IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 94052-5

(Court of Appeals No. 339858)

MICA CRAIG,

Respondent,

v.

WAL-MART STORES, INC.,

Petitioner.

PETITION FOR REVIEW TO THE SUPREME COURT

Troy Y. Nelson, WSBA #27274
RANDALL | DANSKIN, P.S.
601 West Riverside Avenue, Suite 1500
Spokane, WA 99201
Telephone: (509) 747-2052
Facsimile: (509) 624-2528
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Authorities

I. INTRODUCTION AND IDENTITY OF PETITIONER

Petitioner Wal-Mart Stores, Inc. ("Wal-Mart") seeks review of the Court of Appeals decision designated in Part II of this petition.

Mr. Craig ("Craig") was bitten by a rattlesnake in the outdoor Garden Center of the Clarkston, Washington Wal-Mart. This case raises important issues about Washington property owners' duty to protect invitees from hazards created by wild animals. Under this Court's legal precedence, a possessor of land is not an insurer of the safety of invitees; therefore, 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.

The Court of Appeals decision expands Washington landowners' liability beyond existing law so that any landowner who maintains an open air place for invitees, be it a parking lot garden center or a picnic table outside of a coffee shop, is now potentially liable for the acts of wild animals even if the landowner has no notice that said animals were present or that they presented a hazardous condition for invitees. Because the Court of Appeals decision is completely at odds with Washington case law, this Court should accept review.

For the following reasons, this Court should accept review under RAP 13.4(b)(1), (2) and (4):

First, the Court of Appeals decision extends the duty of landowners to protect invitees from acts of wild animals, even when the landowner has no notice of the presence of such animals, which is in conflict with the Washington Supreme Court's own decisions.

Second, The Court of Appeals decision to apply the Pimentel self-service exception is unsupported by this Court's own interpretation of the exception.

Third, the Court of Appeals rejected the notice requirement before imposing a duty, which conflicts with the Restatement (Second) of Torts §§ 343 and 344, both of which this Court has adopted.

II. COURT OF APPEALS DECISION

The Petitioner seeks review, pursuant to RAP 13.4, of the Opinion of the Washington Court of Appeals, Division III, filed December 8, 2016. That decision is attached in the Appendix A 1-10.

III. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals erroneously reverse the trial court's granting of summary judgment, holding that a duty of reasonable care exists on the part of a landowner to protect its invitees from

acts of wild animals when there is no notice, contrary to other decisions of this Court?

B. Did the Court of Appeals, contrary to other decisions of the Court of Appeals and of this Court, erroneously apply the Pimentel notice exception in the absence of any evidence of a continuous hazard related to Wal-Mart's mode of operation?

C. Did the Court of Appeals, contrary to Washington law, improperly impose a duty without the requisite notice as required by Restatement (Second) of Torts §§ 343 and 344.

IV. STATEMENT OF THE CASE

A. Factual Background.

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

Craig 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.

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 sightings 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.

On May 11, 2012, 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.

Prior to his arrival, store employees inspected the Garden Center for hazards and swept the Garden Center with a broom. CP 117 -118, CP 104. No hazards were detected. Id.

Craig pulled his car up to the outdoor Garden Center. CP 124. He got out of his car and looked down at a product price tag. CP 124. There was "garbage, a stick or something" blocking the price tag. CP 124, ll. 13-15. He reached down to move the stick, it turned out to be a rattlesnake, which bit him. CP 124, ll. 16-21. Craig has no idea where the snake came from or how long it had been present. CP 125-126.

Another witness, Maria Geffre, was also present before and 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.

At the time of the incident, Wal-Mart retained the services of 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.

B. Procedural History.

Wal-Mart moved for summary judgment on the basis of lack of notice, and therefore lack of duty. Craig responded arguing in part that he did not have to establish notice under the Pimentel self-service exception. Argument was heard and on December 22, 2015, Asotin County Superior

Court Judge Scott Gallina filed an order granting Wal-Mart's motion for summary judgment. CP 276-280.

Judge Gallina made the following factual findings:

- No snakes were ever observed at this Wal-Mart by anyone, customers or employees, at the time prior to the incident.
- Wal-Mart employees had cleaned and serviced the garden area only hours prior to the incident.
- Wal-Mart employs a pest control company for the purpose of detecting, monitoring and capturing pests at its store and no snake activity was ever reported.
- Craig was an invitee.

