DIVISION ONE
FILED: 05/01/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCISCA H. ELVIRA and EDUARDO ELVIRA, wife and husband, Plaintiffs/Appellants, v. OLD NAVY, LLC, Defendant/Appellee.	1 CA-CV 11-0372 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200800800

The Honorable Andrew W. Gould, Judge

AFFIRMED

Bowman & Smith, P.C. Yuma
By William Michael Smith
and
Jeff Richards, P.C. Yuma
By Jeff Richards
Attorneys for Plaintiffs/Appellants

The Jancarole Law Firm Phoenix
By Frank B. Jancarole
Attorneys for Defendant/Appellee

S W A N N, Judge

¶1 Plaintiffs/Appellants Francisca and Eduardo Elvira appeal the superior court's summary judgment for

Defendant/Appellee Old Navy, Inc., on their claim for negligence. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 On July 22, 2006, while shopping in an Old Navy store with her sister, Francisca was injured when a sign fell from a display table and hit her foot. The Elviras sued Old Navy, alleging that it was negligent because it failed adequately to maintain its premises and failed to discover or correct a hazardous condition in the store.

¶3 Old Navy moved for summary judgment, arguing that the Elviras could not establish that a "dangerous condition" existed at the time of the incident because they had no evidence regarding how Francisca's injury occurred. It cited Francisca's deposition testimony that neither she nor her sister, Eloisa Cabrera, saw the sign fall. In response, the Elviras produced Eloisa's affidavit, in which she avowed that she did see the sign fall from a display table onto Francisca's heel, and the affidavit of mechanical engineer Mark Cannon, who opined that the unsecured sign and its location on a display table were a

[1] On appeal from summary judgment, we view the facts in the light most favorable to the non-moving party, in this case the Elviras, and draw all inferences fairly arising from the evidence in their favor. *Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, 137-38, ¶ 2, 149 P.3d 761, 761-62 (App. 2006).

"dangerous condition." The court denied the motion.

¶4 Thereafter, Old Navy again moved for summary judgment on the ground that the sign was not in an "unreasonably dangerous" condition because there was no evidence that it was on the edge of the display table or otherwise placed in a dangerous manner. Citing Eloisa's deposition testimony, as well as the opinion of its expert, Dr. Frank Gomer, Old Navy argued that the evidence showed there was nothing dangerous about the sign or how it was placed on the table. The Elviras contended that the sign could be dangerous, even if it was not hanging over the edge of the table, because it was unsecured. The court granted the motion and entered judgment for Old Navy.

¶5 The Elviras timely appeal. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶6 The trial court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*,

166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The Elviras argue the superior court erred by granting Old Navy's motion for summary judgment because a material question of fact exists regarding whether Old Navy satisfied its duty to make its premises safe for Francisca's use.

¶7 A plaintiff in a negligence action must show the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. *Berne v. Greyhound Parks of Ariz., Inc.*, 104 Ariz. 38, 39, 448 P.2d 388, 389 (1968). A business owner "is not an insurer of the safety of a business invitee, but only owes a duty to exercise reasonable care to his invitees."[2] *Walker v. Montgomery Ward & Co., Inc.*, 20 Ariz. App. 255, 258, 511 P.2d 699, 702 (1973). This duty requires the premises owner to discover and correct, or warn of, hazards "which the [premises owner] should reasonably foresee as endangering an invitee." *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985), *superseded on other grounds by statute*, A.R.S. § 33-1551 (2011), *as recognized in Wringer v. United States*, 790 F. Supp. 210, 212 (D. Ariz. 1992). Whether a premises owner has exercised the care required to keep the premises in a reasonably safe condition for invitees is

[2] Old Navy does not dispute that Francisca was a business invitee.

usually a question of fact for the jury. *Walker*, 20 Ariz. App. at 258, 511 P.2d at 702. The trial court may rule as a matter of law, however, if no reasonable jury could find that the defendant breached the duty of care it owed the plaintiff. *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 497, 616 P.2d 955, 957 (App. 1980).

¶8 To show that a premises owner breached the duty of care it owed to an invitee, a plaintiff must prove (1) that the "dangerous condition is the result of [the] defendant's acts"; (2) that the "defendant had actual knowledge or notice of the existence of the . . . dangerous condition"; or (3) that "the [dangerous] condition existed for such a length of time that in the exercise of ordinary care the [defendant] should have known of it and taken action to remedy it." *Walker*, 20 Ariz. App. at 258, 511 P.2d at 702; *Preuss v. Sambo's of Ariz., Inc.*, 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981).[3]

¶9 The Elviras contend that the superior court erred

[3] The Elviras contend *Walker* and *Preuss* are inapplicable because they concerned different factual circumstances and addressed whether the business owner had actual or constructive knowledge of the hazard. These cases are relevant, however, because they accurately set forth Arizona law regarding premises liability as it concerns business owners and their invitees. We also reject the Elviras' attempt to distinguish *Burke v. Arizona Biltmore Hotel*, 12 Ariz. App. 69, 71, 467 P.2d 781, 783 (1970), discussed *infra*, on the grounds that the allegedly hazardous condition at issue in that case was permanent in nature, unlike the sign involved in this matter.

because there is a material question of fact regarding breach of the duty of care and because the motion involved the same facts and law raised in the first motion, which the court denied. They argue that they presented sufficient evidence[4] to raise a material question of fact regarding whether Old Navy created a hazardous condition by placing the unsecured sign on the lower level of a two-tiered display table.[5]

