6-30-2017

Brooks v. Wal-Mart Stores, Inc. Appellant's Reply Brief Dckt. 44634

IN THE SUPREME COURT OF THE STATE OF IDAHO

DIANE BROOKS, individually,

Plaintiff/ Appellant,

vs.

WAL-MART STORES, INC., a foreign corporation doing business in Idaho,

Defendant/ Respondent.

Supreme Court No. 44634

Ada County Case No. CV-PI-1421952

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

Honorable Lynn Norton, presiding

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I. INTRODUCTION

The central issue in this case is whether Idaho premises liability will be read so narrowly as to protect Wal-Mart from its conscious choice to be ignorant of the risks inherent in self-serve operating methods which it required. Retailers such as Wal-Mart have a duty to keep their premises reasonably safe because the law presumes as the landowner, they have superior knowledge and control of the premises. That knowledge must necessarily extend to products and operating processes which a retailer purposefully brings onto its premises. In other words, it is the premises owner that it is in the best position to assess whether products and/or operating processes can create potential hazards because the premises owner is the most knowledgeable about store operations, traffic patterns, customer behavior, etc.

Here, Ms. Brooks contends that the liquid which caused her to fall came from a Rug Doctor carpet cleaning machine which spilled or leaked water onto the floor during the unsupervised self-serve rental process. In viewing the record most favorably to Ms. Brooks, the district court accepted the facts as true and determined that if liquid spilled during the rental process then the rental and use of the Rug Doctor machine could create a hazardous condition. Given the evidence as to the various ways liquid could spill or leak from a machine, the district court determined that because *Rug Doctor's* rental process anticipated that third parties would be in control of the machines, questions of fact existed as to whether it was foreseeable to Rug Doctor that a liquid could spill and cause injury.

Ms. Brooks argues that the district court erred by limiting its findings to Rug Doctor. The record is undisputed that the self-serve rental process which placed the machines in the

control of third persons was required by Wal-Mart as condition of allowing the Rug Doctor machines in its store. In fact, the record reflects that the self-service kiosk required by Wal-Mart is unique to it. All other retailers have employees involved in the rent and return process which means that the machines are inspected upon rental and return.

In addition to dictating the method of product delivery, Wal-Mart also chose the location where the self-serve kiosk would be located within its store. It selected "action alley," one of the busiest places in the store. Once the kiosk was installed, Wal-Mart took a hands off management approach and employees were not allowed to touch the kiosk or be involved in the rental process.

In defense of Ms. Brooks' claims, Wal-Mart takes the position that it had no personal knowledge of, nor control over, the self-serve rental process. Consequently, Wal-Mart admits that it did nothing to assess whether the self-serve rental process that it required could create a foreseeable risk of harm to customers and employees within its store. While Wal-Mart claims that there was no record or history of any spills occurring in the area where Ms. Brooks fell, Wal-Mart does not does not keep records as to where spills occur, when spills occur, or why spills occur. Thus, even if spills had occurred and been documented, Wal-Mart would not know if the spill was related to the self-serve rental of a Rug Doctor machine because it had no "personal knowledge" of the process or how the machines operated. More importantly, Wal-Mart is really suggesting that it had no duty to guard against the foreseeable risk unless and until there was a documented problem or incident. That is contrary to its own policies and procedures which require Wal-Mart to be proactive in assessing areas of the stores where potential slip and fall accidents may occur.

Wal-Mart essentially manufactures the foundation for its argument that it had no actual or constructive notice of an otherwise foreseeable risk by choosing to be selectively ignorant as to process. This Court should not take the bait and permit a retailer, such as Wal-Mart, to be consciously ignorant of foreseeable risks which arise from operating methods that it requires by claiming it had no knowledge. To affirm the district court in this case would be poor public policy and create bad law as it would reward retailers who fail to inform themselves of foreseeable risks, who fail to follow their own procedures, and who fail to document.

