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NO. 663615

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION I

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SHANNON McELYEA, a married woman,

Appellant.

v.

WAL-MART STORES, INC., a Delaware corporation,

Respondent.

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BRIEF OF RESPONDENT

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**ORIGINAL**

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	2
III. STATEMENT OF THE CASE.....	4
A. Snow and ice in the Wal-Mart parking lot was not an unreasonably dangerous condition. ....	4
B. Ms. McElyea was well aware of snow and ice in the parking lot yet she chose to walk through the parking lot to return to her car.....	4
IV. ARGUMENT.....	5
A. Summary judgments are reviewed <i>de novo</i> . ....	5
B. As a matter of law Ms. McElyea failed to meet her burden of proof that an issue of fact exists to support every element of her claim. .	7
1. No evidence exists to prove that Wal-Mart had notice of an unreasonably dangerous condition in its parking lot. ....	9
a. Accumulated snow and ice in a parking lot does not constitute a risk so unreasonable as to give rise to liability.....	10
i) Evidence that Wal-Mart salted the entrance to the store and had de-icer available for sale has no bearing on whether ice in the parking lot was an unreasonably dangerous condition.....	14
b. No evidence exists to prove that Wal-Mart had notice that the condition of snow and ice in the parking lot was unreasonably dangerous. ....	15
c. There is no evidence that Wal-Mart could have anticipated that the snow and ice in the parking lot would cause harm or that Ms. McElyea would fail to protect herself from it. ....	18
i) Wal-Mart had no duty to warn Ms. McElyea of a condition which she herself said was open and obvious. ....	18

d.	The record is void of evidence rebutting that Wal-Mart failed to expend reasonable care to protect Ms. McElyea from an allegedly dangerous condition. ....	20
i)	Wal-Mart exercised reasonable care by providing a pedestrian route for its customers. ....	22
ii)	Ms. McElyea’s reliance on <i>Pay’n Save</i> and <i>Mucsi</i> is misplaced and the facts of each case are distinguishable from the facts of this case. ....	25
e.	Even if liability could be established based on the mere presence of snow and ice, which it cannot, Wal-Mart expended reasonable efforts to keep its parking lot safe. ....	27
C.	Wal-Mart requests an award of attorney fees and costs. ....	29
V.	CONCLUSION.....	29

**TABLE OF AUTHORITIES**

**Page(s)**

**Table of Cases**

**Federal Cases**

*Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1988)..... 6

**Washington Cases**

*Brandt v. Market Basket Stores*, 72 Wn.2d 446, 433 P.2d 863 (1967) ..... 9, 10, 17

*Chapman v. Perera*, 41 Wn. App. 444, 704 P.2d 1224, *rev. denied*, 104 Wn.2d 1020 (1985) ..... 29

*Coleman v. Ernst-Home Ctr., Inc.*, 70 Wn. App. 213, 853 P.2d 473 (1993) ..... 9

*Daly v. Lynch*, 24 Wn. App. 69, 600 P.2d 852 (1961)..... 19

*Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 440 P.2d 834 (1968). 25

*Ford v. Red Lion Inns*, 67 Wn. App. 766, 840 P.2d 198 (1992)7, 10, 13, 26

*Fredrickson v. Bertolino's*, 131 Wn. App. 183, 127 P.3d 5 (2005) ..... 10, 16, 20

*Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 960 P.2d 912 (1998) ..... 7

*Hanson v. Washington Natural Gas Co.*, 95 Wn.2d 773, 632 P.2d 504 (1981)..... 10

*Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 20 P.3d 1003 (2001) ..... 23, 24, 25

*Huston v. First Church of God*, 46 Wn. App. 740, 732 P.2d 173 (1987). 10

*Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 566 P.2d 972 (1977)..... 6

*Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996)..... 15, 17

*Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 666 P.2d 392 (1983) ..... 7

*Kalinowski v. Y.M.C.A.*, 17 Wn.2d 380, 135 P.2d 852 (1943) ..... 10

*Leonard v. Pay'n Save*, 75 Wn. App. 445, 880 P.2d 61 (1994) ..... 17, 21, 25, 26, 27

*Lish v. Dickey*, 1 Wn. App. 112, 459 P.2d 810 (1969) ..... 24, 25

*In re Marriage of Greenlee*, 65 Wn. App. 703, 829 P.2d 1120 (1992) .... 29

<i>Maynard v. Sisters of Providence</i> , 72 Wn. App. 878, 866 P.2d 1272 (1994)	11, 12, 13, 14, 26
<i>Morton v. Lee</i> , 75 Wn.2d 393, 450 P.2d 957 (1969)	21
<i>Mucsi v. Graoch Associated Ltd. P'ship. No. 12</i> , 114 Wn.2d 847, 31 P.3d 684 (2001)	16, 21, 25, 26, 27
<i>Nelson v. Tacoma</i> , 19 Wn. App. 807, 577 P.2d 986 (1978)	22, 23, 25
<i>Pimentel v. Roundup Co.</i> , 100 Wn.2d 39, 666 P.2d 888 (1983)	15
<i>Schaeffer v. Woodhead</i> , 63 Wn. App. 627, 821 P.2d 75 (1991)	18
<i>Seven Gables Corp. v. MGM/US Entm't Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986)	6
<i>Simmerman v. U-Haul of Inland Northwest</i> , 57 Wn. App. 682, 789 P.2d 763 (1990)	27
<i>Tincani v. Inland Empire Zoological Soc'y</i> , 124 Wn.2d 121, 875 P.2d 621 (1994)	7, 18, 20
<i>Wash. State Farm Bureau Fed'n v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007)	6
<i>Wiltse v. Albertson's, Inc.</i> , 116 Wn.2d 452, 805 P.2d 793 (1991)	15
<i>Younce v. Ferguson</i> , 106 Wn.2d 658, 724 P.2d 991 (1986)	8
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	6

