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## Summary of Foster v. Costco Wholesale Corp., 128 Nev. Adv. Op. 71

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*Foster v. Costco Wholesale Corp.*, 128 Nev. Adv. Op. 71 (Dec. 27, 2012) <sup>1</sup>

## NEGLIGENCE – OPEN AND OBVIOUS DANGEROUS CONDITION

### **Summary**

Appeal from a district court summary judgment in a negligence action in which the court considered the landowner's duty of care in regard to open and obvious dangerous conditions on the landowner's property.

### **Disposition/Outcome**

In recognition of the continuing development of the law governing landowner liability, the Court adopted the rule set forth in the Third Restatement.<sup>2</sup> Under this rule, the open and obvious nature of a dangerous condition does not automatically relieve a landowner from the general duty of reasonable care. Instead, the fact that a dangerous condition may be open and obvious bears on the assessment of whether reasonable care was exercised by the landowner.

### **Factual and Procedural History**

In October 2005, Foster visited a Costco store in Henderson, Nevada. While in the store, Foster tripped over the corner of a pallet, which was covered by a box. Foster fell and sustained injuries. Foster subsequently sued Costco in district court, alleging that Costco was negligent in creating a dangerous condition and in failing to warn Foster of the existence of the dangerous condition.

Costco filed a motion for summary judgment, contending that the presence of the pallet was open and obvious and that it was not liable for injuries arising from an open and obvious hazard. The district court granted Costco's motion for summary judgment, finding that Costco did not breach its duty of care because under the circumstances, Costco had no duty to warn Foster or to remedy the open and obvious condition. Foster appealed the summary judgment.

### **Discussion**

Chief Justice Cherry wrote the opinion for the three justice panel. In the opinion, the Court examined the evolution of a landowner's duty of care to entrants on the landowner's property and refined the current status of that duty.

Traditionally, a landowner had no duty to protect entrants on the landowner's property from open and obvious dangers. The rationale of the open and obvious doctrine is that the defendant should not be held liable for harm caused by a danger that was open and obvious to the person suffering harm. However, in 1969 the Court adopted the

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<sup>1</sup> By Kelli Michelle DeVaney.

<sup>2</sup> Restatement (Third) of Torts: Physical and Emotional Harm §51 (2012).

Second Restatement approach which states that the entrants knowledge of danger does not inevitably bar recovery.<sup>3</sup> Under the Second Restatement, a landowner should anticipate, and is liable for failing to remedy, the risk of harm from obvious hazards when an invitee could be distracted from observing or avoiding the dangerous condition, or may forget what he or she has discovered, and the landowner has “reason to expect that the invitee will nevertheless suffer physical harm.”<sup>4</sup> This principle is known as the distraction exception to the open and obvious rule.

The Court noted that the duty espoused in the Third Restatement is similar to, and includes, both the general landowner’s duty imposed with regard to invitees in the Restatement (Second) of Torts § 343, and the “distraction exception” to the open and obvious rule found in Restatement (Second) of Torts § 343A.<sup>5</sup> However, the duty in the Third Restatement is amplified because it does not just extend to invitees, but to all entrants on the land.<sup>6</sup> Therefore, under the Third Restatement, landowners bear a general duty of reasonable care to all entrants, regardless of the open and obvious nature of dangerous conditions. Under the Third Restatement, the “duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm.”<sup>7</sup>

While the open and obvious nature of the conditions does not automatically preclude liability under the Third Restatement, it instead is part of assessing whether reasonable care was employed.<sup>8</sup> In considering whether reasonable care was taken under the Third Restatement, the fact-finder must also take into account the surrounding circumstances, such as whether nearby displays were distracting and whether the landowner had reason to suspect that the entrant would proceed despite a known or obvious danger. The Court also stated that courts must be consider the entrant’s actions and whether the entrant failed to exercise reasonable self-protection in encountering the danger in determining comparative negligence in awarding damages.<sup>9</sup>

The Court noted that the district court relied on *Gunlock v. New Frontier Hotel*<sup>10</sup> but determined that subsequent development of the open and obvious doctrine compelled the reversal of summary judgment. In adopting the Third Restatement approach, the Court found that there were genuine issues of material fact as to whether Foster had actually observed the pallet and whether Costco had breached its duty of care to Foster by allowing the conditions to exist and by permitting Foster to encounter those conditions.

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<sup>3</sup> *Rogers v. Tore, Ltd.*, 85 Nev. 548, 550; 459 P.2d 214, 215 (1969).

<sup>4</sup> Restatement (Second) of Torts § 343A comment f (1965).

<sup>5</sup> “[A] land possessor owes a duty of reasonable care to entrants on the land with regard to: (a) conduct by the land possessor that creates risks to entrants on the land; (b) artificial conditions on the land that pose risks to entrants on the land; (c) natural conditions on the land that pose risks to entrants on the land; and (d) other risks to entrants on the land when any of the affirmative duties ... is applicable.” Restatement (Third) of Torts § 51.

<sup>6</sup> Restatement (Third) of Torts § 51.

<sup>7</sup> *Coln v. City of Savannah*, 966 S.W.2d 34, 43 (Tenn. 1998).

<sup>8</sup> Restatement (Third) of Torts § 51 comment k.

<sup>9</sup> *Id.*

<sup>10</sup> 78 Nev. 182, 370 P.2d 682 (1962).

## **Conclusion**

The district court erred when it found as a matter of law that Costco did not breach a duty of care because the hazard created was open and obvious to Foster. The summary judgment was reversed and the case was remanded to determine whether the pallet was an open and obvious condition, whether Costco acted reasonably under the circumstances, and whether Foster failed to exercise reasonable self-protection. On remand, the Court ordered that Costco's alleged negligence be determined pursuant to the Third Restatement.