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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PHILLIP BLAIR and MICHELLE BLAIR, Plaintiffs/Appellants, v. CIRCLE K STORES, INC., Defendant/Appellee.	2 CA-CV 2009-0138 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20077459

Honorable Michael O. Miller, Judge

AFFIRMED

Harold Hyams & Associates, P.C.
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K E L L Y, Judge.

¶1 In this personal injury action, appellants Phillip Blair and Michelle Blair appeal from a judgment entered in favor of appellee Circle K Stores, Inc., after a jury trial. They maintain the trial court erred in refusing to give certain requested jury instructions. Finding no error, we affirm.

Background

¶2 "We view the evidence and reasonable inferences therefrom in the light most favorable to upholding the jury's verdict." *Acuna v. Kroack*, 212 Ariz. 104, ¶ 3, 128 P.3d 221, 223 (App. 2006). In January 2006, Phillip Blair went to a Circle K store to buy gasoline for his car. Blair testified that as he put the nozzle of the fuel hose into his car's fuel tank filler pipe, the hose disconnected from the pump and struck his right cheek, spilling gasoline into his eye. The register clerk on duty that day testified she had seen the hose "hit him from the back," but had "not observe[d] the hose hitting him in the face."

¶3 Circle K uses a "breakaway" or "disconnect" on its fuel hoses in order to prevent gasoline spills if someone drives away from a pump without having removed the nozzle from the vehicle's filler pipe. The breakaway essentially connects the nozzle and hose to the pump. The male end of the hose is threaded and screws into the breakaway. If a person drives away with the nozzle still in their filler pipe or otherwise applies sufficient pressure to the breakaway, it will disconnect to prevent gasoline from coming out of the hose. The Blairs' expert witness at trial testified he had reviewed a letter from a company that did maintenance work on Circle K's fuel pumps. The letter stated that, between January 1, 2003, and September 2008, the company had "received work orders

to replace the breakaway and/or repair drive-offs for Circle K approximately 64 times per month."

¶4 After Blair was struck with the hose, the manager of the Circle K store inspected the hose. He testified he had put the breakaway back onto the hose after the incident. Blair, on the other hand, testified he had noticed "a shiny chrome fitting" on the "opposite end of the nozzle" and "a piece that came up," suggesting to him "that [the] last thread [on the fitting of the hose] had somehow become unattached from the other threads below it." Blair therefore apparently believed the breakaway had come unscrewed from the hose itself, rather than disconnecting.

¶5 Blair testified that his vision was impaired after the incident. His ophthalmologist similarly testified Blair had "significantly decreased vision in the right eye" and "a branch retinal vein occlusion with hemorrhages in multiple different layers of the retina." The doctor further stated Blair was essentially blind in his right eye and there was "a reasonable medical probability that the trauma shortly before the onset of symptoms was . . . a cause of loss of vision."

¶6 The Blairs brought the instant action against Circle K Stores. After a trial, the jury found in favor of Circle K, and the court entered judgment in its favor. This appeal followed.

Discussion

¶7 The Blairs argue the trial court erred in denying their request for certain jury instructions. "A trial court must give a requested instruction when: (1) the evidence supports the instruction, (2) the instruction is legally proper, and (3) it pertains to an

important issue and the other instructions fail to address the gist of the requested instruction." *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 53, 977 P.2d 807, 816 (App. 1998). "When reviewing whether a requested jury instruction should have been given, we look at the evidence in the light most favorable to . . . the requesting party." *Id.*

¶8 The Blairs first contend the trial court "abused its discretion when it failed to give a 'mode of operation' jury instruction" based on the mode-of-operation rule:

> Even if you find that Circle K had no notice of the unreasonably dangerous condition that Phillip Blair claims caused harm, Circle K was negligent if you find the following:
>
> 1. Circle K adopted a method of operation from which it could reasonably be anticipated that unreasonably dangerous conditions would regularly arise; and
>
> 2. Circle K failed to exercise reasonable care to prevent harm under those circumstances.

The trial court found the mode-of-operation rule did not apply and refused to give the instruction.

