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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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION/SUMMARY OF ARGUMENT

Sears' Motion for Summary Judgment was clear. Sears argued Plaintiff could not establish the presence of an ottoman or bench in the shoe department created a dangerous condition or that Sears breached a duty of care owed to Ms. Jonson. Sears has no written policy about store inspections. There is no evidence in the record which dictates where ottomans are to be located, and there is no evidence any inspection occurred the day Ms. Jonson tripped over the ottoman.

In contrast to Sears' lack of evidence, Ms. Jonson testified she did not see the ottoman and JoEllen Gill opined the ottoman created a hazardous condition because of its height and location in the aisle where Ms. Jonson's vision was directed at the shoes on the shelves. This creates a question of fact.

Sears' argument about the qualifications of JoEllen Gill must be disregarded because no challenge under ER 702 was made at the trial court level and cannot be addressed for the first time on appeal.

II. ARGUMENT

A. The focus of the Court must be whether a dangerous condition existed; whether Sears had actual or constructive knowledge; and if there was a danger, was it open and obvious.

In their reply, Sears appropriately argues it is not liable because "(1) the ottoman did not constitute a dangerous condition; (2) Sears had no

actual or constructive knowledge of any dangerous condition; and (3) even if a dangerous condition did exist, such condition was open and obvious." (See Respondent's Brief, page 5). Summary judgment was not appropriate on any of these issues.

1. *Whether an ottoman located in an aisle constitutes a dangerous condition is a question of fact.*

Whether the ottoman presented a dangerous condition in this case is determined by three factors. First, JoEllen Gill has opined the ottoman in the shoe aisle created a dangerous condition. Second, Sears is undisputedly a self-service department store. For self-service stores, there only needs to be a relation between the hazardous condition and the self-service mode of operation. *Tavai v. Walmart Store, Inc.*, 176 Wn. App. 122, 129, 307 P.3d 811 (2013). Third, it is ordinarily a question of fact for the jury to decide under all of the circumstances, whether a defective condition existed long enough so that an owner exercising reasonable care would have discovered it. *Id.* at 133.

The mere existence of an ottoman in a shoe store may not create a hazardous condition. Sears does not provide (1) a policy which addresses where an ottoman must be located, or (2) expert testimony that an ottoman can be located anywhere in the store without constituting a hazard. There is no evidence as to whether an employee or customer placed the ottoman

in the shoe aisle nor is it known how long the ottoman remained in the aisle prior to Ms. Jonson tripping over it.

From this evidence, or lack thereof, Sears argues that, "common sense dictates that an ottoman does not constitute a dangerous condition". (Respondent's Brief, pages 6 & 7). Common sense is not dispositive in any manner. It is not even a factor to be considered under any prevailing legal analysis. Accordingly, Sears "common sense" approach must be rejected.

2. *Sears had actual or constructive knowledge of the dangerous condition posed by the ottoman.*

Sears is undeniably a self-service establishment. Certain risks are inherent in the mode of operation of self-service establishments such that a plaintiff need not prove notice of a dangerous condition. *Ingersoll v. Debartolo, Inc.,* 123 Wn.2d 649, 652, 859 P.2d 1014 (1994). Under *Debartolo*, a question of fact exists as to whether the ottoman, found in an aisle, creates a risk that is foreseeable. *Id.* Sears suggests that general knowledge of an ottoman in a store is common to the degree that it can be located anywhere and be open and obvious. There is no reported opinion that stands for this general proposition.

The ottoman, like merchandise and goods which are stacked, removed and replaced by customers, do not remain in the same position.

Accordingly, a question of fact existed as to whether the ottoman located in the shoe aisle was a hazard given the fact that it is 19-½" off the ground and was located in an area where merchandise was stored above eye level. No case or testimony was introduced by Sears that states, under these facts, summary judgment is proper based upon a lack of notice.

3. *It is a question of fact whether the ottoman was open and obvious.*

Ms. Gill opined that customers expect ottomans in open areas and aisle end caps where shoes can be tried on. Further she opined (1) the ottoman presented a dangerous condition, (2) there are industry standards that Sears should have known, and (3) Sears should have had a risk management policy to protect guests.

An argument may exist that at certain locations in a store like Sears an ottoman would be open and obvious. However, Sears asked this Court to disregard visual cues, the actual location of the ottoman when Ms. Jonson fell, and other factors identified by JoEllen Gill which rule out that ottomans located anywhere in a department store are, per se, known, open and obvious.

Housekeeping procedures can present a question of fact for a jury as to whether a jury exercised ordinary care. *Coleman v. Ernst Home Center, Inc.*, 70 Wn. App. 213, 221, 853 P.2d 473 (1993). Sears has no

written policy on periodic inspections. Sears indicates inspections occur on an on-going basis. However, Sears provided no evidence of any inspection on the day Ms. Jonson fell. On these facts, courts have rejected summary judgment.

> To hold for appellants [the store] on the issue, as a matter of law, would compel us to ignore entirely the issue of whether appellants housekeeping procedures and practices, with respect to the display stand and the surrounding area, met the standard of care that an ordinarily careful and prudent store owner would have deemed reasonably adequate under the same circumstances. The resolution of that issue was for the jury, not this court.

Morton v. Lee, 75 Wn.2d 397-98, 450 P.2d 957 (1969). In this case, the rationale stated in *Morton* must be applied because Sears can only state generally how it inspects its store but provides nothing about its actual practices the day of the incident.

B. Sears cannot challenge Plaintiff's expert for the first time on appeal.

Sears did not request a *Frye* hearing or specifically challenge JoEllen Gill as an expert prior to summary judgment or as part of its motion. The trial court never evaluated the qualifications of JoEllen Gill because they were never challenged as part of summary judgment. Where a party does not challenge an expert's opinion as not being generally accepted in the scientific community nor requests a Frye hearing, the court will not consider those issues for the first time on appeal unless the party

demonstrates a manifest error affecting a fundamental Constitutional right. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 356, 333 P.3d 388 (2014). Accordingly, the entirety of Sears' critique of Ms. Gill or her qualifications as an expert should not be considered.

III. CONCLUSION

Given the testimony of JoEllen Gill, the failure by Sears to challenge her opinion, and lack of a contrary expert opinion, summary judgment should not have been granted. There are simply too many unanswered questions and nothing to rebut Ms. Gill. Accordingly, the trial court's ruling must be reversed and this matter remanded back to superior court for trial.

Dated this 21st day of March, 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 March 21, 2016, I mailed the original of the foregoing document for filing 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 21st day of March, 2016, at Richland, Washington.

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