had actual or constructive notice of the dangerous situation.

If the facts of this case were like the facts in DeLuce and Craig developed testimony that Wal-Mart employees frequently saw snakes on the front sidewalk and actually chased them away, then a duty would have existed. But just like Wamser, even though it is known that sharks swim in the ocean, a shark attack was still not reasonably foreseeable

and the City had no duty to protect swimmers, and it further had no duty to seek information about the frequency of sharks in the area. Also, just like in Mann, there is no liability for the failure to erect fences to keep deer off a highway when there is no actual or constructive notice of a dangerous situation.

Importantly, all of the cases cited thus far involving injury caused by wild animals - whether it be by rats, bears, deer, sharks or snakes – universally require plaintiffs to prove notice before a duty exists to protect invitees against such hazards.

B. Craig Can Not Carry His Burden to Demonstrate Notice.

A well-established rule in Washington requires a plaintiff to prove that the possessor of land has actual or constructive notice of an unsafe condition prior to the imposition of liability for an injury. See Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 896 P.2d 1014 (1994). Additionally, Washington law indicates that constructive notice exists "if the unsafe condition has been present long enough that a person exercising ordinary care would have discovered it." Wilste v. Albertson's, Inc. 116 Wn.2d 452, 459, 805 P.2d 793 (1991).

In this case, Craig must, therefore, prove that Wal-Mart had actual or constructive notice of the unsafe condition. The mere fact that

Craig was injured at Wal-Mart does not prove negligence on the part of Wal-Mart.

1. **The Record is Devoid of Any Evidence Establishing Actual Notice.**

Craig has no evidence that Wal-Mart had actual knowledge of the presence of the snake. CP 125. There are no allegations or evidence whatsoever that any employee of Wal-Mart placed the snake at the location or had actual knowledge of its presence prior to the incident. Id. "As to the law, we start with the basic and well-established principle that for a possessor of land to be liable to a business invitee for an unsafe condition of the land, the possessor must have actual or constructive notice of the unsafe condition."[3] Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994); see also Restatement (Second) of Torts § 343. It is undisputed that there is no evidence in the record that Wal-Mart ever had actual notice of any rattlesnakes on its premises -

[3] Plaintiff concedes that the Restatement (Second) of Torts § 343 defines the duty owed by landowners to invitees. The Restatement (Second) of Torts § 344 has also been adopted in Washington, which deals with the duty of a landowner to protect invitees from acts of third person or animals. Restatement (Second) of Torts § 344 defines a landowners duties to its invitees as it relates to "accidental, negligent or intentional acts of third persons or animals." This section clearly applies to third persons AND animals and it was adopted because it "properly delimits the duty of the business to an invitee." Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 204, 943 P.2d 286 (En Banc 1997). "We expressly adopt it [§ 344] for a business owner and business invitees." Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d at 204 (citing comments d and f) ("possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons, **or the acts of animals**.")

not in the store, not outside the store, not in the parking lot and not in the garden center. Thus, Mr. Craig has failed to establish actual notice. Id.

2. **The Record is Devoid of Any Evidence Establishing Constructive Notice.**

Constructive notice arises where the condition "has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." Ingersoll, 123 Wn.2d at 652. Craig asserts that Wal-Mart had constructive notice of the rattlesnake because rattlesnakes are indigenous to Clarkston. However, Craig presented no evidence that rattlesnakes had **ever** been present on the premises. He admitted in his deposition that he does not know where the snake came from or how long it had been present. He submitted no testimony in his response to the present motion that established where the snake came from or how long it had been present.

Monthly inspections by Ecolab failed to uncover any evidence of snake activity and inspections of the property by Wal-Mart employees in

the months, days and hours prior to this incident failed to reveal any signs of snake activity.[4]

The applicable rules regarding constructive notice were set out in Coleman v. Ernst Home Ctr., Inc., 70 Wash. App 213, 853 P.2d 473 (1993), as follows:

> Ordinarily, it is a question of fact for the jury, whether under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care. The permissible period of time for the discovery and removal or warning of the dangers condition is measured by the varying circumstances of each case. To a large extent, it depends upon the opportunity for discovery opened to the defendant's employees by reason of their number, their physical proximity to the hazard, and, in general, the likelihood they would become aware of the condition in the normal course of duties. The decisive issues, therefore, are the length of time the condition is present and the opportunity for discovery under the circumstances proved. While the plaintiff must prove that the defective condition existed long enough so

[4] Craig offers no **evidence** critical of Wal-Mart's inspection policies, procedures or practices. Craig submits no testimony that the extent, frequency or duration of Wal-Mart's inspections was deficient in any manner. Additionally, although Craig argues that Wal-Mart employees received no training relating to snakes, he submits no evidence that Wal-Mart owed a duty to train employees about rattlesnakes and he submits no evidence that such a lack of training caused his injury or was a violation of some standard of care.

