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SUPREME COURT
STATE OF ARIZONA

ROXANNE PEREZ, individually, Plaintiff/Appellant, v. CIRCLE K CONVENIENCE STORES, INC., a foreign corporation, Defendant/Appellee.	**Case No. _____** Arizona Court of Appeals Case No. 1 CA-CV 22-0425 Maricopa County Superior Court Case No. CV 2020-010129

PETITION FOR REVIEW

Table of Contents

Table of Citations

Cases

Statutes and Rules

Other Authorities

Introduction

Roxanne Perez seeks review of the April 9, 2024 Opinion and the April 29, 2024 Order denying her reconsideration motion.

In his special concurrence, Judge Randall M. Howe stated he "would urge the supreme court to grant review in this case" to resolve a possible conflict between *Dinsmoor* and "*Markowitz* and the other cases holding that whether an unreasonable risk of harm exists and whether the danger is open and obvious are factual questions not for a court to resolve, but for a jury." *Op*.-¶47 (citing *Dinsmoor v. City of Phoenix*, 251 Ariz. 370 (2021) (duty to student limited to school-controlled premises) and *Markowitz v. Arizona Parks Board*, 146 Ariz. 352 (1985) (discussing duty to invitees on the premises, such as Roxanne Perez)).

There is no conflict, because the duty in *Markowitz*, and in the many earlier and later premises-liability cases, including *Dinsmoor*, applies to *all* invitees on the premises, including to Perez.

Issues Presented for Review

Duty of care. Did Circle K owe a duty to invitee Perez to maintain its premises in a reasonably safe condition?

Unreasonably dangerous condition. Did the Court of Appeals erroneously find, as a matter of fact, that the hazardous condition confronting invitee Perez was not unreasonably dangerous?

Legal Argument

1. Perez tripped over a floor item posing a hazardous situation.

On March 13, 2020, Perez was an invitee at a Circle K store and tripped over a water display. (IR-035-Page5:13-15). Circle K's designated Rule 30(b)(6) representative admitted he would have moved the display and that it appeared to be a "hazardous situation" needing fixing. *Op.*-¶18 (IR-033-Page5-SSOF-¶5). After Perez fell, a Circle K employee apologized and admitted displays were normally stacked higher, differently, and elsewhere. (IR-033-Pages3-4-SSOF-¶¶2,9).

Perez had visited the store before, but had never before seen a case of water where she tripped—and did not see this one until *after* tripping. (IR-033-Pages1-2-¶¶1-2,4). Perez was not looking at her feet while walking in the store because she did not expect to encounter tripping hazards. (IR-033-Page3-¶¶6-8).

2. Circle K argued it owed no duty.

Circle K claimed it "did not owe Perez a duty of care because," in its view, "the condition was not unreasonably dangerous." (IR-028-Page9:7-8). "With no proof of a duty," Circle K argued it "cannot be liable." (IR-035-Page1:26-27). Circle K claimed there "is simply no admissible evidence on the record to support a duty on the part of Circle K toward [Perez]." (IR-035-Page6:14-15). But for centuries the common law has imposed on landowners a nondelegable duty to make their premises reasonably safe for invitees.

The trial court held Circle K owed "no duty" because, although "the case of water may have created a dangerous condition, it did not create an unreasonably dangerous condition." (IR-040-Page3).

The Opinion "affirmed" the trial court's ruling that "no duty existed." *Op*.-¶1. Still, the Opinion noted Perez was arguing she was a business invitee and had cited cases holding a business owes an "affirmative duty to use reasonable care to make the premises safe for [an invitee's] use." *Op*.-¶8 (quoting *Markowitz,* 146 Ariz. at 354 (1985) (quoting *Tribe v. Shell Oil Co., Inc.*, 133 Ariz. 517, 519 (1982)).

The Opinion declares a business's duty of care to invitees is limited to protecting them from "unreasonable risks of harm." *Op*.-¶¶7,14. And so, according to the Opinion, a court supposedly cannot determine if a relevant duty exists without also examining the duty's scope. *Op*.-¶14. The Opinion decided Perez's admissions that she had been to the store before and could have seen the water display if she had looked "do not support [finding] that the condition was unreasonable." *Op*.-¶14. But that is simply saying that, because of Perez's supposed contributory negligence or assumption of risk, Circle K cannot be liable, although, in Arizona, only the jury can decide the merits of those defenses. Ariz. Const. art. 18, § 5; A.R.S. § 12-2505(A).

That analysis transformed the Court of Appeals into a factfinding jury. The

analysis incorrectly viewed the facts in the light most unfavorable to Perez and allowed for no inferences in her favor. But the facts favored Perez: (1) Circle K did not normally place water displays where she tripped; (2) she did not recall ever previously seeing cases of water where she tripped; (3) she did not see the case of water until after tripping; (4) she was not looking at her feet while walking in the store; and (5) she did not expect to run into any hazardous floor items.

