No. 339858

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MICA CRAIG,

Appellant,

vs.

WAL-MART STORES, INC.,

Respondent.

ON APPEAL FROM ASOTIN COUNTY SUPERIOR COURT
(The Honorable Scott Gallina)

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Hiding behind the "lack of notice" argument, Wal-Mart buries as an afterthought the exceptions to the notice rule: (1) that the specific unsafe condition is foreseeably inherent in the nature of the owner's or occupier's business or mode of operation and (2) that the owner or occupier caused the hazardous condition.

The manner, mode and location in which Wal-Mart arranged and operated its outdoor garden center clearly put Mr. Craig in direct contact with the garden product that he intended to purchase, sitting on a pallet in its outdoor garden center. But for the product being merchandised in such a manner that Mr. Craig was required to touch it to inquire about or purchase it, he would not have encountered and been injured by the snake thereon.

Regarding the second exception, defendant creating the injurious condition, Mr. Craig agrees with Wal-Mart's analogy that the mere "presence of sharks in the ocean" does

not, in and of itself, make a city on the shore liable for shark bites. However—taking the analogy to the next level—given the well-known fact that sharks are drawn to blood, if that city is aware of the presence of sharks in the nearby ocean and were to, for example, dump or allow the dumping of blood-saturated products (such as chum for fishing) into an area adjacent to its swimming area, and a person was thereafter attacked by a shark, reasonable persons could certainly find that the city caused the conditions that led to the shark attack. Such specific scenarios not necessarily captured in prior case law are exactly the reason why summary judgment proceedings are fact-specific, not generalized.

Both of the exceptions to the notice rule apply and, given the existence of questions of fact, a jury must be allowed to determine whether the risk was foreseeable and, if so, what precautions Wal-Mart should have taken.

While Mr. Craig's injury occurred at a local Wal-Mart store, that location does not operate in a vacuum. Defendant Wal-Mart is a multi-national corporation with stores throughout the United States. Mr. Craig has established multiple incidences of snakebite injuries occurring in the outdoor garden centers of other Wal-Mart stores that are located in areas of the country where snakes are prevalent. As such, even without a specific reported incidence of a snakebite at the Clarkston Wal-Mart location, Defendant Wal-Mart is on notice of the specific risk under similar conditions in its own stores.[1]

Mr. Craig has raised questions of fact for a jury as to whether Wal-Mart caused the injurious conditions, whether the risk was foreseeable and whether, at minimum, Wal-Mart should have posted signage warning against the

[1] Each Wal-Mart store's safety and other policies are governed by Wal-Mart corporate and exist "under the wire," on Wal-Mart's online corporate policy listing. CP 055, pp. 14:21-15:17; CP 071, pp. 22:16-23:4.

possibility of such injuries. The matter should be remanded for trial to resolve these questions of fact.

II. ARGUMENT AND AUTHORITY

Despite Wal-Mart's continued focus thereon, Mr. Craig is not appealing on the grounds that Wal-Mart had actual or constructive notice. He is arguing that he need not prove notice for the court to impose liability because the circumstances of his injury fall under two exceptions to the notice rule. As laid out in the Restatement:

> An owner or occupier of land may be liable to an invitee for injuries resulting from a dangerous condition on the land of which the owner or occupier does not have actual or constructive knowledge if (1) the specific unsafe condition is foreseeably inherent in the nature of the owner's or occupier's business or mode of operation or (2) the owner or occupier caused the hazardous condition.

Restatement 2d of Torts § 343. Both exceptions apply here.

The trial court was required to view the evidence *and all reasonable inferences therefrom* in the light most favorable to Mr. Craig. Where reasonable persons could reach different

conclusions based upon that evidence, the foreseeability of Mr. Craig's injury is a question for the jury and the trial court should have denied Wal-Mart's motion. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980).

A. Restatement § 344 does not eliminate the Restatement § 343 exceptions to the notice requirement.

Wal-Mart appears to suggest that Restatement § 344 is an extension of Restatement § 343 that eliminates the exceptions established in Restatement § 343. The plain language of Section 344 makes clear that is not the case. Section 344 reads as follows:

> 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 to protect them against it.

