

2007

Jule Kreyling v. City of St. George : Brief of Appellee

Utah Court of Appeals

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Winder Haslam; Linnette B. Hutton, Esq.; Attorneys for Defendant-Appellee.

Brain Olson; Gallian, Wilcox, Welker, Olson, and Beckstrom, L.C.; Attorneys for Plaintiff/Appellant.

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IN THE UTAH COURT OF APPEALS

JULE KREYLING, :
 :
Plaintiff/Appellant, : Docket No. 20070882-CA
 :
vs. :
 :
CITY OF ST. GEORGE, :
 :
Defendant/Appellee. :

BRIEF OF APPELLEE

Appeal from the Order Enter Summary Judgment to St. George City by
Fifth District Court, the Honorable James L. Shumate, presiding
Case No. 050501129

LINETTE B. HUTTON (Bar No. 6408)
WINDER & COUNSEL, P.C.
175 West 200 South, Suite 4000
P. O. Box 2668
Salt Lake City, UT 84110-2668
Telephone: (801) 322-2222
Attorney for Defendant/Appellee City of St. George

Brian L. Olson, Esq. (Bar No. 8070)
GALLIAN, WILCOX, WELKER,
OLSON & BECKSTROM, L.C.
965 East 700 South, Suite 305
St. George, UT 84790
Telephone (435) 628-1682
Attorneys for Plaintiff/Appellant Jule Kreyling

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UTAH APPELLATE COURTS

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ORAL ARGUMENT REQUESTED

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WINDER & COUNSEL, P.C.
175 West 200 South, Suite 4000
P. O. Box 2668
Salt Lake City, UT 84110-2668
Telephone: (801) 322-2222
Attorney for Defendant/Appellee City of St. George

Brian L. Olson, Esq. (Bar No. 8070)
**GALLIAN, WILCOX, WELKER,
OLSON & BECKSTROM, L.C.**
965 East 700 South, Suite 305
St. George, UT 84790
Telephone (435) 628-1682
Attorneys for Plaintiff/Appellant Jule Kreyling

ORAL ARGUMENT REQUESTED

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It shall be unlawful for any person to occupy or use any portion of a public street for the erection or repair of any building abutting thereon, without first making application to and receiving from the public works encroachment

officer a permit authorizing the same. Any permit may be revoked by the public works encroachment officer, at any time, when the holder thereof fails to comply with any rule or regulation under which it is granted, or when, in the opinion of the public works encroachment officer, the public good requires such revocation. (1962 Code § 9-1-5; amended. 2003)

St. George City Code § 7-1-12: Sidewalk Construction 19

A. Conformance Required: It shall be unlawful for any person, either as owner, contractor or employee, to construct any sidewalk in the city unless the sidewalk is constructed to lines and grades approved or as given and established by the city engineer, unless special permission to deviate from such lines and grades is first obtained from the city council. (1962 Code § 9-1-20; amended 2003).

B. Permit Required: It shall be unlawful for any person to construct any permanent sidewalk in the city, without having first obtained a permit so to do. The acceptance of the permit shall be deemed an agreement upon the part of the person to construct the sidewalk in accordance with the specifications given by and grades approved by the city engineer as to the character and quality of work; and if the sidewalk be constructed of concrete, the character and quality of the concrete, the constituent parts of the mixture, and the thickness of the walk. When the walk is extended from the main sidewalk to the back of the curb already constructed, there shall be placed between the back of the curb and the walk, an expansion joint designated by the city engineer. It shall be unlawful to construct any sidewalk in violation of the specifications given by the city engineer. (1962 Code § 9-1-21; amd. 2003 Code).

St. George City Code § 7-2-1: Permit Required; Applicability 19

It shall be unlawful for any person, firm or corporation to tunnel under or to make any excavation in any street, alley or other public place in the city

without having obtained a permit as is herein required, or without complying with the provisions of this chapter, or in violation of or variance from the terms of any such permit. The provisions of this chapter shall apply to and be binding upon all property owners, developers, agents, contractors or employees engaged in activities regulated by this chapter. (Ord. 1-2-96, 1-18-1996).

St. George City Code § 7-2-7: Protective Measures 20

A. Barriers, Warning Devices: It shall be the duty of every person cutting or making an excavation in or upon any public place, to place and maintain barriers and warning devices necessary for safety of the general public.

B. Conformance; Warning Lights: Barriers, warning signs, lights, etc., shall conform to the requirements of the manual on uniform traffic control devices (MUTCD) and the public works encroachment officer. Warning lights shall meet MUTCD standards to indicate a hazard to traffic from sunset of each day to sunrise of the next day.

C. Emission Of Light: Electrical markers or flashers shall emit light at sufficient intensity and frequency to be visible at a reasonable distance for safety. Reflectors and reflecting materials shall be used to supplement, but not replace, light sources.

D. Traffic: The permittee shall take appropriate measures to assure that during the performance of the excavation work, traffic conditions as near normal as possible shall be maintained at all times so as to minimize inconvenience to the occupants of the adjoining property and to the general public. When traffic conditions permit, the public works encroachment officer may by written approval, permit closing of streets and alleys to all traffic for a period of time prescribed by him, if in his opinion it is necessary. Such written approval may require that the permittee give notification to various public agencies and to the general public. In such cases, such written approval shall not be valid until such notice is given.

E. Advance Warning: Warning signs shall meet MUTCD standards and be

placed far enough in advance of the construction operation to alert traffic within a public street, and cones or other approved devices shall be placed to channel traffic, in accordance with the instructions of the public works encroachment officer. (Ord. 79-5-4, 5-3-1979, eff. 7-1-1979; amd. 2003 Code)

St. George City Code § 7-2-8: Restoration of Surface 20

Any person, firm or corporation making any excavation or tunnel in or under any public street, alley or other public place in the city where no pavement exists, shall immediately upon completion of the project restore the surface to its original condition. Additionally, any opening in a paved or improved portion of a street shall immediately, upon completion of the project, be repaired and the surface relaid by the applicant. All work site restoration as required by this section shall comply with all ordinances of the city, the city standard specifications for design and construction, any requirements set forth by the public works encroachment officer in issuance of the permit, and under supervision of the director of public works, and shall include, but not be limited to, repair, cleanup, backfilling, compaction and stabilization, paving and other work necessary to place the site in an acceptable condition following the conclusion of the work or the expiration or revocation of the permit. (Ord. 1-2-96, 1-18-1996; amd. 2003 Code).

JURISDICTION

Jurisdiction is proper pursuant to Utah Code Ann. § 78-2a-3(2)(j) (as amended 2001).

