Filed 12/13/17 Wal-Mart Stores v. Superior Court CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WAL-MART STORES, INC., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; GRACELYNN JUN, Real Party in Interest.	No. B284803 (Super. Ct. No. MC026307)

ORIGINAL PROCEEDING; petition for writ of mandate. Randolph A. Rodgers, Judge. Writ granted in part and denied in part.

Lewis Brisbois Bisgaard & Smith, Steven E. Meyer, Caroline E. Chan, David B. Tipton, and Anny Edinchikyan for Petitioner.

Law Offices of Berglund & Johnson, Daniel W. Johnson, for Real Party in Interest.

No appearance for Respondent.

Plaintiff Gracelynn Jun sued defendant Wal-Mart Stores, Inc. (Wal-Mart) after she was struck by a motorized shopping cart and injured by its sharp edges. Respondent court granted her discovery motion in part and ordered Wal-Mart to produce records of all litigation involving motorized shopping cart collisions at all Wal-Mart stores nationwide. We grant in part Wal-Mart's petition for extraordinary relief and limit discovery to prior lincidents involving pedestrians struck by the sharp edges of a motorized shopping cart or claims that Wal-Mart's shopping carts lacked bumper guards or other safety mechanisms, including edge coverings, warning buzzers, or electronic stop devices.

FACTUAL AND PROCEDURAL BACKGROUND

On June 17, 2014, Jun was at the Wal-Mart store in Lancaster. As she was putting her shopping cart away, a man on a motorized shopping cart provided by Wal-Mart struck her, lacerating her right Achilles tendon. Jun filed a personal injury action against Wal-Mart, alleging defendant's motorized shopping carts were defective and dangerous, i.e., they lacked safety bumpers, safety guards, rubber insulation, warning buzzers, electronic safety stop devices, or other safety features to prevent serious injuries to persons struck by them.

At issue in this writ petition are two requests for production of documents (RFPs) that Jun propounded to Wal-Mart:

> RFP No. 25: All DOCUMENTS regarding prior claims in the past ten years involving the use and/or accidents as a result of the use of a motorized shopping cart at Walmart stores.
>
> RFP 42: All DOCUMENTS that reflect complaints made to Walmart regarding the safety of motorized shopping carts being supplied at its stores during the 5 years preceding the INCIDENT.

In supplemental responses, Wal-Mart agreed to produce responsive documents for claims involving motorized shopping carts for the 54 stores located in Los Angeles County for the five-year period before Jun's accident. Jun moved to compel further responses.

On August 3, 2017, the trial court granted Jun's motion to compel in part, as follows:

> The motion is GRANTED as to Request for Production Nos. 25 & 42, but as an initial matter is limited to discovery of litigation involving motorized shopping cart collisions within the United States during the period of five years before the incident at issue to present; provided, however, that Wal-Mart shall also send an electronic inquiry to the management of all Wal-Mart stores asking whether any manager has any knowledge of any incident between a motorized shopping cart and pedestrian, regardless of date, and, if so, to provide the approximate date, location and general description of the incident, on or before Sept[ember] 3, 2017.

On September 1, 2017, Wal-Mart filed a petition for writ of mandate. We granted a stay of the discovery order and issued an alternative writ of mandate, inviting respondent court to modify its discovery order by adding the following italicized language: "discovery of litigation involving *a pedestrian who is struck by the sharp edges of a motorized shopping cart or claims that Wal-Mart's shopping carts lacked bumper guards or other safety mechanisms, including edge coverings, warning buzzers, or electronic stop devices*." Respondent court conducted a hearing pursuant to *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233 and declined to modify its order. We now grant the petition for writ of mandate.

STANDARD OF REVIEW

We apply the abuse of discretion standard to review discovery orders. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186; *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 380.) However, "'[t]he scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action. . . ." Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.'" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

ANALYSIS

Relevance

"Unless otherwise limited by order of the court . . . any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved . . . if the matter

either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010.) Appellate courts should not "reverse a trial court's grant of discovery under a 'relevancy' attack unless it concludes that the answers sought by a given line of questioning cannot as a reasonable possibility lead to the discovery of admissible evidence or be helpful in preparation for trial." (*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 173.)

Evidence of prior similar incidents is relevant, reasonably calculated to lead to the discovery of admissible evidence, and may demonstrate "the extent of the risk which should have been foreseen and guarded against." (*Morfin v. State of California* (1993) 12 Cal.App.4th 812, 817 (*Morfin*).) It may also reveal a common factor contributing to the accidents. (*Davies v. Superior Court* (1984) 36 Cal.3d 291, 301.)

In *Morfin*, the plaintiffs were seated inside a DMV office when a car crashed into the building, injuring them. (*Morfin*, *supra*, 12 Cal.App.4th at p. 814.) They sued, alleging the building was designed in a way that presented an unreasonable risk of injury to its occupants. (*Id*. at p. 815.) In a 2-1 decision, the Court of Appeal held the plaintiffs were entitled to interrogatory responses about all vehicle collisions with any California DMV building for 10 years before the accident. (*Id*. at p. 817.) The majority noted the state's witnesses testified the DMV office and parking lot in question were constructed under a "standard design used in virtually all DMV's." (*Id*. at p. 816.) In light of that similarity, vehicle-building collisions at DMV buildings across the state were discoverable. (*Id*. at p. 817.)

Consistent with *Morfin*, we agree with Jun that incidents in Wal-Mart stores beyond Los Angeles County may establish whether Wal-Mart knew or should have known that its motorized shopping carts present a danger to pedestrians. To that extent, the trial court properly expanded the scope of discovery to Wal-Mart stores nationwide, rather than just those in Los Angeles County.

