2007

Donna Jex vs. JRA, Inc. and James Fillmore and Angela Fillmore : Brief of Appellee

Utah Court of Appeals

Denton M. Hatch; attorney for plaintiff.
Robert L. Janicki, Michael L. Ford; Strong & Hanni; attorneys for defendants.

DENTON M. HATCH, #1413
Attorney for Donna Jex
128 West 900 North, Suite C
Spanish Fork, UT 84660
Phone (801) 794-3852
Fax (801) 794-3859

IN THE UTAH SUPREME COURT

DONNA JEX, Plaintiff and Cross-Appellant, vs. JRA, INC. dba HICKORY KIST DELI, JAMES FILLMORE and ANGELA FILLMORE, Defendant and Appellant.	**BRIEF OF APPELLEE AND CROSS-APPELLANT** Case No. 20070651-SC

This is an appeal from the decision of the Utah Court of Appeals dated July 19, 2007.

Robert L. Janicki
Michael L. Ford
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84181
(801) 532-7080
Attorney for Defendants/Appellants

Denton M. Hatch
128 West 900 North, Suite C
Spanish Fork, UT 84660
Phone (801) 794-3852
Fax (801) 794-3859
Attorney for Plaintiff/Cross-Appellant

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Statement of Jurisdiction

The Utah Supreme Court has jurisdiction over this case pursuant to its granting of the Petition and Cross-Petition for Writ of Certiorari on December 10, 2007 pursuant to Utah Code Ann. § 78-2-2(3)(a).

Statement of Issues

1. *Did the Court of Appeals commit reversible error by ruling that Hickory Kist did not have constructive knowledge of the dangerous condition?*

This issue presents a question of law which is reviewed for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994), *abrogated on other grounds by Campbell v. State*

Farm Mut. Auto Ins. Co., 2001 UT 89, 65 P.3d 1134, *and modified on other grounds, State v. Levin,* 2006 UT 50.

This issue was preserved in the trial court by filing Reply Memorandum Opposing Motion For Summary Judgment And Memorandum In Support of Motion For Summary Judgment For Plaintiff (R. at 241), at the hearing on that Motion, by filing Objection to Proposed Order Granting Defendant's Motion For Summary Judgment (R. at 294), and by filing a Notice of Appeal dated June 13, 2006. (R. at 299). The issue was also preserved by filing a Cross-Petition for Writ of Certiorari.

2. *Did the Court of Appeals err in ruling that Miss Jex could not recover under the permanent condition theory of business owner liability?*

This issue presents a question of law which is reviewed for correctness. *Pena,* 869 P.2d at 936 (Utah 1994).

This issue was preserved in the trial court by filing Reply Memorandum Opposing Motion For Summary Judgment And Memorandum In Support of Motion For Summary Judgment For Plaintiff (R. at 241), at the hearing on that Motion, by filing Objection to Proposed Order Granting Defendant's Motion For Summary Judgment (R. at 294), and by filing a Notice of Appeal dated June 13, 2006. (R. at 299). The issue was also preserved by filing a Cross-Petition for Writ of Certiorari.

Statutory and Constitutional Provisions

There are no constitutional or statutory provisions that are applicable to this case.

Statement of the Case

A. Nature of the Case, Course Proceedings, and Disposition in the Trial Court

This case involves the claim of Donna Jex for injuries she received when she slipped on the wood floor at Hickory Kist's store. Motions for summary judgment were made by both parties. The honorable Judge Derek K. Pullan entered a final order granting the defendants' motion on June 6, 2006. Donna Jex then filed a timely appeal which the Utah Court of Appeals heard on July 19, 2007. The Court of Appeals upheld the trial court's ruling regarding constructive knowledge and method of operation, but reversed as to whether the dangerous condition was created by Hickory Kist or its employees. Hickory Kist then filed a Petition for Writ of Certiorari to the Supreme Court and Donna Jex filed a Cross-Petition. Both petitions were granted on December 10, 2007.

B. Statement of Facts

On January 26, 2004, there was new snow. (R. at 290). James Fillmore, owner of Hickory Kist Meat Snacks and Deli, came in the back door of the store at about 5:00 a.m. (R. at 290). Mr. Fillmore was wearing Asics or Adidas athletic shoes. (R. at 289). At about 6:30 or 7:00, after removing the snow and spreading ice melt at the front part of the store, Mr. Fillmore walked through the front door of the store all the way to the back to start cooking. (R. at 290). Before any customers arrived Mr. Fillmore likely walked across the area where Miss Jex was injured many times. He walked across the floor before the mats were down and therefore could not clean his feet when he came in the door.

At about 5:30 a.m. Sharlene Barber, an employee of Hickory Kist, came into the store. (R. at 290). That day Sharlene was wearing Sketchers brand shoes with thick soles. (R. at 289). Sharlene usually turns the lights on, but cannot remember turning them on that day. (R. at 290). At about 7:00 a.m. Sharlene put mats on the floor. (R. at 290). Sharlene stated that prior to Jex's injury she and James Fillmore were the only people in the area where the injury occurred. (R. at 290). While Sharlene testified that she knew the wood floor was slick when wet, she does not inspect for water in the mornings and did not check for water the morning of the injury. (R. at 290). Further, because of her cooking duties and other responsibilities, it is unlikely that she would have noticed a wet spot by chance. (R. at 290).

Donna Jex came into Hickory Kist prior to 8:30 a.m. Miss Jex was the first customer of the day and was wearing snow boots with new, but small tread. (R at 290, 289, 202). As Miss Jex entered the store she noticed that the lights in the store were dim, as if some of the lights were not on. (R. at 290). When Miss Jex reached the cash register she turned right to go to the back of the store to make her order. (R. at 289). As she turned Miss Jex slipped on the wood floor due to a small puddle, about four inches in diameter. (R. at 289). As a result of the fall Miss Jex suffered a broken wrist, and injured her teeth and her back.

