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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. CV-24-0104-PR** Arizona Court of Appeals Case No. 1 CA-CV 22-0425 Maricopa County Superior Court Case No. CV 2020-010129

PLAINTIFF/APPELLANT'S SIMULTANEOUS SUPPLEMENTAL BRIEF

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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

We start with an irrefutable principle: "In Arizona, the duty owed by a landowner to an entrant on the property is determined by the status of the entrant as an invitee, licensee, or trespasser." *Wickham v. Hopkins*, 226 Ariz. 468, 471 ¶ 11 (App. 2011). The status determines duty. "A person's status as invitee, licensee, or trespasser determines the duty of care a landowner owes him." *McDonald v. Smitty's Super Valu, Inc.*, 157 Ariz. 316, 318 (App. 1988). Since Perez's status was "invitee," Circle K owed her the duty owed to any invitee. That is a given.

So, we start knowing there was a duty. Whether Circle K fulfilled that duty by ensuring that conditions at its premises were reasonably safe raises issues of compliance with the standard of care. It does not raise issues of duty. Duty exists.

1. Circle K owed a common-law duty of care to invitee Roxanne Perez.

On March 13, 2020, Roxanne Perez was a Circle K invitee when she tripped and fell because of an unnoticed, badly-placed, bottled-water display. Thus, Circle K owed her a duty of care to make and keep its premises in a reasonably safe condition. But after Perez fell when Circle K placed its display of bottled water in

a way posing a tripping hazard, the trial court granted summary judgment to Circle K "on the basis that no duty existed." *Mem. Dec.* ¶ 1. That misreads the law. Because Perez was an invitee, Circle K automatically owed her a duty of care.

The majority states that "Perez must, among other things, plead and be able to prove that Circle K owed her a duty under Arizona law." *Mem. Dec.* ¶ 7. Although Perez pleaded and proved Circle K owed her a duty under Arizona law, the majority ignored that. In addition, the majority held that, when deciding if a duty exists, "a court cannot resolve the issue without examining the scope of the duty, including what it is not." *Mem. Dec.* ¶ 8.

That view of duty misstates existing concepts of duty. Recognizing the long-established duty owed to a business invitee does not require exploring "what it is not." The common law has already stated what duty is owed to an invitee. Knowing what that duty "is not" is unhelpful and irrelevant. After all, there is no need to know what something is not to know what it is. A blue whale is not a potato, for example, but that says nothing useful about what a blue whale is.

The majority concluded that, to determine if there is a duty, "courts may 'consider facts to determine whether a duty exists based on the presence of an *unreasonable risk of harm* that arose within the scope of a special relationship.'" Mem. Dec. ¶ 12 (quoting *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 376 ¶ 27 (2021) (emphasis added)). But *Dinsmoor* was not a premises-liability case. It was a

case analyzing the limits of the special relationship between school and student in determining if there is a duty of care when an injury occurs off campus.

Despite that, the majority relied on *Dinsmoor* for the proposition that this Court has supposedly "unambiguously allowed for factual analysis in evaluating the only question before this court, which is the duty owed by Circle K." *Mem. Dec*. ¶ 13. That is inaccurate and irrelevant. The duty is known and clear.

"Arizona recognizes that a possessor of land 'is under an affirmative duty' to use reasonable care to make the premises safe for use by invitees." *Markowitz v. Arizona Parks Board*, 146 Ariz. 352, 355 (1985) (quoting *Tribe v. Shell Oil Co*., 133 Ariz. 517, 519 (1982)). "The duty of a business owner to its invitees is to maintain its premises in a reasonably safe condition." *Woodty v. Weston's Lamplighter Motels*, 171 Ariz. 265, 268 (App. 1992). A possessor of land must protect its invitees from the risk of unreasonable harm from existing dangers. *Smedberg v. Simons*, 129 Ariz. 375, 378 (1981).

But the majority ploughed on, citing the 1963 *Cummings* case for the idea that, when people "likely to encounter a condition may be expected to take perfectly good care of themselves without further precautions, then the condition is not unreasonably dangerous because the likelihood of harm is slight." *Mem. Dec.* ¶ 13 (quoting *Cummings v. Prater*, 95 Ariz. 20, 27 (1963)).