Judge Gallina then analyzed the law and determined that the Washington Supreme Court adopted the view of Restatement (Second) of Torts § 343 and that under that section, notice is a condition precedent for the existence of a duty. He went further and determined that under Washington Supreme Court case law the Pimentel self-service notice exception did not apply.

Craig appealed to the Court of Appeals of the State of Washington, Division III. The Court of Appeals reversed Judge Gallina's granting of summary judgment. The Court of Appeals found the existence of the rattlesnake on Wal-Mart's premises was a reasonably foreseeable hazard

because even though no rattlesnake had ever been present, rattlesnakes live in Clarkston. The Court of Appeals further relieved Craig of demonstrating notice by applying the Pimentel self-service exception.

V. 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)). Since the trial court granted summary judgment in favor of Wal-Mart, this Court's overreaching analysis, if review is accepted, will concern whether that grant was proper. See Yolk v. DeMeerleer, 2016 WL 7421397.

A. Judge Gallina Properly Found Washington Law Requires Actual or Constructive Notice Prior to the Imposition of a Duty and the Court of Appeals Decision Conflicts with Opinions of this Court and the Court of Appeals.

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, this 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
>
> (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.

---

[1] Iwai v. State, 129 Wn.2d 84, 915 P.2d 1089 (1996).
[2] Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 943 P.2d 286 (1997).

This Court has been 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.

The Court of Appeals decision at issue in this case stands in stark contrast to this Court's holdings in both Iwai and Nivens. Iwai specifically held that under the Restatement, notice of a hazard is required before a landowner can be liable for an injury to an invitee. Likewise, in Nivens, this Court specifically stated that Restatement (Second) of Torts § 344 "properly delimits the duty of the business to an invitee." Nivens, 133 Wn.2d at 204. § 344 as quoted above, requires notice before liability can be imposed against a landowner for injuries to an invitee caused by an animal. The Court of Appeals in Nivens likewise adopted this section for the duty owed by a business to an invitee. Nivens v. 7-11 Hoagy's Corner, 83 Wash. App. 33, 46, 920 P.2d 241 (1996). The Court of Appeals decision in this case completely disregards this precedent.

Additionally, all of the persuasive authority cited by the parties involving injury caused by wild animals - whether it be by rats, bears, deer, sharks or snakes – universally require claimants to prove notice before a duty exists to protect invitees against such hazards.

B. Judge Gallina Properly Found Craig Did 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." Wiltse v. Albertson's, Inc. 116 Wn.2d 452, 459, 805 P.2d 793 (1991).

In this case, Craig therefore must 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. The Court of Appeals, in overturning Judge Gallina's summary judgment grant, is at odds with this Court's decisions and thus review should be granted.

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 - 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.

[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**.").

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.

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 dangerous 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

[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.

> 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 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, Wal-Mart employees 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, Craig 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 wild 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]

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 Craig, 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 was present on the property.

The Court of Appeals decision in this case, while it did not find notice, simply ignored or rejected this Court's holdings in Ingersoll, Wiltse and Coleman and the Restatement sections that this Court has

[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.

expressly adopted. Those cases and the Restatement require notice. As demonstrated above, there was no notice. The Court of Appeals in this case, without any basis, determined that even though there was no notice, liability should attach. Thus, this Court should grant review.

C. The Court of Appeals Decision is Completely at Odds with the Washington Supreme Court's Own Interpretation of the Pimintel Exception.

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).

Self-service departments are areas of a store where customers service themselves, or where customers otherwise perform duties that the proprietor's employees customarily performed. O'Donnell, 107 Wn.App. 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.

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.

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 own 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

[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).

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 Wiltse 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 unforesceable and in no way related to the store's self-service operation. Wiltse, 116 Wn.2d at 456.

Craig failed to establish in the record that the Garden Center was a self-service area. Specifically, he did not show 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, to the extent it existed.

As Judge Gallina properly found –

> Nothing in this case indicates that there was any relation between the snake which inflicted the injury and Wal-Mart's mode of operation of its business. There's been no evidence produced that Wal-Mart enticed or encouraged patrons to handle snakes in the garden center or pick up sticks in the parking lot as part of its business operations.

CP 278.