Miss Jex's injury occurred about eight feet from the counter where employees assist customers. (R. at 290). When an employee is standing behind the counter, the employee can easily see the area where the injury occurred. (R. at 290).

On the day that Donna Jex was injured Hickory Kist failed to place mats on all walking areas. (R. at 289, 288). Mr. Fillmore decides where the floor mats will be placed. (R. at 288). While a mat had previously been placed over the area where Miss Jex fell, there was no mat in this area on the day in question. (R. at 288). Mr. Fillmore said he decided to remove the mat because it was getting in the way. (R. at 182-81). Thus, because Mr. Fillmore chose to have the mat removed, Miss Jex stepped from a mat onto a wet hardwood floor and slipped and fell.

After the injury Mr. Fillmore inspected the area where the injury took place and found a small amount of water on Miss Jex's boots and on the floor. (R. at 289). Although Mr. Fillmore did not see any water on the floor prior to Miss Jex's injury, there is no evidence that he inspected the floor. There were no warning signs telling Miss Jex that the floor might be wet. (R. at 289). When asked about what source the water came from Mr. Fillmore stated that there were only two possible sources—his own shoes, or Miss Jex's. (R. at 289). While there was a Pepsi salesman that came in before Miss Jex's accident (R. at 289), he only walked through the store once, and none of the store employees list him as a possible source of the water.

It is undisputed that Hickory Kist did not have a formal policy for keeping their floors clean from water and debris. (R. at 288). The employees were not given any instructions or formal training on inspecting the floor for water. (R. at 288, 204). Mr. Fillmore does not ever remember telling the employees to inspect the floor. (R. at 178). The written daytime checklist does not have anything on it about inspection of the floors. (R. at 178). Hickory Kist has a written checklist with daytime instructions, but the list

does not include any instructions about inspecting the floor for water. Further, rather than mopping up at various times throughout the day, Hickory Kist only has employees mop the floor at the end of the day. (R. at 288).

Miss Jex is a 70-year-old widow. Her broken wrist has made it very difficult to perform her job as a substitute teacher. While she used to teach computers efficiently, she now has severe pain when she types. Carrying books to class and any other light lifting is now extremely difficult and painful.

Response to Appellant's Issues[1]

The Court of Appeals did not misconstrue Utah law when it held that a storeowner may be liable for a temporary condition that either the storeowner or one of his employees creates.

Koer v. Mayfair Markets sets forth the rule that a storeowner is liable for a temporary unsafe condition in *either of two situations*. First, if the store/employee places the object causing the injury on the floor (condition created by an employee); *or* second,

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[1] While it is not critical to the issue on appeal, Hickory Kist argues that the Court of Appeals found that "there was no evidence that Hickory Kist's store owner and employees exercised anything less than reasonable care in the maintenance of the floors " Brief of Appellant, 5-6 This is an incorrect interpretation of what the Court of Appeals held The issue of reasonableness in floor maintenance was not addressed by the Court of Appeals The only statements made by the court in the references cited by Hickory Kist is that there was no evidence tending to show that the water had existed for a long enough time that constructive notice should have been imputed *Jex v JRA, Inc* , 2007 UT App ¶ 16, 24 This statement by the court does not address whether actions by Hickory Kist or its employees in maintenance of its floor were reasonable Miss Jex maintains that the procedures for maintenance were not reasonable See affidavit of Miss Jex's safety expert attached as Appendix A hereto which is unrebutted Her expert, Charles Haines, who has over 40 years of safety experience in the industry, states that Defendant acted unreasonably His affidavit also addressed constructive knowledge and foresee ability Among other things, he says failure to have a policy in place with respect to floor maintenance is unreasonable The store owner cannot expect the employees to develop a policy on their own And " common sense it not enough There should be specific instructions and guidelines " Appendix A, paragraph (g) Further, Mr Haines said the owner " never recalled instructing his employees to 'inspect the floor' " and "after coming in the front and back of the business where Donna Jex fell, he should have inspected and cleaned the floor " Appendix A, Paragraph (d) Last, the owner knew the shiny hardwood floor was slippery when wet "When a floor is slippery, there should be mats in all walking areas In this case the owner had a mat in the area where Donna Jex fell, but he removed the mat where Donna Jex fell and did not replace it Mr Fillmore should have replaced the mat with another one " Appendix A, Paragraph (c)

if the store/employee was aware of the object (constructive or actual knowledge). *Koer v. Mayfair Markets*, 421 P.2d 566, 569 (Utah 1967). The existence of either situation can create liability. *Id.* This rule is not a reiteration of the two types of conditions (permanent and temporary) as argued by Hickory Kist. This rule sets forth two separate grounds of storeowner liability for *temporary* unsafe conditions. The *Koer* court determined the plaintiff could not recover for her slip and fall on *either* of two grounds. "[W]e are not able from the evidence to find any support for the further and necessary inference that this condition was caused *by an act of the defendant*, or that the *defendant had actual or constructive knowledge* of it." (Emphasis added.) *Id.* The plaintiff could have recovered for her injuries if she had shown either (1) that the grape was put on the floor by the defendant or (2) that the defendant had knowledge of the grape.

