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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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DIVISION I
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SEATTLE, WA 98101

Wal-Mart Stores, Inc., Respondent

v.

Shannon McElyea, Appellant

REPLY BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

Assignments of Error

1. The trial court erred in entering summary judgment against the Plaintiff. CP 154-155

Issues Pertaining to Assignments of Error

1. Under Washington law, is there a question of fact for the jury when Wal-Mart owed a duty of reasonable care to Mrs. McElyea, Wal-Mart knew that individuals would traverse its icy parking lot to gain access to its store, and Wal-Mart knew of an unreasonable risk of icy conditions on its premises and took only limited measures to ensure the safety of its customers.

B. Statement of the Case

Procedural History

Shannon McElyea filed a complaint for damages against Wal-Mart on July 17, 2009. CP 1-5. After discovery, the trial court granted Wal-Mart's motion for summary judgment on October 22, 2010. CP 18. Mrs. McElyea then filed a motion for reconsideration on November 1, 2010, which the trial court denied. CP 156-158, 162-163. Mrs. McElyea filed a notice of appeal on November 15, 2010. CP 164-157.

Statements of Facts

On the afternoon of December 20, 2008, Shannon McElyea accompanied her husband Jason McElyea to a Wal-Mart in Covington, Washington, to purchase incidentals to Mr. McElyea's imminent military deployment to Iraq. CP 2, CP 37. At the time, the Seattle area was experiencing abnormally cold temperatures and snow had fallen earlier in the week. CP 36, 38, 80-100.

Arriving at Wal-Mart after driving on main roads that had been sanded and salted, Mrs. McElyea realized that there were several inches of compacted snow and ice on the surface of the Wal-Mart parking lot. CP 37, 38, 101. Also realizing this danger, Mr. McElyea cautiously and slowly navigated the car through the parking lot. CP 38. Wal-Mart was very busy when the McElyeas arrived so they parked their car near the back of the parking lot. CP 38, 101. The parking lot did not appear to have been treated with salt or other de-icing material or plowed by Wal-Mart. CP 39, 101. Despite the icy conditions, the McElyea's successfully navigated the icy parking lot and reached the store entrance without incident. CP 39. Upon reaching the entrance, Mrs. McElyea saw that Wal-Mart had applied de-icing salt outside of the store's entrance, but nowhere else on the premises. CP. 39, 119.

After spending about one hour in the store shopping for her husband's impending deployment, Mrs. McElyea grabbed a full grocery bag with each hand and prepared to return to the car. CP 40. Believing that that walkway that the McElyea's used to reach the store was unsafe because of accumulated snow and ice, Mr. McElyea instructed Mrs. McElyea to follow him to the car through the parking lot. CP 102. Mr. McElyea believed that the parking lot was a safer route to the car than the walkway. CP 120. Following her husband's lead, Mrs. McElyea slowly trailed him back towards their car. CP 40. Because of the icy conditions, both Mr. and Mrs. McElyea walked slowly and carefully. CP 40.

While walking, Mrs. McElyea slipped and fell hurting her back, neck, wrist, stomach, and head. CP 41. Mr. McElyea, an Air Force trained medic, immediately knew that Mrs. McElyea had broken her wrist. CP 43, 73. Realizing the severity of Mrs. McElyea's injury, Mr. McElyea went to get the car and drove back to retrieve Mrs. McElyea where she had fallen. CP 43. Immediately, Mr. McElyea drove Mrs. McElyea to an urgent care facility located across the street where she received emergency medical treatment. CP 42, 43.

The following day, Mrs. McElyea went to an orthopedic doctor for her wrist injury. CP 43. Because of the severity of the fracture, Mrs. McElyea was referred to a surgeon that specialized in wrist surgery. CP

43. Mrs. McElyea required two surgeries to repair her wrist, which included the insertion of a metal plate and screws. CP 44, 46. These surgeries were followed by months of physical therapy and treatment for back pain caused as a result of the fall. CP 45, 46. While the severity of the injuries made recovery very difficult, this difficulty was compounded by Mr. McElyea's deployment to Iraq in the first week of January 2009. CP 50. Mr. McElyea's deployment left Mrs. McElyea in a severely injured state to care for the couple's two children alone. CP 32, 50.

