

NO. A07-2387

State of Minnesota
In Court of Appeals

Andre Gilmore,

Appellant,

vs.

Walgreen Co.,

Respondent.

RESPONDENT'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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Statement of Legal Issue

Whether the district court properly concluded that Respondent Walgreen Co. owed no duty to Appellant Andre Gilmore regarding an admittedly open and obvious condition.

The district court granted summary judgment to Walgreen Co., concluding that it owed no duty because the undisputed evidence was that the display stand over which Gilmore fell was open and obvious and that Gilmore “admitted that nothing prevented him from seeing” it. A.48-49.

Apposite authority:

Bisher v. Homart Development Co., 328 N.W.2d 731 (Minn. 1983)

Baber v. Dill, 531 N.W.2d 493 (Minn. 1995)

Engleson v. Little Falls Area Chamber of Commerce, 362 F.3d 525 (8th Cir. 2004)

Statement of the Case

This appeal arises out of a fall over a two feet by three feet display stand.

Appellant Andre Gilmore claimed that Respondent Walgreen Co. (“Walgreens”) was negligent and failed to warn him of an alleged dangerous condition inside its store. A.2-3 (Complaint, ¶¶ V, VII).

The Honorable David Higgs, Ramsey County District Court, granted summary judgment to Walgreens. The district court noted that Gilmore failed “to see that which [was] clearly visible,” and concluded that Walgreens owed no “duty to protect [Gilmore] from a potential hazard that was open and obvious.” A.49. Gilmore appeals from the adverse judgment.

Statement of Facts

The day before Halloween, Gilmore visited a Walgreens store in the early evening. A.60 (Gilmore depo. p. 41 (lines 23-25); p. 42 (lines 1-7); p. 44 (lines 13-15)). Gilmore had been in the store some five to ten times before and was familiar with it. A.60-61 (Gilmore depo. p. 40 (lines 20-25); p. 41 (lines 1-6); p. 45 (lines 16-18)). He stopped at the store to buy a disposable camera. A.61 (Gilmore depo. p. 45 (lines 1-2)).

Gilmore walked approximately one hundred feet through the store to the customer service area. A.61 (Gilmore depo. p. 46 (lines 12-25); p. 47 (lines 1-12)). He recalls seeing displays of Halloween items, including some fake pumpkins on the floor. A.61-62 (Gilmore depo. p. 47 (lines 4-11); p. 48 (lines 17-25); p. 49 (lines 1-15)). Gilmore claims that the store was in “disarray” with items misplaced and that he saw “about five” bags of candy on the floor. A.61 (Gilmore depo. pp. 47-50). He testified he even “stepped over a bag or so” of candy and that he needed to keep his eyes open for them as he walked through the store. A.62 (Gilmore depo. p. 50 (lines 10-15)).

The display stand that Gilmore tripped over was “near the camera counter.” A.2 (Complaint, ¶ III). It was black and sat upon a white floor. A.65 (Gilmore depo. p. 62 (lines 5-13); p. 64 (lines 15-16)). The stand was approximately two feet by three feet, and stood five or six inches high. A.65 (Gilmore depo. p. 61 (lines 21-25); p. 62 (lines 1-3)); A.77 (Skogen depo. p. 7 (lines 19-22); p. 8 (lines 4-12)).¹ While Gilmore has also stated that the stand may have been only an inch high, he admits that it was open and

¹ In his interrogatory answers, Gilmore stated he “tripped over an empty display stand that had been left in the area and which was just a few inches high.” Answer to Interrogatory No. 18 (Frantzen Aff., Ex. 5).

obvious. A.65 (Gilmore depo. p. 63 (lines 6-25); p. 64 (lines 1-14)); Appellant's Brief at 6 ("Gilmore admits the empty pallet was open and obvious").²