**Rules and Regulations**

CR 11	29
CR 56	6
RAP 10.3(a)(5)	27
RAP 18.1	29
RCW 4.84.185	29

**Other Authority**

Restatement (Second) of Torts § 343	7, 8, 9, 10, 12, 18, 19, 20, 21
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## I. INTRODUCTION

Plaintiff/Appellant, Shannon McElyea, alleges that Wal-Mart negligently caused her personal injuries when she slipped and fell on snow and ice in Wal-Mart's parking lot. On September 22, 2010, the Honorable Jay V. White granted Wal-Mart's motion for summary judgment dismissing Ms. McElyea's complaint in its entirety and with prejudice. The trial court's ruling should be affirmed because Ms. McElyea failed to establish a genuine issue of material fact as to each element of her claim.

There was no evidence presented that Wal-Mart had notice that the condition in the parking lot, snow and ice, was an unreasonably dangerous condition. Furthermore, the evidence demonstrated that Ms. McElyea was aware of the snow and ice in the parking lot. Additionally, Ms. McElyea failed to establish that Wal-Mart should have anticipated the harm or expected Ms. McElyea not to recognize it or to protect herself from it. Finally, Ms. McElyea presented no evidence to show that Wal-Mart failed to act reasonably when Wal-Mart presented proof that an alternate pedestrian route was available to walk on to and from the store and Wal-Mart had the parking lot plowed and sanded the day prior to the incident. There is no case law that would support Ms. McElyea's contention that Wal-Mart had to take extraordinary steps to protect its

invitees from snow and ice in a parking lot. In fact, the law in the State of Washington holds otherwise.

No genuine factual dispute existed to support a finding of negligence in this case, and accordingly, this court should affirm the trial court's dismissal of Ms. McElyea's premises liability claim against Wal-Mart.

## **II. ASSIGNMENTS OF ERROR**

### *Assignments of Error*

Respondent Wal-Mart assigns no error to the trial court's decision.

### *Issues Pertaining to Assignments of Error*

Wal-Mart disagrees with the statement of Issues Pertaining to Assignments of Error by Appellant Shannon McElyea. Wal-Mart believes that the sole issue on appeal is more properly stated as follows:

Whether the trial court properly dismissed Ms. McElyea's premises liability claim as a matter of law on summary judgment where:

1. Under Washington law, the presence of snow and ice in a parking lot alone does not constitute an unreasonably dangerous condition that can be the basis of premises liability;
2. Ms. McElyea relies solely on the presence of snow and ice in the parking lot to support her claim;

3. Under Washington premises liability law a defendant land owner must have notice of the alleged condition and notice that the alleged condition is unreasonably dangerous;

4. Ms. McElyea presented no evidence establishing that Wal-Mart had notice that an unreasonably dangerous condition existed on its premises;

5. For a landowner to be liable to an injured invitee, the evidence must demonstrate that the land owner would expect the invitee to either fail to discover the condition or fail to protect himself from it;

6. Ms. McElyea was aware of the condition and provided no evidence that Wal-Mart should have anticipated the harm or would not expect Ms. McElyea to protect herself from it;

7. A landowner's liability under Washington premises liability law requires proof that it failed to exercise reasonable care to protect against a dangerous condition on its property; and

8. The evidence demonstrates that Wal-Mart provided a pedestrian walkway to and from the store entrance, hired an outside company to plow and sand its lot and manually de-ice the walkway the day prior to Ms. McElyea's slip and fall.

### III. STATEMENT OF THE CASE

**A. Snow and ice in the Wal-Mart parking lot was not an unreasonably dangerous condition.**

Ms. McElyea alleges that Wal-Mart negligently caused her personal injury. CP 1-5. In December 2008, Western Washington experienced unusually severe winter weather. CP 83-100. On December 20, 2008, despite the inclement weather, Ms. McElyea and her husband traveled to the Covington Wal-Mart to obtain supplies for Mr. McElyea's January deployment. CP 50.

The McElyeas arrived at Wal-Mart at approximately 2:30 p.m. and parked towards the back of the parking lot. CP 37, CP Sub. No. 20. Ms. McElyea testified that despite the winter conditions, she was wearing tennis shoes that day. CP 39.

**B. Ms. McElyea was well aware of snow and ice in the parking lot yet she chose to walk through the parking lot to return to her car.**

Ms. McElyea testified that she recalls seeing three to four inches of ice on the parking lot. CP 37. She further testified that there were parts of the parking lot that were like an ice cube. CP 37. According to Ms. McElyea, there were no other people slipping, sliding, or falling in the parking lot. CP 39. In addition, Wal-Mart had its sidewalks, walkways, and parking lot professionally de-iced the day prior to the incident. CP 149.

