

1995

Lynn F. Atherley v. Albertsons, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LYNN F. ATHERLEY,

Plaintiff/Appellant, Case No. 950707-CA

vs.

Priority No. 15

ALBERTSON'S, INC.,

Defendant/Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE SUMMARY JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
THE HONORABLE DAVID S. YOUNG

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MAR 27 1996

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STATEMENT OF JURISDICTION

Appellee Albertson's, Inc. ("Albertson's") agrees with the statement of jurisdiction in the Brief of Appellant.

INTRODUCTION

Mrs. Atherley maintains on appeal that the trial court improperly declined to apply the theory of store owner liability used by this Court in Canfield v. Albertson's, Inc., 841 P.2d 1224 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993), to defeat Albertson's motion for summary judgment. However, it is Albertson's position that not every plaintiff who slips and falls on an object in a grocery store can rely on the Canfield theory of liability.

This Court distinguished the two theories of store owner liability in slip-and-fall cases in Canfield. Under the "traditional" theory of store owner liability, used in situations where the hazard is not store owner-created, the plaintiff must satisfy a two-part burden: first, the plaintiff must show that the store owner knew, or through the exercise of reasonable care should have known, of the hazard; and second, the plaintiff must show that the store owner had a reasonable opportunity to remedy

the hazard. Canfield, 841 P.2d at 1226. By contrast, the Canfield theory of liability applies to cases where the store owner employs a dangerous method of operation that the store realizes may encourage certain acts of customers that create hazards. Id. at 1226. If the plaintiff can produce evidence that the negligent method of operation created the temporary hazard, she withstands a motion for summary judgment.

Merely alleging that Albertson's employed a dangerous method of display, as Mrs. Atherley does here, is not sufficient to trigger the Canfield theory of liability. In the context of summary judgment, the non-moving party must introduce some evidence in support of her claims. The plaintiff cannot sit back and rely on the bare contentions of her complaint. Dybowski v. Earnest W. Hahn, Inc., 775 P.2d 445 (Ut. App. 1989). Aside from allegations, Mrs. Atherley failed to furnish any evidence whatsoever that the open-display method of displaying strawberries caused or created the alleged hazard. She also introduces no evidence that the open display method creates a situation where it is foreseeable that the expectable acts of others will create a hazard. Mrs. Atherley's attempt to impose

the Canfield theory of liability based only on the allegations of her complaint inappropriately seeks to make Albertson's an absolute insurer of its customers' safety.

Even if Mrs. Atherley had mustered sufficient evidence to take advantage of the Canfield theory, the trial court still acted properly in granting Albertson's motion for summary judgment because she has nothing beyond speculation to support her notion that the allegedly negligent method of display constituted the proximate cause of her injuries. When asked directly in her deposition how the strawberry ended up on the floor, she admitted she did not know. Coupled with her own inability to show that the strawberry's presence on the floor was directly caused by the dangerous qualities of the open method of display is Albertson's undisputed evidence that the strawberry could have ended up on the floor due to several different factors. It could have been brought into the Albertson's store by a customer or a customer's child. It could have come from one of the closed containers of strawberries that Albertson's was displaying on the day of the accident. Even if the strawberry originated from the open display, any one of a number of

intervening events beyond Albertson's control could have directly caused the strawberry to be on the aisle. There is simply no evidence that any dangerous qualities of the open display method proximately caused Mrs. Atherley's injuries. Proximate cause cannot be established on pure conjecture, and summary judgment was warranted for this reason.

Given the fact that Mrs. Atherley introduces no evidence that Albertson's display was inherently dangerous, the trial court correctly chose to apply the traditional theory of liability to this case. Summary judgment was proper under the traditional theory because Mrs. Atherley had no evidence that Albertson's knew the strawberry was on the floor or that it had a chance to remove it.

DETERMINATIVE STATUTES OR RULES

Utah Rules of Civil Procedure, Rule 56(e):

Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for

summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

ISSUES AND STANDARD OF REVIEW

1) Did the trial court properly decline to apply the Canfield theory of liability because Mrs. Atherley had no evidence of a negligent method of display?

2) Was summary judgment proper because Mrs. Atherley introduced no evidence that the allegedly negligent method of display was the proximate cause of her injuries?

Both issues are legal ones, reviewed for correctness. Higgins v. Salt Lake County, 855 P .2d 231, 235 (Utah 1993).