> that by the use of reasonable care it should have been discovered and remedied, that fact, like other facts, may be proved by circumstantial as well as by direct evidence.... however, where circumstantial evidence leads only to speculation, a verdict cannot be based on inferences drawn from evidence.

In this case, there is no evidence as to how long the snake had been present. If there are any inferences in this case, it is that any snake could only have been present for a few moments because Maria Geffre was in the same area just moments before the incident and she did not see any snakes. CP 137-138. Further, Mr. Torrelli and Mr. Garai inspected and cleaned the premises at least twice the morning before the bite, and as late as 9:00 am - 10:00 am. CP 107. Again, in the subject case, plaintiff has offered no evidence as to how long the snake had been present, such as to give notice to the store, constructive or otherwise.

There are no cases in Washington with a similar fact pattern. However, and not surprisingly, there are similar fact patterns in cases arising out of the Southern United States. When put together, the cases stand for the proposition that premises owners are not liable with regard to insects or wind animals found in artificial structures or places they are not normally found, such as, stores, hotels, apartment houses, if the

landowner did not have a reason to know the presence of the risk.[5] Overstreet v. Gibson Product Co., Inc., of Del Rio, 558 S.W. 2d 58 (Texas 1977); Bradford v. Louisiana Downs, Inc., 606 So. 2d 1370 (Louisiana 1992); Robison v. Gantt, 673 SO. 2d 441 (Alabama 1995).

The few courts that reach a different conclusion do so only where the landowner knew or should have known of the unreasonable risk of harm posed by an insect or wild animals. See, e.g., DeLuce v. Fort Wayne Hotel, 311 F.2d 853 (6th Cir. 1962) (remanding for new trial where presence of rats in an alley to an adjoining hotel and on the sidewalk in front of it created fact question on the hotel operator's duty to protect guests from a foreseeable event, such as rats entering through the doors); Carlson v. State, 598 P.2d 969 (Alaska 1979) (reversing summary judgment and remanded for trial on fact issue of state's knowledge of bears' presence, danger posed by them, and foreseeability of attack in the location where trash was left uncollected); CeBuzz, Inc. v. Sniderman, 466 P.2d 457 (Colo. 1970) (finding the defendant's

[5] There is also support for the conclusion that the landowner has no duty to protect against attacks by indigenous animals or insects. For instance, the Restatement (Second) of Torts provides that an owner or occupier of land is not normally liable for injury to others as a result of an attack by a wild animal indigenous to the area, even when the owner or occupier captured the animal and it later escaped. Restatement (Second) of Torts § 508.

knowledge of presence of banana tarantulas in the last shipment of bananas delivered to the store gave rise to liability for bite to shopper); Williams v. Milner Hotels Co., 36 A.2d 20 (Conn. 1944) (holding that presence of rat holes in the guest room put landowner on notice of presence of rats).

In Overstreet, the Texas Court of Appeals considered the duty of a property owner to protect invitees from the harm posed by a rattlesnake. Overstreet v. Gibson Product Co., Inc., of Del Rio, 558 S.W. 2d 58 (1977).

In Overstreet, a customer was bitten by a rattlesnake while shopping for groceries in a store operated by the defendant. After a verdict for the plaintiff, the trial court granted a judgment notwithstanding the verdict denying him recovery and plaintiff appealed. Id. at 59. At the time of the incident, no employee of the defendant was in the aisle where the bite occurred, but two of defendant's employees had been in the area a short time before plaintiff was injured. Id. at 60. There was also evidence that rattlesnakes were indigenous to the area where the store was located. Id. In affirming the trial court, the Court of Appeals analyzed the duty of the defendant under Restatement (Second) of Torts § 344.