After he made it to the customer service area, Gilmore waited in line to ask where the disposable cameras were located. He waited up to five minutes behind one or two other people. A.63 (Gilmore depo. p. 56 (lines 3-12)).³ As he waited, Gilmore "actually look[ed] for the cameras" "up and around" and "[k]ind of d[id] a 360 to see what was there." *Id.* (lines 13-22). He did not talk with anyone as he waited. *Id.* (lines 23-25). Gilmore did not see the display stand, either when he approached the counter or while he waited and looked around for the disposable cameras. A.64-65 (Gilmore depo. p. 57 (lines 16-21); p. 64 (lines 20-25)). He did notice "four or five" VHS tapes on the ground that had been knocked off of a wall display. A.63-64 (Gilmore depo. p. 55 (lines 13-24); p. 57 (lines 3-15)).

After waiting, Gilmore asked an employee where the disposable cameras were. The employee motioned to the cameras and pointed over one of Gilmore's shoulders. Gilmore said "thanks" and turned completely around and began to walk towards the cameras. A.64 (Gilmore depo. p. 58 (lines 23-25); p. 59 (lines 1-25); p. 60 (lines 1-11)). He testified the cameras "were like at a[n] . . . 80-degree angle behind" him as he faced the counter. A.64 (Gilmore depo. p. 59 (lines 3-6)). Gilmore took about "one and a half"

² Gilmore's attorney took some photographs of the store a few days later. A.62 (Gilmore depo. p. 50 (lines 20-23)). Six of the photos were marked as deposition exhibits. A.62-63 (Gilmore depo. pp. 51-55); A.73-75. On one of the photos, Gilmore drew approximately where the stand was located. A.64-65, 71 (Gilmore depo. pp. 60-61, 85); A.75; R.A.15 (color photocopy of Gilmore depo. ex. 3).

³ Gilmore's deposition correction sheet changed his answer from five minutes to 90 seconds. A.72 (Gilmore depo. correction sheet).

steps before he fell. A.64 (Gilmore depo. p. 60 (lines 12-14)). Gilmore stated the stand “was not really noticeable for me” and that he “wasn’t expecting anything to be in [his] way when [he] turned.” A.70 (Gilmore depo. p. 83 (lines 12-16)).

Argument and Authorities

I. Standard of Review and Introduction

On appeal from a summary judgment, an appellate court reviews the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Offerdahl v. Univ. of Minn. Hosps. & Clinic*, 426 N.W.2d 425, 427 (Minn. 1988). A party opposing summary judgment must do more than create a metaphysical doubt as to a factual issue and may not rest on mere averments. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Instead, an opposing party must establish a genuine issue for trial by substantial evidence. *Id.* at 69-70; *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995).

The district court did not err. This Court should affirm because there are no disputed issues of material fact and the district court properly cited to and applied the correct Minnesota law. Gilmore’s dissatisfaction with the application of the law to the undisputed facts does not warrant reversal.

II. The district court properly granted summary judgment to Walgreens because the condition was open and obvious and Walgreens should not have anticipated that Gilmore would fail to see what was in plain sight.

The district court applied the correct legal standard and did not err. Walgreens did not owe a duty to warn Gilmore of the admittedly open and obvious condition in its store.

Nothing distracted Gilmore and Walgreens should not have anticipated that Gilmore would fail to see the open and obvious condition and take care to protect himself.

A. Walgreens owed no duty to warn Gilmore of the admittedly open and obvious condition.

The district court correctly concluded that Walgreens did not owe a duty to Gilmore. Though landowners in Minnesota have a duty to protect invitees from harm, this duty is not absolute. *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995) (landowner has no duty to warn an invitee “where the anticipated harm involves dangers so obvious that no warning is necessary”). A landowner generally does not owe a duty to an entrant if the danger is known or obvious. *Id.* at 495-496. The rationale for this rule is that “no one needs notice of what he knows or reasonably may be expected to know.” *Id.* at 496. Accordingly, a “shopkeeper is not an insurer of the safety” of its customers or “business invitees.” *Wolvert v. Gustafson*, 275 Minn. 293, 146 N.W.2d 172, 241 (1966).

