

1996

Michael Erhart v. Waste Management of Utah, Inc. : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

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960506-CA

IN THE UTAH COURT OF APPEALS

MICHAEL ERHART,
Plaintiff/Appellant

v.

WASTE MANAGEMENT OF UTAH,
INC.,

Defendant/Appellee

APPELLEE'S BRIEF
IN OPPOSITION

Priority No. 15

CASE NO.: 960506-CA

PRIORITY NO. ~~15~~

Appeal from an order granting summary judgment in the Third
Judicial District Court, in and for the County of Salt Lake,
State of Utah, Judge David S. Young presiding.

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

MICHAEL ERHART,)	
)	APPELLEE'S BRIEF
Plaintiff/Appellant)	IN OPPOSITION
)	
v.)	
)	
WASTE MANAGEMENT OF UTAH,)	CASE NO.: 960506-CA
INC.,)	
)	PRIORITY NO. 16
Defendant/Appellee)	

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LIST OF PARTIES

The parties listed in the caption are the only interested parties to this appeal.

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STATEMENT OF JURISDICTION

Appellee agrees with Appellant's Statement Of Jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiff waived and abandoned claims of breach of warranty and product liability by failing to brief or argue any basis for error in his Brief On Appeal, thereby conceding summary judgment was properly granted by the trial court.

Whether a party has abandoned a claim on appeal is a question of law for the reviewing court. See Paxton v. State Farm Mutual Insurance Co., 809 P.2d 746 (Utah App. 1991).

2. Whether the trial court was correct in granting summary judgment in a slip and fall case where the Plaintiff failed to forward any admissible evidence that Defendant knew or should have known of the existence of the dangerous condition by failing to forward evidence regarding when the condition arose or how long it existed prior to the accident.

A trial court's decision to grant summary judgment is reviewed de novo by the appellate court. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

DETERMINATIVE STATUTES AND RULES

The determinative statutes and rules are set forth as necessary in the text of the brief.

STATEMENT OF THE CASE

Defendant accepts, for purposes of this appeal, the

Plaintiff's Statement Of The Case.

STATEMENT OF RELEVANT FACTS

In the trial court the following facts were undisputed, and "admitted for purposes of summary judgment" pursuant to Rule 4-501(2)(a) of the Code of Judicial Administration having been offered by the Defendant and unopposed by the Plaintiff, with the exceptions noted below. See, R. 99-116; R. 117-133.

1. Defendant Waste Management of Utah, Inc. is in part, [in] the business of leasing office trailers to construction companies, which trailers are used on-site for offices and other needs of construction companies. See, R. 61.

2. On July 6, 1990, TIC [Plaintiff's employer] leased from Modulaire (a related company of Defendant) a double-wide mobile field office. (citation omitted) See, R. 115.

3. Defendant did not manufacture the subject trailer. Instead it was manufactured by an unrelated company by the name of Advanced Modular which is located in Bluffdale, Utah. Advanced Modular is not a party to this lawsuit. (See deposition of Jerry Bryant, p. 7).

4. The terms and conditions outlined in the lease agreement between Defendant and TIC required TIC to perform the general maintenance associated with the trailer and to pay for that maintenance. (Bryant deposition, p. 10)(Exhibit A, paragraph 12, Terms and Conditions). Paragraph 12 of the Terms and Conditions of the lease states as follows:

1212. Maintenance, damage, and destruction - except as specifically otherwise provided in this paragraph, LESSEE [TIC] SHALL AT LESSEE'S OWN EXPENSE AT ALL TIMES KEEP THE EQUIPMENT IN GOOD AND EFFICIENT WORKING ORDER, CONDITION AND REPAIR AND SHALL KEEP AND MAINTAIN THEREON SUCH IDENTIFICATION OF OWNERSHIP AS LESSOR MAY REQUIRE. Lessor will maintain and make any repairs required from normal use to the roof, doors, windows, light fixtures, heating, ventilation, and air conditioning systems, except that LESSEE SHALL REPLACE HEATING, VENTILATING, AND AIR CONDITIONING FILTERS AND BURNED OUT LAMPS AS REQUIRED AND PAY FOR ANY DAMAGE CAUSED BY LESSEE. LESSEE SHALL BEAR THE FULL RESPONSIBILITY FOR PROTECTING THE EQUIPMENT AGAINST THE RISK OF DAMAGE, THEFT, OR DESTRUCTION OF THE LEASED EQUIPMENT FROM EVERY CAUSE, AND SHALL MAKE ALL REPLACEMENTS, REPAIRS, OR SUBSTITUTION OF PARTS OF EQUIPMENT THEREON AT ITS EXPENSE, ALL OF WHICH SHALL CONSTITUTE AN ACCESSION TO THE LEASED EQUIPMENT. IF LESSEE DOES NOT ADEQUATELY REPAIR ANY DAMAGE FOR WHICH LESSEE IS RESPONSIBLE, LESSOR SHALL HAVE THE OPTION TO PERFORM THE MAINTENANCE OR REPAIR AT LESSEE'S EXPENSE. ANY DAMAGE CAUSED BY NEGLIGENCE OF LESSOR WILL BE REPAIRED AT THE EXPENSE OF LESSOR. LESSEE SHALL AT ITS EXPENSE PROVIDE ADEQUATE JANITORIAL SERVICES TO KEEP THE LEASE EQUIPMENT IN GOOD CONDITION, FAIR WEAR AND TEAR ACCEPTED.

(See Exhibit A, paragraph 12) See, R. 115.

5. Before the trailer was taken to the site where TIC used it, it was inspected. (Bryan deposition, p. 11).

6. Once the trailer arrived on site it was again inspected with a check list. (Bryant deposition, p. 11)(See inspection list, attached as Exhibit B, and incorporated herein by reference as if set forth in full). See, R. 116.

7. Part of the inspection includes a review of the structural requirements and integrity of the trailer. (Bryant deposition, p. 12).

8. This inspection did not reveal any defects relevant to

the floor or the area where Plaintiff's alleged accident took place. (Bryant deposition, p. 121).

9. Upon receipt of the trailer, TIC proceeded to install walls to create individual office space. (Danny R. Piva deposition, p. 13).

10. In September of 1991, Waste Management, at the request of TIC, replaced some floor tiles near one of the doors to the trailer because the tiles were coming loose. (Danny R. Piva deposition, p. 24; Linnae Jolley deposition, p. 9; Richard Young deposition, pp. 38- 41).

11. The entire time TIC had the trailer up until the time of Plaintiff's alleged accident, none of the individuals who worked in the trailer experienced any giveaway or weakness in the floor or any other problems other than those related to the tiling situation mentioned above. (Janae Young deposition, p. 10; Danny Piva, pp. 29-30; Sheryl Piva deposition, p. 20; Linnae Jolly, p. 19; Plaintiff's deposition, p. 36).

12. Defendant did not receive any notice of a dangerous condition with respect to the floor. (Bryant deposition, pp. 14-15).

13. In fact, the trailer was returned the day after the alleged incident and there was no visible damage to the unit. (Bryant deposition, p. 14).

14. The area wherein Plaintiff's alleged accident took place is not the same area where the minor tile repair work

occurred. (Piva deposition, p. 29; Young deposition, pp. 38-41).

15. During the pendency of the lease, Plaintiff's employer, TIC, was in sole and exclusive possession and control of the trailer in question apart from the minor repairs they hired Defendant to perform.

16. Just prior to Plaintiff's accident, TIC demobilized the unit to prepare it for return to Defendant. (Young deposition, p. 10).

17. This demobilization included removing the walls TIC had installed to create office space. (Young deposition, pp. 11, 12; Janae Young deposition, p. 10; Piva deposition, pp. 18-19; Linnae Jolley, p. 10, Sheryl Piva, p. 11, Plaintiff's deposition, pp. 31-33).

18. During this tear out process, no one at any time up until the occurrence of Plaintiff's alleged accident noticed any problems with the floor whatsoever. (Plaintiff's deposition, pp. 21, 22, 31-32, 39; Sheryl Piva deposition, p. 20, Jolly deposition p. 19, Janae Young deposition, p. 10, Danny Piva deposition pp. 29-30; Richard Young deposition, pp. 14-15).