The point in *Cummings* was not absence of duty. In that case, a tenant fell on

a slab at a leased residence that was the same as thousands of other slabs in the community. *Id*. at 31-32. The special duty of care in the leasehold relationship was to inspect the premises when the landlord had reason to suspect defects existing at the time of taking the premises and to either repair them or warn the tenant about them *before* the tenant took possession. *Id*. at 31.

In *Cummings*, there was "no issue of fact to be tried" because, when the landlord surrendered the premises to the tenant, the slabs did not constitute an unreasonably dangerous condition. Thus, the landlord could assume the tenant who now had control over the leased premises was "likely to take perfectly good care of himself and the chances of harm [were] slight." *Id*. at 31-32.

But unlike the plaintiff in *Cummings*, Rozanne Perez was not a tenant taking control of inspected premises from a landlord. She was a non-leasing, store-shopping, transient invitee. Perez was an invitee because she was a person "invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 143 (1982). In slightly different words, a commercial-store invitee is a person "invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Stephens v. Bashas' Inc*., 186 Ariz. 427, 430 (App. 1996).

Speaking of stores such as Circle K, 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). Perez thus had the right to assume—while shopping at Circle K—that the premises were reasonably safe for her use.

The *Perez* majority says that "a court cannot determine whether a relevant duty exist[s]" unless the court examines the scope of the owed duty. *Mem. Dec.* ¶ 14. The majority also criticized the concurrence's position that, if "a court's only duty-based role in liability cases would be to determine the legal relationship of the parties, not the relationship *and* the reasonableness of the circumstances as is necessary in determining duty," then "if a plaintiff minimally alleged being injured while on the property of a business, the issue of duty could never be resolved by motion short of trial." *Mem. Dec.* ¶ 15 (emphasis in original). **That theory is a red herring**. No motion will decide the duty issue because, without dispute, Circle K owed a duty of care to Perez since she was its invitee. Motions can still resolve major disputes on standard of care, breach, and causation. That is all they can do.

Moreover, the majority misconstrues how to decide when duty arises. A duty's "scope" is not part of that decision. "Under Arizona law duty in the negligence context arises either from special relationships or public policy, and we

look primarily to statutes and common law to create and define duty." *Avitia v. Crisis Preparation and Recovery, Inc.*, 256 Ariz. 198, 204 ¶ 26 (2023). Duties "based on special relationships may arise from several sources, including special relationships recognized by the common law, contracts, or 'conduct undertaken by the defendant.'" *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 565 ¶ 16 (2018) (quoting *Gipson v. Kasey*, 214 Ariz. 141, 145 ¶¶ 18-19 (2007)).

Here, the common law has long recognized a special relationship between a store and its invitee. Because of that, a store owes a duty of care to its invitees.

An Arizona business has a non-delegable duty to its invitee to maintain the premises in a safe condition. *Ft. Lowell-NSS Ltd. Partnership v. Kelly*, 166 Ariz. 96, 103-104 (1990). *See also First National Bank of Arizona v. Otis Elevator Co*., 2 Ariz. App. 80, 88 (1965) (An owner's duty "to keep the premises in a reasonably safe condition cannot be delegated by him so as to avoid personal responsibility.").

Since at least 1921, this Court has expressly recognized that every owner of premises has a "duty" to keep the premises "in a reasonably safe condition so that anybody, whether contractor, servant, or invitee, lawfully thereon, may not be unduly exposed to danger." *Arizona Binghampton Copper Co. v. Dickson*, 22 Ariz. 163, 170 (1921). A store such as Circle K has "an affirmative duty to make and keep [its] premises reasonably safe." *Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, 138 ¶ 7 (App. 2006). Whether Circle K violated the duty-based

standard of care and proximately injured Roxanne are questions of fact, not law.