In particular, a landowner has no duty to warn “where the anticipated harm involves dangers so obvious that no warning is necessary.” *Baber*, 531 N.W.2d at 496. As the Minnesota Supreme Court noted in a similar case, “it would be ridiculous” to require additional warnings that “would have made no difference to plaintiff’s lookout and would not have prevented plaintiff’s fall.” *Bisher v. Homart Development Co.*, 328 N.W.2d 731, 734 (Minn. 1983).

The test for what constitutes an obvious danger is an objective one; the question is not whether the injured party actually saw the danger, but whether the danger was in fact visible. *Martinez v. Minnesota Zoological Gardens*, 526 N.W.2d 416, 418-19 (Minn. Ct.

App. 1995) (citation omitted); *Engleson v. Little Falls Area Chamber of Commerce*, 362 F.3d 525, 528 (8th Cir. 2004). Gilmore admits that the display was an “open and obvious” condition. Appellant’s Brief at 6 (“In this case, Gilmore admits the empty pallet was open and obvious”). Given this admission, and the undisputed facts, the district court did not err in determining that Walgreens owed no duty to warn Gilmore about the stand.

B. No distracting circumstances existed to relieve Gilmore from seeing what was visible and Walgreens should not have anticipated that Gilmore would fail to see what was in plain sight.

Given Gilmore’s admission that the stand was open and obvious, on appeal he argues that summary judgment should not have been granted because of the possibility that distracting circumstances existed in the store. This argument should be rejected as it does not create any fault on Walgreens’ part. *See Bisher*, 328 N.W.2d at 734 (“claim of distraction goes only to diminish any fault on [plaintiff’s] part rather than to create any fault on the part of defendant”); *see also Richtsmeier v. Johnson*, 2000 WL 1664990 (Minn. Ct. App. Nov. 7, 2000) (distinguishing reliance on various distraction cases as “misplaced and ineffective” given that distracting circumstances does not create a legal duty). It is implicit in the trial court’s ruling, and clear from the record, that Walgreens could not have anticipated that Gilmore would fail to see what was in plain sight. The trial court set forth the proper rule for premises liability, and applied it faithfully. A.48-49. The ruling should be affirmed.

Gilmore argues that Walgreens should be liable because the store’s displays and goods *might* be distracting. Gilmore offered no evidence that he was distracted. His

speculation and conjecture do not justify overturning the summary judgment the district court granted. *See Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993); *Keeler v. Holiday Plus Stores, Inc.*, 1998 WL 2422 (Minn. Ct. App. Jan. 6, 1998) (affirming summary judgment for store; speculation and conjecture could not support claim for injuries from slip and fall in a puddle at a store).

Significantly, Gilmore never stated that he was distracted. He made no mention of any distraction in a statement he gave three days after the fall, in his sworn interrogatory responses, or when he was deposed. Instead, he simply did not see what was there to be seen – not because of any distraction, but because he “wasn’t expecting anything to be in [his] way when [he] turned.” A.70 (Gilmore depo. p. 83 (lines 14-16)). Minnesota law is clear that absent evidence of other factors such as poor lighting, an invitee is not excused from failing “to see what is in plain sight.” *Johnson v. R.E. Tapley, Inc.*, 272 Minn. 19, 136 N.W.2d 538, 542 (1965). Accordingly, the district court did not err when it granted summary judgment and noted that “nothing prevented [Gilmore] from seeing the platform.” A.49 (“Defendant cannot be held to owe a duty to protect Plaintiff where, as here, Plaintiff fails to see that which is clearly visible”).

A review of the key cases, including the four cases that Gilmore cited, shows that the condition of the Walgreens store does not constitute the sort of distraction Minnesota law has recognized in excusing an individual from exercising due care.

