Circuit Court for Montgomery County
Case No. 401761V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 547

September Term, 2017

WAL-MART STORES, INC., *et al.*

v.

DIMAS CHAVEZ, *et al.*

Meredith,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: August 17, 2018

A motorist lost control of his car and crashed through the fire doors of a store, grievously injuring a customer. The customer filed suit, alleging that the storeowner breached a duty to take reasonable steps to protect its customers against the foreseeable risk of these sorts of vehicle-into-building crashes. The Circuit Court for Montgomery County submitted the case to a jury, which returned a multi-million dollar verdict against the storeowner. The storeowner appealed.

We conclude that the admissible evidence at trial was sufficient to support the jury verdict, but that the court committed prejudicial error in a number of evidentiary rulings. Consequently, we must reverse the judgment and remand the case for a new trial.

FACTUAL AND PROCEDURAL HISTORY

On July 23, 2013, appellees Dimas Chavez and his wife were shopping at a Sam's Club store in Gaithersburg, when they decided to stop for lunch at the store's café. As Mr. Chavez waited in line to order lunch, a car burst through the nearby fire doors, smashed into the counter along which the queue ran, and struck Mr. Chavez. Mr. Chavez suffered serious injuries, which resulted in the amputation of his leg. He and his wife brought suit against Wal-Mart Stores, Inc., and Sam's East, Inc. (collectively "Wal-Mart"), as well as the driver of the automobile that crashed through the fire doors and the owner of the property on which the store was built.[1]

[1] The driver and property owner are not parties to this appeal. While Wal-Mart Stores, Inc., and Sam's East, Inc., are separate and distinct corporations, they are represented jointly, and throughout the case all parties referred to them simply as "Wal-Mart." For simplicity, we shall do the same.

The store in this case, though built close to three decades before the accident, had been renovated in 2010 to add the café. The café was located just behind the store's front wall, which had been moved approximately 20 feet closer to the parking lot during the renovations. The drive aisles in the parking lot had been reconfigured during the renovation, so that a one-way drive aisle was aimed directly at the steel fire doors in the new front wall. A photograph of the store and a video-recording of the accident show that there is no curb between the parking lot and the pedestrian walkway.[2]

The Chavezes' principal theory of liability was that it is foreseeable that drivers sometimes lose control of their vehicles in parking lots (whether because of medical emergencies, inattention or driver error, or mechanical malfunctions) and crash into buildings. A storeowner like Wal-Mart, the Chavezes contended, has a duty to take reasonable steps to protect its customers against the foreseeable risk that a driver will lose control of a vehicle, crash into the store, and injure customers. The Chavezes called an expert to opine that Wal-Mart had an obligation to install steel safety bollards in front of the areas of the store that are vulnerable to a vehicle-into-building crash, particularly areas where customers are likely to congregate. According to the Chavezes' expert, if Wal-Mart had installed safety bollards in front of the fire doors in the Gaithersburg store,

[2] In the statement of facts in its brief, Wal-Mart discusses almost none of the relevant facts, but it does assert that the driver "jumped the curb" (Brief at 8) before crashing into the building and injuring Mr. Chavez. Wal-Mart's assertion is erroneous: there is no curb to jump.

the bollards would have prevented the driver from crashing through the doors and injuring Mr. Chavez.

On May 23, 2016, a jury found in favor of the Chavezes on all counts and awarded them damages in the amount of $6,476,550.60, which included $3,755,000.00 in noneconomic damages. Wal-Mart filed a timely motion for judgment notwithstanding the verdict, a new trial, and remittitur.[3]

On May 2, 2017, the trial court granted the motion for remittitur, reducing the noneconomic damages to $770,000.00 under Maryland Code (1974, 2013 Repl. Vol.), § 11-108 of the Courts and Judicial Proceedings Article, and reducing the total amount of the judgment to $3,491,550.60. The court, however, denied the remaining motions. This timely appeal followed.

QUESTIONS PRESENTED

Wal-Mart raises six questions, which we have consolidated, reordered, and rephrased for concision and clarity:

[3] The jury verdict was entered on the docket on June 1, 2016. Wal-Mart had 10 days to file a post-judgment motion that would toll the time to note an appeal. *See* Md. Rule 8-202(c); *see also Unnamed Atty. v. Attorney Grievance Comm'n*, 303 Md. 473, 486 (1985) ("when a motion to alter or amend an otherwise final judgment is filed within ten days after the judgment's entry, the judgment loses its finality for purposes of appeal."). The tenth day would have been June 11, 2016, a Saturday. Maryland Rule 1-203 states that if "[t]he last day of the period [of time]" is "a Saturday, Sunday, or holiday," then the "period runs until the end of the next day that is not a Saturday, Sunday, or holiday[.]" Wal-Mart filed its motion within the 10-day period on Monday, June 13, 2016.

I. Did the circuit court err in denying Wal-Mart's motions for judgment and for judgment notwithstanding the verdict?

II. Did the trial court err or abuse its discretion in allowing the Chavezes to assert facts not in evidence in cross-examining Wal-Mart's corporate representative and expert?

III. Did the trial court abuse its discretion in denying Wal-Mart's motion for a mistrial after the mention of property insurance during voir dire?

IV. Did the trial court abuse its discretion in denying Wal-Mart's motion for a mistrial when the Chavezes referred to facts not in evidence in closing argument? [4]

For the reasons stated in this opinion, we conclude that the circuit court did not err in submitting the case to the jury and in denying Wal-Mart's post-trial motion for

[4] Wal-Mart formulated its questions as follows:

I. Whether the Trial Court Erred when it Denied Appellants' Motion *In Limine* to Exclude the Hearsay Evidence, Upon Which the Entirety of Appellee's Case Ultimately Relied.