2. The trial and appellate courts failed to uphold the protections of Article 18, § 5 of the Arizona Constitution.

The Court of Appeals decided that, when determining the existence of a duty on Circle K's part, the trial court can examine facts to establish if an unreasonably dangerous condition existed to "trigger a duty by Circle K under law." *Mem. Dec.* ¶ 27. But that duty was already "triggered" since it already existed. But the majority claims "Perez was expected to take care of herself in regard to reasonable risks—such as a trip and fall over a visible object." *Mem. Dec.* ¶ 29. And so, the majority claims that, if an invitee falls on a "visible object," the invitee cannot sue.

Viewed in the light most favorable to Perez and taking all reasonable inferences in her favor, the facts show unreasonable danger. The water display was misplaced and unusually low. Perez, like many shoppers, was not looking at her feet and did not expect there would be any items on the floor that could cause her to trip. A Circle K Rule 30(b)(6)-designated witness admitted he would have moved the water display further back, and that the display was a hazardous condition that should have been remedied. *OB* at 10-12. **There is no issue of notice to Circle K, of course, since it admittedly created the condition.**

Because, according to the majority, "Perez's evidence fails to demonstrate that the case of water was 'unreasonably dangerous,' the superior court was correct in determining that she was responsible for taking care to prevent her injury."

Mem. Dec. ¶ 29. But the trial court had no right to weigh the evidence, to view the evidence in Circle K's favor, or to take any inferences against Perez.

In fact, even if the evidence would convince any Arizona judge that Perez was 100% at fault and caused her own injury because of contributory negligence, comparative fault, or assumption of risk, that does not matter. The reason is Article 18, § 5 of the Arizona Constitution, which states: "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." That guarantee exists in all cases.

When interpreting and applying Article 18, § 5, "contributory negligence" and "comparative negligence" are interchangeable. *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 133 (1986); *Williams v. Thude*, 188 Ariz. 257, 260 (1997). Thus, "the constitutional requirement that the defenses of contributory negligence and assumption of the risk be left to the jury applies to the comparative negligence regime just as it did to contributory negligence." *Gunnell v. Arizona Public Service Co.*, 202 Ariz. 388, 394 ¶ 22 (2002).

In "a negligence case, the jury is the sole arbiter of fact and law as to the defenses of contributory and comparative negligence." *Id.* at 394 ¶ 23. Thus, a "contributory negligence issue cannot be taken from the jury by the simple expedient of calling it an issue of causation." *Markowitz v. Arizona Parks Board*, 146 Ariz. 352, 359 (1985). Nor can the contributory-negligence issue be taken

away by the simple expedient of treating the situation as raising an issue of duty and then saying there is no duty. Under the common law, there was a duty.

Article 18, § 5's protection is unbreakable. The "language of the provision is plain and unambiguous and . . . indicates that the power or duty to finally and conclusively settle the question of contributory negligence or assumption of risk is, by its terms, transferred from the court to the jury." *Inspiration Consolidated Copper Co. v. Conwell*, 21 Ariz. 480, 486 (1920).

The summary judgment was improper because it presumed Perez was 100% at fault (that she was 100% contributorily negligent or comparatively at fault). "Questions of contributory negligence, however, are always for the jury under our constitution, and are not a proper subject for summary adjudication." *Markowitz*, 146 Ariz. at 359. Moreover, it is "constitutionally forbidden for Arizona courts to enter summary judgment for a defendant on the ground of assumption of the risk." *Estes v. Tripson*, 188 Ariz. 93, 95 (App. 1997). That is, "the presence or absence of assumption of risk and its effect, if any, on a plaintiff's recovery, are matters exclusively for the jurors to decide." *Estate of Reinen v. Northern Arizona Orthopedics, Ltd.*, 198 Ariz. 283, 288 ¶ 18 (2000).

Arizona courts have "consistently held that when there is evidence that the plaintiff was negligent, whether such negligence was a contributing cause of the injury as would deprive the plaintiff of the right to recovery was solely a question

for the jury." *Layton v. Rocha*, 90 Ariz. 369, 370 (1962).