At her deposition, Ms. McElyea testified that the only way in and out of the store was across the parking lot. CP 38, CP 39, CP 65. She further testified that on her way into the store, her husband had to hold onto her because the parking lot was so slippery. CP 39. However, the security video shows Ms. McElyea utilizing a pedestrian walkway to get from her car to get to the entrance of the store. CP Sub. No. 20.<sup>1</sup> The video further shows that Ms. McElyea's husband was not holding onto her to prevent her from slipping. CP Sub. No. 20. Finally, contrary to her deposition testimony, the video show Ms. McElyea took a different route returning to her car, and did not utilize the pedestrian walkway. CP Sub. No. 20.

Despite her knowledge of the ice in the parking lot, Ms. McElyea testified that upon exiting the store, she walked through the parking lot to return to her car and allegedly slipped on ice and fell. CP 38, CP 39, CP 65.

#### IV. ARGUMENT

##### A. Summary judgments are reviewed *de novo*.

Summary judgment is proper where the record shows “that there is no genuine issue as to any material fact and that the moving party is

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<sup>1</sup> CP Sub. 20 is the Declaration of Arthur Schepf with a CD of the security video attached. The King County Superior Court Clerk's Office converted the declaration and CD to an exhibit and has provided both to the Court of Appeals.

entitled to a judgment as a matter of law.” CR 56(c). The purpose of a summary judgment motion is to examine the sufficiency of the evidence supporting the formal allegations so that unnecessary trials may be avoided where there are no factual issues to be tried. *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (overruled on other grounds). The nonmoving party then has the burden of submitting competent evidentiary materials showing specific disputes as to material facts. CR 56(e). The nonmoving party may not rely on “speculation, bald argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/US Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Rather, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions. *Id.*; CR 56 (e). Summary judgment is appropriate if the moving party established an absence of evidence to support the non-moving party’s case. *Young*, 112 Wn.2d 216, (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1988)).

On appeal the court reviews summary judgment rulings *de novo*. *Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 300, 174

P.3d 1142 (2007). The court may affirm a judgment on any ground established by the pleadings and supported by the evidence. *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998).

**B. As a matter of law Ms. McElyea failed to meet her burden of proof that an issue of fact exists to support every element of her claim.**

In any negligence action, the plaintiff must prove duty, breach, harm and proximate cause. *Ford v. Red Lion Inns*, 67 Wn. App. 766, 769, 840 P.2d 198 (1992). In actions involving premises liability, the plaintiff's status as an invitee, licensee, or trespasser determines the scope of the duty of care owed by the owner or occupier of the property. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Wal-Mart does not dispute that at the time of her injury, Ms. McElyea was an invitee.

Washington has adopted the Restatement (Second) of Torts § 343 as the appropriate test for determining landowner liability to invitees. *Ford*, 67 Wn. App. at 770 (citing *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983)). The Restatement provides:

**Dangerous Conditions Known to or Discoverable by Possessor.**

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.

Restatement § 343.

Although a landowner owes invitees a duty of ordinary care to maintain the premises in a reasonably safe condition, landowners are not the insurers against all happenings that occur on their premises. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

Here, Ms. McElyea failed to provide any evidence that the snow and ice in the parking lot constituted an unreasonable risk of harm or that Wal-Mart was aware of an unreasonably dangerous condition. Instead she relies on bald assertions of fact, unsupported by the record, that the condition was dangerous. Additionally, Ms. McElyea provided no evidence that Wal-Mart should have anticipated the harm or should have expected Ms. McElyea not to protect herself against the snow and ice in the parking lot. Finally, Ms. McElyea presented no issue of fact to rebut the evidence submitted by Wal-Mart that it exercised reasonable care to protect its invitees from this allegedly dangerous condition.

**1. No evidence exists to prove that Wal-Mart had notice of an unreasonably dangerous condition in its parking lot.**

Summary judgment of dismissal of Ms. McElyea's claim should be affirmed because Ms. McElyea provided no evidence that Wal-Mart had notice of an **unreasonably dangerous** condition. Restatement (Second) of Torts § 343(a) provides that a landowner is liable for conditions on his property only where he has notice of the condition, notice that the condition involves an unreasonable risk of harm, and should expect that the invitee will not discover the danger or will fail to protect themselves against it.

Washington courts have long cautioned against imposing liability merely because a fall occurs:

It is well established in the decisional law of this state that something more than a slip and fall is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control of the floor.

*Brandt v. Market Basket Stores*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967).

The duty to exercise reasonable care to protect an invitee only extends as far as harm that poses an unreasonable risk. *Coleman v. Ernst-Home Ctr., Inc.*, 70 Wn. App. 213- 222-23, 853 P.2d 473 (1993). Where the plaintiff cannot show that the landowner had notice that the condition was unreasonably dangerous, summary judgment for the landowner is

appropriate. *Fredrickson v. Bertolino's*, 131 Wn. App. 183, 189-90, 127 P.3d 5 (2005).