II. ARGUMENT

A. Whether Wal-Mart Exercised Reasonable Care is a Question of Fact.

The parties seem to agree that under Idaho law, a retailer has a duty to exercise reasonable, or ordinary, care to keep its premises reasonably safe and that the duty extends to dangerous conditions which the landowner knew, *or should have known*, about. *Shea v. Kevic*, 156 Idaho 540, 548, 328 P.3d 520, 528 (Idaho 2014), emphasis added. *See also*, Respondent's Brief, p. 11. While Wal-Mart wants to focus the analysis on whether the spill which caused Ms. Brooks to fall was an isolated occurrence, it is important to understand the rationale underlying imposition of the duty in the first instance. In *Shea*, this Court summarized the burden of an injured party as follows:

> In summary, the invitee must show actual or constructive knowledge on behalf of the landowner to establish a prima facie negligence claim regardless of the nature of the condition. The distinction between an isolated and continuing condition does not eliminate the invitee's burden to establish the landowner's knowledge. In some cases it may be easier for the invitee to show knowledge when the alleged condition is recurring or continuous,

> but an allegation of a continuous condition does not extinguish the invitee's burden simply because the dangerous condition is regularly occurring. The invitee still must show that the landowner knew *or should have known* his operating methods caused or were likely to cause a dangerous condition.

Id. at 548-49, 328 P.3d 528-29, emphasis added.

Here, Wal-Mart argues that it had no knowledge that its required operating method could cause a dangerous condition. According to Wal-Mart, that lack of knowledge is based on the fact that it had no notice of any spills or problems arising from the rental or use of the Rug Doctor machines. While there are legitimate disputes as to the credibility of Wal-Mart's position (i.e., Wal-Mart does not track or document where spills occur), Wal-Mart's alleged lack of notice is also tied to its lack of "personal knowledge" as to the very process which it required. In other words, Wal-Mart admits that it knew nothing about the operating process and, consequently, did not discover that the rental and use of the Rug Doctor machine could create a hazardous condition while in the control of a third party (renter). Wal-Mart is not exempt from liability on this basis because ignorance is not a defense.

This Court has noted that the true ground of premises liability is grounded in the proprietor's superior knowledge of his property. Liability, therefore, is not justified where the owner of the land had no knowledge. However, that rationale does not apply if the landowner's lack of knowledge is due to a failure by the owner to use ordinary care. *See, Mautino v. Sutter Hospital Association*, 211 Cal. 556, 296 P. 76 (1931); *Martin v. Brown*, 56 Idaho 379, 382, 54 P.2d 1157, 1158 (1936) ; *Tommerup v. Albertson's*, 101 Idaho 1, 4, 607 P.2d 1055, 1058 (Idaho 1980).

Here, Wal-Mart's alleged lack of knowledge, or notice, is the direct result of its failure to exercise ordinary care. Wal-Mart made conscious choices to be ignorant of the very operating process which it required, to not document where, when and why spills occur, and to ignore company policy relative to proactive assessment of risk.

The following facts are undisputed. Wal-Mart allowed the Rug Doctor kiosk into its store on the condition that the rental process be self-service. R. 678. (Vender Agreement Recital ¶¶ 2, 3). No Wal-Mart employees were involved in the rental process to inspect if machines leaked and where returned or rented with liquid still present. That meant customers were left to their own device in both the rental and return of the machines. R. 682 (Vendor Agreement, ¶ 4.0 Walmart Responsibilities; *see also* R. 603 (Walker Depo, 55:2-23).

It is undisputed that customers would return machine without cleaning them. Thus, machines would be returned with water still in the buckets or hoses. R. 637-638. (Hinkle Depo, 40:11-22, 41:17-43). It is undisputed that the machines will leak secondary to normal wear and tear, and that includes, for example, leaks from nozzles on the bottom the machine. R. 636 (Hinkle Depo, 33:3-13). Spencer Hinkle, Rug Doctor's Account Representative, testified that water, including just a few drops of residual water, will leak from a machine if it is lifted and tilted.[1] R. 650-651 (Hinkle Depo, 92:20-95:1).

