

FILED
JAN 25, 2016
Court of Appeals
Division III
State of Washington

Court of Appeals No. 338690-III
Benton County Superior Court Cause No. 14-2-02739-4

WASHINGTON STATE COURT OF APPEALS
DIVISION III

PATRICIA JONSON,

Appellant,

vs.

SEARS, ROEBUCK & CO., a New York for profit corporation,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant, Patricia Jonson (“Ms. Jonson”), filed a negligence lawsuit against Respondent, Sears & Roebuck Company (“Sears”), for injuries she sustained when she fell over a bench/ottoman located in the aisle of the shoe department at its store located in Kennewick, WA. The fall occurred when Ms. Jonson was looking for shoes on the upper shelf while she was walking. She did not see the ottoman which is at knee level, until it was too late to stop from tripping over it. She then fell which caused her to incur injuries.

Sears moved for summary judgment arguing (1) that Ms. Jonson could not establish that the presence of an ottoman in the shoe department created a dangerous condition, or (2) if the ottoman presented a hazardous condition, it was open and obvious.

Ms. Jonson argued that (1) the issue of negligence was a question of fact, (2) for self-service stores such as Sears showing actual knowledge of a hazard is not necessary, and (3) Sears was obligated to inspect for dangerous conditions to protect its customers, which there was no evidence of in this instance. Accordingly, questions of fact existed which required the court to deny Sears’ summary judgment motion.

II. ASSIGNMENTS OF ERROR

1. The trial court erred to the extent it determined that the presence of the ottoman or bench in the aisle of the shoe department was not a question of fact as to whether it constituted a hazardous condition.

2. The trial court erred in finding that the existence of the ottoman in the aisle was open and obvious, thus Sears was not liable for Ms. Jonson's fall.

III. STATEMENT OF THE CASE

Ms. Jonson filed suit against Sears on November 6, 2014 due to her falling over an ottoman/bench located in the aisle of the shoe department of Sears's department store in Kennewick, Washington on January 10, 2012. (CP 1-3). Ms. Jonson maintains she was looking up at shoes in the aisle while she was walking when she caught a glimpse of the ottoman out of her lower peripheral vision right before she tripped over it. (CP 70). She was not looking for the ottoman at the time she was shopping and did not expect it to be in the aisle where she was walking. (CP 70).

Sears measures the ottoman with the following dimensions: length - 28", width - 14", height - 18". (CP 104). Kenneth Taylor, a private investigator retained by Ms. Jonson, examined an ottoman located at the Kennewick Sears on October 19, 2015 and measured the ottoman as

follows: 30” long, 15” wide, and 19 ½” tall. (CP 85-86). The photos also reveal the color of the ottoman is very similar to the carpet. (CP 88).

In support of its summary judgment motion, Sears Asset and Profit Protection Manager, Mathew Teal provided a photo which he attested to be representative of the store layout and fixtures. (CP 102-103). He also stated in a declaration that he reviewed Sears claims records and found that in the Kennewick store from 2005 to present no evidence of (1) an injury in the shoe department or (2) no trip and fall over an ottoman or bench anywhere in the Kennewick Sears. (CP 102-03).

In support of opposition to Sears’ motion, Ms. Jonson also provided photos of the ottoman. (CP 87-89). She also provided a photograph of an aisle of the shoe store. (CP 90). The dimensions of the aisle at the time of the accident have not been provided as part of the record.

Ms. Jonson also provided expert testimony from JoEllen Gill of Applied Cognitive Sciences, Inc. a systems engineer, who focuses on environmental engineering. Ms. Gill possesses a Bachelor of Science in Systems Engineering, a Master’s in Business Administration, and an M.S. in Environmental Science and Engineering. (CP 74). Ms. Gill’s report provided the following relevant data and opinions:

- (1) As people walk through their environment, they typically look 25 feet or more ahead and use visual cues for gross

navigation. This tendency is exacerbated in a retail setting with displays designed to capture the attention of the shopper.

(2) When focusing in front of oneself, or in this case above, visual acuity rapidly degrades to the point where at a mere 20 degrees people are considered legally blind.

(3) The ottoman was void of any attributes such as motion, blinking light contrasts, or color contrasts to capture a person's attention.

(4) Hazards associated with unsafe walking surfaces are well known to retail business owners as well as commercial and business establishments.

(5) Falls at elevation accidents are consistently the No. 1 cause of accidental injuries for retail stores, restaurants, the hospitality business, and U.S. buildings in general.

