

No. A07-2387

STATE OF MINNESOTA
IN COURT OF APPEALS

Andre Gilmore

Appellant,

vs.

Walgreen Co.

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUE PRESENTED

I. Whether the trial court erred in dismissing Gilmore's case?

The trial court held that Walgreens did not owe a duty to protect Gilmore from a hazard that was open and obvious.

Apposite Cases and Statutes:

Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972)

Wolvert v. Gustafson, 274 Minn. 239, 146 N.W.2d 172 (1966)

Messner v. Red Owl Stores, Inc., 239 Minn. 411, 57 N.W.2d 659 (1953)

Louis v. Louis, 636 N.W.2d 314 (Minn. 2001)

STATEMENT OF THE CASE

This is an appeal from a summary judgment decision by the Honorable David Higgs of the Ramsey County District Court.

Appellant Andre Gilmore sued Respondent Walgreens for personal injuries after he tripped and fell on an empty pallet left by Respondent's employee in a customer area of a Walgreen's store.

Respondent moved for summary judgment, arguing that the pallet was open and obvious.

Gilmore opposed the summary judgment motion, arguing that Walgreen's should have anticipated that someone could trip on the empty pallet and should have moved it, despite its obviousness.

The district court granted the summary judgment motion and dismissed Gilmore's case. Gilmore now appeals the district court's decision.

STATEMENT OF FACTS

Andre Gilmore went to a Walgreens store to purchase a disposable camera. (A-61, Deposition of Andre Gilmore, p. 45.) After entering the store, Gilmore went to the customer service counter to ask for assistance. (A-61, Gilmore Depo., p. 46.) At the customer service counter he waited in line behind one or two people for up to five minutes. (A-63, Gilmore Depo., p. 56.) As he was standing in line, he looked around to see if he could see the cameras. (Id.)

When it was Gilmore's turn to be helped, he asked the customer service person where to find the cameras. (A-64, Gilmore Depo., p. 58.) The customer

service person made a motion and pointed in a direction over Gilmore's shoulder. (A-64, Gilmore Depo., pp. 58-59.) The customer service person said, "they are over there." (Id.). Gilmore turned to follow the employee's gesture, took a step, and fell. (A.-64, Gilmore Depo., p. 60.) As Gilmore looked in the direction the employee was pointing (i.e. toward the cameras), Gilmore failed to see an empty pallet on the ground. *Id.* Gilmore testified that he failed to notice the pallet because "I was looking at the area the gentleman was pointing at where the camera was." (A-70, Gilmore Depo., p. 83.)

Walgreen's assistant store manager on duty at the time of Gilmore's accident testified that the pallet was about 5 inches high, and it had been left on the floor in an area where customers walk. (A-77, 79, Deposition of Matthew Skogen., pp. 8, 15; A-85, Statement of Matthew Skogen, p.3.) The pallet was normally stacked with merchandise, but had been emptied by a Walgreen's store employee up to an hour before Mr. Gilmore tripped on it. (A-79, Skogen Depo., p. 15; A-85, Statement of Matthew Skogen, p. 3.)

The Walgreen's assistant store manager testified that this was the first time he could remember seeing an empty pallet left on the floor of a Walgreen's store. (A-80, Skogen Depo., p. 18.) The pallet weighs about five pounds and could easily have been moved to the storage room or behind a counter. (A-78, 80, Skogen Depo., pp. 10, 17.) The assistant store manager said that if *he* had been the person to empty the pallet, he would not have simply left it on the floor:

Q. If you had removed all of the merchandise from a pallet, would you have moved the pallet so that customers wouldn't trip over it?

...

A. I personally would have, yes. I wouldn't want to leave it out there so it would be sitting in the middle of the store.

(A-79, Skogen Depo., p. 15.) The assistant store manager explicitly acknowledged that leaving the empty pallet where it was posed a hazard to customers. (A-79, Skogen Depo., p. 16.)

Walgreen's assistant manager also testified that the store is set up with a focus on "impulse sales," i.e. the sale of merchandise that customers did not initially come into the store to purchase. (A-80, Skogen Depo., p. 17.) To effectuate these impulse sales, there are displays of merchandise throughout the store designed to attract customers' attention as they are walking throughout the store. (A-80, Skogen Depo., p. 19.) There are also signs posted throughout the store that customers are expected to read as they are walking, showing prices and special offers. (A-80, Skogen Depo., p. 20.) Pictures of the store clearly show colorful merchandise stacked closely throughout the store in such a way as to constantly attract customers' attention as they walk. (See A-73 – 75, Exhibits 1 – 3 of Gilmore Depo.); A-77, Skogen Depo., p. 6.) The empty pallet was about ankle high. (A-77, Skogen Depo., p. 8.)

ARGUMENT

I. THE DISTRICT COURT SHOULD NOT HAVE DISMISSED GILMORE'S CASE.

a. Summary Judgment Standard.