[1] Mr. Hinkle's original deposition testimony in this regard is set forth in Appellant's Brief, pp. 7, 8. Wal-Mart, in its statement of facts, superimposes certain changes which Mr. Hinkle made to his deposition testimony. Those changes were submitted after Ms. Brooks submitted her brief in opposition to the motions for summary judgment filed by both Rug Doctor and Wal-Mart. Pursuant to I.R.C.P. 30(e), the deposition is considered both in its original and changed form, as are any reasons for the change, unless a motion to suppress the change has been made. *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (Idaho 1966). Even though Mr. Hinkle did not provide an explanation for the changed testimony cited by Wal-

It is undisputed that Wal-Mart has a proactive policy which states that store personnel are to assess and anticipate areas where liquids might leak onto the floor and cause a slip and fall hazard. The assessment of such areas is to occur before an accident actually occurs. R. 486, 487 (Walker Depo, 60:9-61:19; 63:17-24, 65:8-15). Wal-Mart admits that it had no personal knowledge of the rental process and Wal-Mart's store manager conceded that he "did not know" how Wal-Mart could assess whether the Rug Doctor machines posed a slip and fall risk without first understanding whether the machines could or would leak during the rental (rent or return) process. R. 672-673; *see also,* R. 489 (Walker Depo, 70:3-16).

Wal-Mart repeatedly states in its Memorandum that no one from Rug Doctor ever advised that the machines leaked and Rug Doctor's knowledge is not imputed to Wal-Mart. Ms. Brooks has never contended that Rug Doctor's knowledge is imputed. Rather, Wal-Mart, as the premises owner, has a duty to exercise reasonable care to keep the premises safe. Liability is not excused where the owner's lack of knowledge is the result of the owner's own failure to exercise reasonable care. Ms. Brooks simply argues that Wal-Mart's duty required that it understand the risks inherent in the operating process it required. That is not unreasonable. Whether Wal-Mart's failure to understand is excused because Rug Doctor did not tell them the conditions under which machines could leak water onto the floor, or whether Wal-Mart's ignorance is a breach of its duty of care, is for a jury to decide, not the district court as a matter of law.

Mart, Ms. Brooks did not seek to have the changes suppressed as the original answer still stands and Mr. Hinkle's credibility cannot be resolved by the district court in a motion for summary judgment.

B. To the Extent Not Already Encompassed within Current Idaho Law, this Court Should Address the Separate and Distinct Risks Inherent in Self-Serve Operations.

Wal-Mart argues that "nothing in Idaho law conditions premises liability on what a retailer knew or should have known about the operations of a self-service kiosk". Respondent's Brief, p. 18. It is true that no Idaho case appears to have wrestled with the issues raised by self-serve operations such as are present here. While Ms. Brooks would contend that reasonable arguments exist which support a finding of liability under current Idaho law, given the prevalence of self-serve operations, Idaho should recognize the narrow exception to traditional premises liability law found in numerous other jurisdictions. That exception is well defined in the State of Washington and addressed by the Washington Supreme Court in *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (Wash. 1983). The required elements have been summarized as follows:

> (1) the check-out operation was self-service, (2) it inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous condition that caused the injury was within the self-service area.

See, Appellant's Brief, p. 28, citations omitted.

Wal-Mart's first opposition to this argument rests on whether the issue should have been raised before the district court. Wal-Mart suggests that Ms. Brooks should have asked the district court to adopt Washington law and is thus precluded from doing so here. It is a well settled principle of law that the Idaho Supreme Court is the ultimate authority in fashioning, declaring, amending, and discarding rules, principles, and doctrines of precedential law by application of which the lower courts will fashion their decisions. This Court has been and

remains the final arbiter of Idaho rules of law, both those promulgated and those evolving decisionally. *State v. Guzman*, 122 Idaho 981, 842 P.2d 660, (Idaho 1992). Even if raised below, the district court would have been constrained to apply the law as set forth by this Court.

Next, Wal-Mart attempts to distinguish Washington law and the exception afforded. However, in doing so, Wal-Mart simply uses selected excerpts without addressing the underlying logic and rationale of the *Pimentel* exception, or the full context and body of the cases to which it cites.