The plain language of Section 344 is intended to limit liability for the "harmful acts of third persons or animals" that the land possessor discovered or should have discovered and warned or protected against. Comment f to Section 344 makes clear that nothing in the same plain language is intended to limit liability for the land possessor's own harmful acts or conditions it caused, if those acts or created conditions result in an injury by a third person [or animal]. See McKown v. Simon Prop. Grp, Inc., 182 Wn.2d 752, 344 P.3d 661 (2015) (explaining comment f):

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. *If the place or character of his business, or his past experience*, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to

> provide a reasonably sufficient number of servants to afford a reasonable protection.

Id., at 768 (explaining comment f, emphasis in original). The McKown Court clarified that "comment f, like section 344 itself contemplates two kinds of situations that may give rise to a duty—the first is where the landowner knows or has reason to know of immediate or imminent harm, and the second is where the possessor of land knows, or has reason to know, based on the landowner's past experience, the place of the business, or the character of the business, there is a likelihood that harmful conduct of third parties will occur on his premises. Id. Our state Supreme Court has confirmed that Restatement Section 344 does not eliminate the exceptions to the notice rule under the circumstances herein alleged.

B. Reasonable people could disagree as to whether the risk of snakebite in the Wal-Mart garden center is inherent in Wal-Mart's mode of operating its outdoor garden centers.

Despite protests to the contrary, Wal-Mart's garden center is clearly a self-service operation. Soils and gardening

products are outside, away from the main store, sitting on shelves or pallets on the ground. Just like inside the store, the customers shop the aisles and pick the products they want, which are then rung up by a cashier. There is no difference in the mode of operation between the inside of the store, which Wal-Mart admits is self-service, and the outside garden center. See CP 084, p. 16:12-25 ("Usually you have a driveway, line up pallets on the side. Make rows, basically so people can drive down the rows or shop down the rows."); CP 099, pp. 13:22-14:6:

> And generally, as a rule, we keep it to where pallets don't go over shoulder length. The ones that are for the customers, we don't want them reaching all the way up and pulling things down. I'm afraid that they might fall on their head or, you know, hit somebody, because they don't know how heavy these bags can be. They're just pulling down, and all of a sudden, they realize it's too heavy; they can't handle it. And we don't want that over their heads, so we try to keep them at shoulder—shoulder height.

CP 100, p. 16:12-19 ("We're asking them to lift it too many times. So they try to make it easier by having the parking lot.").

CP 115, p. 14:1-4 (Q: "Were other people in the parking lot shopping with some of the other merchandise?" A: "Yeah. They were picking up flowers. Maybe somebody on the end was picking up soil."). There is no valid argument that the Wal-Mart garden center is not a self-service operation.

Even if Wal-Mart's garden center was not a self-service operation, the exception could still apply. Wal-Mart claims that Washington courts have only applied the mode of operation exception to self-service establishments. *Response*, p. 28. However, our state Supreme Court, in Iwai v. State, has clarified its earlier stated need for "a relation between the hazardous condition and the self-service mode of operation of the business" it previously set forth in Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 654, 869 P.2d 1014 (1994). Iwai v. State, 129 Wn.2d 84, 98-100, 915 P.2d 1089, 1095-1097 (Wash. 1996). In Iwai, discussing Ingersoll, the court ruled that "self-service" is *not the key to the exception*. Iwai, at 100 (emphasis added). Rather, it held that the question is whether "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., citing Ingersoll, 123 Wn.2d at 654 (quoting

Pimentel v. Roundup Co., 100 Wn.2d 39, 49, 666 P.2d 888 (1983) ("The better response to the facts of this case is to extend the analysis made in Ingersoll and dispense with the self-service requirement altogether."). Expanding the exception to ice in a parking lot, the Iwai court made clear: "The reasonably foreseeable exception to the notice requirement should be applied to any situation, whether or not the mode of business involves self-service, where 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, at 100, citing Ingersoll and Pimental. Ultimately, the Iwai court stated that where the mode of the defendants' business made the risk foreseeable, the plaintiffs' failure to establish actual or constructive notice of the specific

dangerous condition did not preclude a trial court from hearing the case. Id., at 101 ("Even though the ice on which Iwai allegedly slipped was not continuous, a jury could certainly find that its occurrence was foreseeable during inclement weather.").

