

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

SHERRY HALEY, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 99-168-B  
 )  
 WAL-MART STORES, INC., )  
 )  
 Defendant )

**Findings of Fact and Conclusions of Law**

The parties tried this matter before me on March 7, 2000, in Bangor, Maine. Based upon the evidence presented and the deposition testimony which was made part of the record, I find the following facts:

On February 3, 1998, the Plaintiff, Sherry Haley, went to the Wal Mart store in Farmington, Maine with her three year old son. Ms. Haley intended to purchase birthdays gifts for her husband and visited the store's automotive department. While shopping Ms. Haley found a "creeper" device which she determined to be an appropriate gift. Wal-Mart displayed the automotive creepers on a shelf, the bottom of which was approximately the height of Ms. Haley's upper abdomen, just above her waist. Ms. Haley reached up with both hands and removed a creeper from the stack of creepers leaning against the wall.

As she turned to place the creeper into her shopping cart, an undetermined number of creepers (more than one) fell from the shelf striking her back in the area of her right shoulder. Ms. Haley felt immediate pain, falling back on her heels and seeing stars. When she regained her balance she picked up the fallen creepers either returning them to the shelf or moving them to the

side of the aisle on the floor. Ms. Haley then proceeded to the ladies' room where she was sick to her stomach. After regaining her composure she went to the Hallmark card section of the store where she informed a salesclerk of the incident. Ms. Haley then completed her shopping and checked out of the store.

Rather than traveling directly to her home in Rangeley, Maine, Ms. Haley stopped at her husband's place of business to inform him of the accident. At the time she spoke with him she was in pain. Mr. Haley advised her to call the store and notify the manager of the incident, which she did. The next morning Ms. Haley visited her family physician at the Rangeley Health Center. He treated the shoulder by providing her with muscle relaxants, recommending physical therapy and ultimately referring her for a MRI. Finally in May, 1998, Ms. Haley was admitted for surgery at the Franklin Memorial Hospital. She underwent a three hour operation on her shoulder performed by Dr. Gregory Leather. The three part operation consisted of an arthroscopy for evaluation of the shoulder joint, the debridement of the rotator cuff, and the repair of the periscapular muscles which involved the attachment of a metal cable for reinforcement of the shoulder blade area.

Following the operation Ms. Haley was in considerable pain for at least one week and unable to perform many normal household tasks. After the surgery she again undertook physical therapy sessions. Eventually a second less painful surgery was performed on her shoulder to remove the steel cable. Ms. Haley's total medical bills in connection with the shoulder treatment were \$22,167.88. The evidence establishes that more likely than not all of those bills were causally connected to the incident at Wal Mart. The medical testimony connected to the portion of the surgery involving the debridement of the rotator cuff was ambiguous, but it was clearly

part of the same surgical procedure and appeared to be a very minor process. As to that particular piece of the surgery, Dr. Leather offered no opinion as to causation. However, the plaintiff established that any prior shoulder problem which she experienced had resolved long before this accident and that she was symptom free in her right shoulder at the time of new injury.

Ms. Haley currently continues to have sporadic pain in her shoulder and has lost some ability to move her shoulder, lift her arms, and lift heavy objects. In practical terms this means that Ms. Haley is unable to do things like drying her hair, shaving under her arms, or working in a capacity where she would have to lift heavy objects. In medical terms Dr. Leather has assessed a 25% impairment of the upper extremity and a 15% whole person impairment. That assessment is unrefuted by any evidence. Ms. Haley also has two scars on her back which are apparently a permanent disfigurement.

Ms. Haley was not employed full-time at the time of the accident nor is she currently in the position of seeking full-time employment, but for her injury. Since the time of the accident she has given birth to another child and she concedes that she would not be in the labor force at this time. Ms. Haley asserts, with no documentation or corroboration, that at the time of the accident she would have been employed in some fashion and that she lost between \$4,000-\$5,000 because of her inability to work after the accident and prior to the birth of her new child. However, Ms. Haley's tax returns indicate that in 1997, the year prior to the accident, she earned approximately \$2,000.00. In 1995 she earned \$128.00 and in 1996 she did not earn any income. In 1998, the year of the accident, she apparently earned approximately \$600.00. Her various seasonal jobs have included light housekeeping and collecting admissions at the door of a local

nightclub. Ms. Haley appears to have approximately the same earnings post-accident as she had prior to the accident and while her employment opportunities may be narrowed due to the impairment to her shoulder, I am unable to quantify that loss in terms of actual loss of earnings or earning capacity.

Wal Mart has national policies regarding safety in its stores including such things as safety teams, “bump” checks to insure stability in stacking, and daily “sweeps” of the store to check for merchandise which is misplaced or dangerously displayed. However, there is no uniform national policy regarding how “creepers” or any item should be displayed for sale. Those decisions are left to the individual store managers. (*Leyenberger Depo. at 16, lines 7-13*).