STATEMENT OF THE ISSUES

The proper issue before this Court is much broader than that stated by Appellant:

ISSUE #1:

The first issue is whether the District Court properly granted summary judgment based upon its finding that Plaintiff/Appellant, Jule Kreyling, failed to establish that any duty of care was breached by the City of St. George and further, whether the District Court was correct in its analysis that summary judgment was proper because reasonable minds could not differ in the conclusion that the evidence adduced by Kreyling was simply insufficient to sustain his legal claim. *See Rose v. Provo City*, 67 P.3d 1017, 1020 (Utah Ct. App. 2003) (quoting *Lamarr v. UDOT*, 828 P.2d 535, 538 (Utah Ct. App. 1992) and *Ferre v. State*, 784 P.2d 149, 151 (Utah 1989)). There is simply no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a favorable verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *Id.* at 250, *see also AMS Salt Ind., Inc. v. Magnesium Corp. of America*, 942 P.2d 315, 320 (Utah 1997). Such conclusions are reviewed for correctness. *Wheeler v. McPherson*, 40 P.3d 632, 635 (Utah 2002) (citations omitted); R. 655, Transcript of Hearing, Appellee's Addendum "A" at pg. 23; R.615, Order Granting Summary Judgment at pg. 2, Appellee's Addendum "B."

ISSUE #2:

The second issue is whether the District Court properly granted summary judgment

based upon its finding that the Plaintiff presented no probative evidence that St. George City had created or had actual or constructive notice of a defect in the park strip. *See Fishbaugh v. Utah Power & Light*, 969 P.2d 403 (Utah 1998) (Plaintiff must present evidence of notice and an opportunity to remedy a defect to survive summary judgment); *Goebel v. Salt Lake City Southern Railroad Co.*, 104 P.3d. 1185, 1194 (Utah 2004) (evidence of notice and a reasonable time to remedy are required to survive summary judgment or directed verdict). Such conclusions are reviewed for correctness. *Id.* R. 655, Transcript of Hearing, Appellee's Addendum "A" at pg. 23; R.615, Order Granting Summary Judgment at pg. 2, Appellee's Addendum "B.

STATEMENT OF THE CASE

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

Jule Kreyling, Plaintiff and Appellant herein (hereinafter referred to as "Kreyling"), filed a Complaint on or about July 8, 2005, alleging he sustained personal injury when he stepped into a hole located on the park strip when he went for lunch at the St. George Senior Center. R.002. The property and the St. George Senior Center, owned and operated by Washington County ("County"), abuts the St. George City ("City") property which includes the sidewalk, park strip, gutter and road. Kreyling named the City, in his Complaint, as the owner of the park strip where the hole was alleged to have been located, the County, as the abutting landowner for both the old Senior Center and the new Center being constructed on the neighboring lot, Watts Construction Company, Inc., the contractor employed by the County to construct the new Senior Center on the adjoining lot, also abutting the sidewalk, and DeMille Construction Company, the subcontractor who installed the water lines and

removed any and all meter boxes. R.044, 027, 036, 264. Kreyling settled with Defendants Washington County, Watts Construction and DeMille Construction. R.601, 605, 622, 625. The City was dismissed on summary judgment. R. 615; Transcript of Summary Judgment Hearing, attached hereto as Appellee's Addendum "A," and Order Granting the City's Motion for Summary Judgment ("Order"), attached hereto as Appellee's Addendum "B." Kreyling alleged in his Complaint that the City had *created* an artificial condition on the premises and/or knew about a dangerous condition, or failed to discover the dangerous condition through the exercise of reasonable care. R.004.

At summary judgment, Kreyling presented the same evidence and arguments to the District Court that he now presents in his Brief. The District Court held:

The Court finds there is no probative evidence that the City of St. George created the defect or condition in the park strip, or knew or should have known of any defect or condition. Therefore, the court hereby grants Defendant City's motion for summary judgment.

R. 616; Order, Appellee's Addendum "B."

B. Statement of Facts

1. Kreyling testified that he and his wife went for lunch at Washington County's St. George Senior Center ("Center") "two, three, sometimes four times per week." R.476 (Kreyling Deposition at 20-21); *See* also Appellant's Addendum A.

2. On the date of the incident, Kreyling parked his car along the curb near the Center and next to a walkway that bridged the gutter and curb. R.476 (*Id.* at 18:19-25, 19:

1-2, 21:18-20). Plaintiff had parked in the same location dozens of times. R.481 (*Id.* at 39:4, 47:5).

3. There were one or two of these walkways bridging the gutter culverts and Kreyling would always try to park near one, then walk around the vehicle to open his wife's door. R.477, 478, 480 (*Id.* at 23:15-23, 25:16-20, 26:1-2, 27:21, 36:10; 39:23); Photographs of driveway ramp, R342, 345, 561; *See* also Photographs attached as Appellee's Addendum "C."

4. Kreyling believed these walkways were intended for the seniors to use when going into the old Center, and had yellow lines marked for crossing the street. R.479 (Kreyling Deposition at 32:7-9, 20).

5. According to Washington County Building Superintendent, Bob Coulter, parking was available in the Center parking lot, but it was partially blocked for the construction equipment at the building site. R514 (Coulter Deposition at 25). Parking around the old Center was congested. R.526 (*Id.* at 73).

6. Gerald Newton, who volunteers at the Center five days a week Monday through Friday, including lunch time, testified that the Center patrons parked in the street regardless of whether there was parking available in the parking lot. R.494 (Newton Deposition at 20), R.479 (Kreyling Deposition at 33:14-16).

7. Newton testified he considered the location where Kreyling parked to be unsuitable for parking because of the construction, particularly in light of the fact that alternative parking was available both in the Center parking lot and at the neighboring church. R494-495 (Newton Deposition at 21-22).

8. Kreyling was aware of the parking lot, but preferred to park on the street because it was “easier to get in and out.” R. 477 (Kreyling Deposition at 22:17-25, 23:1-9, 132:12-19, and Addendum “A” to Appellant’s Brief at 138-139).

9. Sometime in September or early October, Kreyling and his wife went to the Center for lunch, parking along the curb near the construction site for the new Senior Center. R.481 (Kreyling Deposition at 22:24-25, 38:24-25, 23:1-9, 31-32, 39:1, 52:11-16, 57:24).

10. Kreyling did not want his wife to walk on the dirt, but he parked in front of the Center next to the construction site instead of in the parking lot because there was no fence or cones around the construction. R.477, 479, 481 (Kreyling Deposition at 22, 23, 32, 41).

11. Kreyling testified that he parked his vehicle parallel to the curb and roughly even to a walkway and walked around the car to open the door for his wife; he stepped backwards and into a hole in the park strip at the corner of the curbing and the ramp. R.479 (*Id.* 31-32).

12. Kreyling testified that when he had previously parked in this location, he had never seen a hole, or any other obvious hazard. R.481 (*Id.* at 35:15-16 at 38:13-14, 39:8-9, 40:8-9, 41:13-14).

13. Kreyling testified that prior to his fall, he did not see a hole and distinctly remembered “leaves and stuff,” such as cobwebs, lying on the ground where he stepped in a hole “up to his groin.” R.317, 480-481 (*Id.* at 35:6-19, 52:11-16).

14. On October 9, 2003, Kreyling signed an incident report indicating the fall occurred on September 24 or 25, 2003. R.330-333, 485-486 (*Id.* at 57-58:23-11 and Exhibits

“E” and “F” to MSJ memorandum). On October 13, 2003, he signed another form, entitled “Client’s Report of Accident” citing the date of his fall as October 10, 2003. R.317, 330-331 (Deposition of Kreyling at 18:19-20, 52:14-17, 86:12-25).

