

COURT OF APPEALS RULES PREMISES OWNER HAS NO DUTY TO BUSINESS GUEST UNLESS DANGEROUS, NON-OBVIOUS CONDITION EXISTS

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Perez v. Circle K

Arizona Court of Appeals

April 15, 2024

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Arizona courts have long held that the issue of duty in negligence cases, including those involving the liability of a business owner to customers, is an issue of law for the judge to decide. That duty, when it exists, requires the business owner to protect customers against unreasonable risks of harm. It has not always been clear, however, whether the absence of a dangerous condition means that a business owner has not breached their duty, or that they had no duty to begin with. Last week, the Arizona Court of Appeals sought to clarify this question in a divided opinion, with the majority holding that whether an unreasonably dangerous condition exists is an issue of duty, not breach, and therefore may be decided by the judge as a matter of law.

The facts of this case are relatively simple. While Roxanne Perez was shopping at a Circle K she tripped over a case of water at the end of an aisle. Perez admitted that she was familiar with the store, having been there 25 to 30 times before, that she had not looked down, and that if she had, she would have seen the case of water. Perez suffered injuries to her elbow, neck and back. Perez then brought a negligence and premises liability action against Circle K.

Circle K moved for summary judgment, which the superior court granted. The trial judge concluded that there was no evidence that the case of water created an unreasonable dangerous condition. Perez appealed the resulting final judgment.

On appeal a panel majority in the Court of Appeals in Division 1, agreed that Circle K owed Perez a duty to keep the premises reasonably safe. However, in defining what Circle K's duty should be, the majority held that "the scope of the duty is an issue of law the court determines based on the relationship and reasonableness of the circumstances." In this regard, to answer the duty question, the Court recognized it 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."

Under the facts of this case, the majority held there was no unreasonably dangerous condition. Focusing on Perez's admission that she had been to the store 25 to 30 times and could have seen the case of water if she had looked down, the majority held that the condition at issue—the placement of the case of water—was "open and obvious" so that Perez could have seen it and avoided being injured herself. Thus, the majority held, the condition was not unreasonably dangerous.

The majority did not think it significant that a Circle K employee testified to a "two-foot rule" used as a stacking guideline in Circle K stores that would have required the case of water to be placed closer to the endcap. The majority held that, at best, this testimony demonstrated the store did not follow its own internal policy and that a guideline or policy does not create a duty that does not exist in law. Instead, it speaks to whether a standard of care was breached. Furthermore, the majority noted that Perez presented no evidence to demonstrate that it was unreasonable for the case of water to be on the floor nor that other customers had tripped on the case of water or any other item displayed at an end cap.

Finally, the majority specifically rejected the concurring judge's contention that the judge's role is limited to ascertaining the relationship of the parties and does not include assessing the reasonableness of the circumstances. Such a rule, the majority countered, would allow a plaintiff to overcome summary judgment simply by showing that they were injured while on the property of a business. The majority reiterated that issues of breach and causation are still for the jury to decide at trial, but clarified that the facts used to support those elements may be considered in judging whether a duty exists in the first

place. Thus, the trial judge in this case could consider the placement of the case of water in light of Perez's admissions that she was familiar with the Circle K and could have seen the case of water if she had looked down, and decide that the display was not unreasonably dangerous as part of determining whether a duty existed.

Judge Howe, concurring in the decision, maintained that Circle K did have a duty and that the absence of an unreasonably dangerous condition in this case meant that there was no breach. However, Judge Howe took issue with the majority's application of precedent and called on the Arizona Supreme Court to review the decision. JSH will continue to monitor the case.

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[Arcangelo S. Cella](#) brings a wealth of experience to Jones, Skelton & Hochuli's appellate group. Arcangelo works closely with JSH trial attorneys to assist with critical motions, and provides guidance from the pleading stage through the trial and post-trial stages in state and federal courts. Arcangelo's practice includes insurance defense and bad faith, medical and legal malpractice, civil rights, governmental liability, product liability, school law, and wrongful death and personal injury.

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