> A possessor of land who holds it open to the public for entry for his business purposes is under a duty to exercise reasonable care to protect his business visitors from the acts of animals coming onto the premises. Restatement Second of Torts § 344 (1965). However, since a possessor is not an insurer of the safety of his business guests, he is under no duty to exercise such care until he knows or has reason to know that the dangerous acts by wild animals are occurring or about to occur. There is no evidence that the defendant, or any of its employees, new of the presence of the snake in the store. The question, then, is whether there is evidence to support the inference that defendant had reason to know that the snake was present or might reasonably expect to be present, thus creating a danger for a person in plaintiff's class. We find nothing in the record to suggest that defendant knew, or had reason to know from past experience, that there was a likelihood that snakes presented a danger to patrons of the store.

Id. at 61.

The court went further stating:

> It is not readily apparent that the rule applied in Rosas and Adam Dante differs markedly from the rule embodied in Restatement § 344. If we view the presence of the rattlesnake in the store as creating the danger, the question of liability depends on whether or not it may be reasonably inferred that the condition existed for such length of time as would give defendant a reasonable opportunity to discover it. [citation omitted]. It may be, as plaintiff contends, that very little evidence is required

> in order to justify the necessary inference, but this does not mean that the inference may be drawn in the absence of supporting evidence. The record furnishes no clue as to the length of time that the snake had been in the store prior to the injury.

Id. at 62.

The Overstreet court was careful to point out that the plaintiff's claims were based on negligence, and plaintiff's argument for the imposition of liability without notice would result in strict liability, which "is not the law." Id. at 60-61.

Similarly, the Court of Appeals of Louisiana considered a fact pattern strikingly similar to Mr. Craig's case. Bradford v. Louisiana Downs, Inc., 606 So.2d 1370 (Louisiana 1992). In Bradford, a patron was injured in a parking lot of a race track when he was bitten by a copperhead snake. The court first addressed the duty of the landowner and determined that "[i]n order to recover from an owner or custodian of immovable property, under a negligence theory, the plaintiff must show that the owner or custodian knew or should have known of an unreasonable risk of harm posed by the property." Id. at 1375 (citations omitted). The court held as follows:

> In this case, there is no showing that the defendant had a duty to protect the plaintiff

> against the risk of being bitten by a snake. There is no showing that the defendant knew or should have known of the existence of the snake or that the risk to patrons in its parking lot of being bitten by snakes was a foreseeable risk. In the affidavits and depositions attached to the defendant's motion for summary judgment, it was established that although more than 17 million persons had patronized the racetrack, the plaintiff was the only person ever to report having been bitten by a snake. The affidavits also established that the parking lot was regularly patrolled by security personnel and parking lot employees and that none of these employees ever reported seeing a snake on the parking lot. The steps taken by the defendant in patrolling the parking lot were reasonable in view of the low probability of injury to patrons from snake bites.

Id. at 1375.

The facts of this case are indistinguishable from Overstreet and Bradford; as is evidence by the following portions of plaintiff's deposition testimony.

> Question: ... Mr. Craig, do you know where the snake came from?
> Answer: I have no clue.
>
> Question: Do you have any evidence that it was placed there by an employee of Wal-Mart?
> Answer: I do not.

Question: Have you ever been to this particular Wal-Mart store before May 11, 2012?
Answer: Yes.

Question: On how many occasions?
Answer: Many, many times. I still go to it every day, to this day.

Question: Okay. Well, before this incident, had you ever seen a snake there?
Answer: No.

Question: Have you ever heard of the snake being on the premises there?
Answer: No.

Question: Since the day of the incident, May 11, 2012, have you ever seen a snake on the premises there?
Answer: No.

Question. Do you know how long the snake was present at the Wal-Mart store?
Answer: No.

CP 125.

Question: ... Do you have any evidence that any Wal-Mart employee knew of the presence of the snake before the bite?
[Objection]
Answer: No.

Question: Do you have any evidence about the last time a Wal-Mart employee had been through that area where the bite occurred?
[Objection]
Answer: No.

Question: Do you have any evidence about the last time another customer had been through that area?
[Objection]
Question: And when I say "that area," I'm talking about the snake bite.

[Objection]
Answer: No.