**a. Accumulated snow and ice in a parking lot does not constitute a risk so unreasonable as to give rise to liability.**

Because something more than an injury is required to sustain liability, a plaintiff must prove the alleged condition that caused the injury constituted an “unreasonable risk of harm.” *Huston v. First Church of God*, 46 Wn. App. 740, 745, 732 P.2d 173 (1987); *see also* Restatement § 343(a). Ms. McElyea argues that a dangerous condition existed in the parking lot because of: (1) the mere presence of snow and ice in the parking lot, and (2) the fact that she slipped and fell. However, the mere existence of an accident or injury is not sufficient proof of a dangerous condition to hold a property owner liable to an invitee. *See Hanson v. Washington Natural Gas Co.*, 95 Wn.2d 773, 778, 632 P.2d 504 (1981); *Brandt*, 72 Wn.2d at 448; *Kalinowski v. Y.M.C.A.*, 17 Wn.2d 380, 391, 135 P.2d 852 (1943). In addition, Washington courts have held that the mere presence of ice in a parking lot where plaintiff slipped is not enough to prove negligence on the part of the owner, especially where plaintiff had knowledge of the condition. *Ford*, 67 Wn. App. at 773.

In *Ford* a hotel guest slipped and fell on an icy portion of the hotel’s parking lot. *Id.* at 767. The court reasoned that the hotel’s motion

for summary judgment could not be defeated merely by reliance on the fact that there was an accumulation of ice and snow in the lot. *Id.* at 773. The court noted the guest's avowed knowledge of the condition of the lot and his decision to encounter the risk, and observed that the guest adduced no evidence that the hotel's actions posed an unreasonable risk. *Id.*

In support of her argument that ice in the parking lot posed an unreasonable risk of harm, Ms. McElyea offers nothing new since her response to Wal-Mart's motion for summary judgment. She provides no evidence of an unreasonably dangerous condition other than her testimony that there was snow and ice in the Wal-Mart parking lot. Ms. McElyea provides the same argument from the same case, *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 866 P.2d 1272 (1994), which the trial court considered and properly rejected.

In *Maynard*, Mr. Maynard was injured when he slipped on ice while trying to retrieve sand to provide traction for his car. *Maynard*, 72 Wn. App. at 880. The court found liability was proper because the defendant cleared parking lots reserved for doctors and hospital staff two to three hours prior to Mr. Maynard's fall, but made no effort to sand the patients' parking lot. *Id.* at 883. This, the court noted, showed that Providence was plainly aware of the hazardous condition on the day in

question, had the capacity to take some remedial measures, and failed to do so. *Id.*

The court added that evidence of an aid car's inability to reach Mr. Maynard after he fell, and a witness's declaration about the treacherousness of the conditions immediately after the accident, which led to his partner's fall on the ice, supported Mr. Maynard's contention that the ice presented an unreasonable risk. *Id.*

The *Maynard* court cited the Restatement § 343 for the proposition that “[a] landowner should expect harm where there is reason to believe the invitee will proceed to encounter the known obvious danger because to a reasonable person in his or her position the advantages of doing so would outweigh the apparent risk.” *Id.* at 884. The court noted that “other than trying to get his car mobile, Maynard's options were essentially limited to abandoning his car and walking, calling a taxi or remaining at the hospital until conditions changed.” *Id.* Under these circumstances, the court continued, a reasonable person might well confront the risk of traversing the parking lot to obtain sand. *Id.*

Ms. McElyea has provided no evidence of an unreasonably dangerous condition other than the fact that she slipped and fell. There were no other complaints or incidents that day. CP Sub. 20. Ms. McElyea testified that cars were able to traverse the parking lot and she did not

witness any other invitees slipping, sliding, or falling in the parking lot.  
CP 39.

In addition, Wal-Mart provided its customers with a pedestrian walkway. This is a very different situation from *Maynard*, where the plaintiff's options were so limited that he had little choice but to confront the risk that the dangerous condition presented. Ms. McElyea's choices were not limited to traversing the parking lot to get back to her car. There clearly was an alternate route for ingress and egress to the store. CP Sub No. 20. Although her deposition testimony and brief state otherwise, the security video clearly shows that Ms. McElyea knew of the alternate route and safely used it to get from her car to the entrance of the store. CP Sub No. 20. Unlike the plaintiff in *Maynard*, Ms. McElyea had a readily available option to avoid encountering the risk.

Thus, this case is more like *Ford* where Ms. McElyea has done nothing more than allege that she fell after slipping on ice in the parking lot. Like *Ford*, Ms. McElyea admitted she knew of the allegedly icy condition and chose to encounter the risk. Like *Ford*, the mere presence of accumulated ice and snow is not in itself an unreasonably dangerous condition as to give rise to liability. Like *Ford*, Ms. McElyea has failed to meet her burden of proof and summary judgment dismissal of her complaint was proper.

i. **Evidence that Wal-Mart salted the entrance to the store and had de-icer available for sale has no bearing on whether ice in the parking lot was an unreasonably dangerous condition.**

Ms. McElyea attempts to draw an analogy to *Maynard* because Wal-Mart salted the entrance to its store and had de-icer in stock. App. Br. at 9. What Wal-Mart did at the entrance to its store has no bearing on whether ice in the parking lot was an unreasonably dangerous condition. Moreover, the fact that Wal-Mart had de-icer available for sale to its customers does not lead to an inference that an unreasonable risk existed in its parking lot. Ms. McElyea further attempts to analogize her case to *Maynard* because Wal-Mart had a contractor de-ice and sand the parking lot the day before the incident. In *Maynard*, the court noted that because Providence had de-iced the employee lot two to three hours before the incident, it likely had **notice** of the hazardous condition, and anticipating some form of harm, exercised precautions with respect to the staff parking lot but not as to the visitor's lot. *Maynard*, 72 Wn. App. at 883.

