IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SHANNON McELYEA, a married woman,	)	No. 66361-5-I
Appellant,	)	
v.	)	
WAL-MART STORES, INC., a Delaware corporation,	)	UNPUBLISHED OPINION
Respondent.	)	FILED: September 19, 2011

Ellington, J. — A landowner must take reasonable precautions to protect its invitees from conditions on the land that pose an unreasonable risk of harm. Shannon McElyea slipped and fell on ice in Wal-Mart's parking lot. Because McElyea failed to show the condition of the parking lot was unreasonably dangerous, summary judgment for Wal-Mart was appropriate. We affirm.

BACKGROUND

On December 20, 2008, Shannon McElyea and her husband went to Wal-Mart. At the time, the Seattle area was experiencing abnormally cold temperatures and snow had fallen earlier in the week. The Wal-Mart parking lot had been plowed, de-iced, and sanded the day before, but some compacted snow and ice remained. The lot was fairly full, so the McElyeas parked toward the back of the parking lot and made their way into the store using a pedestrian walkway.[1] Wal-Mart had applied de-icing salt just outside

the store's entrance.

After shopping, Shannon McElyea did not use the pedestrian walkway to reach her car but rather walked down the main driveway of the parking lot, carrying a bag of groceries in each hand. She slipped and fell, injuring her back, neck, stomach, and head. She also fractured her wrist, which required surgery to repair.

A surveillance video of the parking lot on the day of the incident shows the lot was quite busy. Pedestrians, including McElyea, appear to be walking at normal speeds and with normal gait. The cars in the video do not appear to be having trouble navigating because of a slick surface.

McElyea sued Wal-Mart alleging it negligently caused her personal injuries. The trial court granted summary judgment in favor of Wal-Mart. McElyea appeals.

DISCUSSION

We apply the usual standard of review for summary judgment.[2]

In any negligence claim, the plaintiff must prove duty, breach, causation, harm, and proximate cause.[3] In actions involving premises liability, the scope of the duty is determined by the plaintiff's status.[4] The parties in this case agree that McElyea was an invitee at the time of her injury. The criteria for determining a landowner's liability to

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[1] The parties discuss the adequacy and use of this path at length, but it is irrelevant to the determinative issue in this case: whether McElyea provided evidence of an unreasonable risk posed by the condition of the parking lot on the day of her fall.

[2] We review summary judgment de novo, considering all facts and inferences in the light most favorable to the nonmoving party. Iwai v. State, 129 Wn.2d 84, 95-96, 915 P.2d 1089 (1996). Summary judgment is appropriate where the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.; CR 56(c).

[3] Ford v. Red Lion Inns, 67 Wn. App. 766, 769, 840 P.2d 198 (1992).

[4] Iwai, 129 Wn.2d at 90-91.

its invitees are laid out in the *Restatement (Second) of Torts*:

> § 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
>
> (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.
>
> § 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 or obviousness.[5]

Thus, a possessor of land has a duty to protect an invitee against even known or obvious dangers where the possessor should anticipate harm to the invitee, notwithstanding the invitee's knowledge of obviousness.[6] But the possessor of land is not liable to an invitee for injuries caused by a condition on the land unless the owner knows or should know the condition presented an unreasonable risk of harm.[7]

Whether a landowner exercised reasonable care to protect its invitees is a question of fact so long as the record supports a reasonable inference that its duty was breached.[8] McElyea contends summary judgment was inappropriate because Wal-

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[5] Restatement (Second) of Torts §§ 343, 343A(1) (1965).

[6] Kinney v. Space Needle Corp., 121 Wn. App. 242, 249-50, 85 P.3d 918 (2004).

[7] Fredrickson v. Bertolino's Tacoma, Inc., 131 Wn. App. 183, 189, 127 P.3d 5 (2005).

[8] See Leonard v. Pay'n Save Drug Stores, Inc., 75 Wn. App. 445, 451-52, 880 P.2d 61 (1994).

Mart knew the condition of its parking lot on the day of her fall posed an unreasonable risk and there is a question of material fact as to whether Wal-Mart failed to exercise reasonable care to protect her from that risk.