C. Summary of the Argument

A question of fact still remains for the jury. Mrs. McElyea was a business invitee, and therefore, Wal-Mart owed her a duty of care defined by Restatement (Second) Torts § 343. Mrs. McElyea has demonstrated that an unreasonable risk of harm existed, that Wal-Mart knew about risk, and that Wal-Mart should have known that Mrs. McElyea would attempt to traverse the icy parking lot despite the risk. Also, a question of fact remains whether Wal-Mart has discharged its duty of reasonable care. This is a question for jury that the trial court improperly disposed of on summary judgment.

D. Argument

Mrs. McElyea's opening brief is replete with argument why the applicable legal standard in Rest. Torts § 343 has been satisfied and why

the trial court improperly disposed of this case on summary judgment. Rather than repeat the argument already contained in that brief, which counters most of the arguments in Wal-Mart's response brief, this brief will address Wal-Mart's arguments that were not addressed in Mrs. McElyea's opening brief.

I. WAL-MART'S RELIANCE ON *HOFFSTATER*, *DICKEY*, AND *NELSON* IS MISPLACED, BECAUSE EACH CASE IS DISTINGUISHABLE FROM THE CASE AT BAR.

Hoffstater is inapplicable to the case at bar because the court applied a wholly different legal standard. In *Hoffstater*, a pedestrian tripped and fell on uneven bricks in a parking lot and suffered injuries. *Hoffstater v. City of Seattle*, 105 Wn. App. 596, 598, 20 P.3d 1003 (2001). The pedestrian then sued the City of Seattle, the abutting store owner, and the abutting property owner for negligence. *Id.* Wal-Mart relies upon *Hoffstater* court's discussion about the City of Seattle's liability to argue that Wal-Mart may not be found liable because Mrs. McElyea was aware of the dangerous condition. However, this argument does not follow from *Hoffstater*, because the court did not apply the Rest. Torts § 343A. Rest. Torts § 343A did not apply to the City of Seattle in *Hoffstater* but does apply to Wal-Mart.

Rest. Torts § 343A provides that

(1) 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 of obviousness.** (Emphasis added).

Because the Rest. Torts § 343A did not apply to the City of Seattle in *Hoffstater*, Wal-Mart's reliance on the *Hoffstater* court's discussion of the City of Seattle's negligence is inapplicable to the case at bar. Instead, Wal-Mart is held to a much higher standard of care.¹

Wal-Mart's reliance on *Hoffstater* is also an attempt to reinstate the long-rejected "natural accumulations rule." The natural accumulations rule provides that a landowner has no duty to protect invitees from conditions caused by natural accumulations of snow and ice. *See, Woods v. Naumkeag Stem Cotton Co.*, 134 Mass. 357 (1883). Washington courts have soundly rejected the natural accumulations rule, and instead apply the Rest. Torts §§ 343 and 343A. *Iwai v. State*, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996) ("An invitee's awareness of particular dangerous condition does not necessarily preclude landowner liability"); *Leonard v. Pay'N Save Drug Stores, Inc.*, 75 Wn. App. 445, 450, 880 P.2d 61 (1994) ("We...hold that a fall on snow or ice is analyzed under the general rules of a landowner's duty to invitees"); *Ford v. Red Lion Inns*, 67 Wn. App.

¹ Appellants opening brief thoroughly discusses why Wal-Mart is liable even though Mrs. McElyea was aware of the icy conditions. In short, Wal-Mart knew or should have known that its patrons would fail to protect themselves against the unreasonable risk of harm posed by the icy parking lot. See Appellant's Opening Brief pp. 11-13.

766, 771-772, 840 P.2d 198 (1993) (“We note and specifically decline to follow the recent case... which articulated a blanket rule that a possessor of land owes no duty to invitees with respect to obvious dangers created by snow and ice”). The Court should reject Wal-Mart’s attempt to overturn decades of accepted Washington law.