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below.

Appellant Lynn Atherley sued Albertson's for negligence, conversion, trespass, and breach of privacy arising from her slip and fall on a strawberry at an Albertson's grocery store in Kearns, Utah. (R. 1-6). The trial court granted summary

judgment for Albertson's on Mrs. Atherley's negligence claim. (R. 113). The parties subsequently stipulated to the dismissal with prejudice of Mrs. Atherley's remaining claims. (R. 119-121). Mrs. Atherley appeals the trial court's grant of summary judgment for Albertson's on her negligence claim. (R. 125-6).

B. Statement of Facts.

Lynn Atherley was shopping at the Kearns Albertson's store on April 8, 1992, when she allegedly slipped and fell on a strawberry. (R. 2). At the time of the accident, Albertson's sold strawberries in its produce section. (R. 2). She initiated the present lawsuit against Albertson's as a result of her fall. (R. 1-9). Mrs. Atherley did not fall in the produce section of the store, but in an aisle located several feet from the strawberry display in the produce section.¹ (R. 50).

¹The parties dispute the exact distance of the location of her fall from the strawberry display. Glenn Wilkes, Assistant Store Director for the Kearns store, testified that the strawberries were displayed at the north end of the produce section on the day of the accident. (R. 64-5). Knowing the spot where Mrs. Atherley fell by seeing her sitting on the floor after the fall, he calculated the distance between the strawberry display and the location of her fall at 25-30 feet. (R. 64-5). He also produced a photograph showing the strawberry display and the aisle where Mrs. Atherley fell. (R. 68). Mrs. Atherley, on the other hand, testified at her deposition that she was not sure of the distance, but thought it was less than ten feet. (R. 84).

Albertson's employed various methods of displaying the strawberries at the time of the accident. (R. 102-3). It displayed strawberries by the carton in an "open display," where customers could pick the individual strawberries they wanted; in closed plastic quart-sized containers; and in closed plastic three-pint containers. (R. 95, 102-3; Appellant's Brief at 3-4). Albertson's produced a photograph depicting these various methods of display. (R. 95). The photograph shows strawberries in open containers displayed both on flat tables and on inclining tables with surrounding barriers. (R. 74-5, 95).

Albertson's moved for summary judgment on the basis that Mrs. Atherley had no evidence that Albertson's knew, or in the exercise of reasonable care should have known, the strawberry was on the floor and that Albertson's had no opportunity to remove

After Albertson's filed its motion for summary judgment, she testified that she returned to the store to rethink the distance. (R. 92). Contending without any supporting evidence that the photograph produced by Albertson's did not accurately show where the strawberries were displayed at the time of the accident (although accurately depicting the way they were displayed), she estimated the distance at six feet. (R. 92). Even if Mrs. Atherley's unsupported contradiction of Albertson's calculation of distance is enough to create a disputed fact, the parties' dispute over distance is immaterial for purposes of summary judgment because the distance does not bear on whether the method of display was dangerous.

the strawberry before the alleged accident. (R. 52). In opposing Albertson's motion, Mrs. Atherley did not contest that Albertson's would be entitled to summary judgment if the traditional theory of storeowner liability applied. Rather, she claimed that the Canfield theory governed this case, declaring that Albertson's open method of display for strawberries was dangerous. (R. 76).

Mrs. Atherley presented no evidence beyond mere allegation that the open display method for strawberries was dangerous. When asked to explain how the open method of strawberries was dangerous, her only response was that "they're open." (R. 142). She did not introduce testimony of how other grocery stores display strawberries, nor did she point to any other evidence of industry standard. While the plaintiff in Canfield tendered affidavits from experts in the area of grocery display stating that Albertson's method of displaying farmer's pack lettuce created an apparent risk, Mrs. Atherley offered no expert affidavits explaining how the method of display might have been dangerous. (R. 103).

