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No. 66361-5-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

Shannon McElyea, Appellant

v.

Wal-Mart Stores, Inc., Respondent

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION I
CLERK

Jean Magladry
Attorney for Shannon McElyea, Appellant
MW Injury Resolutions
11512 NE 19th Street
Bellevue, Washington 98004
(425) 637-3096
WSBA# 12988

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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 slowly trailed her husband 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

Wal-Mart breached the duty of care it owed to Mrs. McElyea. Mrs. McElyea was a business invitee at the time that she entered the premises of Wal-Mart. Therefore, the relationship between Wal-Mart and Mrs. McElyea is governed by Restatement (Second) of Torts §§ 343 & 343A. Wal-Mart's duty of reasonable care is also governed by those two provisions.

There was an unreasonable risk of harm at the time of Mrs. McElyea's fall that Wal-Mart knew about. The evidence demonstrates that Wal-Mart knew, or at least should have known, of the extreme cold weather that was gripping the Seattle area and the icy conditions it was creating on its premises. Also, as a large retailer operating during the holiday season, Wal-Mart should have anticipated that its customers would expose themselves to the dangerous conditions of its icy parking lot despite the obviousness of the risk. Finally, there is a question of material fact as to whether Wal-Mart failed to exercise reasonable care, because it took only limited precautions to protect its customers from the icy conditions of the parking lot. Viewing all facts in the light most

favorable to the nonmoving party, Mrs. McElyea, and making all reasonable inferences therefrom, the Court must conclude that there is a question of material fact that cannot be disposed of on summary judgment.

D. Argument

I. THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT’S MOTION FOR SUMMARY JUDGMENT, BECAUSE WAL-MART FAILED TO SATISFY ITS DUTY TO ACT REASONABLY

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.”

Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). As the nonmoving party, the court must consider all facts and inferences in the light most favorable to Mrs. McElyea. CR 56(c); *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 329, 229 P.3d 893 (2010).

Wal-Mart, as the moving party, has the burden of demonstrating that there is no genuine issue of material fact. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010).

A. As the possessor of land, Wal-Mart owed a duty of reasonable care to Mrs. McElyea, because she was a business invitee.

Four elements are required to prevail in a negligence action: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Musci v. Graoch Associates Ltd. Partnership No. 12*, 144 Wn.2d 847, 854, 31 P.3d 684 (2001). Having soundly rejected the

natural accumulations rule,¹ Washington courts apply the general rules of a landowner's duty to invitees to an accumulation of snow or ice. *Id.* at 856; *Iwai v. State*, 129 Wn.2d 84, 95, 915 P.3d 1089 (1996); *Leonard v. Pay'N Save Drug Stores Inc.*, 75 Wn. App. 445, 451, 880 P.2d 61 (1994); *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 881, 866 P.2d 1272 (1994); *Ford v. Red Lion Inns*, 67 Wn. App. 766, 771, 840 P.2d 198 (1992); *Geise v. Lee*, 84 Wn.2d 866, 870, 529 P.2d 1054 (1975). It is uncontested that Wal-Mart owed a duty to Mrs. McElyea, because she was a business invitee. CP 17. It is also uncontested that Wal-Mart was in control of the parking lot when Mrs. McElyea fell and was injured. CP 122.

Washington courts use the Restatement (Second) of Torts §§ 343 & 343A as the test for determining landowner liability to invitees. *Iwai*, 129 Wn.2d at 93.

§ 343. 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

¹ The natural accumulations rule, also known as the Massachusetts rule, *see Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357 (1883), provides that a landowner has no duty to protect invitees from conditions caused by natural accumulations of snow and ice.

(b) should expect that they will not discovery or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against damages.

§ 343A. Known or Obvious Dangers

(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.

B. Wal-Mart is liable for Mrs. McElyea's injuries because an unreasonable risk existed, Wal-Mart should have anticipated the harm despite its obviousness, and Wal-Mart failed to exercise reasonable care.

1. Wal-Mart knew or should have known by the exercise of reasonable care that the parking lot's icy conditions posed an unreasonable risk of harm to Mrs. McElyea.

An unreasonable risk is present when the defendant knows that cold and snowy weather occurred near and at the time of the fall and the defendant has taken some precaution to protect against injury caused by icy conditions. *Maynard*, 72 Wn. App. at 883. In *Maynard*, a hospital visitor sued the hospital after slipping and falling in the hospital parking lot following a winter snow storm. *Id.* at 879-80. On review from of summary judgment, the Division 1 Court of Appeals, held that weather records showing low temperatures and precipitation, evidence that the hospital had taken some precautionary measures by sanding part of the

parking lot, and icy conditions making it difficult for an ambulance to reach the plaintiff after he was injured was sufficient to demonstrate that an unreasonable risk existed at the time of his fall. *Id.* at 883.