The trial court abused its discretion, however, in compelling the production of documents relating to all types of motorized shopping cart collisions, regardless of the nature or cause of the collision. (See 1 Witkin, Cal. Evidence (5th ed. 2017 update) Circumstantial Evidence, § 108 [to show the cause of an accident, or knowledge of a defect, "[t]he evidence must relate to accidents that are *similar* and occur under *substantially the same* circumstances"].) For example, the current order would include discovery of all litigation where a motorized shopping cart bumped into a parked car or ran over a shopper's purse.

In this case, Jun alleges she was injured when a motorized shopping cart with sharp, unprotected edges struck her, lacerating her Achilles' tendon. She contends bumper guards or other safety feature, such as cart body edge coverings or buffers, warning proximity buzzers, or electronic safety stop devices may have prevented her injury. Accordingly, information reasonably calculated to lead to the discovery of admissible evidence includes prior incidents involving any of those scenarios, whether the injuries were claimed to be the result of poor design or maintenance. (See, e.g., *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 238 [prior accident where child dragging a boogie board tripped and fell into a fire ring not "substantially similar" to burn accident caused when child walked into a fire

ring containing hot coals].) Jun's motion to compel "set forth specific facts showing good cause justifying the discovery" concerning safety hazards of the motorized carts when they collide with pedestrians and Wal-Mart's potential notice of them. (Code Civ. Proc., § 2031.310, subd. (b)(1).)

Jun's argument that she is entitled to broader discovery because she also has alleged Wal-Mart failed to ascertain whether users of the motorized shopping carts were capable of using them in a safe manner was not similarly supported, however. She did not explain, with reference to specific facts, how broader discovery was reasonably calculated to lead to the discovery of admissible evidence as to that claim in general or to the specific allegation that Wal-Mart negligently entrusted the motorized cart to the driver who injured Jun. (See *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 863.)

In support of her argument for broader discovery, Jun points to three other allegations in the complaint: failure to give adequate warnings of the defective nature of the cart, failure to properly maintain the motorized shopping carts, and strict liability based on defective design. But Jun has not demonstrated why limiting discovery to incidents involving pedestrians and motorized carts with sharp edges or without bumper guards or other safety features, including edge coverings, warning buzzers, or electronic stop devices" would not be sufficient to address those issues.

Jun also argues a punitive damages claim could be supported by evidence of a continuing pattern of providing unsafe motorized shopping carts to users who were incompetent to drive the carts and a repeated failure to warn its shoppers of the dangers of the carts. Jun withdrew her claim for punitive

damages some time ago. Discovery "may relate to the claim or defense of the party seeking discovery or of any other party to the action." (Code Civ. Proc., § 2017.010.) And even though "fishing expeditions" may be appropriate in some cases (*Lopez v. Watchtower Bible and Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591), Jun has not shown good cause to permit it in this case and at this stage of discovery.

Oppression

A trial court "shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a).) Wal-Mart argued to respondent court that a nationwide search would impose an unreasonable burden. Its records of prior claims are maintained in paper files at the individual store levels. Thus, responding to Jun's request would require each of more than 3,000 stores to review and locate responsive paper documents. Wal-Mart believes a full response to Jun's request would require "hundreds if not thousands of man-hours."[1]

To reduce the oppression of discovery, the trial court limited the scope of discoverable prior claims to those involving litigation. It also required Wal-Mart to send an electronic inquiry to the management at all Wal-Mart stores asking whether any

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[1] Jun objects to this declaration as hearsay, arguing it was based on the "information and belief" of Wal-Mart's counsel. Jun did not raise this objection in the trial court; it is waived here. (Evid. Code, § 353, subd. (a); *People v. Mattson* (1990) 50 Cal.3d 826, 853-854.)

manager knows of any incident between a motorized shopping cart and pedestrian, regardless of date, and if so, to provide the approximate date, location, and general description of the incident. The trial court acted within its discretion in restricting discovery to litigation and a storewide electronic inquiry, so as to avoid laboriously oppressive review of paper documents by each of Wal-Mart's 4,700 stores. (See, e.g., *Mead Reinsurance Co. v. Superior Court* (1986) 188 Cal.App.3d 313, 318-319.)

Jun's Request for Affirmative Relief, as Set Forth in the Return, Is Not Properly Before This Court

Finally, in her return to the petition for writ of mandate, Jun asserted she is entitled to discovery of prior claims and complaints made to Wal-Mart, whether or not they escalated into litigation. We do not address this argument because Jun did not affirmatively challenge respondent court's order limiting discovery to litigation rather than claims. (See *Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 922 [court may not grant relief to respondent based on arguments raised in opposition].)

DISPOSITION

We now grant in part and deny in part the peremptory writ of mandate. Respondent court's discovery order is modified to read as follows:

> The motion is GRANTED as to Request for Production Nos. 25 & 42, but as an initial matter is limited to discovery of litigation involving a pedestrian who is struck by the sharp edges of a motorized shopping cart or claims that Wal-Mart's

shopping carts lacked bumper guards or other safety features, including edge coverings, warning buzzers, or electronic stop devices, during the period of five years before the incident at issue to present; provided, however, that Wal-Mart shall also send an electronic inquiry to the management of all Wal-Mart stores asking whether any manager has any knowledge of any incident in which a pedestrian is struck by the sharp edges of a motorized shopping cart, regardless of date, and, if so, to provide the approximate date, location and general description of the incident, within 30 days after remittitur issues.

Petitioner Wal-Mart is awarded its costs.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.