Here, Wal-Mart had its parking lot professionally de-iced and sanded the day prior to the incident. There is nothing in the record to show that this prior action put Wal-Mart on notice of a hazardous condition or that Wal-Mart should have anticipated some form of harm the

following day. Summary judgment dismissal should be affirmed because Ms. McElyea provided no evidence of an unreasonably dangerous condition.

**b. No evidence exists to prove that Wal-Mart had notice that the condition of snow and ice in the parking lot was unreasonably dangerous.**

Washington law requires plaintiffs to show the landowner had actual or constructive notice of the unsafe condition. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996) (emphasis added). The notice requirement ensures liability attaches to owners only after they have become or should have become aware of a dangerous condition. *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 453-54, 805 P.2d 793 (1991).

Here, the record is devoid of any evidence that Wal-Mart had actual notice. Therefore, to prove constructive notice, Ms. McElyea must show that a specific dangerous condition had “existed for such time as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.” *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983). Where the plaintiff cannot show that the landowner had notice that the condition was unreasonably dangerous, summary

judgment for the landowner is appropriate. *Fredrickson*, 131 Wn. App. at 189-90.

Ms. McElyea attempted to prove that Wal-Mart had notice of a dangerous condition merely because there was snow and ice in the parking lot on the date of the incident and weather reports showed that Western Washington was experiencing severe weather during this time period. However, she has failed to show that the snow and ice existed for such time as would have afforded Wal-Mart sufficient opportunity to have removed the danger.

In *Mucsi v. Graoch Associates Ltd. P'ship. No. 12*, 144 Wn.2d 847, 31 P.3d 684 (2001), the court found sufficient evidence of notice where the defendant landlord had **two or three days** after the snow stopped to take corrective action but did not, the landlord had cleared some walkways but not others, and the maintenance crew had snow and ice melting granules available that went unused on side exits to the clubhouse. *Mucsi*, 144 Wn. 2d at 862. The court noted that the landlord did not, nor did it appear that the landlord intended to, clear the walkways leading from the side exits from the clubhouse. *Id.* Moreover, *Mucsi* dealt with a **walkway** and an “inference that all of the exits to the clubhouse might be used and that the landowner had **actual** knowledge that

accumulations of snow and ice persisted on the walkways from those exits. *Id.*

Liability was also found in *Leonard v. Pay'n Save* where the landowner allowed snow to harden and become icy on the only walkway to the store for four to five days without taking any corrective action. *Leonard v. Pay'n Save*, 75 Wn. App. 445, 451-52, 880 P.2d 61 (1994).

Ms. McElyea testified that the area where she fell was icy. But she presented no evidence as to how long this condition had existed. In her brief, Ms. McElyea spends considerable effort asserting that Wal-Mart knew of should have known of a dangerous condition because of the available weather reports. CP 9-10. However, “[t]he sole fact of the temperature being around freezing at the time of [the] fall does not sufficiently demonstrate [that the premises owner] ‘knew or should have known that a dangerous condition existed.’” *Iwai*, 129 Wn.2d at 97 (quoting *Brandt*, 72 Wn.2d at 452). Ms. McElyea presented no proof that Wal-Mart had notice of the alleged unsafe condition in the parking lot. There were no other injuries or complaints of ice in the parking lot on the day that Ms. McElyea was injured. CP Sub. No. 20. According to Ms. McElyea, the parking lot was passable and there was no evidence of other people slipping, falling, or sliding in the parking lot. CP 38-39. Again, Ms. McElyea’s bare allegation that she slipped and fell on

Wal-Mart's property is not enough to satisfy her burden of proof that an unreasonably dangerous condition existed and that Wal-Mart was on notice of such condition. Therefore, this court should affirm summary judgment dismissal of her claim.

c. **There is no evidence that Wal-Mart could have anticipated that the snow and ice in the parking lot would cause harm or that Ms. McElyea would fail to protect herself from it.**

i. **Wal-Mart had no duty to warn Ms. McElyea of a condition which she herself said was open and obvious.**

Washington follows the traditional rule which denies liability in situations where the alleged defective condition is open and obvious and the plaintiff can be expected to discover it and protect herself. *See e.g., Schaeffer v. Woodhead*, 63 Wn. App. 627, 629, 821 P.2d 75 (1991). Washington has adopted this rule from Restatement Second of Torts as follows:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is **known or obvious** to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts § 343A(1) (1965) (emphasis added); *Tincani*, 124 Wn.2d at 139. Under this standard, a defendant is not normally liable for injuries caused by a condition on the land when the

condition and the risk are apparent to and would be recognized by a reasonable man, in the position of a person, exercising ordinary perception, intelligence and judgment. Restatement (Second) of Torts § 343A cmt. b.

Every person has a duty to look out for his own safety and to use a degree of care which a “reasonably prudent person of ordinary intelligence would exercise under like or similar circumstances.” *Daly v. Lynch*, 24 Wn. App. 69, 72, 600 P.2d 852 (1961).