II. Whether the Trial Court Erred When it Denied Appellants' Motion for Mistrial Upon Mention of Wal-Mart's Insurance During Voir Dire.

III. Whether the Trial Court Erred When It Failed to Grant Appellants' Motion for Judgment at the Close of Appellees' Case-In-Chief.

IV. Whether the Trial Court Erred When It Failed to Prevent the Introduction of Hearsay Evidence as Substantive Evidence on Cross-Examination of Witnesses Baldeh and Collins, Upon Which Appellees Thereafter Relied as Proof of Liability.

V. Whether the Trial Court Erred When It Failed to Grant Appellants' Motion for Judgment At the Close of Evidence.

VI. Whether the Trial Court Erred When It Failed to Grant Appellees' Motion for Mistrial When Appellees Expressly Affirmed Their Reliance on Improperly Admitted Hearsay Evidence as Proof of Liability During

judgment notwithstanding the verdict. We also conclude, however, that the court committed prejudicial error in permitting the Chavezes to assert facts that were not in evidence while cross-examining Wal-Mart's witnesses. For that reason, we must reverse the judgment and remand for a new trial. In view of our disposition of the first two issues, it is unnecessary to address the others.

DISCUSSION

I. MOTIONS FOR JUDGMENT AND JUDGMENT NOTWITHSTANDING THE VERDICT

Wal-Mart complains of the denial of its motion for judgment at the close of all the evidence and the denial of its motion for judgment notwithstanding the verdict.[5] In essence, Wal-Mart argues that the Chavezes did not establish the existence of a duty to install bollards outside the fire doors at the Gaithersburg store. We disagree.

Wal-Mart does not and cannot dispute that it had some duty of care to its customers, the Chavezes: the Chavezes were business invitees – i.e., persons who were invited or permitted to be on Wal-Mart's premises for purposes related to Wal-Mart's business. *See* Maryland Civil Pattern Jury Instruction 24:2. Wal-Mart owes its invitees a duty to ensure that they can "traverse the public portions of its property without

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Closing Argument and Physically and Cited Such Material as if it Was Substantive Evidence.

[5] Wal-Mart also complains of the denial of its motion for judgment at the close of the Chavezes' case, but Wal-Mart withdrew that motion by proceeding with the presentation of evidence after the motion was denied. Md. Rule 2-519(c); Paul V. Niemeyer, Linda M. Schuett, and Joyce E. Smithey, *Maryland Rules Commentary* 560 (4th ed. 2014); *see General Motors Corp. v. Seay*, 388 Md. 341, 351 (2005); *Steward Vill. Shopping Ctr., Ltd. P'ship v. Melbourne*, 274 Md. 44, 49 (1975).

unreasonable risk of injury to themselves." *Dalmo Sales of Wheaton, Inc. v. Steinberg*, 43 Md. App. 659, 665 (1979); *accord* Maryland Civil Pattern Jury Instruction 24.3 (owner or occupier of land has a duty "to use reasonable care to see that those portions of the property that the invitee may be expected to use are safe"). Hence, the issue before us is not whether Wal-Mart had any duty at all, which would be a pure question of law. *Corinaldi v. Columbia Courtyard, Inc*., 162 Md. App. 207, 218 (2005). Instead, the issue is the nature and scope of Wal-Mart's duty, which is a question that "depends for its resolution upon the facts proved in the record." *Dalmo*, 43 Md. App. at 665; *accord Crise v. Maryland Gen'l Hosp., Inc*., 212 Md. App. 492, 523-24 (2013).

In reviewing the denial of a motion for judgment that depends for its resolution upon the facts proved in the record, this Court "perform[s] the same task as the trial court, affirming the denial of the motion 'if there is "any evidence, no matter how slight, that is legally sufficient to generate a jury question."'" *Prince George's Cnty. v. Morales*, 230 Md. App. 699, 711 (2016) (quoting *C & M Builders, LLC v. Strub*, 420 Md. 268, 291 (2011), *which quoted Tate v. Board of Educ. of Prince George's Cnty*., 155 Md. App. 536, 544-45 (2004)). "We assume the truth of all credible evidence on the issue, and all fairly deducible inferences therefrom," and we view the evidence and those inferences "in the light most favorable to the party against whom the motion is made." *Orwick v. Moldawer*, 150 Md. App. 528, 531 (2003) (citation omitted).

The denial of Wal-Mart's motion for judgment notwithstanding the verdict "is reviewed under the same standard as [the] denial of a motion for judgment." *Prince*

George's Cnty. v. Morales, 230 Md. App. at 712. "[W]e must assume the truth of all evidence (together with all inferences that may naturally and legitimately be deduced from it) tending to support [the Chavezes'] factual allegations and theory of recovery." *Dalmo*, 43 Md. App. at 665. "'[O]nly where reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the [nonmoving party], does the issue in question become one of law for the court and not of fact for the jury.'" *Elste v. ISG Sparrows Point, LLC*, 188 Md. App. 634, 648 (2009) (second alteration in original) (quoting *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 177-78 (2003)).

In *Dalmo* this Court examined the scope of a storeowner's duty to protect a customer against vehicle-into-building crashes. Writing for the Court, Judge Wilner phrased the question as follows: "Given the existing layout of the property, was the possibility that a car might come over the sidewalk and strike a pedestrian who was lawfully thereon a reasonably foreseeable one that [the storeowner] had a duty to anticipate and guard against?" *Dalmo*, 43 Md. App. at 665.