(6) The condition of the shoe aisle at Sears with an ottoman located in it was inconsistent with basic safety principals, guidelines and standards.

(7) Ms. Gill has reviewed dozens of safety plans for retail stores which consistently prohibit on the sales floor items less than 24" in height, and in some cases, less than 36" in height. The reason for these precautions is the recognition that typical shoppers will fail to detect such hazards in their peripheral vision when shopping in the retail environment.

(8) The ottoman that Ms. Jonson tripped over was inconsistent with requirements of the American Society of Testing and Materials (ASTM) standard practice for safe walking surfaces which requires that walkways shall be maintained flush and even to the extent possible.

(CP 78-80).

Ms. Gill opined that Ms. Jonson's fall was the equivalent of her tripping over unmarked steps in an aisle in the shoe department. (CP 80).

Further, the presence of the unexpected ottoman in the shoe department aisle violated a typical shopper's mental model or "schema" about the world. (CP 81). She states, the expectation for a shopper, such as Ms. Jonson, would be that while there are seats for sitting and trying on shoes, they are typically in the open area between the displays or at the end caps of shoe display aisles. (CP 81).

As to whether the ottoman presented a hazardous condition, Ms. Gill concluded that Sears knew or should have known of this hazardous condition created by the ottoman; knew or should have known such conditions created an unsafe walking surface; and failed to prevent this condition from being created or to take adequate and timely steps to protect its customers from this condition. (CP 81).

Ms. Gill further testified that to protect guests, Sears should employ some type of risk management program to minimize potential harm to its customers. (CP 81).

Through discovery, Sears was asked to identify any policies related to periodic inspections required during the course of the day to ensure that no obstructions existed in the shopping aisles. Sears replied:

Responsibility for maintenance and inspection of the premises is shared by store management, loss control and floor associates, with management and loss control associates responsible for the entire store premises and floor associates responsible for the department in which they are working. The premises occupied are inspected prior to

opening and during public hours, inspected on an on-going basis by store management, loss control and associates. Inspections are not timed, recorded or scheduled.

(CP 62-63). When asked to produce policies responsive to interrogatories related to clearing shopping aisles, Sears produced no written policy but referred to the above quoted interrogatory answer. (CP 64).

IV. ARGUMENT AND AUTHORITY

1. Standard of review.

In a summary judgment motion, the non-moving party must first show the absence of an issue of material fact. *Iwai v. State*, 129 Wn.2d 84, 95, 915 P.2d 1089 (1996). The burden then shifts to the non-moving party to set forth specific facts showing a genuine issue of fact. *Id.* at 95, 96. An appellate court reviewing a summary judgment motion must engage in the same inquiry as the trial court with all evidence and all reasonable inferences therefrom considered in a light most favorable to the non-moving party. *Id.*

To establish the elements of an action for negligence, the Plaintiff must show (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. *Id.* at 96.

A landowner's duty attaches only if the landowner knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk. *Id.* The phrase, "reasonable care" imposes on the landowner the duty to inspect for dangerous conditions, followed by such repair, safeguards, or warnings as may be reasonably necessary for the invitee's protection under the circumstances. *Id.*

(a) Negligence is a question of fact.

In general, negligence is a question of fact for the jury and should be decided as a matter of law only in the clearest of cases and when reasonable minds cannot have differed in their interpretation of the facts. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 741, 927 P.2d 240 (1996). In the case of a customer-invitee, when walking in an area where there is no reason to anticipate a hazard, a customer need not keep her eyes riveted to the floor immediately in front of her feet. *Simpson v. Doe*, 39 Wn.2d 934, 937, 239 P.2d 1051 (1952).

In this instance, Ms. Jonson maintains she was not keeping her eyes riveted to the floor, but rather on shoes at eye level or higher. The ottoman 19 ½" tall and devoid of any color contrast. These fact alone should create a question of fact and requires reversal.

2. Sears had constructive knowledge of the hazard.

Sears argued at summary judgment there was no evidence that it did not inspect the aisle and/or that Sears had no knowledge the ottoman could be a hazard. Generally, a Plaintiff must establish that a Defendant had, or should have had, knowledge of a dangerous condition and time to remedy the situation before the injury or to warn the plaintiff of the danger. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 859 P.2d 1014 (1994).