19. In fact, the Plaintiff frequented the trailer during his employment with TIC and had been in and out of the trailer many times, averaging at least once a day and had not noticed any problems with the floor. (Plaintiff's deposition pp. 21-22.

20. In fact, Plaintiff assisted in the demobilization and had been in and out of the trailer multiple times on the date of

the accident, in the days prior to the date of the accident, and during the demobilization. (Young deposition, p. 10, Plaintiff's deposition, p. 33).

In his Opposition To Defendant's Motion, pursuant to Rule 4-501(2)(b) Plaintiff disputed only paragraphs 12 and 13 of Defendant's Statement Of Facts, stating at R. 118-119:

* * *

3. Defendant asserts in paragraph 12 of its Statement of Points and Authorities in support of its Motion for Summary Judgment that Defendant did not receive any notice of any problems with respect to the floor in the area where Plaintiff's accident took place. The material fact is in dispute. In approximately March, 1992, TIC called Modulaire several times concerning needed repairs to the floor in the front door area of the trailer. (See deposition of Danny Ray Piva, p. 24-25) an unknown person performed structural work in this area which included new structural support members, new subfloor material and new tile. (See deposition of Danny Ray Piva, p. 24-25; deposition of Richard Young, p. 38-40).

* * *

5. Defendant also asserts in paragraph 13 of its Statement of Points and Authorities in support of its Motion For Summary Judgment that the trailer was returned to the lessor the day after the incident and there was no damage to the unit. Yet, witnesses present at the time of the incident testified under

oath during the taking of depositions that Plaintiff's leg fell through the floor of the trailer and that there was a hole left in the floor. (See deposition of Plaintiff, p. 39-41; Deposition of Richard Young, p. 220-26.)

By operation of Rule 4-501(2)(b), of the Code Of Judicial Administration the facts not specifically disputed above were deemed admitted for purposes of Defendant's motion and were the undisputed facts upon which the Trial Court based its ruling granting Defendant summary judgment.

SUMMARY OF ARGUMENT

Plaintiff failed to argue or brief his claims of breach of warranty or product liability. As a result such claims are waived and abandoned on appeal.

In the trial court, Plaintiff failed to forward admissible, material evidence to support a prima facie case of negligence against Defendant. Specifically, Plaintiff failed to forward any disputed evidence tending to show that the allegedly dangerous condition causing his fall was actually known or should have been known to Defendant.

Significantly, in the trial court Plaintiff failed to forward any admissible evidence that the alleged dangerous condition existed or could have been discovered when prior repairs were undertaken. It would be improper to allow a jury to speculate that Defendant should have discovered the dangerous condition simply because prior work was done on the floor of the

trailer. There is simply no competent evidence that the alleged dangerous condition existed and/or could have been discovered at any time prior to Plaintiff's fall. Moreover, no evidence was presented showing that the condition existed for such a period of time that Defendant, in the regular course of its reasonable duties, could have corrected it.

ARGUMENT

I.

PLAINTIFF'S FAILURE TO ADDRESS THE BREACH OF WARRANTY AND PRODUCT LIABILITY CLAIMS CONSTITUTES WAIVER OF THE CLAIMS OF ERROR ON APPEAL.

Utah Courts recognize the general principle that, "where an appellant fails to brief an issue on appeal, the point is waived." Paxton v. State Farm Mutual Insurance Co., 809 P.2d 746, 751 (Utah App. 1991). Similarly, issues raised in a docketing statement but not briefed thereafter are deemed waived and abandoned. Roselli v. Rio Communities Service Station, 787 P.2d 428 (N.M. 1980); In Re: Pulver, 871 P.2d 985 (N.M. App. 1994).¹ Case authority also holds a party may not argue matters for the first time in its reply brief in an attempt to place the

¹ See also, Union Oil Co. of Calif. v. State, 677 P.2d 1256, 1259 (Alaska 1984) (points initially raised for appeal but not briefed are considered abandoned); Quality Furniture Inc. v. Hay, 61 Haw. 89, 595 P.2d 1066, 1068 (1979) (issues raised but not argued in brief are waived); Northwest National Gas Co. v. Georgia-Pacific Corp., 53 Or. App. 89, 630 P.2d 1326, 1329 (assigned errors not briefed are deemed waived) review denied, 291 Or. 893, 642 P.2d 309 (1981); Kurpijuweit v. Northwestern Dev. Co. Inc., 708 P.2d 39, 46 (Wyo. 1985) (errors not asserted are waived or abandoned); Board of Education v. Kansas Dept. of Human Resources, 856 P.2d 1343 (Kan. App. 1993); Emery v. Federated Foods, Inc., 863 P.2d 426 (Mont. 1993).

waived issue back before the court. Braun v. Alaska Commercial Fishing and Agricultural Bank, 816 P.2d 140 (Alaska 1991).