In that case "there was no barrier, in the form of a curb, wheel blocks, or bollards, to inhibit automobiles parked or being driving on the parking lot from encroaching on the sidewalk." *Id*. at 663. Instead, "the parking lot sloped up to meet the sidewalk at grade, leaving somewhat of a rut or gully just before the two joined." *Id*. In a freakish series of events, a parked car lurched across the sidewalk because a careless motorist was attempting to jump-start it while it was in gear (or because its defective transmission

allowed it to slip into gear when he jump-started it). *Id*. at 663-64. The car pinned the plaintiff's legs against the 16-inch high base of the store's outer wall "and threw her torso backward through the plate glass window." *Id.* at 664. "Part of the window dropped on her legs in the manner of a guillotine." *Id*.

"There was no evidence that, in the 21-year history of the building, anyone on the front sidewalk had ever been injured by reason of an encroaching automobile, much less a run-away one[.]" *Id*. at 666. "However, there was evidence that the encroachment by automobiles had been a problem in the past, and that [the store], through its supervisory employees, had been made aware of the problem." *Id*.

The plaintiff's expert in traffic engineering testified that for 20 to 30 years it had been "a 'common and standard practice' to separate parking spaces from pedestrian walkways by the use of curbs, wheel blocks, or bollards." *Id.* at 667. According to the expert, the property "'was not consistent'" with that practice, because it had no barriers to separate the parking spaces from the walkways. *Id*. Additionally, the plaintiff adduced evidence showing that, had the storeowner installed some kind of barrier, such as bollards, a six-inch curb, or five- or eight-inch wheel blocks, it would have prevented the car from reaching the sidewalk or would have delayed its movement long enough for the plaintiff to avoid injury. *Id*. at 667-68.

Before proceeding to a discussion of the merits, Judge Wilner laid out the general principles concerning a business's duty to protect a customer from the negligent acts of third parties:

> "[W]here a storekeeper invites the public to come upon his premises to buy his wares, he is held to a positive affirmative duty to protect them, not only against dangers which may arise from some defect or unsafe condition of the physical property upon which they are invited to enter, but against dangers which may be caused by the negligent acts of his employees, or even of customers, where, as a reasonably prudent person, he should have anticipated the possible occurrence and the probable results of such acts."

Id. at 668-69 (quoting *Eyerly v. Baker*, 168 Md. 599, 607 (1935)).

On the question of what the storeowner in *Dalmo* should have anticipated or foreseen, Judge Wilner recognized that it would "require a wide, loose, and vivid imagination to predict or foresee the strange combination of circumstances that actually led to" the plaintiff's injuries. *Id*. at 672. "But," he wrote, "in the context of actionable negligence, that is not what the element of foreseeability requires." *Id*. Instead, """the question is whether the actual harm fell within a general field of danger which should have been anticipated."""" *Id*. at 672-73 (quoting *Segerman v. Jones*, 256 Md. 109, 132 (1969), *which quoted McLeod v. Grant Cnty. School Dist.*, 255 P.2d 360, 363 (Wash. 1953)). "Under these precepts, it is not the 'freakish' chain of circumstances that actually occurred here that must be reasonably foreseeable, but rather the more general class of harm that might occur to invitees walking upon the sidewalk from the movement of encroaching vehicles." *Id.* at 672.

After surveying cases from across the country on the issue of a storekeeper's liability for injuries caused by encroaching vehicles, Judge Wilner observed that courts typically found no liability as a matter of law only when the landowner had put some kind of a barrier in place. *See id*. at 674-75. In *Dalmo*, by contrast, not only was there no

barrier at all, but there was substantial evidence that the plaintiff might not have been injured had the storeowner installed a standard curb, bollard, or wheel block. *Id.* at 675. In view of that distinction, this Court agreed with the California Court of Appeal's assessment of a similar case:

> "Reasonable men could believe it was necessary to have a barrier separating the waiting customers from those approaching, parking and leaving in vehicles. Reasonable men could believe that the barrier provided was inadequate. Reasonable men could believe that the possibility of a car jumping, lurching, or bolting forward because of mechanical failure, or negligence of the driver, although remote, was foreseeable, and that in balancing this possibility against the risk of harm to patrons . . . it would have been no inordinate burden on the owners or operators, or to the patrons, to have installed a more substantial barrier protecting that particular area of the premises."

Id. at 675-76 (quoting *Barker v. Wah Low*, 19 Cal. App. 3d 710, 721 (1971)) (ellipsis added in *Dalmo*).

Judge Wilner cautioned that a storekeeper is not "bound to erect an impenetrable wall around his building or to protect his patrons from every manner or form of harm[.]" *Id.* at 676. He concluded "only that where there is evidence to establish, or fairly to support the inference, that the injury arose at least in part from an unsafe condition in the storekeeper's property, and that, as to the storekeeper, the class of harm that occurred was reasonably foreseeable and could reasonably have been prevented or guarded against, the issues of proximate cause and foreseeability are for the trier of fact to determine, and are not appropriate for resolution by directed verdict or judgment N.O.V." *Id*. In *Dalmo* the plaintiff met that standard. *Id.*

In light of *Dalmo*, the question before us is whether the record contains evidence to establish, or fairly to support the inference, that Mr. Chavez's injury arose at least in part from an unsafe condition in Wal-Mart's property, and that, as to Wal-Mart, the class of harm that occurred was reasonably foreseeable and could reasonably have been prevented or guarded against. We think that it does.

At trial, the Chavezes called Keith Bergman, a civil engineer who had previously performed engineering services for Wal-Mart and Sam's Club, as well as other so-called "big-box" stores. The court accepted Mr. Bergman as an expert in the fields of civil engineering, traffic engineering, and pedestrian safety "as it pertains to big-box stores." The Chavezes describe Mr. Bergman as an expert in intelligent site-design.

Mr. Bergman explained that in 2010 Wal-Mart expanded the Gaithersburg store by moving part of the building's front wall about 20 feet closer to the parking lot. The café, where Mr. Chavez was seriously injured, is located just behind the new front wall.