While the plaintiff in Canfield had deposition testimony from Albertson's managers and employees that the problem with farmer's pack lettuce was so significant they placed garbage cans on the floor so customers would throw discarded lettuce in them instead of on the floor, Mrs. Atherley presented no evidence that Albertson's had any reason to anticipate its method of displaying strawberries might pose a danger. (R. 103). Glenn Wilkes, Assistant Store Manager for the Kearns store, noted that it is not uncommon to find pieces of produce such as strawberries on the floor throughout the store because customers inadvertently drop them as they shop throughout the store. (R. 66). Mrs. Atherley cannot point to any evidence that Albertson's believes these strawberries end up on the floor because of the open method of display. (R. 65-6). Instead, Mr. Wilkes stated that produce occasionally ends up on the floor for a number of reasons that have nothing to do with the method of display:

I commonly see customers put groceries in their shopping cart or hand basket, travel to other areas of the store and, while they are shopping, inadvertently drop something on the floor. This can happen for a number of reasons: for example; customers often move the groceries in their carts around as they shop in order to make space for more groceries or to change the way their groceries are stacked in the carts so that delicate items are on top or, in some

cases, they exchange groceries they don't want with other groceries they decide they want instead.

I have also seen customers taste produce as they shop in order to test the quality of the produce or, on occasion, let their kids taste produce in order to pacify their kids while they shop. On occasion, as customers taste the produce or give samples to their kids, they will drop the occasional grape, strawberry or peanut on the floor wherever they happen to be in the store.

(R. 66).

While there was evidence in Canfield that Albertson's knew that customers, in the process of selecting a suitable head of farmer's pack lettuce, would discard the unwanted wilted outer leaves on the floor, there is no suggestion here that customers selecting strawberries through the open display customarily drop unwanted strawberries to the ground (or toss them several feet away) as if they were an outer leaf or husk. (R. 103).

Finally, Mrs. Atherley could produce no evidence that the strawberry she fell on came directly or indirectly from the open display several feet away, or whether it came from another source, such as a customer dropping it there from a cart, a child dropping it there from his hand, a customer accidentally jarring a closed container loose in the produce section, or a child bringing it into the store from the outside. When asked in her

deposition how the strawberry got on the floor, Mrs. Atherley conceded that she did not know. (R. 62).

Having no reason to use the Canfield theory of liability, the trial court applied the traditional theory of storeowner liability. (R. 116). It granted summary judgment for Albertson's because there was no evidence that Albertson's had notice of the strawberry on the floor or that Albertson's had a reasonable opportunity to remove it. (R. 116).

SUMMARY OF ARGUMENTS

POINT I: Simply alleging that Albertson's open method of displaying strawberries was negligent does not trigger the Canfield theory. The plaintiff in Canfield had evidence that customers deliberately discarded outer lettuce leaves on the floor and that Albertson's knew of this practice; there is no evidence here that customers intentionally or unintentionally discarded unwanted strawberries on the floor when taking strawberries from the open display, much less that Albertson's knew of such a practice. The plaintiff in Canfield produced expert affidavits explaining that the farmer's pack method of display was unreasonable and contravened industry safety

standards. Mrs. Atherley did not produce expert testimony on the issue of dangerousness; instead, she offered her lay opinion, without supporting explanation, that the display was dangerous. Mrs. Atherley is asking this Court to deem Albertson's method of display negligent simply because it is open, which is tantamount to asking that this Court impose absolute liability on storeowners whenever a customer falls on a good that happens to be "openly" displayed. The trial court acted appropriately in applying the traditional theory of liability here because Mrs. Atherley could not produce any evidence of a negligent method of display.

POINT II: Summary judgment is warranted in this case because Mrs. Atherley cannot demonstrate that the open method of display proximately caused her injury. She does not know where the strawberry came from. The mere existence of a supposedly dangerous method of display does not mean that but for the display, she would not have been injured. Since she cannot establish the essential element of proximate cause on pure speculation, the trial court properly determined as a matter of law that she could not sustain a prima facie case of negligence.

POINT III: Having no reason to apply the Canfield theory of liability, the trial court used the traditional theory of liability. It properly determined under this theory that summary judgment was required because Mrs. Atherley has no evidence that Albertson's knew, or through the exercise of reasonable care should have known, that the strawberry was on the floor or that Albertson's had a reasonable opportunity to remedy the alleged hazard.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DECLINED TO
APPLY THE CANFIELD THEORY OF LIABILITY
BECAUSE THERE IS NO EVIDENCE THAT THE METHOD
OF DISPLAY WAS DANGEROUS.

In order to trigger the Canfield theory of liability, Mrs. Atherley has the burden of introducing evidence indicating that Albertson's did something more than simply display produce in its store. She carries the burden of demonstrating that the particular method of displaying strawberries in open containers was uniquely dangerous compared to any other open displays of produce in the store, such as apples, kiwis, grapes, berries, plums, tomatoes or mushrooms. She must show that the open

display itself was dangerous in that it encouraged customers to act in such a way that risks were created. She has not met this burden.

A. Mrs.Atherley Cannot Produce Evidence of Unique Display, Foreseeable Pattern of Customer Conduct Due to the Unique Display, or Albertson's Knowledge of the Hazardous Condition Created.

The facts relating to the dangerous condition of the farmer's pack method of displaying lettuce in Canfield do not exist here. First, there are no facts here to support the notion that an open display of strawberries is unique. The farmer's pack display in Canfield differed from the typical grocery store method of selling lettuce in cellophane; in the farmer's pack display, heads of lettuce are displayed in the same boxes they came in from the farm without the damaged or wilted outer leaves removed. Canfield, 841 P.2d at 1225. The plaintiff in Canfield established that this was a dangerous condition by tendering expert affidavits explaining how the farmer's pack method of display deviated display procedures of other stores. (R. 103; Canfield, 841 P.2d at 1227). These expert affidavits elucidated industry practice for displaying lettuce; evidence that

Albertson's deviated from this practice created an issue of fact regarding the dangerous nature of the farmer's pack display.

By contrast, Mrs. Atherley has never suggested, much less proven, that displaying strawberries in open containers is special or unique in any way. She does not show that Albertson's is the only grocery store to use this method, nor does she have evidence that it is a method of display done on certain occasions.

Equally as significant, she does not have affidavits from safety experts in the grocery store industry stating that the open display was inherently dangerous. As demonstrated in Canfield, expert testimony is helpful to establishing evidence of breach of standard of care in an industry. Wycalis v. Guardian Title of Utah, 780 P.2d 821, 826 (Utah App. 1989). Mrs. Atherley's bare lay assertion, without any supporting explanation, expert or otherwise, that the open display method of displaying strawberries is dangerous is insufficient to create a factual issue.

In Dybowski v. Ernest W. Hahn, Inc., 775 P.2d 445 (Utah App. 1989) the Court affirmed summary judgment because the plaintiff

in that slip and fall case failed to raise any material issues of fact beyond the bare allegations of the store owner's negligence. See also Utah Rule of Civil Procedure 56(e) (party may not oppose summary judgment with mere allegations). Mrs. Atherley's only "evidence" of a dangerousness is her own speculation that an open display is somehow dangerous.²

Second, the plaintiff in Canfield had evidence of a foreseeable pattern of customer conduct created by the farmer's pack display. As a result of the display, customers often removed and discarded the outer leaves from the heads of lettuce they wanted to purchase. Id. at 1225. Mrs. Atherley does not have similar evidence. She has not alleged, let alone proven, that an open display of strawberries encourages customers to take the ones they do not want and drop them to the ground. She does

²Mrs. Atherley complains that the trial court improperly ruled as a matter of law that the open method of displaying strawberries was not dangerous, claiming that under Canfield, the issue of dangerous condition is always a factual inquiry. Actually, the trial court ruled that it was not a dangerous display because Mrs. Atherley had no evidence to that effect. Mrs. Atherley is not entitled to go to a jury with the mere allegation of a dangerous condition. In any event, the court in Canfield did not state that the issue of whether a condition is dangerous is a jury question, but that the issue of whether the store takes reasonable precautions to protect its customers from a dangerous condition is a jury question. Id. at 1227.

not claim that the strawberries were stacked so high in the open containers that they rolled off the display and onto the ground by themselves. Neither does she explain how it is likely that a typical customer picking objects from a flat display or from an inclined display with barriers will cause one of those strawberries to fall to the ground.

Third, the plaintiff in Canfield was able to show not only that the farmer's pack display created a dangerous condition that was foreseeable, but also that Albertson's was aware of the problem posed by its unique method of display. For example, in Canfield, Albertson's placed disposal boxes around the farmer's pack display, a measure it did not take with other produce displays. Id. at 1225. Mrs. Atherley contends that she has evidence of Albertson's awareness in the form of Albertson's employee Glenn Wilkes' affidavit. Nonetheless, a review of Mr. Wilkes' affidavit reveals that he only states that objects like strawberries or grapes sometimes end up on the floor in various parts of the store. Mr. Wilkes then goes on to explain that this can occur for many different reasons (e.g., because customers inadvertently drop them from carts or hand baskets, or give them

to their children, who then discard them, etc.). Mr. Wilkes never states that the strawberries end up on the floor because of the open display method.

The only similarity between the circumstances in Canfield and the facts of this case is that both plaintiffs asserted that Albertson's used a dangerous method of display. Significantly, the plaintiff in Canfield produced evidence to support her assertion -- the display was unique, it was foreseeable that certain risks, such as customers discarding unwanted leaves on the floor, would arise from it; and Albertson's knew about the risks and tried to remedy it by placing boxes around the display to catch discarded leaves of lettuce. There are no such facts in this case. Consequently, because Mrs. Atherley has introduced no evidence whatsoever in support of her allegations that Albertson's employed a dangerous method of display, the Canfield analysis does not apply to this case.

B. Applying the Canfield Theory of Liability Here Would Be Tantamount to Imposing Absolute Liability on Store Owners and Making Them Insurers of Their Customers Safety.

Store owners are not insurers of their customers' safety. Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977). The

Canfield case does not conflict with this principle, for the court required that before a store owner be held liable for a method of display, evidence of negligence must exist.

In this case, where there is no evidence of a dangerous method of display, applying the Canfield theory of liability would extend store owner liability, and the Canfield holding, beyond its proper bounds. If this Court were to agree with Mrs. Atherley that an open display of strawberries is automatically a dangerous one, then all open produce displays in grocery stores become dangerous. Even broader than that, all open displays of all types of goods in which the customer must pick the particular good he wants from a collection of several, become dangerous. Canfield was not meant to impose absolute liability on store owners for all injuries caused by objects that might have come from a display.

The Canfield theory should only be applied to situations where it is warranted. It is not warranted in cases like this, where the plaintiff cannot muster evidence of a dangerous and known store-created condition that foreseeably creates risks. The trial court properly recognized that Mrs. Atherley did not

produce the evidence necessary to trigger the Canfield theory of liability. It correctly applied the traditional theory of liability and granted summary judgment for Albertson's.

POINT II

EVEN IF THE CANFIELD THEORY SHOULD APPLY,
MRS. ATHERLEY HAS NO EVIDENCE OF PROXIMATE CAUSE.

To avoid summary judgment, Mrs. Atherley must produce competent evidence to support each element of her negligence claim. Harline v. Barker, 854 P.2d 595 (Utah App. 1993). Even if Mrs. Atherley had sufficient evidence to trigger the Canfield theory of analysis, summary judgment is still justified because she cannot show that the allegedly negligent method of display was the proximate cause of her injuries.

Although Mrs. Atherley has been adamant in alleging that Albertson's employed a negligent method of displaying strawberries, she has never alleged that the strawberry she slipped on came from this supposedly negligent display. She conceded in her deposition that she does not know where the strawberry that she slipped on came from. It could have ended up on the aisle, several feet from the strawberry display, in various ways. It might have dropped from a shopping cart. It

could have dropped from a hand basket. It could have dropped from a customer's hand or a child's mouth. It could have fallen out of a closed container, which Mrs. Atherley does not contend was a negligent mode of display, by jarring the plastic lid open. It could have fallen from a closed container that had a latent hole in it. There is simply no evidence that the strawberry came directly from the open display of strawberries. It is pure speculation, just as the above potential explanations for how the strawberry got there are speculation.

When the proximate cause of an injury is left to speculation, the claim fails as a matter of law. Staheli v. Farmers' Cooperative of Southern Utah, 655 P.2d 680 (Utah 1982). In Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985), the court affirmed summary judgment for a hotel because the plaintiff could not produce direct evidence linking the hotel's inadequate security measures to the victim's murder in his hotel room. The Court observed that the murderer may have gained entrance to the victim's room by using a passkey he had taken from hotel personnel, which might be attributable to inadequate security. The Court surmised it was also possible the murderer gained entrance

because the victim voluntarily let him in the room, which would not be attributable to any negligence on hotel's part. The court concluded that "since any attempt to relate Mitchell's death to the alleged negligence of the hotel in providing adequate security would be completely speculative, summary judgment was proper" Mitchell, 697 P.2d at 246. See also Clark v. Farmers Ins. Exchange, 893 P.2d 598 (Utah App. 1993) (summary judgment affirmed for lack of evidence on causation where no one could determine what caused plaintiff's injury without guessing).

It is clear in this case that Mrs. Atherley claims she fell because she slipped on a strawberry. What is entirely unclear is what caused the strawberry to be on the floor. Mrs. Atherley herself admits that she has no evidence to answer this question. One can only guess that the strawberry came from a supposedly negligent condition created by Albertson's, or it may have come from a source beyond Albertson's ability to control. The mere existence of an allegedly negligent display does not mean the display caused her injury. As in Mitchell and Clark, summary judgment is warranted because there is no evidence that the strawberry came from the allegedly negligent display.

POINT III

USING THE TRADITIONAL THEORY OF LIABILITY, THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE PLAINTIFF LACKED EVIDENCE OF KNOWLEDGE AND OPPORTUNITY TO CURE.

Mrs. Atherley has never disputed, either before the trial court or on appeal, that if the traditional theory of liability governs this case, summary judgment for Albertson's is justified. Albertson's reiterates that under the traditional theory of liability, Mrs. Atherley has not shown that Albertson's owed her a duty as a matter of law.

Mrs. Atherley has no evidence that Albertson's knew or should have known the strawberry was on the floor before she fell; she herself does not know how the strawberry got on the floor. She also has no evidence that Albertson's had a reasonable opportunity to remove the strawberry because she does not know how long the strawberry had been on the floor before she fell. (R. 49).

In Long v. Smith Food King Store, 531 P.2d 360 (Utah 1973), the court affirmed summary judgment in favor of the store where the plaintiff slipped on a piece of pumpkin pie. The court explained its affirmance by noting that

in order to impose liability resulting from some foreign substance or defective condition, it must have existed for such time and manner that in due care the defendant either knew or should have known and remedied it.

Long, 531 P.2d at 361.

In Allen v. Federated Dairy Farms, Inc., 538 P.2d 175 (Utah 1975), the court affirmed summary judgment for the defendant arising from a patron's slip on cottage cheese. The court set forth the requirements for maintaining a slip-and-fall action due to an unsafe condition of a temporary nature:

[F]ault cannot be imputed to the defendant so that liability results therefore unless two conditions are met: (a) that he had knowledge of the condition, that is either actual knowledge or constructive knowledge because the condition had existed long enough that he should have discovered it; and (b) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care, he should have remedied it.

Allen, 538 P.2d at 176.

Summary judgment was similarly correct in this case because Mrs. Atherley had no evidence that Albertson's knew of the strawberry on the floor or that it had a reasonable time to remove the strawberry. The trial court used the proper theory of liability and, as a result, properly granted summary judgment for lack of evidence.

CONCLUSION

Mrs. Atherley has presented no compelling reason for this Court to reverse Judge Young's summary judgment in Albertson's favor. Canfield was not meant to apply simply because a plaintiff alleges a dangerous method of display. It is limited to instances where there is competent evidence of a dangerous method that creates hazardous conditions of which the store is aware. Mrs. Atherley's attempt to trigger the Canfield theory of liability solely with the conclusory statement that the open display of strawberries was dangerous because it was open is unavailing.

Even if this Court applied the Canfield theory, Mrs. Atherley has no evidence, just speculation, that the allegedly negligent method of display was the proximate cause of her injuries.

Finally, the trial court properly applied the traditional theory of liability to this case and granted summary judgment for lack of evidence regarding knowledge and opportunity to remedy.

Based upon the foregoing, Albertson's respectfully requests that this Court affirm summary judgment for Albertson's.

DATED this 27 day of March, 1996.

SNOW, CHRISTENSEN & MARTINEAU

By

A handwritten signature in black ink, appearing to read "R. D. Lund", written over a horizontal line.

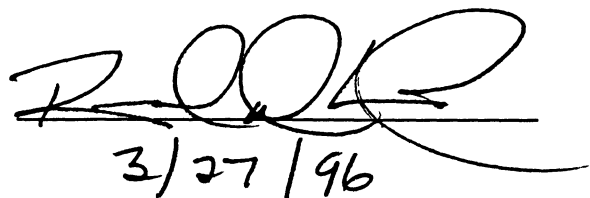
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CERTIFICATE OF MAILING

I hereby certify that a two (2) copies of the foregoing were
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3/27/96