The present case should be governed by *Silcox* and *Koer*, not by *Schnuphase* and *Gobel* as Hickory Kist suggests. Hickory Kist argues that *Schnuphase* and *Gobel* stand for the proposition that notice is required in all temporary condition cases. In light of the two distinct rules set out in *Koer*, this argument is incorrect. While *Schnuphase* and *Gobel* do state that notice is required, these two cases do not deal with the same fact scenario as is presented in the present case—neither *Schnuphase* nor *Gobel* deal with the creation of an unsafe condition by an employee. *Koer* and *Silcox* do address such a situation. In *Koer* it is unknown how the grape was put on the floor, so the court addresses both grounds of recovery. *Koer,* 421 P.2d 568, 569. *Silcox* deals with an unsafe condition that was created by the acts of an employee. *Silcox v. Skaggs Alpha Beta, Inc.*, 814 P.2d 623, 624 (Utah App. 1991).

Knowledge (either constructive or actual) by a storeowner/employee is not required for a plaintiff to recover under temporary condition theory. The court in *Silcox* did not require proof of knowledge for the plaintiff to recover. *Silcox,* 814 P.2d 623-25. The question remanded by the court was not whether actual or constructive knowledge existed, but whether the water was created by the defendant's employee. *Id.* at 624-25. Hickory Kist tries to distinguish *Silcox* from the present case on the grounds that the employee who left the ice in the cart certainly knew they had left it there. Brief of Appellant, 9. Hickory Kist seems to be inferring that the *Silcox* court required a finding of either constructive or actual notice even though such a requirement was not set forth in the case. This inference by Hickory Kist is incorrect. Again, the *only* question sent back on appeal was whether an employee created the temporary unsafe condition, not if there was any type of notice. *Silcox,* 814 P.2d at 624-625

As has been established in the preceding paragraph, knowledge (either constructive or actual) was not, as Hickory Kist implies, a required element of recovery in the *Silcox* case. As an alternative argument, even if knowledge had been at issue, there was no difference between the knowledge of the employee in *Silcox* and the knowledge of Hickory Kist employees. The employee in *Silcox* would have known he left a cart with ice in it. Similarly, in this case Sharlene and Mr. Fillmore knew that they had snow on their shoes when they entered the store. Thus, both Sharlene and Mr. Fillmore had knowledge of the condition that created water on the floor just as the employee in *Silcox* had knowledge of the ice in the cart which created water on the floor. If Hickory Kist is asserting that the employee in *Silcox* had constructive knowledge because he left a cart

with melting ice in it, then Mr. Fillmore and Sharlene also had constructive knowledge of the water on the floor because they left melting snow from their shoes on the store floor.

Summary of Arguments

The Court of Appeals erred in determining that there was no evidence showing that the water Miss Jex slipped on had been there for a significant amount of time. Evidence such as the tread on shoes, the activities of Hickory Kist employees before the store opened, and other factors show that there is much more than speculation and conjecture in imputing constructive notice on Hickory Kist.

The Court of Appeals committed reversible error when it determined that Miss Jex could not recover under the permanent condition theory because the court failed to recognize Hickory Kist's wood flooring as an inherently dangerous condition. The court also failed to recognize that a slip and fall by a customer was foreseeable in light of the snowy weather conditions and the failure of Mr. Fillmore to place mats in all areas of customer traffic.

Argument

I. The Court of Appeals erred affirming the district court's judgment that Hickory Kist had no constructive notice of the dangerous condition.

For a plaintiff to recover when it is unknown who created the unsafe condition the plaintiff must prove two things. First, the plaintiff must show that the store owner or his employees had knowledge of the unsafe condition. *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 478 (Utah 1996). Second, the plaintiff must show that the store owner or his employees had adequate time to remedy the condition. *Id.*

The knowledge requirement is satisfied if the owner or his employees had either actual or constructive knowledge of the unsafe condition. *Id.* Constructive knowledge exists if the unsafe condition existed for a long enough time that the owner or employees should have discovered it. *Id.*

Turning to Utah case law, plaintiffs have been hindered by the lack of clear criteria for proving constructive knowledge. *See Lindsay v. Eccles Hotel Co.*, 284 P.2d 477 (Utah 1955) (Plaintiff slipped and fell on water at the defendant's coffee shop. There was no evidence as to who spilled the water, or how long the water had been there before the plaintiff slipped on it); *Koer v. Mayfair Mkts,* 431 P.2d 566 (Utah 1967) (Plaintiff slipped and fell on a grape in the defendant's store. There was no evdience put on by the plaintiff to show who had put the grape on the floor or how long it might have been there.); *Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175 (Utah 1975) (Plaintiff slipped on cottage cheese in the defendant's store. There was no evidence offered by the plaintiff to show how long the cottage cheese had been there and no one had seen cottage cheese on the floor prior to the incident.). While it is clear from these four cases that courts will not find constructive knowledge from mere allegations by the plaintiff, there are no specific requirements set forth for proving constructive knowledge. The only clear rule regarding constructive knowledge is that the existence of an unsafe condition for two to four minutes is not long enough to impute such knowledge. *See Schnuphase*, 918 P.2d at 478.

While Utah cases have not set forth clear criteria for determining when constructive notice should be imputed, other jurisdictions have. Constructive knowledge

should be imputed on a case-by-case basis. *Miller v. Crown Mart, Inc.*, 425 P.2d 690, 692 (Colo. 1967). While the length of time a condition existed is one of the most important factors, the following factors must also be considered: nature of the condition, its foreseeable consequences, the means and opportunities of discovering it, the diligence required to discover and correct it, and the foresight which a person of ordinary prudence would have exercised under similar circumstances. *Id.*

In addition, other jurisdictions charge a store owner with constructive knowledge when an employee of the owner was in the immediate area of the dangerous condition and could have easily seen the substance. *Banks v. Colonial Stores, Inc.,* 161 S.E.2d 366, 368 (Ga. Ct. App. 1968). "When it is alleged that an employee is in the immediate area of the dangerous condition and has the means and opportunity to discover the same, it then becomes a question for the jury whether the defendant in the exercise of due care should have discovered and either warned the plaintiff or corrected the alleged hazard." *Id.* The unsafe condition does not have to exist for a specific period of time for this type of constructive knowledge to exist. *Id.*

Utah courts must adopt similar criteria for determining when constructive knowledge exists because without such requirements there is an incentive for business owners to ignore unsafe conditions. The law must set reasonable requirements for proving constructive knowledge so that businesses maintain their premises in a reasonably safe manner.