Mr. Bergman also explained that the doors or windows in any structure are "soft spots" – places where the structure is vulnerable to impact. On the front wall of the Gaithersburg store, just in front of where the café is located, are two, steel fire doors. Mr. Bergman described the doors as a "soft spot" in the building.

Mr. Bergman pointed out that, when Wal-Mart remodeled and expanded the store in 2010, it also reconfigured the parking lot. After the reconfiguration, a one-way drive aisle conducted traffic directly toward the fire doors on the front of the building. The

motorist in this case was traveling in that drive aisle when he lost control of his car, crashed through the fire doors, and injured Mr. Chavez.

According to Mr. Bergman, it is well known in the field of civil engineering that drivers lose control of their vehicles and crash into buildings because of driver error or medical emergencies. It "happens all the time," he testified. He further testified that it is a "known hazard" in the big-box store industry that vehicles strike buildings. He observed that in their depositions Wal-Mart's corporate designee and Wal-Mart's expert both acknowledged that vehicles had crashed into Wal-Mart's buildings.[6]

In Mr. Bergman's opinion, the design of the Gaithersburg store created a hazardous condition: one-way traffic was pointed directly at a soft spot in the wall, and unwitting customers behind the wall would have no warning of an errant vehicle before it came crashing into the building.

Mr. Bergman testified that engineers design buildings to minimize the chances that vehicles will penetrate their walls. For example, engineers will direct one-way traffic away from, rather than towards, a building's doors and entrances. In addition, they will use safety bollards to prevent vehicles from entering a building.

Mr. Bergman explained that a safety bollard is a steel pipe, eight feet long and six inches in diameter. The pipe is filled with concrete, the bottom four feet are buried in the

[6] At trial, Wal-Mart's expert agreed on cross-examination that vehicle-into-building accidents "happen frequently." In response to a question about whether vehicle-into-building accidents are a known danger for big-box stores like Wal-Mart, the company's expert testified that cars have been crashing into buildings since "the beginning of the automotive era."

ground, and four feet of steel and concrete extend above the surface. Mr. Bergman distinguished safety bollards from "decorative bollards," which are made of concrete and are used to delineate the boundary between pedestrian walkways and the lanes for motorized traffic.

In Mr. Bergman's opinion, Wal-Mart should have installed safety bollards in front of the fire doors at the Gaithersburg store. Had Wal-Mart done so, he opined, the bollards would have stopped the runaway car and prevented Mr. Chavez's injuries.

Mr. Bergman reviewed photographs of the Gaithersburg store. The photographs show that safety bollards had been installed in some places around the building. All but one of the bollards, however, appear to have been intended to prevent damage to the walls of a loading dock and the walls at the entrance to a service bay; only one bollard was placed in front of a door, which it appears to have adjacent to the service bay.

Mr. Bergman also reviewed photographs or digital images of Sam's Club stores in Florida and California. According to Mr. Bergman, the photograph of the Florida store shows bollards in front of the fire door. The photograph of the California store appears to show the placement of bollards in front of the entrance.[7]

Although the fire code prohibits obstructions in the area of fire doors, Mr. Bergman opined that the code would not prohibit the installation of safety bollards 14 or

[7] As best as we can determine, neither the record nor the record extract contains the photograph of the Florida store. Wal-Mart objected to the admission of both photographs on the ground that the stores were not located in Maryland, but the court overruled the objection. Wal-Mart did not object to the photographs on the ground that the Chavezes had failed to authenticate them. *See infra* section II.

15 feet in front of the fire doors. He pointed out that decorative bollards have been placed at the entrance of the store to define the boundary between a pedestrian walkway and the lane for motorized traffic. He reasoned that if the code did not prohibit the placement of decorative bollards near the entrance, it would not prohibit the placement of safety bollards at a similar distance from the fire doors.

Mr. Bergman concluded his testimony by opining that Wal-Mart should have been on notice that vehicles crash into big-box stores.

In light of Mr. Bergman's testimony, there is no serious question that the Chavezes generated "evidence to establish, or fairly to support the inference, that the injury arose at least in part from an unsafe condition in the storekeeper's property, and that, as to the storekeeper, the class of harm that occurred was reasonably foreseeable and could reasonably have been prevented or guarded against[.]" *Dalmo*, 43 Md. App. at 676. The jury could readily find that Mr. Chavez's injury arose from an unsafe condition: the one-way drive lane that aimed vehicular traffic directly into the vulnerable fire doors, which were unprotected by safety bollards, and behind which unsuspecting customers were invited to congregate. The jury could just as readily find that the harm was reasonably foreseeable: Mr. Bergman, who has worked on the design, planning, and engineering of big-box stores, including Wal-Mart and Sam's Club stores, testified that it is a "known hazard" in that industry that drivers lose control of vehicles and crash into buildings. The jury could also find that the harm could reasonably have been prevented: Mr. Bergman testified that a car would not have crashed through the fire doors and

severed Mr. Chavez's leg if Wal-Mart had installed safety bollards in front of the doors. The circuit court, therefore, correctly denied Wal-Mart's motions for judgment and for judgment notwithstanding the verdict.

In arguing against that conclusion, Wal-Mart quotes the *Dalmo* Court's statement that a storekeeper is not "bound to erect an impenetrable wall around his building[.]" *Id.* at 676. The Chavezes, however, do not contend that Wal-Mart had a duty to erect an impenetrable wall. They contend that Wal-Mart had a duty to install bollards in front of the vulnerable parts of the structure, such as the fire doors just outside a café, in order to protect the customers against the foreseeable risk that someone might lose control of a vehicle in a one-way drive aisle of the parking lot that points directly at the fire doors, and crash through the fire doors. "'Reasonable [persons] could believe that the possibility of a car" crashing through the vulnerable fire doors "'because of mechanical failure, or negligence of the driver, although remote, was foreseeable, and that in balancing this possibility against the risk of harm to patrons . . . it would have been no inordinate burden on the owners or operators, or to the patrons, to have installed a more substantial barrier protecting that particular area of the premises.'" *Dalmo*, 43 Md. App. at 676 (quoting *Barker v. Wah Low*, 19 Cal. App. 3d at 721) (ellipsis added in *Dalmo*).