Circle K's own Rule 30(b)(6) witness admitted he would have moved the case of water and it "appeared to be a 'hazardous situation' requiring remedying." *Op*.-¶19. A "hazardous situation" is "unreasonably dangerous." "Dangerous" and "hazardous" are, after all, synonyms. *Merriam-Webster's Collegiate Dictionary* 572 (11th ed. 2020).

Moreover, after Perez tripped, a Circle K employee apologized (reasonable jurors could view that as a fault admission), told her the cases of water were normally stacked waist-high (reasonable jurors could infer that would have made them more noticeable), and the water display was not normally as it was when she fell (reasonable jurors could infer the abnormal condition was unsafe). *Op*.-¶30.

Peres's testimony, the testimony of Circle K's Rule 30(b)(6) representative, and the post-fall admissions by Circle K's employees, when viewed in the light most favoring Perez, and with all reasonable inferences taken in her favor, support a conclusion that the water display was an unreasonably dangerous condition.

3. Premises-liability law does not only protect perfect invitees.

Perez was not a perfect invitee. No shopper is. In the real world, invitees are often inattentive and forgetful. But that does not make them targets for businesses creating and/or allowing unreasonably dangerous conditions on their premises. After all, invitees rely on businesses to provide reasonably safe premises.

At worst, Perez was inattentive or forgetful. The classic Arizona case on that is *Beach v. City of Phoenix*, 136 Ariz. 601 (1983), where a pedestrian suffered injury when a car struck her after she stepped into the street to avoid a tree blocking the sidewalk. The pedestrian alleged the City had negligently let the tree remain there. The City won at summary judgment by arguing "it owed no duty to [plaintiff] since the tree was an open and obvious danger." *Id*. at 602.

Just as Circle K, the Court of Appeals in *Beach* repeated the rubric that a landowner "is not the insurer of the safety" of its invitees and then "applied the rule that a landowner is not liable to his invitee for injuries caused by conditions or dangers which are known to or obvious to the invitee." *Beach*, 136 Ariz. at 602. The *Beach* Court of Appeals affirmed the grant of summary judgment, concluding the condition's open-and-obvious nature supposedly alerted the plaintiff to all attendant risks equally open and obvious and supposedly ended any duty the City may have owed to its invitee. *Id*. The analysis and result match our case.

But this Court found the Court of Appeals had "erred in its analysis and

legal conclusions." *Id*. at 602. This Court explained it "disagrees with the court of appeals' confusion of the concept of 'duty' with that of 'negligence.'" *Beach*, 136 Ariz. at 603. As in *Perez*, the City's duty as landowner was "constant." *Id*. It was to keep its premises—streets in *Beach*, a store, here—in a reasonably safe condition. *Id*. "What varies are the acts needed to fulfill that duty—including a danger's obvious character." *Id*.

As in *Perez*, a danger's nature "is not important to determine whether the [landowner] owed a duty to the [invitee], but rather to determine whether the [landowner] breached the duty of reasonable care by negligently failing to remove the [dangerous condition]." *Id*. *Beach* held "the court of appeals erred in holding that the open and obvious condition alerted [the invitee] to all the risks and thereby ended any duty the City may have had." *Id*. at 604.

As with Circle K, in *Beach* the "City's duty to use reasonable care did not end" and the "correct issue is whether reasonable people might conclude that the [landowner] was negligent in failing to remedy a defect which was [supposedly] very open and obvious." *Id*.

While a danger's open-and-obvious nature should alert the invitee of the need to exercise reasonable case, that does not relieve the landowner of its duty, "but only raises the possible defense of contributory negligence," which "is always a question for the jury in Arizona and cannot be established by the court. *See* Ariz.

Const. art. 18, § 5." *Id*. at 604. As a result, the negligence question "was a question of fact for the jury." *Id*. In *Perez* as well, the negligence question was a question of fact for the jury. Of course, if "reasonable people can differ as to whether the danger of some injury is reasonably foreseeable, the question of negligence is one of fact for the jury to decide." *Bishop v. State*, 172 Ariz. 472, 477 (App. 1992).

The trial court and Court of Appeals viewed the water display as not unreasonably dangerous since it was supposedly open and obvious. But "the bare fact that a condition is 'open and obvious' does not necessarily mean that it is not unreasonably dangerous. The open and obvious condition is merely a factor to be taken into consideration in determining whether the condition was unreasonably dangerous." *Cummings v. Prater*, 95 Ariz. 20, 27 (1963).