McElyea points to Maynard v. Sisters of Providence, in which the court determined an icy parking lot posed an "unreasonable risk."[9] There, Maynard was a hospital visitor who slipped and fell in the visitors' parking lot. He had noticed snow and ice conditions over the course of two days, including the day of his fall. That day, the parking lot had not been cleared of ice and snow, nor did he notice the hospital taking measures to do so. However, he had seen sanding taking place in the staff parking lot. When attempting to leave the hospital, he could not get his car out of the lot because of the slick conditions. A man with chains was also unable to get Maynard's car out. While attempting to help another person push their car, Maynard slipped and was injured.[10] Maynard sued the hospital for negligence. The court granted summary judgment in favor of the hospital.[11]

This court reversed, concluding Maynard had presented evidence that the condition of the hospital parking lot the day of his fall posed an unreasonable risk. In addition to the trouble he and others had in the parking lot, the aid car dispatched to help Maynard after he fell could not get up the hill to help him because of the icy conditions, even with chains. And when one of the people in the aid car stepped out of the car, he immediately slipped and fell.

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[9] 72 Wn. App. 878, 883, 866 P.2d 1272 (1994). Whether there was an "unreasonable risk" can be determined by the court as a matter of law. See id.

[10] Id. at 879-80.

[11] Id. at 880.

McElyea points out that there were record low temperatures in the Seattle area for at least eight days prior to the incident.[12] She contends that Wal-Mart knew or should have known there was an unreasonably risky condition in its parking lot because (1) Wal-Mart had a large stock of de-icer for sale on the day of McElyea's fall; (2) it had salted the entrance of its store on the day of McElyea's fall; and (3) it had hired an outside contractor to de-ice and sand at least part of its parking lot the day before McElyea's fall.

But Wal-Mart's stock of de-icer for sale only shows it anticipated customer demand for the product in the wintertime. It does nothing to demonstrate the condition of the parking lot. Engagement of a contractor to de-ice and sand part of the parking lot the day before the incident is not evidence that Wal-Mart knew or should have known of or foreseen an unreasonably dangerous condition on the parking lot the following day, especially given the surveillance video showing both vehicle and pedestrian traffic moving along with no indication that the parking lot was particularly slick. Finally, the fact that McElyea slipped and fell is not itself sufficient to show there was an unreasonably dangerous condition.[13]

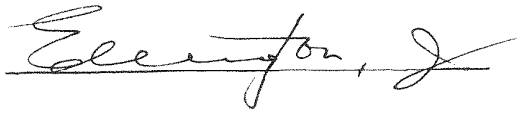
[12] She acknowledges that sole reliance on accumulations of snow and ice is insufficient to demonstrate the existence of unreasonable risk. See Ford, 67 Wn. App. at 772; see also Iwai, 129 Wn.2d at 97 (sole fact that weather was around freezing at time plaintiff fell in icy parking lot not sufficient to show defendant knew or should have known dangerous condition existed).

[13] See Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 451, 433 P.2d 863 (1967).

McElyea argues that, under the *Restatement* governing obvious dangers, Wal-Mart should have anticipated the harm to her. The comment to that section explains that this applies "'where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the advantages of doing so would outweigh the apparent risk.'"[14] McElyea still must show there was an unreasonable risk in the first place. She does not. Summary judgment was appropriate.

Wal-Mart requests attorney fees on appeal citing RCW 4.84.185, which authorizes an award of fees against a nonprevailing party in a frivolous appeal.[15] The facts and issues presented in this case are comparable to several published cases with varying outcomes.[16] We do not agree that McElyea's appeal is frivolous and deny the request.

Affirmed.



[14] Iwai, 129 Wn.2d at 94 (alterations in original) (quoting Restatement (Second) of Torts § 343A cmt. f (1965)).

[15] "An appeal is frivolous when there are no debatable issues on which reasonable minds could differ, when the appeal is so devoid of merit that there was no reasonable possibility of reversal, or when the appellant fails to address the basis of the trial court's decision." Matheson v. Gregoire, 139 Wn. App. 624, 639, 161 P.3d 486 (2007). All doubts as to whether an appeal is frivolous should be resolved in favor of the appellant. Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980).

[16] See, e.g. Musci v. Graoch Assocs. Ltd. P'ship, 144 Wn.2d 847, 31 P.3d 684 (2001); Iwai, 129 Wn.2d 84; Maynard, 72 Wn. App. 878; Ford, 67 Wn. App. 766.

WE CONCUR:

Cox, J.

Grosse, J.