Although Wal-Mart itself disclosed at least three, accidental vehicle-into-building crashes at its other stores, although the Chavezes' expert testified that vehicle-into-building crashes are a "known hazard" in Wal-Mart's industry, although Wal-Mart's own expert testified that protecting against cars crashing into buildings "has been a design

consideration for decades," and although *Dalmo* makes it clear that vehicle-into-building crashes have been a subject of litigation for more than half a century, Wal-Mart contends that the accident in this case was, as a matter of law, unforeseeable because no one had ever accidentally driven into this store, or had driven through the unprotected fire doors at this store or some other store. Wal-Mart advocates an unduly narrow view of foreseeability.

Under *Dalmo*, 43 Md. App. at 672-73, the pertinent inquiry is whether the harm fell within the general field of danger that should have been anticipated. *Accord Pittway Corp. v. Collins*, 409 Md. 218, 245 (2009) (stating that, when deciding whether defendant's negligent actions constitute a legally cognizable cause of complainant's injuries, a court must consider "whether the actual harm to a litigant falls within a general field of danger that the actor should have anticipated or expected"). Under that standard, a vehicle-into-building crash does not become unforeseeable as a matter of law merely because no one had ever crashed into this particular building, or because this particular crash did not occur in precisely the same way as some previous crash.

Wal-Mart would have us distinguish *Dalmo* on the ground that the storeowner in that case had been warned of the risk of vehicles encroaching onto the sidewalk because of the absence of curbs, bollards, or wheel blocks. In our view, that is a distinction without a difference. *Dalmo* neither held nor suggested that a vehicle-into-building crash was reasonably foreseeable only if someone had expressly warned the owner that it might occur because of a specific defect at a specific site. In view of Mr. Bergman's expert

testimony that vehicle-into-building crashes are a "known hazard" in the big-box store industry and that customers were exposed to that hazard because of the defective design of the Gaithersburg store, a jury could reasonably find that the injury in this case was reasonably foreseeable notwithstanding the absence of an express warning about this particular defect.

Walmart urges us to treat this case as a slip-and-fall case, in which the plaintiff "must prove not only that a dangerous condition existed but also that the [defendants] 'had actual or constructive knowledge of the dangerous condition and that the knowledge was gained in sufficient time to give [them] the opportunity to remove it or to warn the [plaintiff].'" *Joseph v. Bozzuto Mgmt. Co*., 173 Md. App. 305, 315 (2007) (quoting *Rehn v. Westfield America,* 153 Md. App. 586, 593 (2003); *see Zilichikhis v. Montgomery County*, 223 Md. App. 158, 186-87 (2015). Just as a storeowner has no liability to a customer who slips on spilled soda unless the customer can show that the owner had actual or constructive notice of the spill in sufficient time to clean it up (*see, e.g., Rehn v. Westfield America*, 153 Md. App. at 593), so too, Walmart contends, it has no liability to the Chavezes absent proof that it had actual or constructive notice of the specific defect in the design of this specific store. Walmart misconceives its obligations under *Dalm*o.

In *Dalmo* Judge Wilner distinguished ordinary premises liability cases from cases like this, which involve the owner's failure to protect customers from the foreseeable negligence of third parties:

> Some types of defects have the capability of causing injury directly to whomever comes into contact with them, without the need for a concurrent

> act or omission by anyone else. Slipping or tripping over wet or greasy spots on the floor, cracks or holes in a pavement, or hard-to-see obstacles in a public aisle or passageway are common examples of this second category of cases.

Dalmo, 43 Md. App. at 670.

By contrast:

> The other type of property defect or unsafe condition is more passive; absent the independent act or omission of a third person, it would, of itself, be incapable of producing the injury complained of. Injury in these cases results not solely from the condition itself, or from the injured person's contact with it, but rather from the combination of the condition and the independent action of another person or object.

Id. at 670-71.

Dalmo, and this case, "fall[] squarely within" the latter category (*id.* at 671) – the category of cases in which the alleged defect exposes a customer to the risk of being injured by a third-party's acts or omissions. In this category of cases, the owner may be liable if the actual harm fell within a general field of danger that should have been anticipated. *Id*. at 672-73. Under that forgiving standard, the owner's liability does not depend on whether it knew or should have known that the same injury had occurred in the same way at the same store, but on whether it could have foreseen an injury akin to the one that the plaintiff suffered.

Rather than engage with the analysis required by *Dalmo,* Wal-Mart relies prominently on cases concerning a landowner's duty (and in some cases, a landlord's duty) to protect against criminal activity by third parties. Brief at 8-10 (citing *Hemmings v. Pelham Wood LLP*, 375 Md. 522 (2003); *Scott v. Watson*, 278 Md. 160 (1976); *Troxel*

v. Iguana Cantina, LLC, 201 Md. App. 476 (2011); *Moore v. Jimel, Inc.*, 147 Md. App. 336 (2002)). Under those cases, a landowner can be held liable only if it fails to protect against prior, similar misconduct of which it knows or should have known. *See, e.g.*, *Scott v. Watson*, 278 Md. at 169. On the basis of those cases, Wal-Mart seems to conclude that it would have a duty to protect its customers against the possibility that a motorist would crash into building after negligently or even innocently losing control of a vehicle only if a similar incident had previously occurred at that specific store. The short answer to Wal-Mart's contention is that the cases in question do not concern the scope of the duty to protect against anything other than criminal conduct. Those cases have nothing to do with the scope of a storeowner's duty to protect its customers from motorists who crash into the store after losing control of their vehicles because of careless driving, a mechanical malfunction, or a totally innocent and unforeseeable medical emergency, such as a heart attack, a diabetic seizure, or the like.[8]