In the present case the Court of Appeals determined that there was no direct evidence suggesting that the water Miss Jex slipped on had been there for any significant amount of time. The court stated that there was nothing about the water itself that suggested it had been there for a long time, and further, that there was no reasonable inference that the owner should have been aware of the water. *Jex v. JRA, Inc.*, 2007 UT App. 249, ¶ 16. The Court of Appeals erred in this determination. When the evidence surrounding the appearance of the water are considered, there is much more than speculation and conjecture showing that constructive notice should be imputed on Hickory Kist.

The evidence showing that Hickory Kist had constructive knowledge is as follows. First, the shoes of Mr. Fillmore and Sharlene had deep tread (See R. at 289). Snow would have easily become lodged in the deep grooves of their shoes and would have been tracked onto the wood floor when they entered the store. Second, Mr. Fillmore had been outside shoveling the snow before he entered the front of the store (R. at 290). Shoveling would have required Mr. Fillmore to step in large amounts of snow numerous times whereas Miss Jex walked into the store after snow removal had occurred (R. at 290). Third, the amount of time needed for snow to melt into water would not have occurred in the one second it took Miss Jex to step from the mat onto the wood floor. Fourth, with the small tread on Miss Jex's shoes, any traces of water and snow would almost certainly been removed from her shoes by the time she reached the wood floor because she walked on approximately twenty five feet of mats before she arrived at the counter. (See R. at 289). On the other hand, the mats were not out when Mr. Fillmore and Sharlene walked

through the front of the store. (See R. at 290). When taken in a light most favorable to the plaintiff, the facts show that either Sharlene or Mr. Fillmore tracked in the snow that caused the water on the floor. Thus, the water most likely was on the floor for 1-2 hours before Miss Jex slipped on it.

The length of time the water was on the floor is a very important factor in determining if the water should have been discovered by Mr. Fillmore or Sharlene. However, length of time must be considered in conjunction with the other case specific factors such as nature of the condition, foreseeable consequences, the means and opportunities of discovering it, the diligence required to discover and correct it, and the foresight which a person of ordinary prudence would have exercised under similar circumstances.

In the present case the water should have been discovered and remedied by either Sharlene or Mr. Fillmore. Hickory Kist is a small store that does not get a lot of traffic. The area of the store is not large and thus, it is easy to inspect the floor frequently. It would not be unreasonable for Hickory Kist to have a policy in place requiring employees to check their small floor for water and other debris every thirty minutes. The water was in a place easily visible to Hickory Kist's employee, Sharlene. The water was only eight feet away from where Sharlene was performing her responsibilities. It was in a plainly visible, un-obscure spot and would have taken little effort to discover. Also, because Hickory Kist had not opened for the day, there would have been no customers to obstruct Sharlene's view of the floor. With snowy weather conditions, a person of ordinary prudence would have had the foresight to know that water and snow would be

tracked in. Such a person would have put up warning signs, covered all wood areas with mats, and inspected the premise before opening for the day.

Unlike previous Utah cases, Miss Jex has provided sufficient circumstantial evidence showing how long the water was on the floor before she slipped on it. This case is distinguishable from previous Utah cases such as *Koer, Lindsay,* and *Allen*, because Miss Jex, unlike previous plaintiffs, provided evidence of how long the dangerous condition existed. Further, this case is distinguishable from *Schnuphase* because the water was on Hickory Kist's floor much longer than two to four minutes.

In short, the evidence shows that Hickory Kist had constructive knowledge of the water because the water was present for at least an hour, was dangerous, could have easily been discovered, and could have easily been removed. While Hickory Kist is not an insurer of its patron's safety, Hickory Kist must be responsible for accidents like this where its employee's negligent acts result in injury to patrons.

II. The Court of Appeals erred in affirming the district court's judgment that there was no permanent dangerous condition.

When a business's method of operation creates a situation where it is reasonably foreseeable that the acts of third parties will create a dangerous condition, they are liable for injures resulting from the dangerous condition. *Canfield v. Albertsons, Inc.*, 841 P.2d 1224, 1226 (Utah Ct. App. 1992). As long as the condition causing the injury was inherently dangerous and foreseeable, then the business owner is liable. *Id.* Manner of use or method of operation is a permanent condition even though a temporary condition such as a head of lettuce is involved. *Id.* There is no logical distinction "between a

situation in which the store owner directly creates the situation and where the store owner's method of operation creates a situation..." *Id.* The type of flooring a store uses can be an inherently dangerous condition. *DeWeese v. J.C. Penney Co.*, 297 P.2d 898, 901 (Utah 1956). If an inherently dangerous condition is employed the business must discharge their duty of reasonable care by employing safety measures that will protect customers from the risk of injury that the condition creates. *Canfield,* 841 P.2d at 1227. To recover under this theory a plaintiff does not have to prove notice of the condition. *Id* at 1226.