Ms. McElyea’s own testimony shows not only that the existence of the snow and ice was obvious to a reasonably attentive invitee, but also that Ms. McElyea was aware of the ice and appreciated the risk of traversing it, as, before leaving her vehicle, she knew of the snow and ice in the parking lot, selected a parking space in the back of the lot, selected to use the pedestrian walkway into the store, yet nevertheless proceeded across the ice to return to her car. There is nothing presented in the record to indicate that, notwithstanding the alleged danger, Wal-Mart should have anticipated that the patch of ice might go unnoticed by Ms. McElyea or any other customer. To the contrary, Wal-Mart could reasonably expect that, in light of the pedestrian walkway, Ms. McElyea and other invitees would recognize the danger posed by the ice and choose to use the walkway to avoid it. Thus, any alleged danger posed by the ice and snow

was both obvious and known, Wal-Mart could have reasonably expected that the danger would be avoided, and Ms. McElyea failed to establish the element of duty essential to a *prima facie* case of negligence. Ms. McElyea's reasoning would create liability for a landowner for any dangerous condition on his or her land. This is not the law of our state.

**d. The record is void of evidence rebutting that Wal-Mart failed to expend reasonable care to protect Ms. McElyea from an allegedly dangerous condition.**

Assuming, *arguendo*, that Ms. McElyea had presented genuine factual disputes (1) that the mere presence of snow and ice constitutes an unreasonably safe condition, (2) that Wal-Mart knew or should have known of the allegedly unsafe condition, and (3) that Wal-Mart should have anticipated the harm, or expected that Ms. McElyea would fail to protect herself from it, then Ms. McElyea also must prove, under the Restatement test, (4) that Wal-Mart "fail[ed] to exercise reasonable care to protect [her] against the danger."

Reasonable care requires that a landowner "inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for the invitees' protection under the circumstances.'" *Fredrickson*, 131 Wn. App. 189 (citing *Tincani*, 124 Wn.2d at 139). Simply because a plaintiff is injured while an invitee is on

the business owner's property, does not necessarily mean the owner failed to exercise reasonable care; the plaintiff must establish the absence of reasonable care. *Morton v. Lee*, 75 Wn.2d 393, 397, 450 P.2d 957 (1969). The question presented by the fourth prong of the Restatement test is not whether Wal-Mart used reasonable care to assure that its parking lot was free from ice, but whether Wal-Mart exercised reasonable care to protect Ms. McElyea from this alleged dangerous condition.

Unquestionably, Wal-Mart exercised reasonable care to protect its customers from danger because it provided a pedestrian walkway to safely traverse to and from the store and had the parking lot sanded and plowed the day before the incident. CP Sub No. 20. There is no evidence, or supporting law, that would require Wal-Mart to take the extraordinary measures that Ms. McElyea suggests in her brief. App. Br. 14-15. Again, the cases Ms. McElyea relies on in her brief, *Mucsi* and *Leonard*, deal with a landowner's failure to take corrective action on ice covered **walkways**. The evidence shows that Wal-Mart had a walkway from the parking lot to the store entrance. CP Sub. No. 20. That the walkway had been manually de-iced the day prior to the incident. CP 149. And that Ms. McElyea was able to use the walkway to get to the store without incident. CP Sub. No. 20.

i. **Wal-Mart exercised reasonable care by providing a pedestrian route for its customers.**

Washington courts are reluctant to impose liability where the possessor of land provides an alternative route and plaintiff fails to follow the safer route. *Nelson v. Tacoma*, 19 Wn. App. 807, 577 P.2d 986 (1978). In *Nelson*, a pedestrian crossed a street midblock to reach his parked car. It had been snowing that day and the sidewalks were blocked with snow. As the plaintiff crossed the street, he slipped and fell on the ice. The court refused recovery stating:

Plaintiff was jaywalking. In effect he selected and created his own crosswalk mid-block, and insists the city should have made it safe for him. To permit him to recover on the basis that the city was negligent would require us to hold that the city must maintain the full block of a street safe for pedestrian cross travel when the sidewalk, or even a portion thereof, is blocked. This we will not do. At the maximum, plaintiff would have had to walk no more than one-half block to reach a crosswalk. There is no allegation or suggestion that the area in the street adjacent to the sidewalk was not reasonably safe. **Plaintiff did not slip on such adjacent area, but rather in the street normally used only for vehicular traffic as he was crossing it.** In reaching this disposition, we need not consider whether a foot of snow on the sidewalk, with no allegation that it was rough, uneven, or icy, rendered the sidewalk impassable, forcing pedestrians into the street.

*Nelson*, at 811 (emphasis added). Likewise is this case. Ms. McElyea created her own pathway by walking through the parking lot and now claims that Wal-Mart should have made it safe for her despite the

availability of the pedestrian walkway. Like the plaintiff in *Nelson*, Ms. McElyea did not slip on the walkway, but rather in the street normally used for vehicular traffic. Like *Nelson*, this court should refuse to find liability merely because a slip and fall occurred on Wal-Mart's premises.