Unlike this case, *Krengel* dealt both with a condition that was not open and obvious, and with evidence of actual distraction. *See Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841, 844 (1973) (noting that the plaintiff

testified “her attention was focused upon the signs in the booth and the mirror” when she tripped over a photo booth riser). *Krengel* dealt with a change in elevation that was not clearly visible – both the floor of the photo booth and the 1 ¼ inch riser were black, a deceptive blending of the same color that was not clearly visible to the customer. Here, the display stand was black, in contrasting color to the white floor. The customer in *Krengel* was also visiting the store for the first time, unlike Gilmore who had been in the store five to ten times before. Finally, the customer in *Krengel* testified that she was actually distracted by the store’s surroundings. Gilmore did not testify that the store’s condition distracted him. Thus, *Krengel* does not support reversal.

Gilmore also relies upon *Williams v. James Gang of Minnetonka*, 2007 WL 2245794 (Minn. Ct. App. Aug. 7, 2007), an unpublished decision. *Williams* is distinguishable and does not aid him. Unlike this case, in *Williams* there was a material disputed issue of fact – the plaintiff claimed a canvas concealed the two-by-four, and the defendant claimed it was “unobstructed.” Here, Gilmore admits the display stand was open and obvious. There was no concealment. *Williams* also involved a 77-year-old customer and evidence of a “narrow pathway” near the concealed condition that patrons regularly used to reach their belongings. Gilmore, who was 46 years old, presented no evidence that he was unable to see the stand or avoid it, or that Walgreens should have anticipated that Gilmore would fail to see or avoid the stand.

Gilmore also relies upon *Ober v. Golden Rule*, 146 Minn. 347, 178 N.W. 586 (1920). In *Ober* the evidence was that the frame the plaintiff tripped or stumbled over was not visible, but instead was hidden. It was much like the two-by-four hidden in

Williams, and thus unlike the admittedly open and obvious stand in the Walgreens store. Unlike the customer in *Ober*, Gilmore was not “absorbed in the inspection of goods.” He simply failed to see what should have been seen – the black display stand sitting against a white floor. He had ample time to do so, up to five minutes, and nothing prevented him from doing so. His speculation and conjecture on appeal should be rejected.

Finally, *Gordon v. Herzog*, 410 N.W.2d 405 (Minn. Ct. App. 1987), does not support reversing the trial court’s decision. *Gordon* involved a plaintiff who had been drinking and who fell out of a bar window. The plaintiff claimed that the “crowded and noisy” bar distracted him from noticing an open window. There was also evidence that cars outside the window created a more dangerous condition than was visible to the plaintiff. Here, the lighting was fine. Gilmore submitted no evidence that the lighting was poor, or that any hidden dangers existed. There is also no evidence that there was any loud or distracting noise. Thus, *Gordon* does not help Gilmore.

Engleson v. Little Falls Area Chamber of Commerce, 362 F.3d 525 (8th Cir. 2004) is instructive. The plaintiff in *Engleson* claimed that she tripped over a traffic cone because the fair organizers failed to anticipate that she would be distracted. She claimed that the thousands of other fairgoers, vehicle traffic, and over one thousand vendors and exhibitors were a distraction. The Eight Circuit affirmed summary judgment and concluded “that there were no distractions the [fair organizers] could have anticipated would cause a reasonably prudent pedestrian to trip on a visible safety cone.” *Id.* at 529. The conclusion in *Engleson* applies in this case. The Walgreens store was not a tumultuous street festival. There were no large crowds, no automobiles, no loud music,

and no sudden movements. The quiet and normal setting that Gilmore was in at the store, a store he had been in before, is unlike the various circumstances described in cases where distracting circumstances might exist to avoid summary judgment. The district court did not err in concluding that Walgreens owed no duty to Gilmore.

Gilmore argues that Walgreens is negligent because of four things: 1) Walgreens left the display in a customer traffic area; 2) the pallet is about 5 inches high; 3) other displays and signs existed that were intended to attract the attention of customers; and, 4) an employee answered Gilmore and pointed towards the cameras. Appellant's Brief at 6.