"Whether a defendant should have foreseen the plaintiff's encounter with a particular 'obvious' hazard will present a jury issue where reasonable people can differ." Dan B. Dobbs, *et al*., *The Law of Torts* § 276 at 88-89 (2nd ed. 2011). In Arizona, "the general rule to be applied is that where reasonable people could differ as to whether the danger of some injury is foreseeable, the question of negligence is one of fact for a jury to decide." *Markowitz,* 146 Ariz. at 358-5. Again, the question is negligence—not duty. The duty is constant.

Finally, there "is unquestionably a greater duty resting upon a defendant engaged in the business of selling merchandise to discover whether there does exist

any dangerous condition upon the premises, than devolves upon an invitee who has the right to assume that the premises are reasonably safe for his use as such invitee." *Glowacki v. A.J. Bayless Markets, Inc.*, 76 Ariz. 295, 306 (1953).

The Opinion states "Perez must, among other things, plead and be able to prove that Circle K owed her a duty under Arizona law." *Op.*-¶7. She did that. The rule Perez pleaded is universal; "A business proprietor has an affirmative duty to make and keep his premises reasonably safe for customers." *Chiara v. Fry's Food Stores of Arizona, Inc.*, 152 Ariz. 398, 399 (1987). Until this Opinion, that duty of care was known and unquestioned.

4. Invitees can be inattentive or forgetful.

The possessor of premises may have reason to expect harm to a business invitee "from known or obvious dangers" when "the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or will fail to protect himself against it." *Restatement (Second) of Torts* § 343A cmt. f (1965). Two Restatement illustrations clarify that principle's application to stores:

> 2. The A Department Store has a weighing scale protruding into one of its aisles, ***which is visible and quite obvious to anyone who looks***. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B.
>
> 3. The A Drug Store has a soda fountain on a platform raised six inches

> above the floor. ***The condition is visible and quite obvious***. ***B, a customer, discovers the condition*** when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, ***she forgets the condition***, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to liability to B.

Restatement (Second) of Torts § 343A cmt. f, illus. 2 & 3 (1965) (emphasis added).

In Illustration No. 2, the obstruction was "visible and quite obvious to anyone who looks." But if, as Perez, a customer is intent on shopping, does not see the obstruction, stumbles over it, and is injured, the store owner can still be liable.

In Illustration No. 3, the condition was "visible and quite obvious" and the customer discovered it, but later forgot, missed her step, and fell. Even so, the store could still be liable, if it could be reasonably anticipated that such a thing might happen. The jury decides reasonableness as a question of fact.

If a "proprietor should anticipate the harm from the condition despite its obviousness, he may be liable for physical injury caused by that condition. The fact that the injured party knew of the danger is *not* conclusive." *Tribe*, 133 Ariz. at 519 (emphasis added). Premises "conditions may be open and obvious and at the same time dangerous if a person's attention is diverted or distracted." *St. Gregory's Church v. O'Connor*, 13 Ariz.App. 421, 427 (1970).

Thus, although a defect's or hazard's open-and-obvious nature is a factor to consider in determining negligence, it is not necessarily determinative. *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 253 ¶ 24 (App. 2013). "Recovery has

been permitted in cases where a plaintiff was aware of the danger but momentarily forgot it." *Murphy v. El Dorado Bowl, Inc.*, 2 Ariz.App. 341, 343 (1965). In *Murphy*, for instance, a bowler could sue the bowling alley for a trip-and-fall injury although he "knew" of a walkway's uneven condition, "knew" it posed a danger, but momentarily forgot about it. *Id*. at 343.

In *Silvas v. Speros Construction Co.*, 122 Ariz. 333 (App. 1979), a worker who knew about a roof's uncovered holes fell into one. *Silvas* held "a jury question was presented as to whether [the contractor] should have anticipated the harm despite [plaintiff's] knowledge and should have taken steps to either cover or barricade the holes." *Id*. *Silvas* relied on the Restatement, which explained a land possessor's duty "'may require'" providing a warning or taking "'other reasonable steps to protect'" against a "'known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.'" *Id*. at 335 (quoting *Restatement (Second) of Torts* § 343A cmt. f (1965)).

Silvas relied on the Restatement's analysis that reason to expect harm to an invitee "'from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.'" *Id*. at 335 (quoting § 343A cmt. f).

Silvas also relied on a legal treatise explaining that, in "'any case where the

occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required.'" *Id*. (quoting William L. Prosser, *The Law of Torts* § 61 (4th ed. 1971)).

"'This is true, for example, where there is reason to expect *that the invitee's attention will be distracted*, as by goods on display, or *that after lapse of time he may forget the existence of the condition*, ***even though he has discovered it*** or been warned; . . . In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough.'" *Id*. at 335 (quoting *Law of Torts* § 61) (emphasis added)).