For example, Wal-Mart argues that *Ingersoll v. De Bartolo Inc.*, 869 P.2d 1014 (Wash. 1994) limits the exception to those areas of self-serve operation where the risk of injury is continuous or foreseeably inherent in the nature of the business or mode of operation. Wal-Mart then argues that because the self-serve Rug Doctor rental process had a "mere possibility" of creating a dangerous condition in the "vicinity" of the operation, application of the *Pimentel* exception would lead to "near strict liability." However, that is clearly not what Ms. Brooks is arguing nor would that be a logical application of the self-serve exception.

The *Ingersoll* case did not change or otherwise modify the elements of the exception as set forth in *Pimentel*. Indeed, as later noted in *Dupuy v. Petsmart, Inc.*, 2010 Wash. App. LEXIS 912 (Wash. Ct. App. May 3, 2010), the exception did not apply in *Ingersoll* because the injured plaintiff had no evidence linking the hazardous condition which caused her fall to any particular method of operation. In fact, the plaintiff in that case could not prove what had caused her to fall. *Ingersoll*, 123 Wn.2d at 654.

Here, it is undisputed that Ms. Brooks' slipped on a puddle of water/liquid on the floor. Ms. Brooks has put forth admissible evidence that the source of the liquid was related to the self-service method of renting Rug Doctor machines. The injury occurred at essentially the precise location where a customer lifted, tilted and then placed the Rug Doctor machine into the shopping cart during the rental process. Consequently, that location, by definition, would be within the area of the self-serve method of operation. The district court has already determined that questions of fact exist as to whether the hazardous condition was a reasonably foreseeable consequence of the operating process.

Wal-Mart also contends that the case of *Tavai v. Wal-Mart Stores, Inc.* 307 P.3d 811 (Wash. Ct. App. 2013), in which summary judgment was affirmed for the retailer, is more applicable to the facts of this case because the court refused to apply the exception based solely on evidence that Wal-Mart sold liquids. However, again, Wal-Mart just uses a sound bite from the case and does not address the full analysis of the Court.

In *Tavai*, the plaintiff could not establish that the source of the liquid, or that the condition which caused her to fall, was related to a self-serve method of operation in the location where she fell. Thus, the *Tavai* court reasoned that the Plaintiff's evidence, and theory of recovery, rested merely on the fact that Wal-Mart sold liquids which was an insufficient basis to apply the exception. *Tavai v. Walmart Stores, Inc.*, 307 P.3d 811, 816 176 Wn. App. 122, 132 (Wash. Ct. App. 2013).

Here, unlike the plaintiff in *Tavai*, Ms. Brooks has come forth with evidence as to the source of the liquid, its location, and how the injury occurred. That evidence reflects that the

hazardous condition which caused the injury was directly related to the unsupervised self-serve rental and occurred in the area of the self-serve operation. Again, the district court has already determined that material issues of fact exist as to whether the hazardous condition was reasonably foreseeable.

Wal-Mart's reliance on Connecticut law is similarly unavailing. In *Fisher v. Big Y Foods*, 3 a.3d 919 (Conn. 2010), the Court reversed a denial of directed verdict following a favorable jury verdict to a plaintiff who slipped on fruit syrup that leaked from a product in the retailers store. Although unclear, it appears that the liquid may have come from a can or product that had fallen from a shelf.[2] In *Fisher*, the court noted the mode of operation rule as followed in Connecticut:

> [A] plaintiff establishes a prima facie case of negligence upon presentation of evidence that the mode of operation of the defendant's business gives rise to a foreseeable risk of injury to customers and that the plaintiff's injury was proximately caused by an accident within the zone of risk.

Fisher, 3 A.3d at 926.

The court then noted that the district court did not give the approved jury instruction, based on the rule of law above, which required identification of the particular mode of self-

[2] The evidence in *Fisher* reflected that store employees were required to sweep the floors dry four times through the day, to inspect each aisle as it was swept, and to document when the sweep was performed on a sweep log. A videotape admitted into evidence at trial showed that, seven minutes prior to the plaintiff's fall, a store employee passed through the aisle where the fall occurred and a sweep log confirmed that the sweep had been performed. *Id.* at 922. Contrast that policy to Wal-Mart. Wal-Mart does not document when or if sweeps occur. While employees are trained to be constantly on alert for spills or other hazards, Wal-Mart does not document when or where spills occur, nor, why. R. 482, 484 (Walker Depo, 43:11-47:15; 50:8-11).

service operation which allegedly caused the injury. Instead, the district court inserted the words "self-service supermarket". The analysis of the *Fisher* court makes clear that exception to traditional rules of notice do not apply simply because a supermarket, for example, operates generally in a self-service manner. The error of the district court in that case was the failure to recognize that the rule, while applied narrowly, required proof that a particular method of operation *within* a generally self-service supermarket was the mechanism of injury. *Id.* at 927.