Craig has failed to establish in the record that the danger of rattlesnakes was continuous or forcseeably 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 Craig. Craig has not shown there is anything inherently dangerous about operating a garden center in the parking lot.[7]

The self-service exception at issue finds its origins in the Division III case of Ciminski v. Finn Corp., 13 Wash. App 815, 537 P.2d 850 (1975), a decision that was largely adopted by this Court in Pimentel v. Roundup Co., 100 Wn.2d 39, 40, 666 P.2d 888 (1983). The Pimentel court stated the difference in its ruling from that in Ciminski:

> The Ciminski decision contained language which suggests that the requirement of showing notice is eliminated it as a matter of law for all self-service establishments. This is not the conclusion we reach under the analysis adopted here; the requirement of showing notice will be eliminated only if the particular self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable.

Pimintel, 100 Wn.2d at 49-50.

---

[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.

Subsequent cases have refined this distinction even further. In a decision reversing Division III, the Washington Supreme Court determined that the Pimentel self-service rule did not apply to a hazard unrelated to the self-service nature of the business:

> Because Pimentel is a limited rule for self-service operations, not a per se rule, the rule should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation. Risk of water dripping from a leaky roof is not inherent in a store's mode of operation.

Wiltse, 116 Wn.2d at 461.

In a subsequent case citing Wiltse with approval, this Court summarized the self-service exception:

> There must be a relationship between the hazardous condition and the self-service mode of operation of the business.

Ingersoll, 123 Wn.2d at 654.

The rattlesnake passing through the area was no more a result of the self-service operation than was the leaky roof in the grocery store. The Court of Appeals decision in this case is completely at odds with Pimentel and its progeny, Wiltse and Ingersoll, because it applied the Pimentel exception without any evidence that operating an outdoor garden center presented a foreseeably greater risk of rattlesnake encounters that simply maintaining a parking lot outside in Clarkston.

As a consequence of these inconsistencies, this Court should grant of the Court of Appeals decision in this case.

VI. CONCLUSION

The Court of Appeals decision expanded the legal duty imposed on businesses across Washington. This expansion is not supported by decisions of this Court. To impose a duty without notice is akin to holding business owners strictly liable for damages caused to invitees by wild animals. That legal proposition is at odds with clear case law from this Court; accordingly, Wal-Mart respectfully requests the Court grant review of this decision.

Dated this 6 day of January, 2017.

Respectfully submitted,

RANDALL | DANSKIN, P.S.

Troy Y. Nelson, WSBA #27274
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 6 day of January, 2017, addressed to the following:

Anne M. Bremner
Frey Buck, P.S.
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101

☐ U.S. Mail
☒ Overnight Mail
☐ Fax Transmission
(206) 902-9660
☒ E-mail Transmission
abremner@freybuck.com

Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

☒ Fax Transmission

Troy Y. Nelson

\22056\PETITION FOR REVIEW:kmt

APPENDIX

A1-10 - Court of Appeals' December 8, 2016 decision.

FILED
DECEMBER 8, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MICA CRAIG,	)	No. 33985-8-III
	)	
Appellant,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
WAL-MART STORES, INC.,	)	
	)	
Respondent.	)	

LAWRENCE-BERREY, J. — A rattlesnake bit Mica Craig while he was shopping at Walmart's outdoor garden center in Clarkston, Washington. Mr. Craig sued Wal-Mart Stores, Inc., doing business as Walmart, on a theory of premises liability. Walmart successfully moved for summary judgment. Mr. Craig appeals.

Walmart argues it lacked actual or constructive notice of any rattlesnake incident on its premises. Mr. Craig responds that rattlesnakes are well known to live in the undeveloped lots adjacent to the outdoor garden center, and Walmart's decision to operate an outdoor garden center in such an area created the risk that a rattlesnake might enter the garden area and bite a customer. Mr. Craig argues that by creating such a risk,

Walmart owes him a duty of reasonable care to prevent his injury. We agree and, therefore, reverse the trial court.

FACTS

A. OVERVIEW OF INJURY

In May 2012, Mr. Craig entered the garden center of Walmart to purchase a bag of mulch. The garden center was an outdoor open air section of the store located in the parking lot. Other customers were also shopping in the outdoor garden center at the time. Mr. Craig saw bags of mulch stored on wooden pallets. He bent down near the bags to brush aside what he thought was a stick obscuring a price tag. The "stick" turned out to be a rattlesnake, and it bit his hand. Mr. Craig immediately went to a medical clinic, and eventually went to a hospital where he received appropriate care and treatment.