Also dispositive is *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 599-601, 20 P.3d 1003 (2001). In *Hoffstatter*, plaintiff walked across a parking strip, tripped over uneven bricks, fell, and sued the landowner, the abutting landowner, and the City of Seattle for negligence. *Id.* at 599. The Court of Appeals, affirming the trial court's summary judgment dismissal of plaintiff's claims, held that the uneven surface of the bricks was not unreasonably dangerous:

In this case, the uneven surface of the bricks was caused by tree roots growing beneath the bricks and dislodging them. It is a common condition in an area set aside for landscaping. Further, the bricks were not hidden, but open and obvious. It is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk.

*Id.* at 600-01. There is little difference between the allegedly icy area where Ms. McElyea fell and the parking strip where Ms. Hoffstatter fell. Both areas contained "open and obvious" hazards due to natural conditions of the land, and both were avoidable because they were adjacent to surfaces more suitable for walking. *Id.* at 601. It was

irrelevant in *Hoffstatter* that pedestrian use of the parking strip was foreseeable. *Id.* at 600 (“It is certainly true that pedestrian use of parking strips must be anticipated. But they are not sidewalks and cannot be expected to be maintained in the same condition.”).

Furthermore, in *Lish v. Dickey*, 1 Wn. App. 112, 459 P.2d 810 (1969), the Court of Appeals held that the trial court did not err when it rejected a claim that the landlord was negligent in not keeping the sidewalk in a clean and dry condition, and dismissing plaintiff’s negligence claim.

The uncontroverted facts establish the following: The course which plaintiff took to reach the manager's apartment was of her own choosing and required her to step over the pile of ice and snow and onto the glare of ice which she testified covered the sidewalk. The icy condition was open and obvious and she admits that she was aware of that condition. Either she knew or, in the exercise of reasonable care, should have known the risk and danger involved in stepping over the pile of snow onto the icy surface of the sidewalk. Furthermore, there was a reasonable alternative. She could have alighted from the car in front of the manager's apartment and approached it on the sidewalk without the necessity of stepping over the ridge of snow and ice; or, she could have "hand-delivered" her rent payable to the manager, as she testified was her practice. She testified that the manager was, at the time of her fall, working on his car in front of his apartment. We hold that this voluntary exposure to the obvious risk and danger involved was unreasonable. In other words, it was a risk to which a reasonable person in plaintiff's position would not expose herself.

*Id.* at 115-16 (citing *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 440 P.2d 834 (1968)).

Ms. McElyea cannot now argue that the pedestrian walkway was somehow blocked or inaccessible forcing her to walk through the parking lot. Nor can she argue that the pedestrian walkway was not reasonably safe. The uncontroverted evidence shows Ms. McElyea safely walked to the store at a brisk pace with no incident using the pedestrian path. CP at Sub. No. 20. Like the plaintiffs in *Nelson*, *Hoffstatter*, and *Lish*, Ms. McElyea chose to take the path she did, in the area normally used for vehicular traffic, and allegedly slipped and fell on ice in the roadway. If she believed she could not travel over the surface of the parking lot carefully, she could have taken the alternate route back to her car. Ms. McElyea however made a conscious decision to walk through the parking lot, knowing it was icy and knowing there was a safer route, and now blames Wal-Mart for her alleged slip and fall and resulting injuries.

- ii. **Ms. McElyea's reliance on *Pay'n Save* and *Mucsi* is misplaced and the facts of each case are distinguishable from the facts of this case.**

Ms. McElyea relies on *Leonard v. Pay 'n Save Drug Stores*, 75 Wn. App. 445, 880 P.2d 61 (1994) and *Mucsi v. Graoch Associated Ltd. P'ship. No. 12*, 114 Wn.2d 847, 31 P.3d 684 (2001), for the proposition

that Wal-Mart failed to use reasonable care to protect her against danger. However, both of these cases are distinguishable from the issues in this case.

In *Leonard*, the court found liability where the landowner failed to clear the **sidewalk** leading to its store and allowed snow to remain on the walkway for four to five days and become hard and icy. *Leonard*, 75 Wn. App. at 451-52. Although the only way in and out of the store was across an ice-covered sidewalk, Pay'n Save took no action to remove the ice or alter its condition. *Id.* The court reasoned that the sidewalk was a relatively small area, as compared to the parking lots in *Ford* and *Maynard*, and thus easier to maintain in a safe condition. *Id.* The court concluded that a jury could reasonably infer that Pay'n Save failed to exercise reasonable care by not maintaining the small sidewalk and remanded the case. *Id.*

In *Mucsi*, the landowner allowed snow and ice to cover the exit ramp from a clubhouse for at least three days. *Mucsi*, 144 Wn.2d at 852-53. Despite the availability of snow melting granules, the maintenance crew cleared some sidewalks but not the one where plaintiff fell. *Id.* at 862. The court found that sufficient evidence existed that the landowner did not exercise reasonable care under the circumstances where the landowner should expect that the tenants will fail to protect themselves

from the harm and failed to take corrective action for two or three days despite the ability to do so. *Id.*

Furthermore, the court in both of the above-cases held that the evidence established that the landowner had notice that a condition that a condition on its premises was dangerous. *Mucsi*, 144 Wn.2d at 859; *Leonard*, 75 Wn. App. at 447. Here, there is nothing in the record establishing Wal-Mart knew that the presence of ice in the parking lot created a danger and there is nothing in the record to suggest that Wal-Mart could have anticipated any harm and that Ms. McElyea would fail to protect herself from that harm.