In this matter Plaintiff originally brought three causes of action against Defendant based on negligence, breach of the warranty of habitability and product liability. See, R. 2-5. In his brief on appeal, Plaintiff addresses only the trial court's final judgment on Plaintiff's negligence claim. Accordingly, Plaintiff has abandoned his claims of breach of warranty and product liability. Summary Judgment may be affirmed as to those two claims as a matter of law.

II.

WASTE MANAGEMENT IS NOT LIABLE IN NEGLIGENCE FOR DANGEROUS CONDITIONS IN THE LEASED PROPERTY OF WHICH IT HAD NO KNOWLEDGE OR REASONABLE TIME TO CURE

Plaintiff's first cause of action as alleged in his Amended Complaint is based on negligence. The over-arching proposition of lessor/lessee liability is that a landlord is not the insurer of the safety of its tenants. Williams v. Melby, 699 P.2d 723, 727 (Utah 1985).

Utah law recognizes that a lessor of premises cannot be held liable for defects to the property unless the lessor knew or had reason to know of the dangerous condition and had sufficient time to remedy the condition after actual or constructive knowledge exists. Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89 (Utah Ct. App. 1988); Williams v. Melby, 699 P.2d 723 (Utah 1985); Stephenson v. Warner, 581 P.2d 567 (Utah 1978); See also,

Moore v. Muntzel, 642 P.2d 957 (Kan. 1982).

A lessor's duty is defined as follows:

. . . a landlord is bound by the usual standard of exercising ordinary prudence and care to see that the premises he leases are reasonably safe and suitable for intended uses, [and] under appropriate circumstances he may be liable for injuries caused by any defects or dangerous conditions which he created, or of which he was aware, and which he should reasonably foresee would expose others to an unreasonable risk of harm.

Stephenson, at 568 (citing Moore, at 958).

At the foundation of a lessor's duty to prevent injury caused by a dangerous condition on premises is the lessor's knowledge of the condition.² However, knowledge is not established by simply forwarding evidence that a person fell and that the fall was caused by a dangerous condition in the premises. The threshold question to be resolved by a jury in all such cases is; "when did the condition arise?" The issue of knowledge and any resulting duty is entirely dependent on the answer to this initial inquiry.

Only when there is some material evidence regarding when the condition arose can it be properly determined whether the defendant actually knew or should have known a particular condition existed. After all, it would be sheer speculation to state that an inspection of the premises would have provided knowledge of a dangerous condition if there is no evidence that,

² The knowledge of a dangerous condition triggers the Defendant's duty. If there is no notice, either actual or constructive, no duty is triggered as a matter of law. See Stephenson, at 568.

in fact, the condition could have been discovered by an earlier inspection. Similarly, Plaintiff cannot establish that the condition existed for such a period of time that it should have been discovered and remedied by the Defendant if there is not some evidence to suggest when the condition first arose.

A. PLAINTIFF FAILED TO OFFER ANY EVIDENCE OF ACTUAL KNOWLEDGE.

Plaintiff asserted in the trial court and has reasserted on appeal that Defendant had actual knowledge of a dangerous condition existing in the floor at the time Plaintiff fell. In support of that claim Plaintiff argues:

By calling and requesting that Modulaire come and repair the water damage to the floor of the trailer, TIC placed Defendant on notice that a dangerous condition existed with the floor area in front of the door. TIC responded to the call and made some repairs. A factual question still exists as to the nature and extent of these repairs.

Appellant's Brief p. 13; See, also, R. 122.