And so, an Arizona "trial court cannot tell a jury what its verdict must be when there is evidence that the plaintiff negligently participated in causing his or her own injuries" and, as "a practical matter, therefore, juries [are] essentially free to grant plaintiffs a full recovery, no recovery, or anything in between," even if the plaintiff was contributorily negligent. *Williams*, 188 Ariz. at 259.

It does not matter that a judge believes a plaintiff was fully contributorily negligent or fully assumed the risk. An Arizona jury always has the sole "right to determine the facts" and "to apply or not, as the jury sees fit, the law of contributory negligence as a defense." *Heimke v. Munoz*, 106 Ariz. 26, 28 (1970).

And so, a jury may find for a plaintiff even if a trial court would ordinarily find as a matter of law that the plaintiff assumed the risk of injury. *Estate of Reinen*, 198 Ariz. at 288 ¶ 18. Indeed, Article 18, § 5 "permits jurors to award damages even if they find [a] plaintiff was contributorily negligent or had assumed the risk." *Del E. Webb Corp. v. Superior Court*, 151 Ariz. 164, 169 (1986).

Article 18, § 5 is so strong that even if a tort victim signs an ironclad release or waiver before an accident, whether there has been assumption of risk cutting off the defendant's liability remains solely a question of fact that only the jury can decide. *Phelps v. Firebird Raceway, Inc*., 210 Ariz. 403, 405 ¶ 11 (2005*). See also Sanders v. Alger*, 242 Ariz. 246, 250 ¶ 16 (2017) ("Under Arizona law, whether a

plaintiff has contractually assumed a risk is an issue of fact for the jury, not an issue of 'duty' to be decided as a matter of law.").

Article 18, § 5 applies to all supposedly contributorily negligent tort victims, including, of course, to a supposedly contributorily negligent store customer. In that regard, the landmark 1983 *Beach* opinion held that, although an obvious roadway obstruction in that case might lead reasonable persons to find that a pedestrian was at fault for failing to use reasonable care to avoid the obstruction, that did "not relieve the City of its duty to pedestrians, but only raise[d] the possible defense of contributory negligence. This defense, however, is always a question for the jury in Arizona and cannot be established by the court." *Beach v. City of Phoenix*, 136 Ariz. 601, 604 (1983). That is also true in our case.

The Legislature has passed statutes to help implement Article 18, § 5's plain words. The lead statute provides 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." A.R.S. § 12-2505(A) (emphasis added). Thus, under Article 18, § 5 and A.R.S. § 12-2505(A), the jury is solely responsible for determining—as a matter of fact—contributory negligence and assumption of risk. No Arizona trial or appellate court can make that determination. An Arizona jury likewise has sole responsibility for assessing percentages of fault. A.R.S. §§ 12-2506(A), (B), and (C).

"Application of the doctrine of contributory negligence as would deprive

plaintiff of the right of recovery was and still is a question for the jury." *Cheney v. Superior Court*, 144 Ariz. 446, 448 (1985) (citing A.R.S. § 12-2505(A)).

The superior court and Court of Appeals thus improperly ignored A.R.S. §§ 12-2505(A), 12-2506(A),(B)&(C). Whether there is any defense of assumption of risk, contributory negligence, or comparative fault is an issue that an Arizona jury—and only an Arizona jury—can decide as a question of fact at all times and in all cases whatsoever, including in the present case. Ariz. Const. art. 18, § 5; A.R.S. § 12-2505(A). No Arizona court can make that decision.

Thus, when the superior court granted summary judgment in favor of Circle K and against Perez, it abused discretion and committed reversible legal error as a matter of procedural, statutory, and constitutional law.

3. Inattention, forgetfulness, and distraction cannot annul the duty of care.

Invitees, including busily shopping store customers, will often be negligent. They are, after all, human beings. That negligence can manifest as forgetfulness, distraction, or inattention. If a "business owner has reason to expect harm to the invitee because, for example, the invitee is likely to be distracted, then duty may require him to warn the invitee or take other steps to protect him." *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 823 (9th Cir. 2011) (Arizona law). That is, "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). As a shopper, Perez focused on getting ice cream, and did not focus on a hazardous, low-lying water display put in an odd place.