- e. **Even if liability could be established based on the mere presence of snow and ice, which it cannot, Wal-Mart expended reasonable efforts to keep its parking lot safe.**

Ms. McElyea baldly asserts that Wal-Mart de-iced and sanded at least part of the parking lot but refused to de-ice the rest of the parking lot. App. Br. at 14. There is no support in the record for these contentions. Under RAP 10.3(a)(5), a party must cite to the record to support a factual contention in his brief. A failure to cite the record precludes review of the contention. *Simmerman v. U-Haul of Inland Northwest*, 57 Wn. App. 682, 685, 789 P.2d 763 (1990). Nor is there any support in law that a landowner has a duty to take extraordinary steps such as hiring a

contractor to de-ice and sand its parking lot every day or “place employees in the strategic locations in the parking lot to warn customers of the dangerous condition.” App. Br. at 15.

The evidence shows that Wal-Mart had its parking lot professionally plowed and sanded the day prior to the incident. CP 149. This included applying sand and granular de-icer to the parking lot and manual de-icing of the sidewalks and walkways. CP 149. Wal-Mart’s expert testified that if Wal-Mart employees had attempted to use the de-icer it had on stock, it would have created an unsafe condition and subjected its customers to danger. CP145-146. Ms. McElyea presented no evidence to rebut this. Ms. McElyea attempts to impose an exceedingly broad rule of liability, disregarding the known or obvious danger doctrine, which would make Wal-Mart the guarantor of all happenings on its premises. She has failed to present evidence that Wal-Mart had a duty to clear its entire parking lot or that Wal-Mart should have expected that Ms. McElyea would fail to appreciate the risk of crossing the parking lot or that the advantage of crossing the parking lot outweighed the risk of harm. Accordingly, the trial court’s decision should be affirmed.

**C. Wal-Mart requests an award of attorney fees and costs.**

Pursuant to RAP 18.1, RCW 4.84.185 and/or CR 11, Wal-Mart requests an award of attorney fees and costs. An appeal is frivolous (and a recovery of fees warranted) “if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *In re Marriage of Greenlee*, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992) (quoting *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *rev. denied*, 104 Wn.2d 1020 (1985)).

Similarly, RCW 4.84.185 provides:

In any civil action, the court ... may, upon written findings ... that the action ... was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense...

As outlined above, well settled authority provides for fees associated with defending frivolous actions, such as the appeal before this court. Accordingly, Wal-Mart is entitled to recovery of fees and costs pursuant to RAP 18.1 and RCW 4.84.185

**V. CONCLUSION**

Ms. McElyea’s burden on summary judgment was to present proof that raised a genuine issue of material fact to support each element of her premises liability claim. As a matter of law, she failed to carry that

burden. Ms. McElyea showed nothing more than ice existed in the parking lot and that the temperature was around freezing at the time of her fall. Under Washington law, she must demonstrate, not only that Wal-Mart had notice of the condition of ice in the parking lot, but also that Wal-Mart was aware that the ice was unreasonably dangerous and Ms. McElyea would fail to protect herself from this danger. The only evidence she provides is that she fell and was injured. The undisputed evidence shows that no other such accident occurred the day of Ms. McElyea's fall. Thus, Ms. McElyea presented no evidence to support that essential element of her claim.

Ms. McElyea had the burden of proving that Wal-Mart should have anticipated her harm, and that Wal-Mart should have been aware that she would fail to protect herself from the ice. Ms. McElyea admitted that she was well aware of the presence of ice in the parking lot. She knew that ice was slippery, and knew of the presence of the pedestrian walkway. She knew, as a reasonable person in her position would have known, of the danger, and there is no question that it was obvious. Ms. McElyea failed to present any evidence whatsoever that would suggest that Wal-Mart should have anticipated her harm, or that Wal-Mart would have expected Ms. McElyea to protect herself in a different manner

than she had when she entered the store. Ms. McElyea failed to meet her burden of proof as to this essential element of her claim.

Finally, Ms. McElyea had to provide facts to rebut the reasonable inference that Wal-Mart exercise reasonable care to protect her against the danger. Wal-Mart provided a pedestrian walkway. That walkway had been professionally de-iced the day before the incident. Furthermore, Wal-Mart had the parking lot professionally de-iced and sanded the day before the incident. Ms. McElyea presents no evidence to suggest these efforts were unreasonable under the circumstances. Ms. McElyea failed to meet her burden of proof as to this essential element of her claim.

Accordingly, this court should affirm the trial court's dismissal of Ms. McElyea's claim in its entirety.

Respectfully submitted this 27<sup>th</sup> day of February, 2011.

LEE SMART, P.S., INC.

By: 

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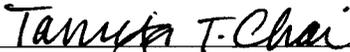
**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on February 24, 2011, I caused service of the foregoing pleading on each and every attorney of record herein:

**VIA LEGAL MESSENGER**

Ms. Jean Magladry  
MW Injury Solutions  
11512 NE 19th Street  
Bellevue, WA 98004

DATED this 24<sup>th</sup> day of February, 2011 at Seattle, Washington.

  
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Taniya T. Chai, Legal Assistant