IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40140

ELAINE C. LINSCOMB,

Plaintiff-Appellee,

versus

WAL-MART STORES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas
(1:91-CV-554)

(January 25, 1995)

Before REAVLEY, DUHÉ and PARKER, Circuit Judges.

PER CURIAM:[*]

The verdict and judgment are supported by evidence, except for the punitive damages and the future medical. We eliminate the punitive damages and reduce the future medical award from $20,000 to $4,000. We explain in the order of Wal-Mart's points of error.

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

1. This record will not support a finding that a managing agent of Wal-Mart was consciously indifferent to the safety of his customers. The jury was entitled to find that management knew of defects on the parking lot, that the concrete was broken and uneven at places. The jury could find a reasonable person should have foreseen harm to people walking there unless the lot was repaired or barricaded. But that does not suffice if a defendant is to be punished with punitive damages. It must be proved that management, in this case Alton Adair, knew that the damage was so great that someone would be injured unless more was done. Or, at least, that the prospects were of such indifference to him that he had no concern for danger presented by the lot's imperfections. The record does not convict Adair of that callousness. He looked at the lot regularly, had assistants touring it weekly and employees cleaning it daily, knew that thousands of customers traversed it without mishap, and did resurface part or all of the lot before and after Linscomb's fall.

We need not rest our decision on recent holdings of the Texas Supreme Court requiring knowledge of "an extreme risk of harm." Older precedent of that court requires conscious disregard for the safety of the injured invitee. Wal-Mart's company policy against confession of fault and Adair's failure to investigate this incident do not prove that Adair consciously disregarded Linscomb's welfare.

2. The district court acted within its discretion in admitting evidence of the Wal-Mart employee's post-accident conduct and the company policy.

3. Linscomb's recovery of actual damages is clearly warranted. Stelly testified Wal-Mart knew of parking lot defects. The employees surveyed the lot weekly. Linscomb fell on an unusual displacement of the concrete that did not occur overnight. The jury could easily find as it did.

4. Wal-Mart is correct about the lack of evidence to support the $20,000 award for future medical care. Linscomb's testimony to the effect that she would agree to an operation to give her relief is no support for the jury's grant of $16,000 for that purpose.

5. The trial judge's conduct of the trial was proper in all respects.

The judgment will be modified to reduce the future medical award to $4,000 and eliminate the punitive damage award. The case is remanded for entry of appropriate judgment.

MODIFIED and REMANDED.