15. Kreyling testified that he and his son took photographs of the area approximately two to three weeks after his fall, but also after the area had been fully excavated. R.293, 301, 302, 304, 305, 505, 506, Addendum “A” Kreyling Deposition at 27:7, 29:16-21, 132:21-25, 134:1-3, 140:14-15. According to Curtis DeMille, the sidewalk, curb and gutter were excavated on November 19, 2003. R.238 (DeMille Deposition, certificate of corrections pg. 51).

16. In preparation for the new Senior Center, and approximately a year before construction began, Washington County purchased several homes at the site of the planned “new” Center, removed the homes and leveled the site for construction. R.335, 312-15, 318 (Coulter Deposition at 26, 32, 37-39, 56). Washington County prepared the site before Watts Construction arrived to begin work. R.338 (Watts Deposition at 7:14-18).

17. Before construction began, the area where the “hole” was located was a park strip with lawn. R.328 (Newton Deposition 24); R.335, 343, 562-64 (Photographs of Pre-existing Homes); *see also* Photographs at Appellee’s Addendum “C.”

18. At one time there had been two driveways crossing the sidewalk and gutter and entering the road from the homes removed by Washington County. R.317, 521, 520 (Coulter Deposition at 51, 56-7); Photographs of pre-existing homes, R. 343, 562-564 and photographs at Appellee’s Addendum “C.”

19. Washington County excavated and removed one of these driveways early on

in its process of leveling and preparing the site for construction of the new Center. R.317, 520 (Coulter Deposition at 57); Photograph R.561, and Photographs included with Appellee's Addendum "C."

20. It is the remaining driveway ramp Kreyling has identified as the "walkway" he used when he and his wife went for lunch at the Center. R.292-93, 477-478 (Kreyling Deposition at 25-27).

21. The records indicate Watts Construction began its work at the site several months prior to Kreyling's fall, in April or May 2003. R.322 (Coulter Deposition at 78).

22. Washington County and/or Watts Construction and/or DeMille Construction excavated the sidewalk where Plaintiff typically tried to park near the "walkway" or driveway ramp. R.310, 513 (Coulter Deposition at 19).

23. Mr. Coulter testified that the County's standard procedure during a construction project is to fence the area as a safety precaution to prevent people from entering the construction site. R.310, 513 (Coulter Deposition at 19); R.345-46, 561 (Photographs of Construction Site).

24. Representatives of Washington County and the Center do not recall whether they ever erected a fence in the area of the accident and any fence that might have been installed, would have been removed when the sidewalk, curb and gutter were excavated because the construction company was "doing all of the dirt moving." R.310, 513 (Coulter Deposition at 20-21); R.326, 493 (Newton Deposition at 15).

25. Washington County employee Bob Coulter testified that at the time of this incident, it was Washington County's practice to request an encroachment permit number

from the City without completing an application and without saving documentation of the encroachment permits. R.320 (Deposition of Bob Coulter at 63-65). However, in this case, Washington County failed to request or obtain an encroachment permit or number to dig on the City's property. R.320 (Coulter Deposition 62-65).

26. Washington County removed the existing sewer, water lines, and gas lines during site preparation. R.321 (*Id.* at 71:13-19).

27. Defendant Curtis DeMille Construction was a subcontractor hired by Watts Construction to install water lines to the new Senior Center and to excavate and remove the curb, gutter and sidewalk and parkway. R.339, 551-52, 367-380 (Watts Deposition 12:21-23); R. 354-55, 551-52 (DeMille Deposition at 7-8:23-2, 21:17-23, 22:12). DeMille began its work in November 2003. R.238 (DeMille certificate of corrections, pg. 51).

28. Curtis DeMille testified that prior to the excavation, he was required to submit an application for an encroachment permit which included a "flagging plan" to demonstrate where the contractor intended to put up warnings or barriers around the site. R.358-59 (DeMille Deposition at 37:21-22, 38:2-11).

29. Any meters in the park strip would have been removed, capped and the holes filled by DeMille Construction. R. 356, 553 (*Id.* at 28:2-10, 29:11-14). However, Curtis DeMille testified he did not recall removing anything from the site identified by Kreyling and saw no "holes" in that area. R.354, 356, 550, 553. (*Id.* 26:5-7, 16-17:18-4).

30. Any posts removed at the accident site were removed by Washington County. R.360, 558 (*Id.* at 46:12-14).

31. Bob Coulter testified that he knew the City had not removed a power pole from

the area Kreyling states he fell; similarly Dennis Jorgensen, Power Systems Operations Manager for the City, averred that the telephone pole currently installed at the location where Kreyling indicates he fell has been in the same location since 1985 and no other power pole has been moved or removed at that location. R.315, R.348-49. (Coulter Deposition at 40:20-23); R.348-49 (Affidavit of Dennis Jorgensen at pg. 2).

32. Curtis DeMille testified that DeMille Construction was contracted to excavate on City property and to remove the park strip, as well as any and all meters located in that area. R.548, 553 (DeMille Deposition at 7-8:23-2, 28:8-9). Bob Coulter testified a meter would not be located where Kreyling indicated he fell. R.319, 366 (Photograph with Kreyling pointing), 521 (Coulter Deposition 60-61:24-3).

33. Bob Coulter testified that he inspected the area where Kreyling fell and did not see a definite hole, only a “dished out” area. R.511-512 (*Id.* at 11-12:12-9, 13:15-20, 14:1-8, 17:5-11).

34. Gerald Newton, a volunteer at the Center testified that he had never seen a “hole” in the park strip prior to Kreyling’s fall. R.492 (Newton Deposition at 12-13:21-2). Following Kreyling’s fall, Newton looked at the area and found a hole that appeared to be about nine inches deep near the curb. R.492 (*Id.* at 10-11:21-15, 13:8-9). There had been some digging in the area, “they had done something to take the dirt out.” R.494 (*Id.* at 18:9-21).

35. According to the testimony of Curtis DeMille, there were no holes or anything out of the ordinary between the curb and gutter and the sidewalk in the area identified by Kreyling and no water or sewer line would cause the shape of the hole or impression

Kreyling described. R. 354, 357, 550, 554 (DeMille Deposition at 16-17, 32:17-20).