Summary judgment must be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law”. Minn.R.Civ.P 56.03. On appeal from a summary judgment the reviewing court determines whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 320 (Minn. 1989). The question here concerns whether the trial court erred in its interpretation and application of the law. The application of case and statutory law is a legal conclusion which this court may review de novo. *Dohman v. Housely*, 478 N.W.2d 221, 224 (Minn.App. 1991).

b. Walgreens had a duty to remove the empty pallet from a customer traffic area.

Duty is an issue to be determined as a question of law and for this court to decide de novo. *H.B. By and Through Clark v Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996).

In this case, the district court held that:

Plaintiff has failed to present specific facts showing that genuine issues of material fact as to whether Defendant owed Plaintiff a duty to protect him from a potential hazard that was open and obvious. Since Plaintiff has presented no proof on the duty element of his negligence claim, Defendant is entitled to summary judgment.

(A-49, Judge Higgs Summary Judgment Memorandum, p. 4.) The district court's decision was error and must be reversed.

The law is well-settled that a property owner owes a general duty of reasonable care for the safety of all persons invited upon its premises. *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 662 (1972). This means that a business owner has a duty to keep and maintain his/her premises in a reasonably safe condition. *Wolvert v. Gustafson*, 274 Minn. 239, 146 N.W.2d 172, 173 (1966). A business owner is liable for injuries sustained by a customer if his employees fail to rectify a dangerous condition after they know, or in the exercise of reasonable care should know, that the condition exists. *Messner v. Red Owl Stores, Inc.*, 239 Minn. 411, 57 N.W.2d 659, 661 (1953).

In its memorandum, the district court relies upon *Peterson v. W.T. Rawleigh*, 274 Minn. 495, 144 N.W.2d 555 (1966). In *Peterson*, the plaintiff slipped and fell on ice in a parking lot. The property owner argued that the ice was open and obvious, such that it should be relieved of all liability as a matter of law. The Minnesota Supreme Court held that although the ice was open and obvious, the property owner, in the specific circumstance of that case, should have anticipated that some people would walk over the icy area. The Court therefore

determined that allocation of fault was a question for the jury and upheld the jury's finding of negligence on the part of the landowner for not clearing the ice.

The district court in the case at bar cites the following language from *Peterson* and the Restatement of Torts: "A possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." (A-48, Judge Higgs Summary Judgment Memorandum, p. 3.) However despite quoting this language, the district court failed to consider the second part of the sentence: "unless the possessor should anticipate the harm despite such knowledge or obviousness." In this case, Gilmore admits the empty pallet was open and obvious. His assertion is that Walgreens is nonetheless negligent because (1) a store employee emptied the pallet and left it in a customer traffic area, (2) the empty pallet is about 5 inches high, (3) the store is full of displays and signs intended to attract customers attention, and (4) another store employee directed Gilmore to turn and walk toward the pallet that was immediately behind him. The district court's opinion gives no consideration to whether Walgreens should have anticipated the harm despite the obviousness of the pallet – particularly when the pallet weighs five pounds and could easily have been moved by store employee who emptied it to a storage area or behind the counter. (A-78, 80, Skogen Depo., pp. 10, 17.)

In dismissing Gilmore's claim, the district court summarized a statement made by the Court in *Peterson*. The district court wrote, "A possessor of land,

however, has no duty to an invitee where the anticipated harm involved dangers so obvious that no warning is necessary.” (A-48, Judge Higgs Summary Judgment Memorandum, p. 3.) However, the Court in *Peterson* actually went on to consider and then hold that the defendant in that case should have anticipated the harm despite the obviousness of the ice and should have either cleaned it up or blocked off access of the area to invitees. In a later case, the Minnesota Supreme Court clearly stated: “If the court concludes that the danger was either known or obvious as a matter of law, it must then decide whether appellant should nevertheless have anticipated the harm despite its known or obvious danger.” *Louis v. Louis*, 636 N.W.2d 314, 322 (Minn. 2001). The district court in this case should have determined whether Walgreens should have anticipated the harm from leaving a five-inch-high pallet in a customer traffic area, despite the obviousness of the danger.¹

¹ The Minnesota Supreme Court has consistently required an analysis of this exception to the open and obvious rule, but the exception itself is not without limit. In *Baber v. Dill*, 531 N.W.2d 493 (Minn. 1995) the court upheld dismissal of Baber’s claim for damages where Baber had erected a retaining wall on Dill’s property, leaving exposed rods on top of the wall, and then impaling himself on one of the rods. Baber sued Dill for Dill’s negligence in allowing the rods to be on the retaining wall and the Supreme Court held there could be no liability where Baber had installed the rods himself. In the opinion, the Supreme Court stated: “The difference between open and obvious dangerous activities and conditions for which the possessor should anticipate harm and those activities and conditions for which the possessor should not anticipate harm because they are so open and obvious is a fine one, but one that we choose to make. In the present case, we conclude a landowner has no duty to an invitee to warn or make safe known and obvious conditions when that invitee has assisted in creating those conditions”. *Baber*, at 496. There has been no assertion in this case that Gilmore emptied the pallet and left it on the floor at Walgreens.