In *DeWeese v. J.C. Penney* the court concluded that, since the defendants knew their floor surfacing was slippery when wet, the only remaining question was whether the defendant discharged its duty to use reasonable diligence to protect its customers against the surfacing. *DeWeese,* 297 P.2d at 901. The court concluded that reasonable minds could find that the defendant had failed to employ proper safety measures in light of the weather conditions. *Id.*

In *Canfield v. Albertsons,* Albertsons sold lettuce that did not have the wilted outer leaves removed. *Canfield,* 841 p.2d at 1225. It thus put out empty boxes for customers to put the wilted leaves in. *Id.* The court determined that these facts, when viewed in a light most favorable to the plaintiff, showed that this method of selling and displaying lettuce leaves was inherently dangerous. *Id.* at 1227. The court further concluded this method of operation made it foreseeable that lettuce leaves would be left on the floor and that customers may slip on them. *Id.*. Given Albertsons chosen method of operation, the Court determined the critical question was whether Albertsons had done what was reasonably

necessary to protect the customers from injuries that would likely be caused by the method of selling and displaying lettuce. *Id.* "Each determination of whether the protective measures taken were reasonable is fact sensitive. . . In any event, the fact finder must determine whether the storeowner's vigilance in protecting against the condition or hazard was commensurate with the risk created by the method of operation." *Id.* The court decided that since Albertsons did not have mats and because the plaintiff challenged Albertsons' assertion that it had cleaned the area shortly before her fall, there was a question of fact for the jury and summary judgment was not proper. *Id.*

In the present case the Court of Appeals determined that there was a lack of direct evidence showing that Hickory Kist chose a method of operation that was inherently dangerous and foreseeable and that Hickory Kist did not have notice that it had created a potentially hazardous condition. *Jex v. JRA, Inc.*, 2007 UT App. 249, ¶ 23.The Court of appeals erred in making this conclusion. It is undisputed that wood flooring was used in the defendants' store. (R. at 215). It is also undisputed that Mr. Fillmore knew the floor was slick when wet (R. at 289), and yet, on a snowy day, failed to direct employees to put mats in all areas of customer traffic. (R. at 288). Just like the defendant in *DeWesse* Hickory Kist chose to employ a floor surfacing that was inherently dangerous when wet.

Due to the snowy weather conditions a slip-and-fall was foreseeable. On the day of the accident James Fillmore and his employee Sharlene knew that it was snowing outside. (R. at 210, 290). They had seen the snow and knew that it would be tracked in. Mr. Fillmore had even shoveled snow off of his store's premises. (R. at 290, 224). These facts, when taken in a light most favorable to the plaintiff, show that the inherently

dangerous condition (the wet wood floor) was foreseeable to Hickory Kist. Thus, the inherently dangerous and foreseeable elements are met.

The essential question then becomes whether or not Hickory Kist did what was reasonable necessary to protect customers from wet wood flooring. The undisputed facts show that Hickory Kist did not meet this requirement. Hickory Kist had no formal policies in place for cleaning, sweeping, and checking its floors throughout the day. (R. at 179-78). While Mr. Fillmore testified that keeping the floors clean was an important issue, there were no scheduled checks or scheduled sweepings throughout the day. (R. at 179-78). There was a daily checklist of jobs, but the checklist did not include inspecting the floors. (R. at 178). Hickory Kist also did not meet its duty of reasonable care because it failed to place mats throughout all areas of customer traffic. (See R. at 288). On the day in question, when it was foreseeable that snow would be tracked in, there was not a mat where Miss Jex slipped (R. at 288), yet it was an area where customers frequently stepped.

Even if the water was brought in by Miss Jex, Hickory Kist is still responsible for the injuries she sustained. When a store creates an inherently dangerous condition, it is responsible for conditions created by third parties. Thus, since Hickory Kist used wood flooring it is responsible for the slippery surface no matter who tracked the water in or when it was tracked in. The only relief from liability would be if Hickory Kist used reasonable precautions to protect customers from slipping on the wet wood floor. Hickory Kist did not meet this burden and thus is liable no matter who tracked in the water.

Last, if the moving party shows there is no material disputed fact, the burden shifts to the nonmoving party "who may not rest upon the mere allegations or denials in the pleadings," but "must set forth specific facts showing there is a genuine issue for trial." *Orvis v. Johnson,* 2008 UT 2, 8; *Bluffdale v. Smith*, 2007 UT App 25, ¶ 8-9, 156 P.3d 175. Undisputed facts which are not cited in the undisputed facts section of a motion for summary judgment, but which are cited and argued in the memorandum in support of the motion are in substantial compliance with Rule 7. *Salt Lake County v. Metro West Ready Mix*, 2004 UT 23, ¶ 23, 89 P.3d 496.

Donna Jex filed with her Motion for Partial Summary Judgment (on the issue of breach of the duty of care only) an affidavit of Charles Haines, a safety expert with approximately 40 years of safety experience, who stated that the store owner breached the standard of care by, among other things, failing to inspect his own tracks and by removing, and failing to replace, the rug where Donna fell. He also stated that Hickory Kist's method of operation breached the standard of care and created an unreasonably dangerous condition. (See Appendix A). While Jex did not state in her undisputed facts that "defendants breached the standard of care" and that "defendants created an inherently dangerous and foreseeable dangerous condition" she did cite her expert's affidavit in the undisputed facts section, and argued in her memorandum that Hickory Kist breached the standard of care and created a dangerous condition. Since industry standards regarding store safety are not within the knowledge of the normal person, the logical response from Hickory Kist would be for it to file an affidavit from its own safety expert stating that defendant did not create a dangerous condition and that defendant

acted reasonably under the circumstances. But Defendant did not file an affidavit controverting Miss Jex's expert's affidavit, and did not file a Rule 56(f) motion asking for more time to respond to the expert affidavit. Although Hickory Kist filed a response to Jex's motion for summary judgment and denied that it created a dangerous condition and that it acted unreasonably, it never even referred to her expert's affidavit in its argument. This issue was raised before the Trial Court in Donna Jex's Motion for Summary Judgment (R. at 241) and the Appellate Court (R. at 299).