Wal-Mart's operation of its outdoor garden center necessarily puts customers in direct contact with dirt products sitting on pallets. Significantly, Anthony Torelli, the department manager of the lawn and garden center at the time of Mr. Craig's injury (CP 98, p. 8:15-25), was not at all surprised that someone had been bitten by a snake:

> I was inside the store. I was inside the garden center area. And – I don't know who it was, whether it was a customer or another associate or whatever, but somebody said somebody got bit in the parking lot by a snake. My first reaction was, had to be one of our people, because I had given them orders to move pallets around and move dirt around. And so if anybody was going to get bit, it was going to be one of ours. And then they just told me, no, it was a customer.

CP 105, pp. 36:23-37:9. Without any information other than that someone had been bitten by a snake "in the parking lot", Mr. Torelli immediately drew a connection to the pallets of dirt

in the garden center, the exact—and apparently foreseeable—location of Mr. Craig's injury. Despite that customers are forced into direct contact with dirt products on pallets, he did not testify to any surprise that someone had been bitten by a snake, only to the fact that the victim was a customer, rather than an employee tasked with moving dirt and pallets. On that testimony alone, this event was clearly not *so highly extraordinary or improbable* as to be wholly beyond the range of expectability, foreclosing the possibility of summary judgment. Johnson v. State, 77 Wn. App. 934, 942 894 P.2d 1366 (Wash. Ct. App. Div. 1, 1995) ("The trial court may determine an event as unforeseeable as a matter of law only if the occurrence is *so highly extraordinary or improbable* as to be wholly beyond the range of expectability. Otherwise, the question of foreseeability is a question for the trier of fact.").

Mr. Torelli's lack of surprise is consistent with the declaration of Mr. Craig's expert, Daniel Beck (CP 194-196), which lays out the conditions Wal-Mart created in its garden

center that would entice common local snakes to enter and remain. Combine those facts with additional evidence that Wal-Mart was on notice regarding multiple snakebite occurrences in outdoor Wal-Mart garden centers in other areas of the country with similar conditions and propensity for snakes and there is clearly a question of fact as to whether the likelihood of a snakebite injury was foreseeable to Wal-Mart. Iwai, supra, at 102 (summary judgment shall be denied if the plaintiff raises questions of fact as to foreseeability.).

Mr. Torelli's testimony confirms that he foresaw the possibility of a snakebite to a person interacting with pallets of dirt under the conditions present at the Clarkston Wal-Mart, thus creating at least a question of fact for the jury regarding Wal-Mart's duty. Rikstad v. Holmberg, 76 Wn.2d 265, 268, 456 P.2d 355 (1969)(the concept of foreseeability is what determines the extent and scope of the land possessor's duty). Perhaps the scope of Wal-Mart's duty was as minimal as

placing warning signs in the garden center. Nonetheless, that is for a jury to decide.

C. Reasonable people could disagree as to whether Wal-Mart created the conditions that caused Mr. Craig's injury.

The second exception to the notice requirement is where Wal-Mart directly created the conditions that caused Mr. Craig to encounter a rattlesnake. Notice is for the purpose of showing that the occupant was aware of the condition of the premises which was created by others and negligently permitted it to continue thereafter. Falconer v. Safeway Stores, 49 Wn.2d 478, 480, 303 P.2d 294, 296 (1956). Again, the rule requiring such notice is not applicable where the dangerous condition of the premises was negligently created by the occupant. Id. ("One is presumed to know what one does."). Negligence is a question for the jury unless we can say, as a matter of law, that no negligence was shown. Id. at 481. The factors at play are similar to those in support of the mode of operation exception above.

Summary judgment is a fact-specific inquiry requiring the court to view the facts and all reasonable inferences in the light most favorable to the non-moving party. Under these specific circumstances, it would be inequitable to allow the Wal-Mart Corporation to hide behind a denial of a specific reported incident of a snake in one location where corporate Wal-Mart governs company wide safety and operational policies in similarly situated locations and should have advised other similarly-situated locations of the risk of harm. E.g. Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105 (La. Ct. App. 1999). In Morrison, the Louisiana Court of Appeals determined that a national fraternity owed a duty to protect a pledge from injuries caused during its local chapter's hazing activities when the national organization was aware of prior hazing activities at that chapter. In that case, the national fraternity was "responsible for all that [went] on in its chapters, as it ha[d] the right to control intake, expel or suspend members, and revoke charters"; had officers and alumni

advisors responsible for auditing and supervising local chapters' compliance with fraternity rules; and had educational programs and workshops "to address the problem of hazing." Id, at 1118. A similar concept is implicated to hold a principal liable for the negligence of another when the principal controlled or had the right of control over activities "from whence the actionable negligence flowed" and caused injury to another. See Kroshus v. Koury, 30 Wn. App. 258, 264, 633 P.2d 909, 912 (Wash. Ct. App. 1981).