SUMMARY OF THE ARGUMENT

Mr. Kreyling has the burden to prove, by a preponderance of the evidence, that he fell into a hole located in the park strip at the St. George Senior Center, owned and operated by Washington County, that the City of St. George, as the property owner of the park strip, created the hole, or knew or should have known that the hole or other dangerous defect existed at that location and sufficient time had elapsed that the City should have addressed the condition. However, all of the evidence available in this case confirms that the persons who frequented the Center, including employees of Washington County, volunteers at the Center, the contractor for the County construction project, Watts Construction and his subcontractor, DeMille Construction, saw no “hole” in the location identified by Kreyling either before or following his fall. Kreyling himself testified that he parked in the same location “dozens” of times prior to his fall and never saw a hole in the park strip. Further, Washington County and Watts Construction confirm that they did not obtain the required encroachment permits, or otherwise notify the City of their intention to dig in the park strip or excavate on City property. There is simply no evidence that the City was aware of any holes or defects in the park strip, or that the City was notified by the County of its excavation in the park strip to remove one of the driveways. The evidence also establishes that the County utilized the property for law enforcement exercises, erecting barricades at the site just about a year before the incident at issue in this case. Appellee’s Addendum “C,” photographs showing pre-existing home and law enforcement officers. A summary judgment movant must show, by reference to “the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any” that there is no genuine issue of material fact. Utah R. Civ. P. 56(c). “Once the movant has made this showing, the burden then shifts to the nonmoving party, who may not rest upon the mere allegations or denials of the pleadings, but must set forth specific facts showing that there is a genuine issue for trial.” *Orvis v. Johnson*, 177 P.3d 600 (Utah 2008). “Failure to produce acceptable evidence demonstrating a genuine issue of material fact will result in a grant of summary judgment.” *Utah Local Govt. Trust v. Wheeler Mach. Co.*, 154 P.3d 175 (Utah Ct. App. 2006).

Kreyling presented absolutely no facts or evidence in support of his allegation that the City created a hole, or that it knew or should have known of the existence of a hole or other defect in the park strip. Utah law is clear, “when the facts are so tenuous, vague, or insufficiently established that determining the legal issue becomes completely speculative, the claim fails as a matter of law.” *AMS Salt Ind., Inc. v. Magnesium Corp. of America*, 942 P.2d 315, 320 (Utah 1997). “[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The district court Order provides:

[T]he Court finds there is no probative evidence that the City of St. George created the defect or condition in the park strip, or knew or should have known of any defect or condition. The court noted “I’m satisfied on the basis of this record that, as a matter of law, under these facts one cannot stretch liability to the City of St. George.

R.616 (Order granting summary judgment at pg. 2), Appellee’s Addendum “B,” R.655

(Transcript of hearing at 23:13-16), Appellee’s Addendum “A.” The district court’s findings and Order Granting Summary Judgment are clearly supported by the evidence, and summary judgment in favor of the City should be affirmed.

ARGUMENT

I. KREYLING FAILED TO PRESENT EVIDENCE SUFFICIENT TO SUSTAIN HIS CLAIM THAT THE CITY IS LIABLE FOR INJURY AS THE LANDOWNER OF THE PARK STRIP.

A. There is No Evidence the City Created or Had Notice of a Defect.

The Utah Supreme Court recently iterated the requirements for a plaintiff to survive summary judgment on a claim for injuries resulting from a defect located on the defendant’s premises. *Goebel v. Salt Lake Southern R. Co.*, 104 P.3d 1185 (Utah 2004). If a plaintiff alleges a defendant negligently failed to remedy a dangerous condition the defendant did not create, “[i]t is quite universally held that fault cannot be imputed to the defendant so that liability results therefrom 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.” *Id.* (citing to *Schnuphase v. Storehouse Markets*, 918 P.2d 476 (Utah 1996)). Evidence of notice and a reasonable time to remedy are required to survive a motion for summary judgment or directed verdict. *Goebel*, 104 P.3d at 1195. These requirements do not apply where the negligence claim requires the plaintiff to establish that the defendant actually created the dangerous condition or purposefully built the dangerous condition into the system for which the defendant is responsible. *Id.* The *Goeble* court noted the rationale behind the

distinct rules is that it is reasonable to presume a party has notice of a condition the party itself creates, but it is not reasonable to presume notice of a condition someone else creates. *Id.*

In this case, there is no evidence the City was responsible for *creating* a defective condition or hole that caused Kreyling to fall or step into it. Kreyling argued at summary judgment that the photographs taken by him confirm that “a half circle [was] cut out of the driveway that went around something that once was there that became a hole.” R.649, 505, 305; Transcript of Hearing at 17:19-20, Appellee’s Addendum “A”; and photograph of plaintiff and excavation at Appellee’s Addendum “C.” In his Brief, Kreyling argues that the semi-circle was present when the driveway was poured. Appellant’s Brief at 18. However, he has presented no evidence of even when the private driveway was poured, what the object might have been, when it was placed, when it was removed or by whom, or whether the defect in the concrete is related in any way to a hole. Indeed, Kreyling has presented no one to confirm the cause of his fall, or the presence of the hole he describes.

The evidence shows the County purchased the homes in this area and utilized them for various activities prior to tearing them down. R.520-21, 562-64; Coulter Deposition at 49, 51, 52, Photographs of pre-existing homes WC005, 008-9, Appellee’s Addendum “C.” Sometime in late 2002 or early 2003, the County tore the houses down, removing one of the driveways all the way to the curb. R.335, 312-15, 318, 338, 515, 517, 520 561-64; *Id.* at 26:17-20, 37:3-6, 57:4-14; Photographs of pre-existing homes and excavation by County, Appellee’s Addendum “C.” The County removed all shrubbery and fencing. *Id.* Gerald Newton, a volunteer at the Center, testified that the County had been “digging” in the park

strip, “they had done something to take the dirt out.” R.494 (Newton Deposition at 18:9-21). Further, Nolan Gardner, the City Water District Superintendent averred that neither the County nor Watts Construction ever notified the City that they would be excavating in the park strip. R.363. He also averred that the City did not dig in the park strip. R.364. Dennis Jorgensen, the City Power Systems Operations Manager, averred that no power poles had been moved or removed from the location identified by Kreyling and the pole located in the park strip where Kreyling fell was installed in 1985 and has not be removed since that time. R.349.

The U.S. Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*:

[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

477 U.S. 242, 249 (1986).

Similarly, there is no evidence the City had “notice” of a defect. *Id.* “It is quite universally held that fault cannot be imputed to the landowner so that liability results therefrom 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.” *Goebel*, 104 P.3d at 1195. Evidence of notice and a reasonable time to remedy are required to survive a motion for summary judgment or a directed verdict. *Id.*

Kreyling argues that, because there is a semi-circle in the driveway, the City must

have had notice of a hole. Appellant's Brief at 18. However, in order for a jury to reach the conclusion that a hole had existed in the park strip since the driveway was poured, it would also have to speculate regarding when the driveway was poured, what it contained, when and who removed the "whatever" that was in the hole and finally, that when the County excavated in the park strip to remove the second driveway, it didn't disturb the soil around the alleged hole. However, the appellate courts have repeatedly affirmed that where "jurors would have to engage in rank speculation to reach a verdict, summary judgment is proper." *Triesault v. Greater Salt Lake Business Dist.*, 126 P.3d 781, 785 (Utah Ct. App. 2005) (citation and quotations omitted).