Since Donna Jex met her burden of proof by filing an affidavit showing that defendant created an unreasonably dangerous condition and acted unreasonably in protecting customers on a slippery floor, the burden shifted to Defendant who failed to carry its burden as stated in *Orvis* and *Bluffdale*. Thus, the District Court should have not ruled against Donna Jex, but should have ruled in her favor on her Motion for Partial Summary Judgment. The fact that Plaintiff did not state in her undisputed facts section that "defendant created a dangerous condition" and "defendant acted unreasonably and breached a duty of care" does not prevent the Court from granting her motion as stated in *Metro West Ready Mix* because she referred to the affidavit in her motion and argued in her Motion for Partial Summary Judgment that they were undisputed facts based on the affidavit.

Conclusion

For the foregoing reasons, the Court of Appeals' decision regarding constructive notice and permanent condition should be overturned. The Court should rule that Defendant breached the standard of care because it failed to carry its burden, and the issues of causation and damages should be remanded back to the trial court for determination by a jury.

Dated this 21 day of February 2008.

Denton M. Hatch

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **BRIEF OF APELLEE AND CROSS-APPELLANT** by first-class mail, postage prepaid, this 21 day of February 2008, to:

Robert L. Janicki
Michael L. Ford
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84181

Bonnie J. Wilkins
Secretary

APPENDIX A

DENTON M. HATCH, #1413
Attorney for Plaintiff
128 West 900 North, Suite C
Spanish Fork, UT 84660
Phone (801) 794-3852
Fax (801) 794-3859

IN THE FOURTH JUDICIAL DISTRICT COURT
AMERICAN FORK DEPARTMENT
UTAH COUNTY, STATE OF UTAH

DONNA JEX, Plaintiff, vs. JRA INC. dba HICKORY KIST DELI, JAMES FILLMORE and ANGELA FILLMORE, Defendants.	**AFFIDAVIT OF CHARLES R. HAINES** Civil No. 050100121 Division 9 Judge Derek P. Pullan

Charles R. Haines, being first duly sworn, deposes and states:

1. I am a certified safety professional and attached as Exhibit A is my CV.

2. I have reviewed the depositions in the captioned case of James Fillmore, Donna Jex, Sharlene Barber, Randy Russell, and Angela Fillmore.

3. It is my opinion that Hickory Kist Deli and its owners, the Fillmores, did not exercise ordinary care to keep the premises in a condition reasonably safe for the business visitor and failed to have a proper method of operation in the following ways:

(a) The lights were dim when Donna Jex entered the store. This made it more difficult for her to see a small puddle of water.

(b) Snow fell the night before. James Fillmore came in the store about 5:00 a.m. through the back door, and later, he came in the front door after shoveling the front and spreading ice melt. Then he went to the back and started cooking. He said he could have walked over the area several times where the injury occurred. He did not see water on the floor, and there is no evidence he inspected the floor. He should have inspected the floor before he went back to cook. Donna Jex came in the store early in the morning about 7:30 to 8:30 a.m. before any other customer according to Mr. Fillmore. Sharlene Barber, an employee who also came in the back door, placed the mats on the floor that morning about 7 a.m., but did not inspect the floor even though the area was in plain view.

(c) The owners and employees knew that the shiny hardwood floor was slippery when wet. When a floor is slippery, there should be mats in all walking areas. In this case, the owner had a mat in the area where Donna Jex fell, but moved the mat before Donna Jex fell and did not replace it. Mr. Fillmore should have replaced the mat with a another one.

(d) The employees should have been instructed to inspect the floor after each person entered the building on a snowy day. Mr. Fillmore, the owner, said he never recalled instructing his employees to "inspect the floor." In this case, Mr. Fillmore

came from the outside twice in athletic shoes which were either Adidas or Asics, which have tread which will carry snow and ice melt. He came in the back and front doors and walked over the area of the injury. Ice melt can also sometimes cause a floor to be slippery. After coming in front and back of the business and walking through the area where Donna Jex fell, he should have inspected and cleaned the floor.

(e) Likewise, employee Sharlene Barber wore Sketchers athletic shoes with thick soles. She also walked across the area of the injury and had tread that would carry snow and ice melt. She said she never inspected the floor in the morning and did not inspect that morning even though the area was in plain view.

(f) Most customers stay on the mats when they purchase something at the counter. Donna Jex stepped off the mats because she had to go to the back of the store to make a large order. In this case, Donna Jex had shoes with new but small tread which would not carry a significant amount of snow across the rugs she walked on when she came in. She came in the front door where the snow was mostly removed so there was probably not any snow on the top of her shoes. Since the tread was new, it would provide resistance to slipping unless the floor is slippery when wet. In addition, she stated that she saw the puddle at the same time she was falling. This indicates that the water was there before she got to it and that the snow had time to melt.

(g) The business did not have, but should have had written instructions and a daily check list regarding caring for the floor on a snowy day. The owner had a check list for employees, but it did not include inspecting for water or snow. The employees were supposed to use common sense and inspect the floor when they cleaned the tables, but common sense is not enough. There should be specific instructions and guidelines. For example in this case no customers came in before Donna Jex so no tables were cleaned and no floors inspected.

(h) There was no sign alerting customers that the floor was slippery when wet.

(i) The business should have had an A-frame to put out when water was tracked into the business.

(j) The employees had no specific formal training on keeping the floor dry on snowy days or any other type of training regarding water on the floor.