The first and second points do not aid Gilmore given his admission that the display was open and obvious. Neither point addresses whether Walgreens should have anticipated harm. Moreover, these points are no different than the situation in *Bisher* where a fall over a 3 ½ inch high border that was at the edge of and “[p]art of the common walkway area of the mall” was not negligence as a matter of law on the part of the landowner. *Bisher*, 328 N.W.2d at 732 & 734. Despite the potential distractions of a shopping center, whose goods are meant to attract attention, there is no need to warn about what is in plain sight. As the Minnesota Supreme Court noted, to “place warning signs at each corner of the multi-cornered planter would be ridiculous” because adding another level or a warning to the 3½ inch border would have made no difference to the plaintiff's lookout and would not have prevented the fall. *Id.* at 734.

As for the third item – a possible distraction from displays and signs – Gilmore did not testify that they distracted him, notwithstanding any intent the store might naturally have had to attract the attention of customers. Indeed, at the summary judgment hearing,

Gilmore only argued that the distraction was a Walgreens' employee pointing towards the disposable cameras. T.8 (lines 17-23); T.9 (lines 17-22). Even when questioned by his own counsel, Gilmore made no mention of signs or displays distracting him. A.70 (Gilmore depo. p. 83 (lines 2-10) ("I was looking at the area the gentleman was pointing at where the camera was")). There is nothing inherently distracting about stores. Numerous decisions exist where judgment was granted to landowners or shopkeepers. *See, e.g., Bisher*, 328 N.W.2d at 734 (rejecting argument that "adjacent shop windows could distract a passerby" at shopping mall); *Munoz v. Applebaum's Food Mkt., Inc.*, 293 Minn. 433, 196 N.W.2d 921, 921 (1972); *Wolvert v. Gustafson*, 275 Minn. 239, 146 N.W.2d 172 (1966) (affirming judgment as a matter of law for gasoline station operator). The store signs and displays did not distract Gilmore from seeing and stepping over bags of candy that were in an aisle, or from seeing a display of fake pumpkins, or noticing that some VHS tapes had been knocked to the floor. Accordingly, Gilmore's argument about the possibility of distracting displays and signs should be rejected.

Gilmore's fourth point also does not warrant reversal. He claims that an employee pointed towards the cameras. This is not a distraction, and it is not sufficient evidence that Walgreens should have somehow anticipated harm. Gilmore simply turned and started walking in the direction the employee pointed without paying attention to where he was going. This does not make Walgreens liable. An employee's gesture in response to a customer's question does not excuse a customer from seeing what is in plain sight and taking reasonable care for one's own safety. *See Johnson v. Home Depot U.S.A., Inc.*, 2007 WL 2366322 (Minn. Ct. App. Aug. 21, 2007) (affirming summary judgment

and rejecting distraction argument; plaintiff's decision to drag bags of mulch rather than use an available cart does not qualify as an exception to the general open and obvious rule). Here, Gilmore stood in line for up to five minutes looking "up and around" trying to find the cameras. He presented no evidence of an actual distraction that prevented him from seeing what was admittedly clearly visible. Because Walgreens should not have anticipated that Gilmore would not see the stand, the district court should be affirmed.

Conclusion

The district court did not err when it granted summary judgment. Appellant fell over an admittedly open and obvious condition in the store, and he was not distracted. He simply failed to see what was in plain sight. There were no distracting displays that gave Gilmore any trouble as he walked through the store. There was nothing that prevented him from seeing what was there to be seen. Instead, after standing in line at least 90 seconds to up to five minutes, all the while looking "up and around" and noticing other things on the floor, Gilmore turned around and took a step or more and fell over an open and obvious condition. Walgreens need not have anticipated that Gilmore would fail to see what was there to be seen. Accordingly, Walgreens owed no duty to warn him and therefore, this Court should affirm the summary judgment entered below.

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