The parties conducted exhaustive discovery. Summary judgment was filed only after discovery was closed. There is absolutely no evidence the City had any knowledge that a hole existed, much less evidence of when the hole was created. The County used and excavated the property without notifying the City of its activities. Coulter testified the County did not apply for either an encroachment permit or a number. The evidence shows that Watts Construction never applied for an encroachment permit. The evidence shows the County failed to barricade the area even *during* excavation of the park strip. Moreover, the evidence makes clear Kreyling was aware of the construction activities in the area. R.481 (Kreyling Deposition at 38:9-11, 38-39:17-12, Appellant's Addendum "A"). Kreyling testified that he did not want his wife to walk on the dirt because she was having trouble with her legs R.476-77, 481 (*Id.* at 21:21-25, 23:18-23, 41:1,), and he knew there was alternative parking with handicap access in the lot. R.477 (*Id.* at 22). Yet he elected to encounter the potential hazard because he had parked there dozens of times in the past and had "never

noticed” the hole. R.481 (*Id.* at 39:7). There is no evidence to support Kreyling’s hypothesis.

In *Goebel*, the plaintiff alleged that the defendant railroad was responsible for his bicycle accident because it failed to inspect and discover a “gap” at the crossing near the rail. The evidence showed that the area had been inspected, but more importantly, the court noted the plaintiff had used the crossing numerous times before the accident and the court found he should have been attuned to potential bicycle safety issues and had failed to notice the gap himself. *Goebel*, 104 P.3d at 1194. Similarly, in *Maloney v. Salt Lake City*, the plaintiff alleged Salt Lake City had failed to inspect and maintain a sidewalk that collapsed while he was on it. *Maloney*, 262 P.2d 281, 282 (Utah 1953). The court affirmed a directed verdict in favor of the city, emphasizing that the plaintiff was unable to show that the sidewalk was in a defective condition before it collapsed, even though he himself had used the sidewalk many times prior to the accident. *Id.* In this case, not only did Kreyling testify that he had parked in the same place and never noticed a hole, but employees and volunteers testified that they saw no defect or hole in the park strip prior to Kreyling’s fall. In this case, Kreyling failed as a matter of law to present sufficient, probative evidence the City had constructive notice of a defect. Even assuming, for the sake of argument, that the City had notice of the defect, Kreyling still “must present evidence of the length of time the defendant had notice.” *Goebel*, 104 P.3d at 1194. Kreyling argues that the jury should be allowed to speculate about the semi-circle in the concrete. However, there is no evidence the “semi-circle” in the driveway was associated in any way with a defect in the park strip. Such speculation falls short of creating a genuine issue of material fact sufficient to survive summary judgment.

Gildea v. Guardian Title Co. of Utah, 970 P.2d 1265, 1270 (Utah,1998); *Triesault v. Greater Salt Lake Business Dist.*, 126 P.3d 781, 785 (Utah Ct. App. 2005), *Clark v. Farmers Ins. Exch.*, 893 P.2d 598, 600-01 (Utah Ct.App.1995) (quotations omitted). A plaintiff may not rely on inference as to whether the defendant had notice of a defect and adequate time to remedy the situation, he must present specific probative evidence of the defect, that it caused the injury and the length of time it was present. *Fishbaugh v. UP&L*, 969 P.2d 403, 408 (Utah 1998). The plaintiff's mere hypothesis that a defect may have existed for some unknown length of time does not suffice and summary judgment is appropriate. *Id.*, *Goebel*, 104 P.3d at 1194.

B. The City Had No Duty to Kreyling Under the “Special Use” Doctrine.

All changes and excavation in the area were undertaken or caused by the abutting landowner, Washington County. However, ordinarily liability will not be imposed on the owner of property abutting an unsafe street or sidewalk, but such liability may be imposed under the “special use” doctrine. *Rose v. Provo City*, 67 P.3d 1017, 1021 (Utah Ct. App. 2003).

Kreyling testified that the driveway ramps were intended for use by the senior citizens visiting the County owned Senior Center. R. 476-81; Appellant's Addendum A: Kreyling Deposition at 18:19-25, 19:1-2, 20, 21:18-20, 23:15-23, 25:16-20, 26:1-2, 27:21, 32:7-9, 36:10, 39:4-23. He testified that there were one or two of these walkways bridging the gutter and he would always try to park near one when he visited the Center with his wife. R.346, and photographs of site at Appellee's Addendum “C.” County employees testified that they knew the patrons were parking on the street near the construction even though parking was

available in the lot. R.494 (Newton Deposition at 20-22), R.479, 477. It is apparent the driveway ramps were being used for a “special” or unintended purpose, despite alternative available parking.

Kreyling argues the “special use” doctrine does not diminish the City’s duty to prevent his fall, or discover the hole next to the driveway in the park strip. Appellant’s Brief at 14. However, this argument is only partially accurate. Under the “special use” doctrine, liability for maintaining the park strip may be transferred to the abutting landowner if he makes special use of the area. *Rose v. Provo City*, 67 P.3d 1017, 1021 (Utah Ct. App. 2003).

In *Rose*, the restaurant landowner abutting a public sidewalk and road made use of an asphalted planter box as a driveway. *Id.* The plaintiff bicyclist was injured when he rode into a ditch at the end of what appeared to be a driveway extending into the street. The Court found there was sufficient evidence to find the city negligent for *creating* the hazard when it excavated the ditch that it knew was being used by the landowner as a driveway. *Id.*

Plaintiff argues the city in *Rose* was not relieved of liability due to the negligence of the property owner. However, this does not accurately reflect the factual and legal findings in that case. First, the court found the city was responsible for *creating* the hazard. The evidence established that the city tore up the park strip on two occasions to expose and replace a pipe in the ditch and then left the ditch exposed; thus creating the dangerous condition in the public way. The property owner had been using the park strip as a driveway and had photographs “accurately representing the area from 1989 to the date of Rose’s accident in 1995, including the period during which the city twice removed the pipe” and exposed the ditch. *Id.* at 1024. The property owner testified that he called the city and told

them about the hazard and his use of the asphalted park strip as a driveway. Thus, due to the evidence produced by the plaintiff, the court found there was a genuine issue as to whether the city knew or should have known of the hazard it had created. *See Goebel*, 104 P.3d at 1995.

In this case, there is no evidence the City created any hazard. On the contrary the evidence supports the fact that the Senior Center invited its patrons to use the driveway “ramp” to access the Center and there is no evidence the City was ever advised of this use; the evidence also confirms that the County never advised the City of any construction or “digging” in the park strip to remove or alter the driveways, nor is there evidence the City should have been aware of the excavation in the park strip. R.326, 493-95, Newton Deposition at 15, 20-22; R.310, 320, 513-14, 526, Coulter Deposition at 19, 20-21, 25, 62-65. Witness testimony confirms that persons who frequented the area on a daily basis saw no defect, no hole, “nothing out of the ordinary” prior to Kreyling’s fall. *Id.*; R.511-12 (Coulter Deposition at 11-12:12-9, 13:15-20, 14:1-8, 17:5-11; R.492, 494, Newton Deposition at 12-13:21-2, 18:9-21; R.354, 357, 550, 554, DeMille Deposition at 16-17, 32:17-20. The evidence also establishes that the County used the property for law enforcement exercises, inserted and removed poles, fences and shrubbery from the area. R.562, Appellee’s Addendum “C,” Photographs. Finally, the evidence shows the County failed to erect any barricades to protect the public from the construction and/or excavation. *See* St. George City Code § 7-1-3 (encroachment permit required to erect or repair any building abutting public property); St. George City Code § 7-1-12 (permit required to excavate or construct a sidewalk, or alter a sidewalk); St. George City Code § 7-2-1 (permit required to excavate any

street, alley or public place); St. George City Code § 7-2-7 (barrier and warning devices are required for anyone cutting or making an excavation in or upon any public place for safety of the general public); St. George City Code § 7-2-8 (any work that includes damage or excavation of public property shall immediately restore the condition of the site); *see also* Utah Code Ann. § 10-8-84 confirming the municipal legislative power to adopt ordinances and rules and to enforce obedience.