(k) When a person moves from a mat to a slick surface, the reduction in friction is a major cause of falls. In this case, the area where Donna Jex fell was a slick floor because the mat had been removed. As she moved from the mat to the slick floor the reduction in friction increased the probability of her falling.

(l) On a snowy day if a salesman arrives at the store early in the morning, the owner should instruct employees to check the floor after he entered or the owner should do it. In this case, employees James Fillmore and Sharlene Barber knew that a salesman came from the outside and walked to the back of the store. It is unclear

whether he could be a source of the water because neither employees listed him as a possibility when asked in their depositions, and there is another way to get to the back where he went. But in any event, Mr. Fillmore or another employee should have checked the slick areas immediately after the salesman walked over the area. Inspection is not difficult since the area of the injury was in plain view and easily seen from the front counter.

(m) Snow melt can cause increased slipping on a hard, slick floor. Mr. Fillmore should take precautions to make sure it is not tracked into the store after he spreads it outside.

Dated this 17 day of February 2006.

Charles R. Haines

State of Missouri)
:
County of St Louis)

On this 17 day of February 2006, personally appeared before me Charles R. Haines, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

DATED this 17 day of February 2006.

Notary Public

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **Affidavit of Charles R. Haines** this 17 day of February 2006, to:

Robert L. Janicki
Strong & Hanni P.C.
3 Triad Center, Suite 500
Salt Lake City, Utah 84180

Bonnie J Welker
Secretary

Denton Hatch, Esq.

C.R. HAINES & ASSOCIATES INC.

CHARLES R HAINES, P.E. CALIF. & MASS.
IN SAFETY ENGINEERING
CERTIFIED SAFETY PROFESSIONAL

825 WHEELWRIGHT DRIVE
MANCHESTER, MISSOURI 63021
PHONE/FAX (636) 227-3959

PROFESSIONAL SAFETY BACKGROUND OF CHARLES R. HAINES

EDUCATION

1958 - 1962 University of Pennsylvania (Penn), Philadelphia, PA. BA Sociology, One Year Mechanical Engineering.

1963 - 1964 George Washington University MBA Courses.

TEACHING EXPERIENCES

Numerous Safety Courses taught for Industry, The National Safety Council, Regional Safety Councils, and the American Society of Safety Engineers, including Safety Program Development, Audits, Accident and Reconstruction, General Industrial Safety, Construction Safety, Ladder/Scaffold Safety, Amusement and Water Park Safety.

ORAL PRESENTATIONS

National Safety Congress, (numerous) including Machine Guarding, Safe Scaffolding and Evaluating Facility, Equipment and Safety Program Loss Control, Regional Safety Council (numerous), Associated General Contractors of America Regional Meetings, and American Society of Safety Engineers.

PUBLICATIONS, ARTICLES AND SCRIPTS

A "THE NEW CONSTRUCTION SAFETY ACT" - GLASS DIGEST, NOVEMBER 1971

B "GOALS FOR A SAFETY DIRECTOR" - NATIONAL SAFETY COUNCIL NEWSLETTER, FEBRUARY 1976

C WROTE THE SCRIPT FOR SAFE DRIVING FILM SPONSORED BY ANHEUSER BUSCH, "AT THE WHEEL" FEATURING PAUL NEWMAN.

D "PREVENTING EYE, FACE AND HEAD HAZARDS" - OCCUPATIONAL HAZARDS, FEBRUARY 1984 (BY INTERVIEW)

E "WHY HAVE A SAFETY PROGRAM" - BEER MARKETING MAGAZINE, DECEMBER 1984.

F "HOW TO IMPLEMENT AN EFFECTIVE SAFETY PROGRAM" - BEER MARKETING MAGAZINE, JANUARY 1985!

G "MANAGEMENT COMMITTEE PROVIDES SAFETY FOUNDATION" - NATIONAL SAFETY COUNCIL NEWSLETTER, MAY 1977

EXPERIENCE HIGHLIGHTS

1984 - PRESENT PRINCIPAL, C.R. HAINES & ASSOCIATES, INC.
A Safety and Loss Control Consulting firm working in accident prevention, safety training, accident reconstruction, consulting and expert witness in litigation.

1977 - 1984 Anheuser-Busch Companies, Inc., St Louis, MO. Corporate Director of Safety and Health. Had overall Safety and Health responsibilities for all major areas of corporation including breweries, theme parks, water parks, grain elevators, yeast plants, company owned distributors, vehicle fleet safety, malt plants, bakeries, etc.

1967 - 1977 PPG Industries, Pittsburgh, PA. Plant divisional and corporate safety director. As Corporate Safety Director was responsible for all areas of Safety and Loss Control in the corporation which included glass, fiberglass, paint and fiberglass manufacturing divisions, plus the construction division.

1965 - 1966 Corhart Refractories (Subsidiary of Corning Glass) Louisville, KY. Plant Safety director for two refractory plants (foundry type operations).

1964 - 1965 Ford Motor Company, Louisville, KY. Supervisor of a section of the heavy truck assembly line.

1962 - 1964 Commissioned United States Army Officer - PX Officer - Honorable Discharge.