B. PROCEDURE BELOW

Mr. Craig brought suit against Walmart. He alleged premises liability, among other causes of action. After brief discovery, Walmart moved for summary judgment dismissal of Mr. Craig's premises liability claim.

Walmart asserted it lacked actual or constructive notice of any rattlesnake danger. Specifically, it asserted its Clarkston store had been in operation since September 2009, that over four million customers had visited the store prior to May 2012, and that there had never been a "reported incident involving a snake." Clerk's Papers (CP) at 34. Walmart also described various efforts it used to decrease the risk of dangerous incidents,

such as routinely sweeping and checking the garden center area and hiring a company to provide monthly pest control.

In response, Mr. Craig submitted declarations, including one from a middle-aged man who had lived in Clarkston his entire life, and another from a snake expert. The layperson asserted, "it is common knowledge that rattlesnakes are prevalent in areas around the levies of [Clarkston], including in the immediate vicinity of the Clarkston, WA Walmart." CP at 217. The expert asserted that there were undeveloped lots immediately adjacent to Walmart's outside garden center, and that rattlesnakes could live in those lots and the general area. He also posited various steps that Walmart could have taken, but did not, which would have reduced the risk of a rattlesnake getting into the outdoor garden center area.

Mr. Craig argued that the *Pimentel*[1] self-service exception applied. He argued that Walmart's outdoor garden center used a self-service method of operation, and that Walmart's choice to use such a method of operation in rattlesnake country created the unsafe condition.

The trial court granted Walmart's summary judgment motion. In dismissing Mr. Craig's premises liability claim, the trial court concluded:

[1] *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983).

> [T]o invoke the Pimentel exception, a plaintiff must present some evidence that the unsafe condition *in the particular location* of the accident was reasonably foreseeable. There is simply no evidence whatsoever of any snake activity of any kind anywhere on the premises of this particular Walmart store and a complete lack of evidence that Walmarts [sic] mode of business operations would somehow encourage or promote invitees to encounter and interact with [a rattlesnake].

CP at 279 (emphasis added) (citation omitted).[2]

Mr. Craig appeals.

ANALYSIS

A. SUMMARY JUDGMENT STANDARD

"'Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Berger v. Sonneland*, 144 Wn.2d 91, 102, 26 P.3d 257 (2001) (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). "The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact." *Id.* "The appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment." *Id.* "All facts and reasonable inferences are considered in a light most favorable to the nonmoving party." *Id.* at 102-03. "All questions of law are reviewed de novo." *Id.* at 103.

[2] Although Mr. Craig asserted causes of action other than premises liability, the parties treated the summary judgment order as a final order dispositive of all claims.

B. PREMISES LIABILITY AND THE *PIMENTEL* EXCEPTION TO NOTICE

In premises liability actions, a person's status as an invitee, licensee, or trespasser determines the scope of the duty of care owed by the possessor of that property. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). Walmart does not dispute that Mr. Craig was a business invitee.

A business invitee must usually show that the owner of the premises had actual or constructive notice of the hazardous condition for liability to attach. *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 128, 307 P.3d 811 (2013). But such notice need not be shown if the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable. *Id.* This is known as the *Pimentel* exception. *Id.*

The *Pimentel* exception is a limited rule for self-service operations. A self-service operation is one where goods are stocked and customers serve themselves by handling the goods. *O'Donnell v. Zupan Enter., Inc.*, 107 Wn. App. 854, 859, 28 P.3d 799 (2001). The exception applies if (1) the area where the injury occurred was self-service, (2) the hazardous condition that caused the injury was within the self-service area, and (3) the mode of operation inherently created a reasonably foreseeable hazardous condition. *Id.*

Walmart first argues that the *Pimentel* exception does not apply because the outdoor garden center was not a self-service area. We disagree. The record is undisputed that customers are permitted in the entire outdoor garden center, including the area where Mr. Craig was bitten, to gather goods they wish to purchase.

Walmart also argues its mode of operation did nothing to cause a reasonably foreseeable hazardous condition. Again we disagree. Rattlesnakes wander. As noted by Mr. Craig's expert, rattlesnakes are especially prone to wander during the spring, such as in May, when Mr. Craig was bitten. Walmart's choice to locate an outdoor garden center in its parking lot and adjacent to undeveloped land where rattlesnakes are known to live created a reasonably foreseeable hazard. The reasonably foreseeable hazard was that its customers would interact with wandering rattlesnakes hiding among the dirt, plants, and other items for sale in the outdoor garden center. It is further reasonably foreseeable that a customer, retrieving such items, might be bitten by a rattlesnake. This risk is inherent during the entire spring and summer when Walmart utilizes its outdoor garden center.