[8] It did not escape the Chavezes' attention, or ours, that, on two occasions in this phase of its argument, Wal-Mart employed ellipsis to omit key language from the cases that it quoted. First, Wal-Mart argued that "the foreseeability of tortious activity must be established by a showing of '. . . acts occurring on the landlord's premises, of which he knows or should have known (and not those occurring in surrounding neighborhoods).'" Brief at 9 (quoting *Scott v. Watson*, 278 Md. at 169) (ellipsis added by Wal-Mart). Second, Wal-Mart argued that "'if the harm is not the sort of harm that a landlord of ordinary intelligence would associate with that . . . activity, the duty does not attach.'" Brief at 9-10 (quoting *Hemmings v. Pelham Wood LLP*, 375 Md. at 541) (ellipsis added by Wal-Mart). After the omitted word in *Scott v. Watson* is restored, the relevant passage ties the landlord's duty to "*criminal* acts occurring on the landlord's premises, and of which he knows or should have known (and not those occurring generally in the surrounding neighborhood)." *Scott v. Watson*, 278 Md. at 169 (emphasis added). After the omitted word in *Hemmings v. Pelham Wood* is restored, the relevant passage states that, "if the harm is not the sort of harm that a landlord of ordinary intelligence would

In summary, the circuit court did not err in denying Wal-Mart's motions for judgment and for judgment notwithstanding the verdict. To the contrary, the court would have erred had it granted either of those motions. Viewing the facts in the light most favorable to the Chavezes, a reasonable jury could have concluded that Wal-Mart should have foreseen and guarded against the possibility of a vehicle-into-building crash at a vulnerable place in the exterior of its building, such as the unprotected fire doors at the end of the one-way drive aisle that aimed traffic directly at the doors and the customers congregating behind them. A reasonable jury, therefore, could have concluded that Wal-Mart's duty to its customers required it to install safety bollards in front of the fire door, to prevent against the "known hazard" of vehicle-into-building crashes. A reasonable jury could also have concluded that, but for Wal-Mart's failure to comply with its duty, Mr. Chavez would not have suffered his grievous injuries.

For those reasons, we conclude that circuit court did not err in submitting the case to the jury. Thus, although we must reverse the judgment on other grounds (*see infra* section II), the Chavezes will have another opportunity to present their case to a jury.

II. EVIDENCE ABOUT OTHER INCIDENTS AND OTHER STORES

During discovery, the Chavezes requested documents concerning injuries sustained by customers in vehicle-into-building crashes at Wal-Mart and Sam's Club

associate with that *criminal* activity, the duty does not attach." *Hemmings v. Pelham Wood LLP*, 375 Md. at 541 (emphasis added). Using ellipsis to omit crucial, qualifying terms is not an effective advocacy technique.

stores. Wal-Mart objected to the document request and refused to produce any documents, asserting, among other things, that they were irrelevant.

In its motion for summary judgment, however, Wal-Mart seemed to abandon its contention that other incidents at other stores were categorically irrelevant: Wal-Mart argued that it was, "by definition, not reasonably foreseeable" that a driver would crash through the unprotected fire doors at the Gaithersburg store, because, it said, what the driver did that day "has never been done before." Wal-Mart's argument appears to have been part of the broader but erroneous argument that it had no liability to the Chavezes because it had no prior notice that this particular defect at this particular store had ever resulted in injury to any other customer.

Although the court denied Wal-Mart's motion for summary judgment, the company's *volte face* about the relevance of other incidents prompted the court to grant the Chavezes' motion to compel documents concerning those incidents. Wal-Mart ultimately produced incident reports about four crashes, three of which the court deemed to be relevant. The Chavezes, however, do not appear to have introduced any of those documents in their case.[9]

[9] Wal-Mart argues that the court erred when it denied a motion in limine to exclude references to any incident in which vehicles had crashed into other Wal-Mart stores. The denial of the motion in limine is, however, subsumed into and superseded by the evidentiary rulings at trial. We review the evidentiary rulings at trial. Because the Chavezes did not attempt to introduce the information that the court permitted them to introduce when it denied the motion in limine, there is little point in evaluating the ruling, except to say that the other three incidents fall within the broad definition of relevance (Md. Rule 5-401) in a case in which the foreseeability of similar incidents is an issue.

In Wal-Mart's case, it called its corporate representative, the manager of the Gaithersburg store where Mr. Chavez was injured. The corporate representative testified that he was unaware of any prior, similar incidents either at the Gaithersburg store or at any of the several other stores over which he had responsibility. On cross-examination, the Chavezes asked the representative whether he was aware of a number of vehicle-into-building crashes (13 in total) that had allegedly occurred at Wal-Mart and Sam's Club stores across the country between 2008 and 2013. The questions included key details of the alleged crashes, such as the precise date (and sometimes the time of day) of the crash, the location of the store, the type of vehicle that was involved in the crash, the part of the building that was affected, and sometimes how the crash occurred. Over objection, the representative testified that he was aware of none of them, but that he would have liked to have known of them.

Wal-Mart also called an expert to address the Chavezes' contentions about the design of the Gaithersburg store. In brief summary, the expert testified that the fire code would have prohibited the installation of bollards outside of the fire doors, because the bollards would have blocked the sidewalk and interfered with the customers' ability to escape from the building. On cross-examination, the Chavezes showed the expert (and the jury) a number of unauthenticated photographs (or digital images) purportedly depicting other Wal-Mart stores that apparently have bollards near doors. The images drew the expert's conclusions into question by showing that Wal-Mart apparently can and does install bollards near where customers must exit its stores during an emergency.