ADDITIONAL BACKGROUND

1 BOARD CERTIFIED SAFETY PROFESSIONAL - NATIONAL REGISTRATION BY EXAM SINCE (7 / 1 / 73) Certificate #3590

2 PROFESSIONAL ENGINEER IN SAFETY ENGINEERING - REGISTERED IN CALIFORNIA SINCE 10/13/76 Certificate #0818

3 PROFESSIONAL SAFETY ENGINEER - REGISTERED IN MASSACHUSETTS SINCE 8/24/95, License # 38908

4 CERTIFIED MISSOURI SAFETY CONSULTANT SINCE 2/6/95

5 MISSOURI SAFETY COUNCIL - VICE PRESIDENT, 5 YEARS

6 ST. LOUIS SAFETY COUNCIL - EXECUTIVE BOARD AND DIRECTOR 10 YEARS

7 AMERICAN SOCIETY OF SAFETY ENGINEERS - NATIONAL FINANCE COMMITTEE

8 AMERICAN SOCIETY OF SAFETY ENGINEERS - ST. LOUIS CHAPTER
PRESIDENT, VICE PRESIDENT, SECRETARY, TREASURER

9 UNITED STATES BREWERS ASSOCIATION - SAFETY COMMITTEE, 7 YEARS

10 AMERICAN SOCIETY FOR TESTING AND MATERIALS - MEMBER COMMITTEE F24 ON
AMUSEMENT RIDES AND DEVICES, REGARDING AMUSEMENT RIDE SAFETY

11 GENERAL CHAIRMAN - MISSOURI GOVERNOR'S STATE SAFETY
CONFERENCE, 4 YEARS

12 NATIONAL SAFETY COUNCIL MEMBER - FOOD AND BEVERAGE, CONSTRUCTION
AND GLASS AND CERAMICS SECTIONS, 25+ YEARS

13 INTERNATIONAL ASSOCIATION OF AMUSEMENT PARKS AND ATTRACTIONS, SAFETY
MEETINGS ATTENDED

14 AMERICAN SOCIETY OF SAFETY ENGINEERS PROFESSIONAL
DEVELOPMENT NATIONAL CONFERENCE COORDINATOR

15 MEMBER ANSI/AMERICAN SOCIETY OF MECHANICAL ENGINEERS B56.1
NATIONAL FORK TRUCK SAFETY STANDARDS COMMITTEE PAST MEMBER

16 NATIONAL AND REGIONAL SAFETY COUNCIL SPEAKER ON NUMEROUS OCCASIONS

17 CONDUCTED SAFETY TRAINING FOR THE NATIONAL AND REGIONAL
SAFETY COUNCILS ON MACHINE GUARDING, SCAFFOLDING AND
OTHER TOPICS

18 RECEIVED NATIONAL SAFETY COUNCIL CERTIFICATE OF ACHIEVEMENT IN 1976 AND 1982

19 ATTENDED IN EXCESS OF 30 SAFETY PROFESSIONAL DEVELOPMENT
COURSES OF 2 DAYS TO 2 WEEKS DURATION OVER THE PAST 30 YEARS.
TYPICAL COURSES WERE.

A INTERNATIONAL SAFETY ACADEMY ADVANCED SAFETY
TRAINING

B AMERICAN SOCIETY OF SAFETY ENGINEERS PROFESSIONAL
DEVELOPMENT CONFERENCES

C INTERNATIONAL LOSS CONTROL INSTITUTE

D PENN STATE UNIVERSITY SAFETY COURSES

E UNITED STATES DEPARTMENT OF LABOR - CERTIFIED
INSTRUCTOR CONSTRUCTION SAFETY AND HEALTH

F US DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (NIOSH COURSES)

G SAFETY FIRST INDUSTRIES - FIRE PREVENTION TECHNIQUES

H ANSUL FIRE EXTINGUISHER COMPANY - FIRE FIGHTING TECHNIQUES

I NATIONAL SAFETY COUNCIL COURSES, VARIOUS

J STATE OF OHIO - CERTIFIED SAFETY TRAINING INSTRUCTORS COURSE (40 HOUR)

K NATIONAL SAFETY COUNCIL INDUSTRIAL HYGIENE COURSE

L CONFINED SPACE ENTRY AND RESCUE COURSE

20 NATIONAL SAFETY COUNCIL DEFENSIVE DRIVING COURSE INSTRUCTOR

21 AMERICAN RED CROSS FIRST AID COURSE INSTRUCTOR

22 DEVELOPED PPG CORPORATE SAFETY PROGRAM FOR SUSPENDED AND STEEL SCAFFOLDING USE

23 DEVELOPED NUMEROUS CORPORATE SAFETY PROGRAMS, PROCEDURES AND MANUALS

24 WESTERN PENNSYLVANIA SAFETY COUNCIL CONSTRUCTION SECTION PAST MEMBER

25 MEMBER AMERICAN SOCIETY OF SAFETY ENGINEERS NATIONAL CONSULTANTS DIVISION, MANAGEMENT DIVISION AND CONSTRUCTION DIVISION

26 INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES INDUSTRY REPRESENTATIVE ON SAFETY COMMITTEE. PARTICIPATED IN WRITING SAFETY MANUAL AND CONTRIBUTED TO APPRENTICESHIP TRAINING SAFETY PROGRAM.

27 OUTDOOR AMUSEMENT BUSINESS ASSOCIATION MEMBER 15+ YEARS

28 SYSTEM SAFETY SOCIETY PAST MEMBER 10+ YEARS

29 AMERICAN SOCIETY FOR TESTING AND MATERIALS - MEMBER COMMITTEE F13 ON PEDESTRIAN AND WALKWAY SAFETY AND FOOTWEAR

30 HUMAN FACTORS AND ERGONOMICS SOCIETY PAST MEMBER 12+ YEARS

31 LISTED IN "THE BEST LAWYERS IN AMERICA" DIRECTORY OF EXPERTS" SINCE 1991

32 LISTED IN THE AMERICAN SOCIETY OF SAFETY ENGINEERS "NATIONAL DIRECTORY OF SAFETY CONSULTANTS"

RATE @ 225/HR
+ ACTUAL
EXPENSES
RETAINER 4 HRS
= $900