Plaintiff's appeal is based exclusively on the premise that Defendant had actual knowledge of a defect in the floor prior to Plaintiff's fall. Plaintiff argues that when repairs were made to the floor of the trailer in September of 1991, the Defendants must have had notice of the existence of the dangerous condition which caused Plaintiff's fall over six months later on April 28, 1992. See Brief of Appellant, p. 11, 13, 15. Plaintiff argues that such knowledge can be inferred by a jury as a matter of "logic." Id.

The fatal flaw in Plaintiff's argument is the lack of any

evidentiary connection between the evidence offered regarding the nature of the previous repairs to the floor and evidence of the condition of the floor at the time Plaintiff fell. To properly show some evidence that Defendant had actual knowledge that a dangerous condition existed at the time prior repairs were made, Plaintiff should have forwarded some admissible evidence tending to show that the condition of the floor at the time of the earlier repairs would have alerted a reasonable person that the condition was presently dangerous or could become so during the ensuing weeks or months. Plaintiff offered no evidence that the dangerous condition existed or was observable when the prior repairs were made.

In fact, in the trial court, Plaintiff did not dispute the statement of undisputed facts forwarded by Defendant which demonstrated that Plaintiff did not even fall in the area where repairs were previously made.³ See, supra, State Of Relevant Facts No. 14. Instead, for the first time on appeal, Plaintiff argues that the jury should be able to "logically" conclude that simply because some repairs were previously made to the floor, that must have been where Plaintiff fell and, as a result, the dangerous condition must have existed earlier and been known to Defendant.

³ Plaintiff is bound by the undisputed fact that the his fall did not even occur in the area where prior repairs were made. Because the statement of fact was undisputed in the court below, the admission is binding for purposes of summary judgment and on appeal. See 4-501(2)(b).

Contrary to Plaintiff's novel argument, the trial court properly precluded the jury from speculating that the condition that caused Plaintiff's fall "must have" existed or "had to be known" to defendant merely because repairs were made earlier. Moreover, the disputed evidence of the location of Plaintiff's fall, even if properly raised below, does not itself, support the necessary inference that Defendant must have had notice of the dangerous condition when prior repairs were made. In the case of Kitchen v. Cal Gas, 821 P.2d 458 (Utah App. 1991), the court ruled that evidence that a truck driver was driving improperly forty-five minutes before an accident occurred was not admissible as tending to establish that he was driving negligently at the time of the accident. The court ruled that the jury could not be left to make such a speculative leap in logic. Id.

By analogy, in the present case, evidence that Defendant was called to perform some repairs to the floor six months earlier is not competent, admissible evidence tending to show that a defective condition existed at the time of Plaintiff's fall or, more significantly, that the condition was known to Defendant at any time. After all, as recognized in Kitchen, there are "numerous possible explanations" as to the floor's dangerous condition, "many of which would not involve the negligence" of Defendant. See Kitchen, at 459. In fact, all of the relevant witness in this matter testified that they had observed no prior problems with the floor of the trailer prior to Plaintiff's fall.

See, supra. Statement Of Relevant Facts No. 18. Here, as in Kitchen, "submitting the issue of negligence to the jury would require the jury to engage in mere speculation as to whether (the Defendant) was negligent." Id. at 460.

In sum, Plaintiff failed to present any competent, admissible evidence to connect the fact of prior repairs to the floor with knowledge of the condition of the floor at the time Plaintiff fell. To permit the jury to speculate that actual knowledge existed based only on the fact that earlier repairs occurred would have been improper under the law as stated by this Court in Kitchen. Plaintiff failed to forward admissible evidence of negligence and, as a result there is no evidence to establish that a duty toward Plaintiff ever arose in this case. Summary judgment was properly entered and may be affirmed on appeal.

B. PLAINTIFF FAILED TO SUBMIT ANY GENUINE EVIDENCE OF CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION.

Plaintiff's failure to forward some admissible evidence regarding when the condition arose is also fatal to any claim of constructive notice. Constructive notice is imposed on a landlord when a dangerous condition exists and could have been discovered by the landlord during its reasonable inspection of the premises. Gregory, 754 P.2d at 91. It is also recognized that the constructive notice of latent conditions cannot exist where the lessee is in exclusive control of the premises. See

Moore v. Munsell, 642 P.2d 957, 958 (Kan. 1982). Where the landlord gives up all possessory interest and maintenance of the premises is undertaken by the lessee, the landlord has no realistic opportunity to inspect or repair and a duty to discover cannot be imposed because it is realistically incapable of performance. See, Id; See also Beach v. University Of Utah, 726 P.2d 413, 417 (Utah 1986).