Wal-Mart contends that the court committed reversible error in allowing the Chavezes to cross-examine its representative about the 13 incidents and to cross-examine its expert using the photographs of the other stores. Although the principal argument in support of Wal-Mart's position could not have less merit, we agree with its subsidiary argument that the court erred in allowing the Chavezes to refer to facts that were not in evidence – i.e., facts about the other incidents and facts about the other stores.

Throughout its brief, Wal-Mart repeatedly refers to the photographs as "hearsay photographs" and to counsel's references to other incidents as a "hearsay list" of other incidents. It faults the trial court for erroneously permitting the Chavezes to admit this "hearsay." It deploys the word "hearsay" at least 91 times in its 35-page brief. Wal-Mart is wrong.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a).

Ordinarily, a photograph or (digital image) cannot be hearsay, because an image is neither an oral or written assertion nor nonverbal conduct that is intended as an assertion. *See State v. Pruett*, 638 N.W.2d 809, 817 (Neb. 2002) (collecting cases). Furthermore, questions posed by an attorney are not hearsay, because they are not evidence. *See*, *e.g.*, *Morrison v. State*, 98 Md. App. 444, 455 (1993).

An attorney's questions may, however, "run afoul of the rule prohibiting questions that assume facts not in evidence." *Id*. A party may also run afoul of that rule if it fails to lay the proper foundation for the admission of a photograph or digital image, but asks questions that assume that the image fairly and accurately depicts some person or thing.

About 80 percent of the way through its brief, Wal-Mart moves from the fallacious argument about hearsay to an argument that the trial court erred in permitting the Chavezes to pose questions that assume facts that are not in evidence. That argument has merit.

"[Q]uestions that assume facts that are not supported by the evidence already admitted are an objectionable subcategory of leading questions." Lynn McLain, *Maryland Evidence: State and Federal* § 611:5 (3d ed. 2013); *see Simpson v. State*, 121 Md. App. 263, 288 (1998) ("questions that assume facts not in evidence are objectionable"). The questions are considered objectionable because they put unproven allegations before the jury, *Johnson v. State*, 408 Md. 204, 224 (2009) (quoting Dennis D. Prater et al., *Evidence: The Objection Method* 7 (2d ed. 2002)); *Simpson v. State*, 121 Md. App. at 288; because they are argumentative, *CSX Transp., Inc. v. Pitts*, 430 Md. 431, 474-75 (2013); *Johnson v. State*, 408 Md. at 224; *Clermont v. State*, 348 Md. 419, 431 (1998); and because "'a yes or no answer will be misleading.'" *Tirado v. State*, 95 Md. App. 536, 550 (1993) (quoting Lynn McLain, *Maryland Evidence: State and Federal* § 611:5 (1987)).

We turn first to the detailed questions about other vehicle-into-building crashes that the Chavezes employed during the cross-examination of Wal-Mart's corporate representative.

The Chavezes' method of cross-examination would have been highly effective but for one thing – the Chavezes never proved these prior incidents actually occurred. The Chavezes could not properly impeach the representative for being unaware of something that did not happen. His ignorance of the 13 incidents was irrelevant unless they had actually occurred. The Chavezes, however, did not introduce evidence of any of those incidents.

In overruling one of Wal-Mart's objections to a question concerning one of the 13 other incidents, the trial judge remarked that the Chavezes were not introducing evidence of the incident, but were simply asking questions about them. The court's reasoning was flawed, because the questions assumed that the incidents had in fact occurred.[10]

At oral argument, the Chavezes' counsel conceded (correctly, in our opinion) that the questions were conditionally relevant, in that their probative value depended on whether the incidents could be proven. Because the incidents were never proven, they

[10] There is little question that at least four incidents did in fact occur, because the trial court compelled Wal-Mart to produce incident reports about them. After the court found one of the four to be irrelevant (because it involved intentional or criminal misconduct), Wal-Mart mentioned the other three in its opening statement and in its cross-examination of the Chavezes' expert. Wal-Mart would have been hard-pressed to deny the accuracy and admissibility of its own incident reports. Consequently, the Chavezes had the means to prove those three incidents.

had no relevance, and hence, no probative value. The court erred in allowing the questions to stand.[11]

A similar error occurred during the cross-examination of Wal-Mart's expert, when the Chavezes used the photographs or digital images of other stores. The Chavezes' questions assumed that the photographs or digital images fairly and accurately depicted the conditions at other Wal-Mart stores at other locations at another relevant time. The questions were relevant only if the images truly did fairly and accurately depict the other stores, because only then would they undermine the expert's opinion that it was impermissible to install bollards near exits. Yet the Chavezes introduced no evidence to authenticate the images – i.e., to show that they depict what the Chavezes claim. *See Washington v. State*, 406 Md. 642, 651 (2008) (citing Md. Rule 5-901(a)).

In an effort to defend the use of the digital images, the Chavezes cite cases in which courts have taken judicial notice of digital maps from online mapping services. *See, e.g., Ray v. Mayor & City Council of Baltimore*, 203 Md. App. 15, 34-35 (2012) (using MapQuest to measure distance, including driving distance, between residence and proposed development to determine whether party had standing to object to development), *aff'd*, 430 Md. 74 (2013); *Cobrand v. Adventist Healthcare, Inc.*, 149 Md.

[11] We do not mean to imply that the Chavezes lacked a good faith basis for the questions about other incidents. To the contrary, they had clearly conducted extensive online research to uncover information about the incidents. Indeed, if the incidents occurred as described, the Chavezes may have uncovered evidence that Wal-Mart failed to disclose during discovery.

App. 431, 442 n.7 (2003) (using MapQuest to compare driving distance and travel time between house and courthouses in different jurisdictions to evaluate transfer for convenience of parties).