The law in Connecticut does not appear to be much different, if at all, from the law of Washington and the *Pimentel* exception, a fact noted in *Fisher* when it commented that the state of Washington appeared to have the most developed "mode of operation" rule in the country. The *Fisher* court recognized, consistent with its own rule, that the Washington Supreme Court had clearly rejected the notion that the requirement to prove notice was eliminated as a matter of law for all self-service establishments. Rather, the *Fisher* court read the *Pimentel* decision as carving out an exception to the notice requirement where a *particular* self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable. *Fisher*, 3 A. 3d at 933, quoting *Pimentel v. Roundup Co.*, 100 Wn. 2d 39, 49, 666 P.2d 888 (1983).

Wal-Mart argues that Ms. Brooks is urging this Court to adopt a rule of law that completely eliminates the notice requirement simply because a retail store uses a self-serve operation. That is plainly not the case. Ms. Brooks simply contends, consistent with Washington law, and Connecticut law for that matter, that if the *particular* self-serve operation can create hazardous conditions which are inherently, or reasonably foreseeable, then the retailer should be

charged with notice of the condition or the notice requirement should be eliminated. Where, as here, Wal-Mart specifically required the particular method of operation, to the exclusion of the traditional way Rug Doctor dispensed its product, and profits from the rental despite incurring little or no overhead costs, there is no reason to excuse Wal-Mart's refusal to educate itself about the potential hazards.

Finally, Wal-Mart relies heavily on an argument that the possibility of water leaking from a machine is de minimus, or "extremely remote," or "mere possibility." This argument is based on a false statistical hypothetical which Wal-Mart creates to suggest that there is only a .00032% chance of a machine leaking. The basis for the calculation comes from Mr. Hinkle's testimony that he has seen "probably 20" machines leak when pulling them to his vehicle for servicing. Wal-Mart used Mr. Hinkle's testimony about the number of stores he visits per week, and the approximate number of machines he services, which it then multiplied by some unknown number of weeks in a year.

The lack of foundation for the calculation is readily apparent. Wal-Mart's hypothetical does not account for the time that Mr. Hinkle is not present in the store between his service calls. He testified that, except for Wal-Mart, his accounts are on 20, 40, 60 or 80 day cycles. R. 632 (Hinkle Depo, 17:5-23). As for Wal-Mart, he services those accounts approximately every two weeks. R. 632-633 (Hinkle Depo, 20:15-21:8). In addition, there is no testimony from Mr. Hinkle that indicated how many stores he has serviced over the 8 year period. If is unknown if he started with 20 account, 50 accounts or 300 accounts in the years prior to his deposition.

Accepting Mr. Hinkle's testimony at face value, if a machine was leaking when he arrived at a store to service it, then one can infer or presume that the machine still had water in it which had not been emptied. In addition, one can presume that the machine was leaking when it was returned by a customer, and perhaps, leaking if rented by another customer before Mr. Hinkle arrived to service the machine. In fact, if the machine was not in the store or kiosk on the day that Mr. Hinkle arrived, it could be anywhere from 14 to 80 days before he might have an opportunity to inspect the machine again. If that leaking machine was rented even once, twice, or five times, in that 14-80 day period, and it leaked or spilled water onto the floor, Mr. Hinkle would have no knowledge of that.

In addition, if the machine leaked either at a Wal-Mart or another retailer, the spill would presumably have been cleaned up by an employee of the retailer. As to the Wal-Mart store on Overland, for example, no record would be kept of where the spill was cleaned up nor would there be any assessment to determine where the liquid had come from. Mr. Hinkle, obviously, would have no knowledge of any spills or leaks that occurred between his twice monthly visits to Wal-Mart stores, nor of spills or leaks that occurred between the 20, 40, 60, or 80 day cycles of other accounts.