Irrespective of whether Sears was inspecting the aisle, there is an exception to showing actual or constructive notice to a hazard where certain risks are inherent in a mode of operation. *Id.* at 652.

An owner of a self-service establishment has actual knowledge that its mode of operation creates certain risks of harm to its customers. Since a self-service operation involves the reasonable probability that these risks will occur, these risks are foreseeable. Thus, it is not necessary to show actual or constructive notice of the specific hazard causing injury, and it becomes the task of the jury to determine when the proprietor has taken all reasonable precautions necessary to protect invitees from these foreseeable risks.

Id. “Self-service departments” are areas of a store where customers service themselves. *Id.* In such areas, where lots of goods are stocked and customers remove and replace items, “hazards are apparent”. *Id.* at 653.

Sears did not offer any expert opinion or case law which suggests (1) an ottoman under 24 inches is never a hazard, or (2) whether the ottoman was designed to be left in an aisles way or is intended to be located in a more open area for people to try on shoes. Thus, the court necessarily concluded the 19 ½” inch tall ottoman was not a hazard irrespective of where it was located or whether it was marked in any manner at the time of the fall.

In this instance, it is unknown how the ottoman became located in the shoe aisle. Nonetheless, Ms. Gill has opined that an object under 24 inches presents a hazards because they cannot be detected by peripheral vision, particularly when there is no color contrast or other visual cues to draw ones attention to it. Accordingly, Ms. Gill opined the ottoman should have been placed in an end cap or open area because a shopper, such as Ms. Jonson, would not be looking for or necessarily see the ottoman in the shoe aisle.

Under these facts, the trial court simply erred to the extent it concluded that in a self-service establishment, an ottoman, in an aisle as opposed to an open space is never a hazard.

3. A question of fact existed as to whether the ottoman posed a risk.

Sears provided no evidence that on that day an inspection occurred. Rather, Sears provided a general description of its inspection

process but no evidence of what inspection, if any, actually occurred on the day of Ms. Jonson's fall.

A proprietor of a store must inspect for dangerous conditions and provide such repair, safeguards, or warnings as may be reasonably necessary to protect the customers under the circumstances. *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn. App. 854, 860, 28 P.3d 799 (2001). The reasonableness of a proprietor's methods of protection is a question of fact. *Id.* Again, given the fact that Ms. Gill has opined the ottoman was a hazard and no evidence was produced as to when Sears may have inspected the aisle, summary judgment was not proper.

4. Ms. Jonson's actions were reasonable.

Ms. Jonson had a duty to exercise reasonable care to avoid injury. *Beltzelle v. Doces Sixth Avenue, Inc.*, 5 Wn. App. 771, 776, 490 P.2d 1331 (1971). Reasonable care may or may not require looking on the ground. *Id.* Whether examining the photos or relying upon Ms. Jonson's testimony, it is an undisputable fact that the Sears shoe department locates its product at eye level or higher. Ms. Gill opined that a shopper would not see an ottoman because of its height and lack of visual cues and Ms. Jonson's mode of shopping was reasonably foreseeable. The law is clear Ms. Jonson was not required to keep her eyes riveted to the floor. *Simpson*, 39 Wn.2d at 937. Accordingly, Sears may have an

argument that Ms. Jonson was contributorily negligent, but it was improper to grant summary judgment in favor of Sears.

V. CONCLUSION

Ms. Jonson ultimately argues several questions of fact exist that precluded summary judgment. Those questions of fact include a determination as to whether a 19 ½” ottoman is a known hazard; whether a customer would reasonably expect a 19 ½” tall ottoman to be located in the aisle of a shoe department; whether Sears inspected or failed to inspect where Ms. Jonson fell; and whether Sears took reasonably safe precautions to protect Ms. Jonson. Because Sears is a self-service department store, it was charged with constructive knowledge of the hazard the ottoman presented regardless if it had specific knowledge at the time of Ms. Jonson’s fall. Accordingly, summary judgment should have been denied, and the trial court must be reversed.

DATED this 25th day of January, 2016.

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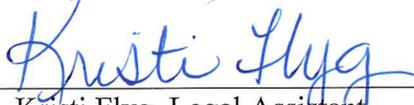
CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on January 25, 2016, I filed the original of the foregoing document with the Court of Appeals, Division III. I also caused a true and correct copy of the foregoing document to be served on the following counsel, via e-mail and first class U.S. Mail to:

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DATED this 25th day of January, 2016, at Richland, Washington.

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By: 

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