Our holding today does not impose potential liability on all self-service businesses operating in rattlesnake country. Most businesses have walls and doors that generally prevent wild animals, including rattlesnakes, from entering. Potential liability is limited to only those situations where the business owner fails to take reasonable care to prevent rattlesnake bites. *See Pimentel*, 100 Wn.2d at 49. Although Walmart addressed the steps it took to reduce various risks of animal-caused injury, Walmart neither argued below nor on appeal that its steps were sufficient to eliminate liability as a matter of law. We, therefore, express no opinion on that issue here.

Reverse.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

I CONCUR:

Fearing, C.J.

33985-8-III

KORSMO, J. (dissenting) — The majority extends liability to all landowners in the Clarkston area simply because rattlesnakes commonly live in the region. There is no support for that extension of landowner liability in our case law, particularly since the majority's rule is completely at odds with the Washington Supreme Court's own interpretation of the *Pimentel*[1] exception. I dissent.

The majority's theory is premised on two facts: (1) rattlesnakes live in the riverbanks of the Clarkston area, and (2) Walmart runs its garden center outside in the general vicinity of the river. That casts far too wide a net.

The self-service exception at issue finds its origins in this court's opinion in *Ciminski v. Finn Corp.*, 13 Wn. App. 815, 537 P.2d 850 (1975), a decision that was largely adopted by the Washington Supreme Court in *Pimentel*, 100 Wn.2d at 49-50. The *Pimentel* court stated the difference in its ruling from that in *Ciminski*:

> The *Ciminski* decision contains language which suggests that the requirement of showing notice is eliminated as a matter of law for all self-service establishments. 13 Wn. App. at 820-21. This is not the conclusion we reach under the analysis adopted here; the requirement of showing notice will be eliminated only if the particular self-service operation of the

[1] *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983).

> defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable.

Id.

Subsequent cases have refined this distinction even further. In a decision reversing this court, the Washington Supreme Court determined that the *Pimentel* self-service rule did not apply to a hazard unrelated to the self-service nature of the business:

> Because Pimentel is a limited rule for self-service operations, not a per se rule, the rule should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation. Risk of water dripping from a leaky roof is not inherent in a store's mode of operation.

Wiltse v. Albertson's Inc., 116 Wn.2d 452, 461, 805 P.2d 793 (1991). In a subsequent case citing *Wiltse* with approval, the court summarized the self-service exception:

> There must be a relationship between the hazardous condition and the self-service mode of operation of the business. *See Wiltse.*

Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 654, 869 P.2d 1014 (1994).

The trial court properly applied these cases when it dismissed this action at summary judgment. The rattlesnake passing through the area was no more a result of the self-service operation than was the leaky roof in the grocery store.

Plaintiff's expert hypothesized that a snake travelling between its winter and summer homes may have passed through the Walmart lot and decided to spend the night under a pallet when it became too cold to travel further that day. There was no evidence

that the store's garden shop was a particularly attractive location[2] for snakes to visit, let alone take up residence. It simply happened to be the nearest available shelter. Presumably, the same thing could be said about a vehicle in the parking lot or any other nearby sheltered location such as the benches on a golf course or a backyard barbecue. This pallet simply was a convenient location. It was not an attractive nuisance for snakes.

Operating a self-service business is not a basis for premises liability in the absence of notice of a dangerous condition. Only when the self-service operation creates a risk that is reasonably foreseeable does liability arise. No evidence was presented that operating a garden shop outside presented a foreseeably greater risk of rattlesnake encounters than having the parking lot did. *Pimentel* requires more than the plaintiff presented here.

The judgment should be affirmed. Accordingly, I dissent.

Korsmo, J.

[2] While the majority states that the garden items created a "foreseeable hazard" of rattlesnake encounters, there is no evidence in the record backing the statement. Majority at 6. Indeed, the only evidence that plaintiff presented was that rattlesnakes liked riverbank areas for their dens and that they would forage up to two miles away in the summer. There is no indication that the mulch and fertilizer bags attracted snakes or even attracted creatures that snakes feast on. The same expert indicates that snakes "might" like the empty lands adjacent to Walmart, but no one indicated that snakes had ever been found there.