Wal-Mart’s reliance upon *Lish v. Dickey* is similarly misplaced, because the facts are distinguishable from the case at bar and the court did not apply the same legal standard. In *Lish*, the plaintiff fell and injured her leg when she slipped on ice while walking to her landlord’s duplex to pay rent. *Lish v. Dickey*, 1 Wn. App. 112, 112-13, 459 P.2d 810 (1969). The court held “that voluntary exposure to the obvious risk and danger involved was unreasonable.” *Id.* at 115-16. However, as in *Hoffstater*, the court never applied Rest. Torts § 343A. Therefore, the case is inapplicable to the case at bar, because the court applied a different legal standard. Also, Mrs. McElyea was reasonable in deciding to use the parking lot rather than the pedestrian walkway, as evidenced by the declaration of Mr. McElyea, which provides

On our way into the store, we walked on a pathway between parked cars which had not been shoveled or cleared. It was full of snow and ice. When we exited the store, I told my wife to follow me on a path in the parking lot that had less snow and ice and seemed safer than the pathway we had taken previously. CP 102.

Because the different facts and legal standard, *Lish* is inapplicable to this case.

Similarly, *Nelson v. City of Tacoma* is distinguishable. 19 Wn. App. 807, 577 P.2d 986 (1978). In *Nelson*, the plaintiff slipped on an icy street while jaywalking and was injured. *Id.* at 807. The court held the City of Tacoma was not liable for the plaintiff's injuries, because while the City had a duty to keep streets in reasonably safe conditions for pedestrians, the plaintiff had failed to introduce evidence that the sidewalk, or immediately adjacent part of the street that lead to crosswalk, was not reasonably safe. *Id.* at 811. In contrast, Mr. McElyea's declaration provides that the pedestrian walkway was unsafe. This evidence that the pedestrian walkway was not safe makes *Nelson* inapplicable to the case at bar.

Wal-Mart's reliance on the *Hoffstater*, *Lish*, and *Nelson* is misplaced and the cases are not applicable to the case at bar.

II. THE COURT SHOULD NOT GRANT ATTORNEYS FEES

The issuance of attorneys fees based on allegedly frivolous appeal is discretionary. *See* CR 11; RCW 4.84.185. Washington courts consider the following factors in determining whether an appeal was frivolous:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should

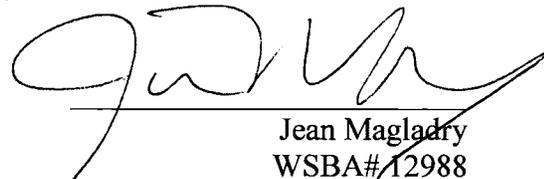
be considered as a whole; (4) an appeal that is affirmed simply because the argument are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is totally devoid of merit that there was no reasonable possibility of reversal.” *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

Considering the record as a whole and resolving all doubts in favor of Mrs. McElyea, the Court cannot conclude that the appeal was frivolous. Numerous debatable issues exist upon which reasonably minds could differ, and Mrs. McElyea’s brief has cited significant amounts of judicial authority in support of all of its arguments. Finally, an award of fees to Wal-Mart would have a chilling effect for any party who propounds a reasonable, good faith argument, which would be contrary to the purposes of CR 11 and RCW 4.84.185.

D. Conclusion

For the reasons set out above and in appellant’s opening brief, the appellant respectfully requests that the court reverse the trial court’s judgment.

Respectfully submitted this 21 day of March, 2011



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DECLARATION OF SERVICE

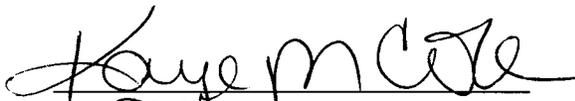
I declare that I served the foregoing REPLY BRIEF OF APPELLANT on the attorneys below

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- By causing a full, true and correct thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Bellevue, WA, on the date set forth below.
- By causing a full, true and correct copy thereof to be HAND DELIVERED BY ABC MESSENGER SERVICE to the party, at the address listed above, which is the last-known address for the party's office, no later than March 22, 2011.
- By causing a full, true and correct copy thereof to be FAXED to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Bellevue, Washington, on this 21st day of March, 2011.


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