The Minnesota Court of Appeals has also recognized this exception to the “open and obvious” rule, pointing out that this exception applies “in situations in which, for example, a distracting circumstance would tend to cause an entrant to overlook the open and obvious danger.” *Williams v James Gang of Minnetonka*, File. No. 1100806 (Minn.Ct.App. August 13, 2007) (*unpublished*)², citing *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 206, 203 N.W.2d 841, 845 (1973) (noting that distracting circumstances are factors that may excuse a plaintiff’s failure to watch where he was stepping). The Restatement (Second) of Torts § 343A, Comment F, provides some examples of when this may occur:

Such reason to expect harm to the visitor 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.**

Van Gordon v. Herzog, 410 N.W.2d 405 (Minn.Ct.App. 1987) *quoting*

Restatement (Second) of Torts § 343A, comment f (emphasis added). The

Minnesota Supreme Court may have stated it best in 1920 when it commented “It

² The court of appeals in *Williams* remanded the case because it found disputed facts on whether the condition was open and obvious. The court then went on to say: “Given the very narrow pathway between the partition and the chair, and the assertion that patrons regularly use this narrow alley to reach the area where they place their belongings on the hook, whether James Gang should have anticipated the harm despite the allegedly open nature of the risk also is a question that must be resolved before judgment may be entered for James Gang. Because the district court has not yet addressed this issue, we offer no opinion whether it may be decided as a matter of law.” In this case, Gilmore is asking the court to determine now, as a matter of law, that Walgreens should have anticipated the danger of the pallet despite the obviousness of the condition. It would not serve justice nor judicial economy for this legal issue to be remanded to the district court and then appealed a second time.

could not reasonably [be expected] that customers absorbed in the inspection of goods thus displayed would bestow the same degree of attention to their steps or to the floor as would properly be required at places where it would not be likely that they would have eyes only for a merchant's display of his wares.” *Ober v. The Golden Rule*, 178 N.W. 586, 586 (Minn. 1920).

In its memorandum to the district court, Walgreens asserted that this case is very similar to *Bisher v. Homart Dev Co.*, 328 N.W.2d 731 (Minn. 1983).

Contrary to Walgreen’s assertion, however, *Bisher* is distinguishable because in *Bisher* the plaintiff ran into a planter, which was a large decorative display intentionally placed in a common area for the aesthetic enjoyment of patrons.

Here, the empty pallet was five inches high and Walgreen’s own manager admits that it was dangerous and should not have been left where it was.

The district court erred in not considering whether Walgreens should have anticipated the harm despite the obviousness of the pallet. Gilmore presented evidence and argued this to the district court. The evidence in the record is undisputed that a Walgreen’s employee emptied the pallet and left it in an area where customer’s walk. The evidence in the record is undisputed that empty pallet was left there for up to an hour before Gilmore tripped on it. The evidence in the record is undisputed that the pallet was just five inches off the ground and that the store was filled with displays and signs designed to attract customers’ attention. Walgreen’s assistant store manager admits the pallet should have been removed

and that leaving it there was a danger to customers.³ Given these undisputed facts, this court should reverse the district court, determine as a matter of law that Walgreen's owed a duty to Gilmore to remove the pallet, and remand to the district court for trial on the issues of comparative fault and damages.

- c. Walgreens had a duty to warn Gilmore of the empty pallet before directing him to turn and walk in that direction.

Gilmore testified that the reason he failed to avoid the pallet is that a Walgreen's employee directed him to the area where the cameras were and he tripped on the pallet when he turned and took a step to follow the employ's direction. The Walgreen's employee was facing the direction of the pallet, and may have been for up to an hour before the accident, while Gilmore had has back to the pallet. As he was directing Gilmore, the store employee had a duty to warn Gilmore of the empty pallet lying on the floor just behind him. A shopkeeper is under legal obligation to keep and maintain his premises in reasonably safe condition for use as to all whom he expressly or impliedly invites to enter the premises. *Ober v. The Golden Rule*, 178 N.W. 586, 586 (Minn. 1920). Here, any reasonable person in this situation would warn another person of a low-to-the-ground object immediately behind that person before directing him in that direction. Walgreen's employee had an obligation to warn Gilmore, and anyone

³ In fact, one could argue that this admission by a Walgreen's assistant manager begs the question of whether Walgreen's should have anticipated the harm despite the obviousness of the condition.

could anticipate the danger of directing him to turn around with the pallet just behind him. The employee's failure to warn Gilmore of the pallet was negligence, and the district court's failure to recognize this was in error.

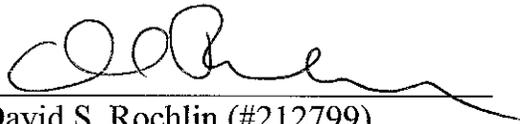
CONCLUSION

The district court erred when it dismissed Gilmore's case. The dismissal should be reversed and Gilmore should be given his day in court.

Respectfully submitted,

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