In *Johnson v. Tucson Estates, Inc.*, 140 Ariz. 531, 533-34 (App. 1984), the plaintiff knew a shower-room floor was slippery and had fallen there before. But the "evidence presented a jury question on whether the appellant should have anticipated harm to a person in the appellee's position despite its open and obvious condition." *Id*. at 534. *See also Tribe*, 133 Ariz. at 519 (quoting *Restatement* § 343A at cmt. f). So, too, Circle K should have anticipated a customer busy shopping could overlook or forget about a floor display—creating a jury fact question.

Other Arizona opinions letting juries decide an open-and-obvious-danger defense include:

- *Sherman v. Arno*, 94 Ariz. 284, 289 (1963) ("The jury might reasonably have inferred a person using this sidewalk might be distracted from the

place where he was walking while observing cars passing in the driveway, especially if, as in plaintiff's case, his car was in the parking lot across the drive and he was looking for a place to cross to it, and that defendants could have foreseen this.").

- *Wiseman v. Young*, 4 Ariz.App. 573, 574-75 (1967) ("Reasonable minds could differ as to whether the step-down could be momentarily forgotten while patrons were physically and emotionally occupied with their pets; it could be unreasonably dangerous.").

- *Yuma Furniture Co. v. Rehwinkel*, 8 Ariz.App. 576, 579 (1968) ("A reasonable mind could well believe that the salesman should have recognized that these elderly women would not perceive or realize the danger of falling into the well because of the lighting and the attention they were giving to the pillow.").

Here, Perez forgot about or overlooked the display. The effect of that presents a jury question.

5. The jury must decide any open-and-obvious-danger defense.

Ariz. Const. art. 18, § 5 states that: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." A.R.S. § 12-2505(A) likewise guarantees that: "The defense of contributory negligence or of assumption of risk is in all cases a question of fact and shall at all times be left to the jury." Whether viewed as assumption of risk or as contributory negligence, the open-and-obvious-danger defense is a question of fact in all cases whatsoever and must, "at all times, be left to the jury."

Let us take an extreme case: What if Perez signed a form before tripping

stating she had seen the display and assumed any tripping risk? Even in that case, only an Arizona jury may decide whether to find assumption of risk. *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 405 ¶ 7 (2005).

Finally, Division Two has held that finding a plaintiff "knew and appreciated a risk" as a matter of law when the risk was "obvious" was "proscribed in this state by the Arizona Constitution, art. 18, § 5." *City of Tucson v. Holliday*, 3 Ariz.App. 10, 15-16 (1966). *Perez* contradicts *Holliday*—which supports granting review.

6. Deciding the merits of an open-and-obvious defense as a matter of law is incompatible with comparative fault.

Finally, in a pure comparative-fault system such as Arizona's, an open-and-obvious-danger defense cannot provide a matter-of-law basis for ending an invitee's case. Legal commentators have criticized the open-and-obvious-danger defense since it can place full fault on a plaintiff although the defendant is at least partly at fault, contradicts the "very purpose of comparative fault statutes," and is not viable in a comparative-fault system. Roger L. Pardieck & Sharon L. Hulbert, *Is the Danger Really Open and Obvious?*, 19 Ind. L. Rev. 382, 393 n. 81 (1986). Thus, many states have abolished the defense because it is incompatible with comparative negligence. *Steigman v. Outrigger Enters., Inc.*, 267 P.3d 1238, 1249 (Haw. 2021).

7. Reasons to grant the petition for review.

The Court should grant review because:

(1) The Court of Appeals (a) misapplied the law on duty in premises-

liability cases; (b) did not let the jury resolve the contributory-negligence and assumption-of-risk issues in this open-and-obvious-danger defense case, in violation of Ariz. Const. art. 18, § 5 and A.R.S. § 12-2505(A); and (c) construed all facts and inferences from them in the light most unfavorable to Perez. ARCAP 23(d)(3).

(2) The petition raises issues of statewide interest and importance. *State ex rel. Mitchell v. Cooper*, 256 Ariz. 1, 7 ¶ 23 (2023).

(3) *Perez* conflicts with other decisions on the duty owed to invitees. ARCAP 23(d)(3); *State v. Santillanes*, 156 Ariz. 480, 484 ¶ 10 (2024).

(4) The petition raises "purely legal" questions this Court can decide de novo. *May v. Ellis*, 208 Ariz. 229, 230 ¶ 6 (2004).

(5) The nature of the duty owed to invitees affects "many cases, both pending and planned," *Arizona Dept. of Rev. v. Action Marine, Inc.*, 218 Ariz. 141, 142 ¶ 5 (2008), and will arise again. *Lynn v. Reinstein*, 205 Ariz. 186, 188 ¶ 5 (2003).

(6) Clarification is needed on the premises-liability duty analysis. *City of Phoenix v. Geyler*, 144 Ariz. 323, 325 (1985).

DATED this 12th day of May, 2024.

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