¶9 "A business proprietor has an affirmative duty to make and keep his premises reasonably safe for customers. However, a proprietor who is not directly responsible for a dangerous condition is not liable simply because an accident occurred on his property." *Chiara v. Fry's Food Stores of Ariz., Inc.*, 152 Ariz. 398, 399, 733 P.2d 283, 284 (1987) (citation omitted). Rather, negligence law traditionally required the proprietor to have notice of the dangerous condition in order for a plaintiff to establish a

claim for negligence. *Id.* at 400, 733 P.2d at 285. Under the mode-of-operation rule, however, "the plaintiff is not required to prove notice if the proprietor could reasonably anticipate that hazardous conditions would regularly arise." *Id.*

¶10 Here, the Blairs' expert witness testified that a hazardous condition had been created by Circle K's lack of a protocol for regularly inspecting the breakaways. He stated that the lack of such a protocol "increase[s] a probability of a hazardous condition existing, thereby increasing the risk of failure, thereby increasing the risk of injury." As noted above, the Blairs' expert witness testified that Circle K's maintenance company had received work orders to repair breakaways sixty-four times per month between January 2003 and September 2008. The Blairs argue this evidence was sufficient to show Circle K could reasonably have anticipated a hazardous condition would regularly arise and the trial court should therefore have instructed the jury that it could find negligence on that basis.

¶11 But, not only must a plaintiff demonstrate that spills or other conditions "of some kind regularly occur; the business must be able to reasonably anticipate that a condition hazardous to customers will regularly occur." *Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, ¶ 9, 149 P.3d 761, 763 (App. 2006). As Circle K points out, the Blairs introduced no evidence that a breakaway had ever broken off a hose at the threads as Phillip Blair believed this one had. Nor did they present any evidence that a breakaway that disconnected as it was intended to had ever injured another Circle K

customer.[1] Thus, although Blair's expert testified after the fact that a hazardous condition had been created by Circle K's lack of an inspection protocol, nothing in his testimony or the other evidence before us suggested that Circle K could reasonably have anticipated that this condition would be hazardous to its customers. *See id.*

¶12 Likewise, the Blairs did not present any evidence about how many Circle K stores the maintenance company serviced or how many pumps those stores had. Thus, whether we consider only the store at which this incident occurred or all Circle K stores, as Blair urges, it is impossible to determine whether sixty-four breakaway repair orders per month made such repairs "'[c]ustomary, usual, or normal'" for purposes of the mode-of-operation rule.[2] *Id.* ¶ 8, *quoting Borota v. Univ. Med. Ctr.*, 176 Ariz. 394, 396, 861 P.2d 679, 681 (App. 1993) (alteration in *Borota*). Indeed, as the trial court stated:

> There has been some discussion of the potential for a hazardous condition as a theoretical matter. However, in terms of the evidence at this trial, there has not been any evidence of it creating an actual hazardous condition particularly on a regular basis as it would affect the customers at this particular store.

In the absence of evidence that breakaways disconnect and cause injury with sufficient regularity for "the business . . . to reasonably anticipate that a condition hazardous to

[1]The register clerk on duty at the time of the incident did testify that a hose had hit her on one occasion when she pulled on the hose while inspecting it after she had seen a customer drive off "halfway" with the gas nozzle still in the customer's vehicle. She apparently had not been injured.

[2]The register clerk additionally testified that breakaways disconnected infrequently at the store—approximately three times a year. Likewise, the store's manager testified he had seen breakaways disconnect three or four times in the four to five years prior to the trial. Neither testified that any injuries had occurred as a result of those disconnections.

customers will regularly occur," we cannot say a mode-of-operation instruction was required. *Contreras*, 214 Ariz. 137, ¶ 9, 149 P.3d at 763.

¶13 The Blairs also contend the trial court "erred in not giving a constructive notice jury instruction." Based on the theory that the breakaway had broken loose from the hose instead of disconnecting, they argue that "one could infer that it took a reasonably long time for the hose to unwind from the breakaway coupling device so that it could be hanging by a thread."

¶14 To establish negligence, a plaintiff must generally show either that the defendant created the dangerous condition leading to injury or "had actual or constructive knowledge of the condition." *Id.* ¶ 7. "Constructive notice is shown by proof 'the condition existed for such a length of time that in the exercise of ordinary care the proprietor should have known of it and taken action to remedy it.'" *Id.*, *quoting Chiara*, 152 Ariz. at 400, 733 P.2d at 285. In this case, although they assert "there [wa]s sufficient circumstantial evidence that it requires a reasonable period of time for the unscrewing of . . . a hose to take place," they do not specify what that evidence was. On the record before us,[3] the Blairs did not introduce any evidence of how long it might take for a hose to unscrew from a breakaway and, therefore, were not entitled to a constructive-notice instruction.

[3]Blair has designated only portions of the trial court record for inclusion in the record on appeal. We must presume any other transcripts that may have contained testimony relating to this issue supported the trial court's ruling. *See Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

Disposition

¶15 The judgment of the trial court is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge