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Lynn F. Atherley v. Albertsons, Inc. : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS
STATE OF UTAH

LYNN F. ATHERLEY, Plaintiff/Appellant, vs. ALBERTSON'S, INC., Defendant/Appellee.	Case No. 950707-CA Priority 15

REPLY BRIEF OF APPELLANT

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

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ARGUMENT

MRS. ATHERLEY'S CLAIM MEETS THE REQUIREMENTS OF THE CANFIELD THEORY OF LIABILITY.

As Mrs. Atherley set forth in her brief, evidence was presented to the trial court sufficient to state a claim under the theory of liability set forth in Canfield v. Albertson's, Inc., 841 P.2d 1224 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993). Mrs. Atherley showed that she had stepped and slipped on a strawberry that was approximately six feet away from the table holding Albertson's strawberry display. (R at 92.) She produced testimony that there were no barriers around the strawberry display to prevent strawberries from rolling to the floor, that there were no floor mats around the strawberry display, and that the strawberries were displayed in open containers. (R at 92 through 93.) Canfield does not require that Mrs. Atherley demonstrate that Albertson's method of displaying strawberries was "uniquely dangerous." The fact that Albertson's may have displayed other produce in a dangerous or hazardous manner does not render their display of strawberries acceptable.

A. Mrs. Atherley Produced Evidence Sufficient For The Fact Finder To Conclude That Albertson's Had Chosen A Method Of Display That Was Dangerous When Combined With The Foreseeable Patterns Of Customer Conduct Or When Simply Acted Upon By The Law Of Gravity.

Mrs. Atherley had no obligation to show that the strawberry display was in any way unique. The strawberry display was no more unique than the farmer's pack display of lettuce in Canfield. Selling lettuce in farmer's packs was certainly not unique to Albertson's. It was different and more dangerous, however, than

the alternate method of display that Albertson's also used, that is selling lettuce wrapped in cellophane. The identical situation was presented with Albertson's elected methods of displaying strawberries. It sold strawberries in closed containers but also sold strawberries in open containers, displayed on inclined tables with no barriers sufficient to catch the strawberries in the event they were acted upon by the force of gravity or bumped by customers.

Albertson's would place a burden on Mrs. Atherley to provide "expert" testimony that Albertson's method of display was dangerous. That is not a conclusion requiring expert testimony but is, instead, a fact so within the common knowledge and experience of the lay person that a jury, the only proper fact finder in this case, could determine that the method of display was dangerous. Mrs. Atherley also has no burden to show that Albertson's method of display differed from display practices in other stores. The fact that every other store may also use dangerous methods of display does not render those methods less dangerous. The Canfield opinion does not require expert testimony to establish the dangerous condition. The standard of care in this type of case is not established by an industry standard.

The evidence presented by Mrs. Atherley went well beyond her "allegations of the store owner's negligence." She provided clear evidence, through the testimony of Albertson's own witness, that it was foreseeable to Albertson's that strawberries would end up on

the floor either through a pattern of customer conduct or by merely rolling or being bumped to the floor. (R at 66.)

Albertson's was just as aware of the hazards posed by the strawberries as it was the hazards created by the farmer's pack lettuce display in Canfield. Albertson's points out that in the Canfield case, it placed disposal boxes around the farmer's pack display, a measure it did not take with other produce displays. Albertson's produced testimony that it tried to remedy the hazard posed by the open strawberry displays by placing barriers around the incline displays and mats on the floors next to the display cases. These actions would have absolutely no purpose if Albertson's was not aware of the potential hazard created by its method of display. Mrs. Atherley disputed that there were barriers sufficient to keep strawberries from rolling or being bumped off of the display onto the floor and disputed the claim that their were mats directly next to the display case. The fact that Albertson's has provided evidence that it took these measures to try to remedy a dangerous method of display, establishes that it was aware of the risks created by that method of display. The Canfield analysis is directly on point and the facts of Mrs. Atherley's fall are almost identical to those of the plaintiff in Canfield.

B. The Canfield Theory Of Liability Applies In Mrs. Atherley's Case And Does Not Impose Strict Liability On Store Owners. Albertson's Interpretation Of The Canfield Requirements Seeks Absolute Immunity For Store Owners Against The Claims Of Customers Who Could Not Possibly Meet The Burden That Albertson's Interpretation Would Impose.