Sole reliance on accumulations of snow and ice is insufficient to demonstrate the existence of an unreasonable risk. *Ford*, 67 Wn. App. at 772. In *Ford*, the plaintiff fell in the icy parking lot of a Red Lion Inn. *Id.* at 768. The Division 1 Court of Appeals affirmed the trial court's summary judgment in favor of Red Lion, because the plaintiff "relied only on the fact of accumulated snow and ice." *Id.* at 772.

Factually analogous to *Maynard* is the case at bar. Just as Everett's weather records for the four days preceding Maynard's fall created a "permissible inference that ice and snow were likely to be present and that what was slush when Maynard arrived could turn to ice," *id.*, so does the substantial evidence in the record demonstrating the record low temperatures that gripped the Seattle area for at least eight days prior to Mrs. McElyea's fall. Viewing the evidence in the light most favorable to Mrs. McElyea, the court may infer that Wal-Mart knew that an unreasonable risk existed.

Unlike *Ford*, the substantial weather records are not the only evidence demonstrating the existence of unreasonable risk. Like the hospital in *Maynard* that sanded part of the parking lot, Wal-Mart took

some precautionary measures to protect its business invitee's against harm. Wal-Mart salted the entrance to the store. The only reason that Wal-Mart would have salted the entrance to the store is if it knew that there was a danger that ice could form at its entrance. Wal-Mart was aware that an unreasonable risk existed and took action, albeit insufficient. Similarly, Wal-Mart hired an outside contractor to de-ice and sand at least part of its parking lot on December 19, 2010, the day before Mrs. McElyea's fall. CP 149. Wal-Mart would not have spent over \$800 on this service if it did not recognize that the snow and ice posed an unreasonable risk to its business invitees. Finally, Wal-Mart knew that an unreasonable risk existed, because on the date of Mrs. McElyea's fall, the store had over four thousand pounds of de-icer on its shelves. CP 101-106, 119. Wal-Mart is a sophisticated party that integrates forecasting with merchandise that it puts on its shelves. CP 161. Wal-Mart may not stock its shelves with de-icer to meet the demand from Seattle-area residents struggling with the effects of a record streak of low temperatures, and then plead ignorance to the fact that unreasonably dangerous icy conditions existed on its premises. Wal-Mart knew that unreasonable dangerous condition existed on its premises, and took some precautionary measures. The sufficiency of those precautionary measures is a question of fact for the jury, and cannot be disposed of on summary judgment.

Restatement (Second) of Torts § 343 also requires that the defendant know of the unreasonable risk. This is why “Washington law requires plaintiffs to show the landowner had actual or constructive notice of the unsafe conditions” *Iwai*, 129 Wn.2d at 96. Constructive notice requires a “showing [that] the specific unsafe 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.” *Id.* (quoting *Pimental v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983)). As discussed above, Wal-Mart had at least constructive notice, if not actual notice of the unreasonable dangerous condition of their parking lot. The snow and eight days of record-low temperature raises an inference that Wal-Mart knew of the icy conditions. *See Maynard*, 72 Wn. App. at 883. Also, Wal-Mart’s recognition of the icy condition of its premises is the reason why they salted the entrance to the store and hired an outside company to de-ice and sand part of the parking lot the day before Mrs. McElyea’s fall.

Wal-Mart knew that the icy conditions of its premises posed an unreasonable risk of harm to its business invitees. Recognizing the unreasonable risk, Wal-Mart de-iced part of its premises and hired an outside contractor to assist in the effort. The question of whether Wal-Mart’s actions were reasonable is a question that must be left to the jury.

2. Wal-Mart should have realized that business invitees like Mrs. McElyea would fail to protect themselves against the unreasonable risk of harm posed by the icy parking lot.

“An invitee’s awareness of particular dangerous conditions does not necessarily preclude landowner liability” *Iwai*, 129 Wn.2d at 94; *see also* *Musci*, 144 Wn.2d at 685 (plaintiff “could see the area outside the side exit was covered with snow and ice”); *Leonard*, 75 Wn.2d at 446; *Maynard*, 72 Wn. App. at 882 (“dangerous condition of the parking lot was obvious and known to Maynard”); *Geise*, 84 Wn.2d at 867 (plaintiff informed defendant about the dangerous condition). Washington law recognizes that despite the obviousness of some dangers, when premises are held open to use by business invitees, the business must expect that those invitees will continue to encounter the risk. *Pay’N Save*, 75 Wn. App. at 449-50 (citing WILLIAM L. PROSSER & W. PAGE KEETON, TORTS § 61 (5th ed. 1984) at 427-28). Recognizing this reality, Washington has adopted Restatement (Second) § 343A which provides:

(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 or obviousness.** (Emphasis added).