The Supreme Court held in *Tripp v. Granite Holding Co.*, 450 P.2d 99, 100 (Utah 1969), that where an abutting landowner creates an unsafe or dangerous condition or situation on public property, he is obligated to maintain and correct the condition. As the district court noted, “there is no probative evidence that the City created the defect in the park strip, or knew or should have known of any defect.” R.616 (Order Granting Summary Judgment, pg. 2). “[This court is] satisfied, on the basis of this record that, as a matter of law, under these facts one cannot stretch liability to the City of St. George.” R.655 (Transcript of hearing at pg. 23:13-16).

C. Kreyling Knew of Alternative Available Parking Away from Construction

“It is well settled that a plaintiff, acting in a reasonably prudent manner, had a duty to foresee a danger, particularly one that is plainly visible and avoid it. *Deats v. Commercial Security Bank*, 746 P.2d 1191, 1194 (Utah Ct. App. 1987). Kreyling admits that he was aware of the construction of the new Senior Center. R. 477, 479, 481 (Kreyling Deposition at 22:17-25, 23:1-9, 38:24-25, 31-32, 39:1, 52:11-16, 57:24, 132:12-19). Indeed he testified that an unidentified construction worker assisted him to his feet. R.478, *Id.* at 28:6-11. He testified that he parked in the location because of the ramp and because, although he was

aware of the nearby construction activities, there was no fence or barricade where he parked. R.477, 479, 481, *Id.* at 22-23, 32, 41. He also knew that he had the option of parking in the Senior Center parking lot or even the nearby church parking lot with handicap access for his wife. R. 477, *Id.* at 22-23, 132. If a plaintiff fails to see, or sees but fails to avoid the danger, then the plaintiff acted negligently. *Id.*, see *Pollesche v. K-Mart Enterprises of Utah, Inc.*, 520 P.2d 200, 203 (Utah 1974); *Whitman v. W.T. Grant Co.*, 395 P.2d 918, 920 (Utah 1964) (plaintiff can be negligent either in failing to look or in failing to heed what he saw).

II. KREYLING’S CLAIM THAT THE CITY’S INADEQUATE OR FAILED INSPECTION OF A PRIVATE DRIVEWAY AND/OR THE COUNTY’S CONSTRUCTION PROJECT CAUSED HIS INJURY IS BARRED BY GOVERNMENTAL IMMUNITY.

Under the Governmental Immunity Act in the fall of 2003, immunity was waived unless the injury arises out of, in connection with, or results from a latent dangerous or latent defective condition of any road, street, sidewalk, or other structure located on them. Utah Code Ann. § 63-30-10(16)(2001)¹. A “latent defect” is a defect which reasonably careful inspection will not reveal. *Vincent v. Salt Lake County*, 583 P.2d 105, 107 (Utah 1978). Injuries resulting from latent defects in a street not due to faulty municipal work, and which could not have been discovered by ordinary care and diligence, do not give a right of action against the municipal corporation in the absence of actual or constructive notice. *Id.* at 105. Kreyling argues that the City should have known about the hole, if it had inspected the private driveway when it was poured, or inspected the County’s construction project for compliance with the City’s building and safety ordinances.

However, Kreyling has presented no evidence to suggest that the “hole” of which he complains was even present prior to when he stepped on the site, or whether it was possible to

¹The Governmental Immunity Act version applicable at the time of Plaintiff’s accident.

discover the hole upon any inspection. Indeed, Kreyling himself testified that he had parked in this same location “dozens” of times prior to his fall and had never previously seen a hole, nor did he see a hole on the date of the accident. R.480-82; Kreyling Deposition 35:15-16, 38:10-14, 39:4-9, 40:8-9, 41:13-14, 47:5, 27:19. Bob Coulter, the Washington County employee who was present at the site for all phases of the construction and excavation, including the removal of the driveway and later the sidewalk, testified that he did not see a defect or hole. R.512, Coulter Deposition at 15:4-24 57, 64-65. Gerald Newton, a volunteer at the Center who worked there Monday through Friday, never saw a defect in the park strip and was unable to identify the hole of which Kreyling complains even after the incident. R.492; Newton Deposition at 11-13. Eric Watts, of Watts Construction, saw no defect or hole in the park strip and Curtis DeMille, of DeMille Construction, saw “nothing out of the ordinary” in the park strip. R.550; DeMill Deposition at 16-17; R.338; Watts Deposition at 9:18-20. This is the evidence in this case. Everything else is speculation and conjecture.

Kreyling specifically argues, however, that the City “should have known” about the hole if it had properly inspected the private driveway when it was “poured around an object” creating the semi-circle. The extension of this argument is that the semi-circle, located in the corner of the park strip between the edge of the gutter and the driveway ramp, is the location and/or “cause” of the hole, although there is no evidence to support this conjecture (“Q: In picture No. 1, it shows concrete with kind of a half circle or a half moon cut out of it. Do you know if that’s the approximate location of the hole” A: No, no, I don’t know.” R.512, Coulter Deposition at 15:4-24). He also argues the City “should have known” the County and its contractors were damaging the park strip, regardless of the County’s failure to notify the City of its encroachment, if it had properly inspected the site and the County’s excavation work.

These arguments clearly raise the issue of the City’s immunity pursuant to Utah Code Ann.

§ 63-30-10(4), for failure to make an inspection or for making an inadequate inspection. Kreyling suggests that, had the City inspected the County's construction project and, some many years ago, inspected the construction of the private driveway, it would have been aware that the County or the homeowner had created a defect in the park strip. However, such an inspection would be intended to assure compliance with the various building and other safety codes, as well as City ordinances. *Nixon v. Salt Lake City Corp.*, 898 P.2d 265, 270 (Utah 1995). Such a failure to inspect or inadequate inspection is strictly protected from liability by the Governmental Immunity Act. "We thus conclude that the immunity granted in section [63-30-10(4)] was intended to immunize the conclusions and results of an inspection where the inspector may have overlooked something..." *Ericksen v. Salt Lake City Corp.*, 858 P.2d 995, 998 (Utah 1993).