¶10 A defective condition becomes actionable only "when [it] creates an unreasonable risk of harm," *Burke*, 12 Ariz. App. at 71, 467 P.2d at 783, as the standard of care does not impose "liability for conditions from which an unreasonable risk of harm is not to be anticipated." *Berne*, 104 Ariz. at 41, 448 P.2d at 391. "Since people can and daily do sustain injuries from almost all conceivable conditions under a multitude of varying circumstances, and since the possessor of the premises

---

[4] The Elviras cite *Andrews v. Fry's Food Stores of Ariz.*, 160 Ariz. 93, 96, 770 P.2d 397, 400 (App. 1989), in which we held that the trial court erred by failing to instruct the jury that it could infer from the circumstantial evidence that a hazardous condition on the defendant's premises caused the injury. As the Elviras acknowledge, however, their case is not based upon circumstantial evidence because Eloisa testified she saw the sign fall from the table and strike Francisca.

[5] The Elviras also contend there is a question of fact regarding whether Old Navy had actual or constructive knowledge of the existence of the dangerous condition created by the sign. But if Old Navy created the condition, as the Elviras claim, there is no need to consider whether it had notice. *Walker*, 20 Ariz. App. at 258, 511 P.2d at 702; *Preuss*, 130 Ariz. at 289, 635 P.2d at 1211.

is not an insurer of the safety of invitees, the line between liability and nonliability must be drawn at some point." *Id.* We cannot presume that a defective condition created an unreasonable risk of harm simply because an injury occurred. *Burke*, 12 Ariz. App. at 71, 467 P.2d at 783 ("The mere fact that an injury has been sustained does not give rise to a presumption that a defective condition created an unreasonable risk of harm."); *Berne*, 104 Ariz. at 41, 448 P.2d at 391 ("Liability cannot be determined from hindsight . . . . From hindsight one could always postulate how an accident might have been prevented.").[6]

¶11 Here, the undisputed testimony showed that before the accident, the sign was "on the edge" of the lower level of a two-tiered display table. There was no evidence that the base of the sign was partially over the edge of the table or

[6] The Elviras, relying on the text of a former version of the Revised Arizona Jury Instructions ("R.A.J.I.") (Civil) 3d, Premises Liability 1, argue that the jury must determine whether a condition is unreasonably dangerous and the trial judge may not rule on that issue as matter of law. The R.A.J.I.'s are no longer authoritative, but we note that the current instruction provides that a business owner must use reasonable care to warn of or remedy an "unreasonably dangerous condition." R.A.J.I. (Civil) 4th, Premises Liability 1. The comment explains, "[i]t is conceivable that harm could arise from almost any object or condition," but "[n]egligence is the failure to correct or warn of an *unreasonably dangerous condition*." R.A.J.I. (Civil) 4th, Premises Liability 1, cmt. 1, citing Restatement (Second) of Torts, § 343.

otherwise precariously placed.[7] Given this evidence, the superior court correctly determined that the evidence could give rise to no reasonable inference but that the likelihood of harm was slight and therefore, as a matter of law, the condition was not unreasonably dangerous. *Burke*, 12 Ariz. App. at 72, 467 P.2d at 784.

¶12 We also observe that the reasoning of *Burke* applies with even greater force today than when it was written. The standard under which the *Burke* court operated prohibited summary judgment when there was the "slightest doubt as to the facts," *Peterson v. Valley Nat'l Bank of Phoenix*, 90 Ariz. 361, 362, 368 P.2d 317, 318 (1962). Under the more modern *Orme School* standard, evidence creating the "slightest" doubt is no longer sufficient to forestall summary judgment.

¶13 Finally, we address the Elviras' argument that the superior court erred by granting Old Navy's second motion for summary judgment because it involved the same facts and issues of law raised in the first motion. They cite Eloisa's

[7] The Elviras represent in their opening brief that the on-duty Old Navy manager stated that the "metal sign was in the wrong place and that it should have been on the top of the two level table, not on the bottom level" and that this statement created a "strong question of fact." Both Eloisa's and Francisca's affidavits attest only that the manager stated that the sign should not have been on the table -- the manager's alleged statement not only does not mention what level the sign was or should have been on, it does not create the inference of dangerousness that the Elviras suggest.

affidavit, offered in opposition to Old Navy's first motion for summary judgment, in which she avowed that the sign was "on the edge" of the display table. The Elviras argue that because the court determined that a question of fact precluded summary judgment on Old Navy's first motion, it erred by granting the second motion based upon Eloisa's deposition testimony regarding the placement of the sign, because her testimony was consistent with the avowals contained in her affidavit. However, in ruling on the second motion for summary judgment, the superior court specifically stated that it denied the first motion for summary judgment because, based upon Eloisa's affidavit, a reasonable juror might "conclude that the sign may have been sticking off part of the table and was in a, maybe in a precarious position." The court went on to say that because Old Navy had deposed Eloisa and established that there was no evidence that the sign was "off the edge" of the table, there was "nothing about that sign in terms of its position or its construction that would give notice to the store owner that it was dangerous, potentially dangerous." Accordingly, we find no error.

CONCLUSION

¶14 For the foregoing reasons, we affirm.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
JON W. THOMPSON, Judge