Businesses should reasonably anticipate that their invitees will want to go home, and therefore traverse icy parking lots to get to their cars. *Maynard*, 72 Wn. App. at 884. In *Maynard*, the plaintiff left the

hospital to find that his car was stuck and could not gain traction on the icy surface. *Id.* at 879-80. The plaintiff was returning to the hospital to procure sand that he hoped would provide his car with more traction when he fell and was injured. *Id.* at 880. The court held

Here, the hospital should have reasonably anticipated that its visitors will want to go home. 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. Under these circumstances, a reasonable person might well confront the risk of traversing the parking lot to obtain sand. *Id.* at 884.

Wal-Mart holds itself out as a large grocery retailer that also sells consumer goods. Wal-Mart should anticipate that people will drive to its stores and walk through the parking lot to gain access. Wal-Mart should be ever more cognizant of this fact during the holidays. The McElyeas went to Wal-Mart on just five days before Christmas, a peak shopping time. Knowing that shoppers will purchase goods at their store, Wal-Mart should expect those shoppers to carry those goods to their cars, navigating its icy parking lot. Also, given that Wal-Mart had stocked its shelves with large amounts of de-icer, and a cold snap had enveloped the Seattle-area, Wal-Mart not only should have expected shoppers to traverse its icy parking lot to enter the store, but it made an economically rationale decision

premised on the idea that people would traverse its parking lot to buy de-icer. Wal-Mart may not claim that it did not anticipate people walking across its icy parking lot to enter its store.

3. Wal-Mart failed to exercise reasonable care to protect Mrs. McElyea against danger.

“The phrase ‘reasonable care’ imposes on the landowner the duty ‘to inspect for dangerous conditions, followed by such repair, safeguards, or warning as may be reasonably necessary [for the invitee’s] protection under the circumstances’” *Iwai*, 129 Wn.2d at 96, (quoting *Tincani*, 124 Wn.2d 121 138-39, 875 P.2d 621 (1994) (internal citations omitted)).

A store’s failure to clear snow and ice from a sidewalk outside of the store that is normally used by customer’s carrying packages when the store is open for business is evidence that jury could use to reasonably infer that the store failed to exercise reasonable care. *Pay’N Save*, 75 Wn. App. at 452. In *Pay’N Save*, the Division 1 Court of Appeals remanded the plaintiff’s slip and fall case to trial finding that there was a question of fact as to whether the store exercised reasonable care. *Id.* The court relied on the fact that the snow and ice had been on the ground for four to five days and had become hard and that customers carrying packages often used the sidewalk where the plaintiff fell. *Id.* at 451-52.

Similarly, failure to take corrective action to make snow and ice covered premises safe is sufficient evidence of a failure to exercise reasonable care to overcome a motion for summary judgment. *Musci*, 144 Wn.2d at 863. In *Musci*, the plaintiff slipped and fell on snow and ice outside of an apartment building common area. *Id.* at 853. Remanding the case for trial, the Washington Supreme Court held that viewing the evidence in the light most favorable to the plaintiff (the nonmoving party), the evidence that the landowner had two to three days to take corrective action and its maintenance crew **had** “snow and ice melting granules at its disposal” that went unused was sufficient to raise a question of fact to whether the landowner exercise reasonable care. *Id.* at 862.

Construing all evidence in the light most favorable to Mrs. McElyea, and making all reasonable inference therefrom, the Court must conclude that there is a question of facts as to whether Wal-Mart exercised reasonable care. Wal-Mart recognized the severity of the icy conditions as it de-iced its entryway and hired a contractor to de-ice and sand at least part of the parking lot the day before Mrs. McElyea’s fall. Wal-Mart also stored de-icer on its shelves knowing that its customers would likely need it. However, Wal-Mart failed to exercise reasonable care by assuring that rest of the parking lot had been de-iced. Why did Wal-Mart refuse to de-ice the rest of the parking lot? Why did Wal-Mart refuse to hire a

contractor to de-ice and sand the parking lot on December 20, 2010, the date of the Mrs. McElyea's fall? Why did Wal-Mart refuse to put out signs warning their customers of the icy conditions? Why did Wal-Mart refuse to place employees in the strategic locations in the parking lot to warn customers of the dangerous conditions? These are all questions of fact for the jury, and may not be disposed of on a motion for summary judgment.

D. Conclusion

For the reasons set out above, the appellant respectfully requests that the court reverse the trial court's judgment.

Respectfully submitted this 24 day of January, 2011



Jean Magladry
WSBA# 12988
Attorney for Appellant

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DECLARATION OF SERVICE

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

Philip B. Grennan
Lee Smart
701 Pike Street #1800
Seattle, WA 98101-3929
Fax. 206-624-5944
Attorney for Respondent

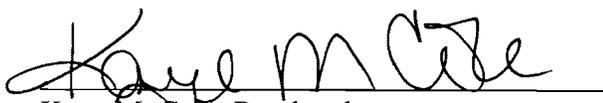
By causing a full, true and correct thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Bellevue, WA, on the date set forth below.

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 January 26, 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 24th day of January, 2011.


Kaye M. Cole, Paralegal to
Jean Magladry, WSBA #12988
Attorneys for Appellant

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