Finally, if, as Wal-Mart urges, the possibility of a liquid escaping from a machine were so de minimus, why would Mr. Hinkle, the person most knowledgeable about the machines and their propensity to leak or spill, recommend that floor mats be placed in front of the kiosk:

> Q. At any of the Walmarts where you have accounts --so this can be broader than the Treasure Valley--are there floor mats in front of any of those kiosks?

A. No.

Q. Have you ever recommended that a floor mat be in front of a kiosk?

A. Yes.

Q. And when have you recommended that?

A. What date? Probably a year ago.

Q. Who did you make that recommendation to?

A. My boss Eric White.

Q. And why did you make that recommendation?

A. Just to avoid any problems in case there ever was water.

R. 651 (Hinkle Depo, 96:8-21).[3]

C. Wal-Mart Was on Constructive Notice of the Actual Spill Because at Least Two Employees Should Have Discovered the Liquid.

In addressing this aspect of Ms. Brooks' opening brief, Wal-Mart contends that Ms. Brooks has "failed to present evidence that supports a finding as to the source of the liquid and how long the liquid was on the floor prior to the fall." This is consistent with Wal-Mart's factual statement in which Wal-Mart contends that the source of the liquid which caused Ms. Brooks to fall, and the length of time it was on the floor, is "unknown." That is not what the record shows. The fact that a puddle of water, or liquid, was on the floor is undisputed. Ms. Brooks put forth admissible evidence as to the source of that liquid, the location of that liquid, and the period of

[3] Mr. Hinkle's recommendation was made after Ms. Brooks fell. However, the recommendation was made without knowledge of that incident as Mr. Hinkle was unaware of Ms. Brooks' injury until a few weeks before his deposition which was taken on February 5, 2016. R. 634 (Hinkle Depo, 25:11-26:13)

time that the liquid was on the floor. Those facts were taken in a light most favorable to Ms. Brooks and presumed to be true by the district court which is consistent with the applicable standard of review.

Wal-Mart contends that the surveillance video does not show the presence of liquid, let alone the source of the liquid. While it is true that the video does not show the liquid on the floor, that is related to the quality of the video and the glare from the flooring. Regardless, the video does not lead to an inference that there was no liquid present as it is undisputed that Ms. Brooks slipped and fell and the cause of that slip and fall was a puddle of liquid on the floor. Nor does it lead to an inference that the source of the liquid is something other than what Ms. Brooks claims it to be. That is because Wal-Mart has offered nothing but speculative theory that the liquid came from some other source. Ms. Brooks offered the video, the testimony of a Wal-Mart employee that the liquid appeared to run towards the Rug Doctor machine (kiosk), the still photo overlays which reflect that Ms. Brooks fell in the precise location where the customer lifted the Rug Doctor machine into the shopping cart, and the testimony of Spencer Hinkle. *See,* Appellant's Brief, pp. 7, 8, 10, 11.

Wal-Mart's argument simply underscores the inherently factual nature of the issue. Moreover, for purposes of establishing notice of the actual condition, it is mostly irrelevant because there was a puddle of water on the floor prior to Ms. Brooks' fall and at least one, if not two, employees had the opportunity to observe the spill and either clean it up or warn Ms.

Brooks of its presence. The video reflects the actions of each employee and whether or not a jury believes that they were being "vigilant," as trained, is a question of fact.[4]

III. CONCLUSION

For the reasons set forth, both in Appellant's Brief, and here, Ms. Brooks respectfully submits that the district court's grant of summary judgment and dismissal of the case against Defendant/Respondent Wal-Mart should be reversed and the case should be remanded for trial on the merits.

RESPECTFULLY SUBMITTED this 30th day of June, 2017.

COMSTOCK & BUSH

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[4] Wal-Mart chooses not to respond to Ms. Brook's argument regarding the employee who was accompanying her at the time of her accident. As the record reflects, that employee did not observe the spill, or if he did, he did not warn Ms. Brooks about the condition. R. 364. (Brooks Depo, 154:16-19).

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2017, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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