Of course, a "condition is not necessarily rendered safe as a matter of law merely because it is open and obvious." *George v. Fox West Coast Theatres*, 21 Ariz.App. 332, 335 (1974). If "the possessor should foresee that the condition is dangerous despite its open and obvious nature, neither the obvious nature nor the plaintiff's knowledge of the danger is conclusive." *Markowitz*, 146 Ariz. at 356.

So, "'although the open and obvious nature of a defect or hazard is one factor to be considered in determining whether a defendant was negligent, it is not necessarily determinative.'" *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 253 ¶ 24 (App. 2013) (quoting *Udy v. Calvary Corp*., 162 Ariz. 7, 14 (App. 1989)).

In 1982, this Court held that whether a condition is "dangerous, open and obvious" or whether actors "should have anticipated the harm if open and obvious are issues to be decided by a jury in its capacity as triers of fact." *Tribe v. Shell Oil Co., Inc.*, 133 Ariz. 517, 519 (1982). Many Arizona cases hold that invitees may recover for falling injuries even when they are distracted, forgetful, or inattentive.

***Murphy*.** "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*, the plaintiff was a bowling alley's regular patron. *Id*. at 341. He was assigned a specific lane with an adjacent walkway lower

than the lane's surface. *Id*. at 341-43.

The walkway's unevenness was obvious; both landowner and plaintiff knew about it. *Id*. at 342. After bowling a ball, the plaintiff was watching to see the result, and took a step with his right foot and then with his left. His left foot went over the drop-off to the walkway, causing him to fall and suffer injury. *Id*. at 343. The trial court ruled for the defense because the condition was obvious and known to the plaintiff. *Id*. at 341. The trial court found the bowler "knew" about the walkway's existence and "knew" there was a danger of injury. *Id*. at 343.

But *Murphy* held that, although a condition was open and obvious, it could still be unreasonably dangerous. *Id*. at 343. *Murphy* recognized the plaintiff was on the premises to play a game of athletic skill and something that "might be perfectly obvious to a person walking normally is likely to be forgotten by a contestant in the excitement of a game." *Id*. Since reasonable minds could differ whether the possessor had negligently permitted the walkway's condition, *Murphy* held that the issue should have been left to the jury. *Id*. at 344. That concept applies here as well.

***Silvas*.** In *Silvas v. Speros Const. Co.*, 122 Ariz. 333 (App. 1979), a worker for a subcontractor sued a general contractor after falling through a known hole in the roof of a building under construction. *Id*. at 334. The worker had to move material across the roof in a heavily-loaded wheelbarrow. *Id*. He noticed that when the wheelbarrow was full he could not see the roof holes well. *Id*. The worker

pushed a loaded wheelbarrow to avoid a hole, stepped into an uncovered hole, and fell. *Id*. The trial court directed a verdict for the general contractor. *Id*. at 333.

The Court of Appeals reversed, finding that the "facts show that the existence of one of these holes on the roof distracted [plaintiff] from detecting the hole through which he fell." *Id*. at 335. "Considering the number of holes in the roof, the fact that [the contractor] knew they were hazardous if left uncovered, and the fact that [the contractor] knew that [the] employees would be going back and forth on the roof with wheelbarrows, 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*. Because of that, *Silvas* held the trial court erred in refusing to submit the case to the jury.

Silvas relied on the Restatement rule that a landowner'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 also quoted 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).

Illustration 3 deals with forgetting the known, the obvious—and the seen:

> 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 § 343A illus. 3. Those facts exemplify the fact that forgetting what you saw may still not bar liability. If so, not seeing a danger at all is also no bar.

Silvas also relied on a respected 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.'" *Silvas*, 122 Ariz. at 335 (quoting William L. Prosser, *The Law of Torts* § 61 (4th ed. 1971)).

"'This is true, for example,'" the treatise added, "'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 *The Law of Torts* § 61) (emphasis added)).