Kreyling argues that *Ingram v. Salt Lake City*, 733 P.2d 126 (Utah 1987) supports the conclusion that summary judgment was improper. However, in *Ingram*, summary judgment was denied because the plaintiff presented evidence that created a genuine issue of fact. The plaintiff claimed he was injured when he stepped on a manhole cover that collapsed under his weight. The plaintiff claimed the city was negligent for failing to discover the defective manhole cover. Each party submitted affidavits from expert witnesses regarding whether or not the defect in the manhole cover was discoverable upon reasonable inspection. *Id.* at 127-28. In this case, the Plaintiff has presented no evidence that would raise such an issue of fact. Kreyling has presented no evidence that the hole was discoverable, or even present prior to his fall.

"[I]t is well settled that the court may not permit a jury to speculate upon the evidence and a finding of fact cannot be based upon surmise, conjecture, guess or speculation." *Olsen v. Warwood*, 255 P.2d 725 (Utah 1953); "To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.' "

Dvorkina v. Jewish Community Center (JCC), 179 Fed.Appx. 454, 455-56 (10th Cir. 2006). Thus “unsupported conclusory allegations ... do not create a genuine issue of fact.” *Id.*; *Annett v. Univ of Kansas*, 371 F.3d 1233, 1237 (10th Cir.2004). “The question of whether the city exercised proper vigilance to discover a defect depends on the element of time, the nature and extent of the defect its prominence in location and other factors bearing on what could reasonably be expected of a person charged with the duty of supervising miles of streets and sidewalks.” *Pollari v. Salt Lake City*, 176 P.2d 111, 116 (Utah 1947). It is apparent there is no evidence to support the factual conjecture argued by Mr. Kreyling and summary judgment was proper.


CONCLUSION

Based on the foregoing, Defendant City of St. George respectfully requests that this Court affirm the district court’s Order Granting Defendant’s Motion for Summary Judgment

DATED this 27th day of May 2008.

WINDER & COUNSEL, P.C.

By: _____


LINETTE B. HUTTON

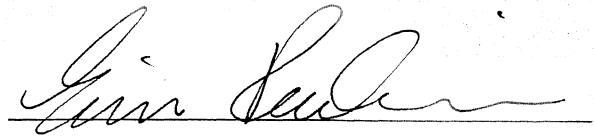
Attorney for Defendant/Appellee

CERTIFICATE OF SERVICE

Appellee/Defendant City of St. George certifies on this 27 day of May 2008, that a true and correct copy of the foregoing BRIEF OF APPELLEE was sent by the method indicated below to the following:

Brian L. Olson
Gallian, Wilcox, Welker & Olson, PC
965 E. 700 S., #305
St. George, UT 84790

(X) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

A handwritten signature in cursive script, appearing to read "Brian L. Olson", is written over a horizontal line.

APPELLEE'S ADDENDUM

Transcript of Hearing at Summary Judgment A

Order Granting Defendant St. George City's Motion for Summary Judgment ... B

Photographs C

Photographs of excavation, R. 304

Photograph of construction, R.346

Photograph of construction and removed driveway, R. 561

Photograph of pre-existing homes and SWAT activities, R. 562

Photograph of pre-existing homes taken 2-7-2002

Photograph of pre-existing home showing driveways, fencing, poles, shrubs

ADDENDUM “A”

JULE KREYLING,

Plaintiff,

VS.

CITY OF ST. GEORGE.

Defendant.

CASE NO. 050501129

BEFORE THE HONORABLE JAMES L. SHUMATE

FIFTH DISTRICT COURT

220 NORTH 200 EAST

ST. GEORGE, UTAH 84770

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SEPTEMBER 4, 2007

TRANSCRIBED BY: Russel D. Morgan

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APPEARANCES

FOR THE PLAINTIFF:

BRIAN L. OLSON
GALLIAN, WILCOX, WELKER
& OLSON
59 S. 100 E.
ST. GEORGE, UTAH 84770

FOR THE DEFENDANT:

LINETTE B. HUTTON
WINDER & HASLEM
175 WEST 200 SOUTH, #4000
SALT LAKE CITY, UTAH 84110-2668

634

1 September 4, 2007. St. George, Utah.

2 PROCEEDINGS

3 **THE COURT:** 11 o'clock in the morning. Matter that
4 we have before us is Kreyling vs. City of St. George. And,
5 Mr. Olson, you are here in behalf of the plaintiff in this
6 case.

7 And, Miss Hutton, you are here in behalf of the city.
8 Is that correct, counsel?

9 **MS. HUTTON:** That's correct, Your Honor.

10 **THE COURT:** All right. Now, counsel, we have before
11 us a motion for summary judgment filed by the city that I'm
12 not going to mince words on it, counsel. I worry about this
13 kind of a case and this kind of a motion when it looks like
14 we might come up to a jury issue. And I want you to give me
15 an idea of why it is that you think that this should never
16 get to a jury from the city's standpoint. Why shouldn't it,
17 counsel?

18 **MS. HUTTON:** Well, factually and legally speaking,
19 there is absolutely no evidence that the city was aware of,
20 was involved in any construction or excavation at the county
21 senior center. Under the governmental immunity act, under
22 landowner liability, under the special use doctrine, the
23 party, the governmental entity has to either have created the
24 defect or they have to have been aware of it, made aware of
25 it either by the nature that it had been there for so long

1 that they should have been aware of it as a property owner.
2 But that has never been established. In fact, the evidence
3 is to the contrary, that the city was not made aware. There
4 was never any encroachment permit obtained by any of the
5 contractors, including the county, that were involved in this
6 construction project.

7 **THE COURT:** Counsel, that encroachment permit
8 concept, as I understand it, if I'm going to dig a hole
9 anywhere that's going to impact a paved city street of the
10 City of St. George, I'm in violation of law if I don't have a
11 permit --

12 **MS. HUTTON:** That's right.

13 **THE COURT:** -- to open that street.

14 **MS. HUTTON:** That's correct.

15 **THE COURT:** And, without that permit, it's pretty
16 darn hard to show that the city had any knowledge of this at
17 all.

18 **MS. HUTTON:** That's correct. And the only
19 encroachment permit -- everyone who testified, Bob Coulter
20 from the county, Curtis DeMille for DeMille Construction,
21 Eric Watts for Watts Construction, they all testified that
22 they have done construction digging in that area. Now, I'm
23 not saying there is any evidence that it was in a specific
24 area where the alleged hole is, because no one really knows
25 for sure. But they all testified that nobody got an

1 encroachment permit.

2 Now, Curtis DeMille produced very recently an
3 encroachment permit for trenching in the road to put in an
4 8-inch water main for fire prevention. That was done
5 November 18th of 2003. But that was well after the alleged
6 period of time.

7 **THE COURT:** Separate and apart from this plaintiff's
8 injuries.

9 **MS. HUTTON:** Exactly. There was no permit. They all
10 testified that they have responsibility to remove water
11 meters. The meter setters remove and count water lines,
12 sewer lines. But no one obtained an encroachment permit.
13 And the defect is not even clearly defined. We are not
14 really sure where it was, what caused it, how it occurred.
15 There is no question from the photographs that were provided
16 by the county that sometimes when they began their
17 construction and removed those four homes for purposes of
18 construction that they also -- there's a telephone pole that
19 everyone draws your attention to. On either side of this
20 telephone pole, were driveways. One driveway went into a
21 private residence. The other driveway went in behind the
22 senior center.