Question: What, if anything, do you know about the inspection policies that were employed before you came to the store on May 11, 2012?
Answer: Nothing.

Question: Do you have any evidence that the inspection policies and procedures that were employed on May 11, 2012, were somehow not carried out by the employees of Wal-Mart?
[Objection]
Answer: I don't.

Question: Okay. Mr. Craig, in your mind, what did Wal-Mart do wrong?
[Objection]
Answer: I don't know what the laws are, but I know if a guy is sitting there shopping for something of their merchandise, I should not have to worry about being bit by something, being hurt by anything, or my grandkids, my grandparents, anybody should have to worry. **If I'm shopping for something of theirs, they're responsible to keep me safe.**

CP 126-128 (emphasis added).

The claim that "if I'm shopping for something of theirs, they are responsible to keep me safe" is not the law in Washington. Landowners are not the guarantors of the safety of its invitees and can only be liable for hazardous conditions upon the property when they knew or should have known of the hazard. Restatement (Second) of Torts § 344.

Here, there is no actual or constructive notice of the presence of rattlesnake on the premises. Thus, there is no duty to exercise reasonable care to protect invitees from the unknown danger posed by a rattlesnake. Viewed in the light most favorable to the plaintiff, the evidence does no more than establish that a particular species of rattlesnakes is indigenous to the area, but there is still no evidence that any rattlesnake ever ventured onto the premises, either before or after May 11, 2012.

C. Wal-Mart Created No Unsafe Condition, so Craig Must Prove Notice.

Craig claims that he does not have to show actual or constructive notice because the Pimentel self-service exception applies, which requires him to show that the danger of rattlesnakes was continuous or foreseeably inherent in Wal-Mart's mode of operation. This narrow "self-service" or "Pimentel" exception excuses a business invitee from

proving the landowner had notice of an unsafe condition, if the unsafe condition causing the injury was continuous or foreseeably inherent in the nature of the business or mode of operation; however, courts have applied this exception only to self-service establishments, and the hazardous condition must be related to the self-service mode of operating the business. Fredrickson v. Bertolino's Tacoma, Inc., 131 Wn.App. 183, 127 P.3d 5 (2006); see also Pimentel v. Roundup Co., 100 Wn.2d 39, 40, 666 P.2d 888 (1983); Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 653-54, 869 P.2d 1014 (1994). O'Donnell v. Zupan Enters. Inc., 107 Wn.App. 854, 858-59, 28 P.3d 799 (2001).

The exception applies here only if Craig can show that (1) the Garden Center operation was self-service, (2) it inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous condition that caused the injury was within the self-service area.[6] O'Donnell, 107 Wn.App. at 859.

Self-service departments are areas of a store where customers service themselves, or where customers otherwise perform duties that the

[6] Craig argues that snake bites in other Wal-Mart stores across the country make this incident "foreseeable." First, foreseeability is not the question when it comes to triggering a legal duty. Notice triggers duty, not foreseeability. Second, the Pimentel exception requires a plaintiff to demonstrate the unsafe condition was reasonably foreseeable "*in the area in which she fell.*" Arment v. Kmart, 79 Wn. App. 694, 698, 902 P.2d 1254 (1995).

proprietor's employees customarily performed. Id. at 859. "In such areas, where lots of goods are stocked and customers remove and replace items, hazards are apparent." Ingersoll, 123 Wn.2d at 653.

For example, in O'Donnell, 107 Wn.App. at 856, the injured person slipped and fell on a piece of lettuce in the checkout aisle of a grocery store where customers were responsible for unloading their grocery items from their grocery carts onto the conveyor belt at the checkout stand. Id. at 857. There, the court applied the Pimentel exception because the checkout aisle was a self-service area and the hazard of produce on the floor was reasonably foreseeable and related to the self-service nature of the checkout aisle. Id. at 858-59. In contrast, in Wilste v. Albertson's, Inc., 116 Wn.2d 452, 460, 805 P.2d 793 (1991), the plaintiff slipped and fell on water that had dripped from a leak in the store's roof. The court refused to apply the Pimentel exception because the hazard was unforeseeable and in no way related to the store's self-service operation. Wilste, 116 Wn.2d at 456.