In this case Wal-Mart displayed the creepers in a vertical fashion leaning against the solid backing of the shelving unit and stacked one in front of the other. There was no chain or other restraint toward the top of the unit, each creeper being approximately three feet tall when standing in the vertical fashion. The shelving unit had a small lip across the front. A customer, even one as tall as Ms. Haley, who is five feet eleven inches tall, had to reach up and then lift the eight and one-quarter pound item down from the shelf. Gravity controlled the stability of the display. (*Leyenberger Depo. at 14, line 19*). It is not clear from the testimony and photographs how many creepers were displayed, but based upon the evidence I find that at least three and perhaps as many as five creepers were leaning against each other on the shelf. While the shelf itself does not appear to be wide enough for five creepers to be placed one in front of the other, there was room on the shelf beside the creeper removed by Ms. Haley, and additional creepers could have been leaning to the side as well. Ms. Haley does not have a specific memory about this, but she does remember that there was more than one other creeper on the display.

## Discussion

### I. Negligence

The mere fact that an accident happened or an injury occurred, by itself, does not permit one to draw any inference that the accident or injury was caused by negligence or by anyone's fault. *Rice v. Seabrook Valley Hospital*, 487 A.2d 639, 641 (Me. 1985). A defendant store has "a positive duty of exercising reasonable care in providing reasonably safe premises" *Currier v. Toys 'R' Us, Inc.*, 680 A.2d 453, (Me. 1996) (quoting *Milliken v. City of Lewiston*, 580 A.2d 151, 152 (Me. 1990)). A store is not required to guarantee the absolute safety of its premises. Its duty is to use ordinary care to ensure that the premises are reasonably safe, guarding against all reasonably foreseeable dangers, in light of the totality of the circumstances. *Hanson v. Madison Paper Co.*, 564 A.2d 1178 (Me. 1989).

In the present case I am satisfied that Wal Mart displayed the creepers in a negligent fashion. The photographs which were admitted into evidence demonstrate the potential hazard. It was certainly foreseeable that customers would reach up and remove the item from the shelf. It was also apparent that the creeper was an unboxed, unwieldy item with wheels and a black cushioned pillow which meant that although the items leaned, one against the other, the possibility of movement was great given that customers would move items repeatedly during the course of a day. Wal Mart relied upon gravity to keep the creepers on the shelf, but given that customer conduct would likely push the creepers into more upright positions thereby shifting the center of gravity, it was reasonably foreseeable that the creepers might topple over and injure someone.

There were a number of things Wal Mart could have done to avoid this accident. Wal Mart chose to display more than one or two creepers at a time, and I am satisfied that crowding more creepers onto the shelf, as described by Ms. Haley contributed to the instability. Furthermore, the creepers could just as easily have been leaned against each other in a horizontal fashion or stacked at a lower level.

## **II. Proximate Cause**

In order for negligence to be actionable it must be a proximate cause of injury. An injury is legally caused by an act, or failure to act, whenever the act or failure to act played a substantial part in bringing about or actually causing the injury; and the injury was either a direct result or a reasonably foreseeable consequence of the act or failure to act. Alexander, *Maine Jury Instruction Manual*, § 7-36 (3<sup>rd</sup> ed. 1998). Here, it is apparent that Wal Mart's negligence proximately caused Ms. Haley's injury. She testified that the creepers caused her injury and Dr. Leather corroborated that the force of the creepers striking her shoulder could cause the type of injury found in Ms. Haley's shoulder.

## **III. Comparative Negligence**

Wal Mart has asserted that if it was negligent and if its negligence was a proximate cause of injury, Ms. Haley was also negligent and caused her own injury. Based upon the evidence presented I do not find that Ms. Haley was negligent in any fashion. As a shopper in the store she would have no reason to believe that the removal of an item offered for sale would endanger her own safety by causing the other items to topple from the shelf. She certainly had no responsibility for determining how the items were displayed for sale.

#### **IV. Damages**

Based upon the evidence presented I find that Ms. Haley's damages consist of the following components: (1) medical bills and expenses; (2) pain and suffering; and (3) permanent impairment. Applying the rule of *Lovely v. Allstate Insurance Co.*, 658 A.2d 1091 (Me. 1995), to the facts of this case, the defense has not persuaded me that a pre-existing condition or injury was responsible for any of Ms. Haley's damages. Although apparently her right shoulder has always been lower than the left and she suffered a strain injury to her shoulder in 1992 - 1993, the evidence supports the conclusion that her current injuries are all related to the incident at Wal Mart.

I find from the evidence that Plaintiff's medical damages are \$22,167.88, her remaining damages are for pain and suffering and permanent impairment. Although Ms. Haley has two significant surgical scars on her back, the most substantial permanent impairment is the loss of movement in her shoulder area. Although I do not find that loss to have substantially reduced her earning capacity, it has interfered with her ability to perform certain daily living tasks. Additionally both the injury and the attendant circumstances produced pain and discomfort and that pain was magnified during the procedures attendant to the surgery. The pain and suffering and permanent impairment components of this case amount to \$50,000.

**Conclusion**

Judgment is entered for the Plaintiff on the Complaint in the amount of \$72,165.88, plus interest and costs.

*So Ordered.*

Dated this 13<sup>th</sup> day of March, 2000.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

CLOSED STNDRD

U.S. District Court  
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-168

HALEY v. WAL-MART STORES, INC  
Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK  
Demand: \$0,000  
Lead Docket: None  
Dkt # in FRANKLIN SUPERIOR

Filed: 06/30/99

Nature of Suit: 360  
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Personal Injury

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