It is an insupportable stretch of reason for Albertson's to argue that applying the Canfield theory to Mrs. Atherley's claim

would impose absolute liability on store owners. Canfield does not impose absolute liability on store owners. Mrs. Atherley's claim has met the Canfield requirements and, therefore, does not seek the imposition of absolute liability. If Mrs. Atherley's claim is allowed to go back to the trial court, she will still have to present her case to the jury and persuade the jury that Albertson's method of display was dangerous.

In fact, if the court were to apply Albertson's interpretation of the Canfield theory, store owners would be afforded virtually absolute immunity from the claims of customers who could not possibly meet that burden because of the impossibility of gaining the type of knowledge that Albertson's would require them to obtain and to present as evidence before they could even present their cause to the jury.

C. Albertson's "Proximate Cause" Argument Is A Red Herring. Proximate Cause Is Established To The Same Degree As It Was In Canfield.

In its "proximate cause" argument Albertson's again attempts to impose the burdens of the first theory of liability on those seeking redress under the Canfield theory. Albertson's would have this court uphold the trial court's Summary Judgment determination because Mrs. Atherley cannot show precisely how the strawberry that she fell on came to be on the floor. In all likelihood, Mrs. Atherley may never be able to establish that fact. Under the Canfield theory, however, it is not necessary for her to do so. It is precisely that type of unreasonable burden that the Canfield theory rejects. Even proximate cause is a question of fact to be

determined by the fact finder. Harline v. Barker, 854 P.2d 595 (Utah App. 1993). The jury can determine proximate cause from the facts that Mrs. Atherley will be able to present and could make a determination from the facts that she has already presented. The kind of wild speculation suggested by Albertson's would not be necessary for a jury to reach such a conclusion. We know that Albertson's brought the strawberries into the store, chose to display them openly, and knew of the hazard presented by that open display. There was no more evidence in Canfield that the lettuce leaf came directly from the farmer's pack display of lettuce than there is that the strawberry came directly from the open display of strawberries. Albertson's speculation that the strawberry may have come out of a closed container of strawberries is no different than alleging that the lettuce leaf came from a head of lettuce that may have been loosely wrapped in cellophane, or opened by a customer and discarded where the plaintiff in Canfield fell, or even, as Albertson's suggests, brought into the store from the outside by a customer. The facts presented by Mrs. Atherley do not present any greater challenge to the jury than did the facts in Canfield.

D. The Trial Court Improperly Applied The Traditional Theory Of Liability Which It Never Saw As Separate From The Canfield Theory.

It was apparent throughout this proceeding that both the trial court and Albertson's were very uncomfortable with the Canfield theory of liability and its fair application. The trial court and Albertson's are apparently more comfortable applying the traditional theory of liability which acts as a bar to most

plaintiffs. The Canfield theory, as Mrs. Atherley has amply shown, applies to her case which is virtually identical factually to the Canfield case. Mrs. Atherley's claim cannot survive under the traditional theory, but in light of Canfield, it does not have to.

CONCLUSION

Canfield is directly on point with Mrs. Atherley's claim which meets all of the standards set by Canfield. Mrs. Atherley presented facts to the trial court sufficient to defeat Summary Judgment. She presented facts sufficient for a jury to make a determination that Albertson's is liable for Mrs. Atherley's injuries under the Canfield theory. It is also critical to keep in mind that it should not have been necessary for Mrs. Atherley to present her entire case in order to defeat Summary Judgment. Additional facts can certainly be developed before trial. The facts presented by Mrs. Atherley to the trial court, however, were sufficient to defeat Albertson's Summary Judgment motion. She was, however,, granted no deference by the trial court. Albertson's is arguing for absolute immunity for store owners by asking this court to render an interpretation of Canfield that would deny plaintiffs the very remedy that this court determined plaintiffs were entitled to have in store owner liability cases where they were under such an enormous disadvantage under the traditional theory of liability.

The trial court improperly granted Albertson's Motion For Summary Judgment. This court should reverse the trial court's decision and remand Mrs. Atherley's claim to be tried under the Canfield theory.

DATED this 19th day of April, 1996.

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MAILING CERTIFICATE

I hereby certify that on the 29th day of April, 1996, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT LYNN F. ATHERLEY to the following:

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