***Johnson*.** In *Johnson v. Tucson Estates, Inc.*, 140 Ariz. 531, 533-34 (App. 1984), the defendant argued the trial court erred by failing to grant its motion for a

directed verdict because a shower-room floor's slipperiness was open and obvious. *Johnson* held the defendant was not entitled to a directed verdict based on an open-and-obvious condition when 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.

Although the invitee knew the floor was slippery and had fallen in the shower before, the defendant knew the area "was a social gathering place for male residents" and "should have expected harm from the dangerous condition of the floor because this distraction might cause the invitees to forget the slippery condition of the floor or fail to protect themselves against it." *Id*. *See also Tribe*, 133 Ariz. at 519 (Landowner may anticipate harm to invitee from a condition despite its obviousness when there is reason to expect the invitee's attention may be distracted, so he will not discover what is obvious or protect against it.).

***Beach*.** We return to the milestone case of *Beach v. City of Phoenix*, 136 Ariz. 601 (1983), where a car struck a pedestrian after she stepped into the street to avoid a tree blocking the sidewalk. The pedestrian alleged the City negligently left the tree there. The City won at summary judgment by claiming "it owed no duty to [plaintiff] since the tree was an open and obvious danger." *Id*. at 602. The Court of Appeals "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." *Id*.

The Court of Appeals added that a 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*.

But this Court found the Court of Appeals had "erred in its analysis and legal conclusions," explaining it "disagrees with the court of appeals' confusion of the concept of 'duty' with that of 'negligence.'" *Id*. at 603. After all, the City's duty as landowner is "constant." *Id*. The duty is to keep the premises—a street in *Beach*, an aisle here—in a reasonably safe condition. *Id*. The "acts which are necessary to fulfill" a landowner's duty "vary depending upon the circumstances, including the obvious character of the obstruction." *Id*. The issue is standard of care—not duty.

Beach held that a danger's nature "is not important" to determining if a landowner owed a duty to an invitee, but to determining if a landowner breached the duty of care by negligently failing to remove a dangerous condition. *Id*. at 603. Likewise, here, the danger's nature is not important to determining if Circle K owed a duty to Perez. After all, Circle K owed a duty of care to each invitee.

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 [landowner] may have had." *Id*. at 604. Thus, 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 very open and obvious." *Id*. The issue, again, was standard of care, not duty.

While a danger's open-and-obvious nature should alert an 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," a defense 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. "The question of negligence, therefore, was a question of fact for the jury." *Id*. And so it is in our case.

Beach is a guide for our case. *Beach* supports the proposition that the openness and obviousness of a condition's danger do not relieve the premises owner of liability—but raise the issue of an invitee's contributory negligence. And under Arizona's unique Article 18, § 5, that is an issue only the jury can decide.

Other Arizona cases approving letting juries decide the effect of an open-and-obvious condition when a plaintiff was unobservant, forgetful, or distracted include *Sherman v. Arno*, 94 Ariz. 284, 289 (1963); *Wiseman v. Young*, 4 Ariz.App. 573, 574-75 (1967); and *Yuma Furniture Co. v. Rehwinkel*, 8 Ariz.App. 576, 579 (1968).

Notably, in 1966, 58 years ago, Division Two found that imposition by judicial fiat of the doctrine that, "under certain circumstances the court is justified in holding as a matter of law that a plaintiff knew and appreciated a risk because it was so obvious" is "proscribed in this state by the Arizona Constitution, art. 18, § 5." *City of Tucson v. Holliday*, 3 Ariz.App. 10, 15-16 (1966). And so it is.

Conclusion

The Court of Appeals (1) ignored the basic rule that status (such as being an invitee) determines whether a duty is owed to an entrant on land, (2) misstated the nature of the common-law duty owed to an invitee, (3) conflated the duty owed to an invitee with the standard of care needed to fulfill that duty, and (4) failed to apply Article 18, § 5's protections. Those errors threaten over a century of Arizona premises-liability law. Roxanne Perez thus asks the Court to correct those errors.

DATED this 26th day of November, 2024.

AHWATUKEE LEGAL OFFICE, P.C.

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