More importantly, however, is Plaintiff's failure to forward any competent evidence regarding when the condition arose. Absent some evidence of when the defect arose, it cannot be said that the Defendant should have discovered it at some earlier point in its duty to inspect and/or maintain the trailer. Without some evidentiary benchmark of time, it is improper to allow a jury to speculate whether the condition could or should have been discovered before the accident. Therefore, Plaintiff failed to establish that a duty arose as a matter of law.

Finally, no evidence was presented to the trial court upon which a jury could base a finding regarding the length of time the defective condition existed. Absent some evidence of how long the condition existed, or its cause, it is sheer conjecture to surmise that Defendant had a reasonable period of time to remedy the situation before the accident. See Gregory, at 91.

Plaintiff's negligence claim fails for the simple reason that no admissible evidence was presented regarding when the alleged dangerous condition developed, for how long it existed or

that Defendant was or should have become aware of its existence prior to the accident. Summary judgment should be affirmed in favor of Defendant.

CONCLUSION

Plaintiff failed to address the warranty or product liability claims in his brief. As a result claims of error as to those causes of action are waived on appeal.

It has been shown that Plaintiff failed to forward any admissible evidence regarding when the alleged dangerous condition arose. His failure to forward such evidence is fatal to his claims of actual or constructive knowledge by Defendant. Therefore, no duty arose on the part of Defendant. Plaintiff's negligence claim fails as a matter of law. Summary judgment, as granted by the trial court, may be affirmed here on appeal.

DATED, November 4, 1996.

HANSON, EPPERSON & SMITH

A handwritten signature in black ink, appearing to read 'Scott W. Christensen', is written over a horizontal line.

SCOTT W. CHRISTENSEN
BRADLEY R. HELSTEN
Attorneys for Defendant/Appellee
Waste Management Of Utah, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 1996, a true and correct copy of the foregoing document was served via U.S. Mail, postage prepaid, to the following:

Mr. James W. McConkie, Esq.
PARKER, McKEOWN & McCONKIE
Attorneys for Plaintiff
4001 South 700 East, Ste. 500
Salt Lake City, Utah 84107

A handwritten signature in black ink, appearing to read "Rodger H. Erhart", is written over a horizontal line.

G:\HELSTEN\WP\ERHART.APP

THIRD DISTRICT COURT
Third Judicial District

MAY 16 1996

SALT LAKE COUNTY
By Christensen Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

MICHAEL ERHART,	:	ORDER
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
WASTE MANAGEMENT OF UTAH, INC.:	:	Civil No. 940904775 PI
	:	Judge David S. Young
Defendant.	:	
	:	

Defendant's Motion for Summary Judgment, having come before the court on Friday, May 3, 1996, plaintiff being represented by James R. McConkie, defendant being represented by Scott W. Christensen, the court having reviewed the pleadings, having heard oral argument, and being fully advised in the premises;


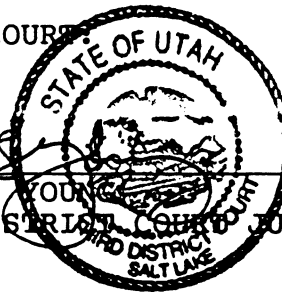
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's Motion for Summary Judgment is granted. Plaintiff presented no evidence upon which a jury could conclude that the plaintiff received his injuries in the area where repairs had been performed some months prior to his accident. Without other evidence of what the defect consisted of, when it arose, or when it

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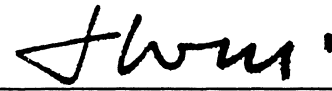
would reasonably have been discovered, summary judgment for the defendant was proper.

DATED this 16th day of May, 1996.

BY THE COURT


DAVID S. YOUNG
THIRD DISTRICT COURT JUDGE


APPROVED AS TO FORM AND CONTENT:



JAMES W. McCONKIE
Attorney for Plaintiff

94-523D
ERHART\ORDER