Wal-Mart insists that there had been no other snakebite incidents at the Clarkston Wal-Mart property, yet the garden center manager was utterly unfazed by the report of a snakebite that he promptly assumed resulted from an employee "moving dirt and pallets." CP 105, pp. 36:23-37:9. Wal-Mart is a multi-national corporation with stores throughout the United States, including other locations in areas commonly known to be inhabited by snakes, such as Florida and Louisiana. Wal-Mart customers have, in fact, experienced multiple snakebites under

similar conditions in the outdoor garden centers of these similarly situated locations. CP 223-229. Wal-Mart's employees testified that Wal-Mart's safety and other organizational and operational policies are companywide, available and accessible to employees online. See CP 055, pp. 14:21-15:17; CP 071, pp. 22:16-23:4. Similar conditions exist in various Wal-Mart locations where the same injury has occurred, yet corporate Wal-Mart, which promulgates the policies company wide, negligently continued to allow—even direct—its local stores to create conditions that made the presence of snakes and snakebites more likely.

The Clarkston Wal-Mart—pursuant to corporate Wal-Mart policies—set up its garden center in the parking lot away from the main building and adjacent to several tracts of undeveloped land. CP 211-213. There was no fence or other barrier between the parking lot/garden center and the undeveloped tracts. Id. The Clarkston area is commonly known as a natural habitat for rattlesnakes. CP 217. Rattlesnakes are

known to be more active in the spring and summer months when the garden center is in place. CP 70; CP 196. Rodent/mouse sightings are a common occurrence at the Clarkston Wal-Mart, thus providing a source of food for snakes. CP 69-70; CP 86; CP 102; CP 114. One employee testified to his understanding that after Mr. Craig's snakebite a company was called out to look for other "snakes and rodents," confirming that one of the pests often seen at the Clarkston Wal-Mart—rodents—is known to attract the other—snakes. Most importantly, Wal-Mart's garden center operation requires the customers to handle their own mulch and other dirt products, necessarily putting customers like Mr. Craig in direct contact with the pallets of product. CP 54-55; CP 70-72; CP 084, p. 16:12-25; CP 099, pp. 13:22-14:6; CP 100, p. 16:12-19; CP 115, p. 14:1-4.

Wal-Mart's garden center manager, Mr. Torelli, admitted no surprise that someone had been bitten by a snake, which he assumed happened when someone was moving the dirt and

pallets in the garden center. CP 105, pp. 36:23-37:9. Without any information other than that someone had been bitten by a snake "in the parking lot", Mr. Torelli immediately drew a connection to the pallets of dirt in the garden center, the exact—and apparently foreseeable—location of Mr. Craig's injury. He did not testify to any surprise that someone had been bitten by a snake, but only to the fact that the victim was a customer, rather than an employee tasked with moving dirt and pallets.

Mr. Craig's expert, Professor Daniel Beck, described the common habitat of rattlesnakes, the travel and shelter habits of rattlesnakes, and the conditions created by Wal-Mart in its garden center that made it more likely that rattlesnakes would be enticed to travel and shelter in those conditions, such that they could come into contact with customers. CP 194-196. Wal-Mart's expert, Professor Kenneth Kardong, came to the entirely speculative, unsupported, and contrary conclusion that "someone brought [the rattlesnake] there." CP 282. The very fact that the parties' two experts came to entirely different

conclusions as to the conditions that caused Mr. Craig's injury is sufficient to create a serious question of fact precluding summary judgment.

III. CONCLUSION

Summary judgment is fact-specific and may only be granted when, after viewing all evidence and reasonable inferences therefrom in the light most favorable to the non-moving party, there is no question of fact as to the non-moving party's claims and reasonable persons could not disagree. It is not proper for the trial court to weigh the credibility of sworn witnesses or the comparative weight of dueling evidence in the moving party's favor to grant a dispositive motion. Where it is clear that the trial court did just that, summary judgment in favor of Wal-Mart must be reversed and the case remanded for trial.

RESPECTFULLY SUBMITTED this 14th day of July 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of ***Appellant's Reply Brief*** on:

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DATED this 14th day of July 2016, at Seattle, Washington.

Lia Maria Fulgaro, Paralegal