Craig has failed to establish in the record that the Garden Center was a self-service area. Specifically, he has not shown that customers "served themselves" in the Wal-Mart garden center; and he has presented no evidence that customers in the Garden Center performed

duties that Wal-Mart's employees customarily performed. Further, he has not shown how any hazard posed by the rattlesnake related to any self-service aspect of Wal-Mart's mode of business operation.

Craig has failed to establish in the record that the danger of rattlesnakes was continuous or foreseeably inherent in the nature of Wal-Mart's business. There are multiple witnesses who have testified that there has never been an incident where a rattlesnake bit a customer. No customer ever complained about a rattlesnake injury prior to Mr. Craig. Mr. Craig has not shown there is anything inherently dangerous about operating a garden center in the parking lot.[7]

D. Craig's Expert's Affidavit Does Not Raise an Issue of Material Fact.

Plaintiff's expert's declaration alleges that Clarkston has an indigenous species of rattlesnake. Prof. Beck goes further to opine that snakes have been reported "in the vicinity" or "near Wal-Mart." He does not say it is reasonably foreseeable that a rattlesnake would pose a hazard to customers at the Garden Center; rather, he states that it is

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[7] Craig argues, with no evidentiary support, that the spacing of the pallets in the Garden Center created areas for a snake to hide. There is no evidence that the snake was ever present or hiding in the pallets. That is pure speculation. There is no testimony that the configuration of the pallets caused or contributed to Mr. Craig's injury. To the contrary, the snake was open and obvious as evidenced by Mr. Craig's testimony that he saw the snake and mistook it for a stick, prior to reaching down and grabbing it with his hand.

"***plausible*** that a rattlesnake ***could*** move from such locations to where the Garden Center was located in 2012."

He goes further to state it is "plausible" that the Garden Center would have been "accessible" to snakes. He does not provide the court with testimony that the snake's presence on May 11, 2012 was foreseeable, or that Wal-Mart knew or should have known of its presence. Interestingly, both the expert and Craig's counsel attempt to demonstrate that the Garden Center had places that a snake "might" hide. However, that position has no relevance and should be given no weight because there is no evidence that the snake that bit Mr. Craig was hiding in a pallet. Quite to the contrary, as Mr. Craig approached the snake, he observed it. He mistook it for a stick. The allegation that the snake was lying in wait in a trap set by Wal-Mart is simply not supported by the evidence in the record.

Wal-Mart's motion for summary judgment hinges on the lack of notice of the presence of a rattlesnake on it premises, as described herein in great detail. In support of this motion, Wal-Mart submitted the declaration of rattlesnake behavior expert, Prof. Ken Kardong of WSU. Dr. Kardong expressed the following undisputed opinion:

> It is my opinion that based on the documented lack of rattlesnake activity at the Clarkston, Washington Wal-Mart prior to this incident, **there was no reason for Wal-Mart to expect or anticipate the presence of a rattlesnake in the Garden Center.** Wal-Mart's operation of its Garden Center did not create or worsen any risk of rattlesnake activity, rather Wal-Mart's conduct of sweeping the Garden Center as described in the deposition testimony lessened any such risk, to the minimal extent it exists.

CP 282.

Plaintiff's expert, Prof. Beck, does not offer any testimony to refute this opinion. Nowhere in his declaration does he claim that Wal-Mart knew or should have known that this rattlesnake would be present on its premises. Prof. Beck takes great length to describe the travel habits of rattlesnakes living near Clarkston, but his testimony fails to establish that Wal-Mart should have known that such travel habits would lead a snake to be present on its property, since in the years leading up to this incident no such event had ever occurred. Any connection would be based on pure speculation.

Just like in Mann, we know snakes are present in Clarkston just as sharks are present in the ocean. However, liability for bites of sharks or snakes can only be established if the land owner had a duty to protect

its invitees; and such a duty arises only when the land owner knows, or in the exercise of reasonable care would discover, that the hazard exists.

IV. CONCLUSION

A possessor of land is under a duty to use reasonable care to protect its invitees from unreasonable hazardous conditions; however, since the possessor is not an insurer of the safety of his invitees, he is under no duty to exercise such care, in the case of wild animals, until he knows or has reason to know that dangerous acts by wild animals are occurring or are about to occur. Such requisite knowledge is absent here, thus no duty exists.

DATED this 14 day of June 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 14 day of June, 2016, addressed to the following:

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