The Chavezes are correct that, just as a court can take judicial notice of the information in a tangible, paper map from before the digital age (*see, e.g.*, *Burral v. State*, 118 Md. App. 288, 295 (1997)), so too may a court take judicial notice of information in a digital map from an established online mapping service, such as MapQuest or Google Maps. *See Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of Google Map and satellite image); *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (quoting Fed. R. Evid. 201) (taking "judicial notice of a Google map and satellite image as a 'source[] whose accuracy cannot reasonably be questioned'").

A digital image of a building is, however, a different matter, even if the image is accessible through an online mapping service like Google Maps. A digital image is akin to a photograph, and a factfinder may consider it only if it is authenticated in the way a photograph would be. *See* Md. Rule 5-901(a). Without authentication, the factfinder has no way to know whether the image is what it purports to be – in this case, an image of the exterior of some Wal-Mart store at some date relevant to this case.

The Chavezes correctly characterize the digital images as a form of "demonstrative evidence." Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1102, at 527 (2009) ("[p]hotographs are usually classic examples of demonstrative evidence").

Even so, they are admissible only if "the required foundation is laid, that the photograph fairly and accurately depicts what it purports to depict." Lynn McLain, *Maryland Evidence: State and Federal*, *supra*, § 403:5, at 679-80. "This foundation is particularly important with regard to digital and digitally enhanced photographs" (*id.* at 681), because they are susceptible to manipulation.

Without citation to authority, the Chavezes argue that, "[w]hile demonstrative evidence may be offered into evidence, it need not be offered or admitted." (Emphasis in original.) Because authentication is a condition precedent only for admissibility (Md. Rule 5-901(a)), and because they did not actually move to admit the digital images (i.e. the demonstrative evidence), the Chavezes contend that authentication was unnecessary.

The Chavezes are correct that some forms of demonstrative evidence need not be admitted into evidence: one example is charts or summaries of facts or data that are in evidence; another is anatomical models to help the factfinder explain medical testimony. *See* Joseph F. Murphy, Jr., *Maryland Evidence Handbook*, *supra*, §§ 1101[A][1], 1101[A][2], at 526. But the digital images in this case were different from charts, summaries, skeletons, etc. The purpose of the images was not merely to explain facts that were already in evidence; it was to provide substantive proof that Wal-Mart could and did install bollards where the Chavezes said bollards should be installed, and where Wal-Mart's expert said they could not. The court should not have permitted the

Chavezes to show the images to the jury and to question the expert about them without first authenticating them.[12]

In the circumstances of this case, we are constrained to conclude that the errors were prejudicial, in that they are likely to have affected the verdict below. *See Barksdale v. Wilkowsky*, 419 Md. 649, 673 (2011); *Crane v. Dunn*, 382 Md. 83, 91 (2004). In this hard-fought trial, the jury could not have ignored the references to more than a dozen vehicle-into-building accidents at Wal-Mart stores within the five years before Mr. Chavez suffered his injuries, or Wal-Mart's representative's ignorance of those alleged incidents. Nor could the jury have ignored the effect of the digital images, which undermined the expert's opinion that it is improper to do what Wal-Mart may in fact do in a number of its stores. The Chavezes themselves recognize the impact of the digital images, because they say that they used them "to expose the ridiculous nature of the liability expert's opinions." In short, because the record reflects both error and prejudice, we must reverse the judgment and remand for a new trial.

On remand, the Chavezes may introduce the photographs of the other stores if they lay a foundation sufficient to establish that the photographs do in fact fairly and

[12] In an affidavit that he submitted in opposition to Wal-Mart's motion for summary judgment, the Chavezes' expert attached and discussed several images of Sam's Club stores that had bollards near the exits and a list reflecting online research into vehicle-into-building crashes at other Wal-Mart stores. Under Md. Rule 5-703(b), if those facts or data are reasonably relied upon by experts in this particular field in forming opinions or inferences upon the subject, and if the facts or data are "determined to be trustworthy, necessary to illuminate testimony, and unprivileged," the court may permit the Chavezes to disclose them to the jury even if they are not admissible in evidence.

accurately depict the appearance of the stores at some relevant date. Additionally, the Chavezes may question witnesses about the other incidents if they first establish that the incidents did in fact occur.[13] If Wal-Mart does not stipulate to the facts necessary to facilitate the admission of the photographs and the evidence of other incidents, the Chavezes may establish them through requests for admissions of fact under Md. Rule 2-424. If Wal-Mart fails to admit the truth of any matter as requested and if the Chavezes later prove the truth of the matter, the court may require Wal-Mart to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees. Md. Rule 2-424(e).

III. MISCELLANEOUS ISSUES

Wal-Mart asserts that the trial court abused its discretion in denying a motion for mistrial during voir dire, when a potential juror mentioned that he had "handled" Wal-Mart's "property insurance" between 1986 and 1989. Wal-Mart asserts that the trial court also abused its discretion in denying a motion for mistrial during closing argument, when the Chavezes' attorney referred to a list of the 13 incidents of vehicle-into-building crashes that he had mentioned during the cross-examination of Wal-Mart's corporate designee. Because we must reverse the judgment on other grounds, and because the

[13] In the memorandum in support of its motion for judgment notwithstanding the verdict, Wal-Mart wrote that it was able to confirm 12 of the 13 incidents. Wal-Mart added that five of the 13 incidents involved intentional and criminal misconduct, which the circuit court had determined to be irrelevant. We leave it for the circuit court to make the initial decision about whether those incidents involved intentional and criminal misconduct and whether such misconduct is irrelevant.

circuit court is highly unlikely to be confronted with either of these specific discretionary decisions on remand, it is unnecessary to discuss them any further.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND APPELLEE.