

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 09 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT MAYORGA,

Plaintiff -counter-defendant - Appellant,

v.

COSTCO WHOLESALE
CORPORATION,

Defendant -counter-claimant- Appellee.

No. 07-35166

D.C. No. CV-06-00882-DJH

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Dennis J. Hubel, Magistrate Judge, Presiding

Submitted November 21, 2008**
Portland, Oregon

Before: W. FLETCHER and FISHER, Circuit Judges, and BREYER, District
Judge.***

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral
argument. *See* Fed. R. App. P. 34 (a) (2).

*** The Honorable Charles R. Breyer, United States District Judge for the
Northern District of California, sitting by designation.

Robert Mayorga, an Oregon resident, was charged with violating an Oregon law that makes it illegal to transport certain quantities of liquor in Oregon unless the beverages are procured through the Oregon Liquor Control Commission (“OLCC”). Mayorga had purchased the offending liquor at a Costco warehouse store in Redding, California. He sued Costco for negligence and emotional distress, claiming that Costco failed to warn him about Oregon’s law. The district court granted Costco’s motion for summary judgment and denied Mayorga’s motion for leave to amend the complaint to add an indemnity claim. Mayorga appealed. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

We review the grant of a summary judgment motion de novo. *Aguilera v. Baca*, 510 F.3d 1161, 1167 (9th Cir. 2007). The denial of a motion for leave to amend a complaint is reviewed for abuse of discretion. *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 985-86 (9th Cir. 1999).

Mayorga’s negligence claim fails as a matter of law. Under Oregon law the legal duty to warn arises only as to hazards that are not generally known and recognized, that is, that are not obvious. *Fuhrer v. Gearhart-By-The-Sea, Inc.*, 760 P.2d 874, 879 (Or. 1988) (observing that under Oregon law businesses have an affirmative duty to warn of dangerous conditions on the premises that are not

obvious); *Benjamin v. Wal-Mart Stores, Inc.*, 61 P.3d 257, 264 (Or. App. 2002) (stating that “a seller is ‘not required to warn with respect to products . . . when the danger, or potentiality of danger, is generally known and recognized.’”) (quoting *Restatement (Second) of Torts* § 402(A), comment j (1965)).

Oregon law also presumes that all of its citizens know the laws that apply to them. *Bartz v. State*, 839 P.2d 217, 221 (Or. 1992); *Dungey v. Fairview Farms, Inc.*, 290 P.2d 181, 183 (Or. 1955); *Scherzinger v. Portland Custodians Civil Serv. Bd.*, 149 P.3d 142, 149 (Or. App. 2006); *see Bibeau v. Pac. Nw. Research Found., Inc.*, 188 F.3d 1105, 1110 (9th Cir. 1999), *as amended*, 208 F.3d 831 (9th Cir. 2000).

The Oregon law imposed an obligation not to transport certain quantities of alcohol in Oregon unless the beverages were purchased through the OLCC; Oregon law presumes that everyone who purchases alcohol, including Mayorga, is aware of that legal obligation. The hazard of which Mayorga claims he should have been warned was therefore known and obvious.

Mayorga’s claim for intentional infliction of emotional distress also fails. To succeed on a claim for intentional infliction of emotional distress, a plaintiff must prove: “(1) the defendant intended to inflict severe emotional distress on the plaintiff, (2) the defendant’s acts were the cause of the plaintiff’s severe emotional

distress, and (3) the defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct." *McGanty v. Staudenraus*, 901 P.2d 841, 849 (Or. 1995) (internal quotation marks and citation omitted).

Viewing the stipulated facts in the light most favorable to Mayorga, and drawing all reasonable inferences in his favor, *see Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 784 (9th Cir. 2007), no reasonable trier of fact could find that Costco's acts "constituted an extraordinary transgression of the bounds of socially tolerable conduct."

Finally, the lower court's denial of Mayorga's motion to add an indemnity claim was not an abuse of discretion. To prevail on a claim for common law indemnity "the claimant must plead and prove that (1) he has discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the obligation ought to be discharged by the latter." *Stovall v. State ex rel. Or. Dept. of Transp.*, 922 P.2d 646, 665 (Or. 1996) (internal quotation marks and citation omitted). Mayorga could not plead or prove the first element: his defense of the misdemeanor criminal prosecution did not discharge a legal duty owed to a third party.

AFFIRMED.