23 At the time the county began their construction, Bob
24 Coulter, who is the building superintendent for the county,
25 he testified that those driveways were excavated by the

1 county back to the sidewalk. Photographs confirm that the
2 driveway that the plaintiff was actually standing on, and he
3 took photographs of, that was excavated back to the sidewalk.
4 But the one on the other side of the telephone pole, which is
5 directly in this area that the plaintiffs been complaining
6 about, was excavated all the way to the curb. And you can
7 see it in the photographs.

8 I actually sent you some additional photographs that
9 are a lot more --

10 **THE COURT:** I have them right here, counsel.

11 **MS. HUTTON:** -- a lot more legible. I was concerned
12 about how well the other ones would show you what was
13 actually occurring. The first -- there's a photograph in
14 there marked Washington County 008, Washington County 009.
15 Those show those driveways in place, one on either side of
16 the telephone pole. They were -- can you see that?

17 **THE COURT:** Got it.

18 **MS. HUTTON:** Okay. If you go to the next one down,
19 which is marked 0007, the bottom photograph --

20 **THE COURT:** Right.

21 **MS. HUTTON:** -- you can see that the sidewalk is gone
22 between -- I mean, not sidewalk, the driveway. The driveway
23 has been excavated all the way to the curb.

24 **THE COURT:** In fact, it appears that the only thing
25 remaining of that driveway surface is the actual culvert top,

1 if you want to call it that, from the blacktop to the top of
2 the curb.

3 **MS. HUTTON:** Exactly. The gutter. That's all that
4 is left. So, clearly, with respect to all three of the
5 theories of immunity that the city has asserted, in order to
6 establish that we were not immune, the plaintiff would have
7 to establish that we in some way had some knowledge of this
8 defect which can not be established. In fact, Mr. Kreyling
9 testified that he parked in this same area from two to as
10 many as four times a week. During that time -- well, what
11 his statement was, "I parked there dozens of times and never
12 noticed a hole. It looked like solid dirt."

13 Bob Coulter testified that he saw it after he heard
14 someone had fallen there. He's not sure of the time period,
15 because even the plaintiff's a little faulty about when he
16 actually fell. Bob Coulter testified there was no hole. It
17 was just a dished out area. Gerald Newton, who is a
18 volunteer for the senior center and who was at the senior
19 center five days a week, he testified that it was just a
20 rough dirt area with lots of leaves everywhere.

21 Curtis DeMille, who is the president of DeMille
22 Construction, he testified that he looked at the area, and
23 there was nothing out of the ordinary.

24 In the plaintiff's responses to interrogatories, the
25 plaintiff states -- well, actually, in response to the city's

1 statement of facts, at paragraph 12 he admits, in responding to
2 the city's motion for summary judgment, that he saw this area
3 as many as four times a week and never noticed a hole. So,
4 there's no way that the city could have been aware unless they
5 were made aware. If people who were there four or five times a
6 week were unaware of it without the encroachment permit, there
7 is no way that the city would have any idea that anything had
8 happened to the park strip.

9 **THE COURT:** Well, counsel, I guess my real concern
10 is, if I look at your photograph sheet that you have supplied
11 me, the lower right hand designation you put on it is Exhibit
12 B, and quote, close quote, reply, I see ~~the~~ the cones around
13 this hole and ground. And I see -- there's probably a term
14 of art that described this particular critter -- but it's one
15 of those --

16 **MS. HUTTON:** Divot?

17 **THE COURT:** -- one of those delineator markers with a
18 heavy bottom on it that has toppled over into the hole. And
19 the hole, if I've got the scale right, looking at the
20 infamous telephone pole as well as the person who is standing
21 next to it at the top --

22 **MS. HUTTON:** Um-hmm, yes.

23 **THE COURT:** -- that hole appears to be, I would say
24 18 to 20 inches deep. It's just your position that no
25 encroachment permit, no other statement of any kind in any

1 record, any place, gave the city notice that there was that
2 hole next to that street in that location by the telephone
3 pole?

4 **MS. HUTTON:** That's correct. Also, what you are
5 seeing in those photographs -- those are the photographs that
6 the plaintiff took. Those photographs are after the sidewalk
7 and curb and everything was removed.

8 **THE COURT:** Right.

9 **MS. HUTTON:** We don't have any idea really what it
10 looked like at the time that the plaintiff alleged he was
11 there.

12 **THE COURT:** (Inaudible.)

13 **MS. HUTTON:** Now, there is testimony that the dished
14 out area that Mr. Coulter looked at was about nine inches
15 deep.

16 **THE COURT:** Okay. So, this excavation that we have
17 here is after the fact.

18 **MS. HUTTON:** Um-hmm.

19 **THE COURT:** By -- has anybody been able to establish
20 how far after the fact, how many days or weeks after the
21 fact?

22 **MS. HUTTON:** Well, according to the most recent
23 production that was made by DeMille -- and I just got this a
24 couple weeks ago -- they have made a change in his deposition
25 transcript. And he states in his deposition where he's made

1 these changes that the sidewalk was removed on November 19th.
2 Now, that would mean that that photograph that you are
3 holding was taken sometime after November 19th. But I have
4 no way to confirm or deny that other than this statement that
5 was made by Mr. DeMille that the sidewalk wasn't removed
6 until --

7 **THE COURT:** Mr. Kreyling's injury was in --

8 **MS. HUTTON:** He states, well, sometime between
9 September 3rd and September 10th.

10 **THE COURT:** Okay. So, this would have been at least
11 30 and maybe as many as 40 days after?

12 **MS. HUTTON:** And he does testify in his deposition,
13 he being Mr. Kreyling, that he took the photographs two or
14 three weeks later. So, we know it's after November 19th.
15 That looks like a pretty nice day for it to be November 19th,
16 almost Thanksgiving, but --

17 **THE COURT:** Well, in St. George all (inaudible),
18 counsel.

19 **MS. HUTTON:** Yeah.

20 **THE COURT:** Well, counsel, I guess you know what my
21 real problem always is going to be whenever you are asking a
22 trial judge for summary judgment. I'm always of a mind that
23 summary judgment is a lovely way to get (inaudible), but it's
24 a great way to get reversed. You are confident that based
25 upon the record that you've got and all the discovery that

1 you have been through, that the grounds that you have; that
2 is, no encroachment permit, no notice, no proof of any notice
3 that the St. George City's immunity simply is established?

4 **MS. HUTTON:** That's correct. And also, I want to
5 point out that the supreme court of the Utah State in
6 Gullible [phonetic] vs. Salt Lake Southern Railroad, citing
7 to Schnop House vs. Storehouse, it's one of those slip and
8 falls, 2004. "It's usually held that fault can not be
9 imputed to the defendant unless the plaintiff demonstrates,
10 one, that the defendant had knowledge of the condition; and,
11 two, that after such knowledge sufficient time had elapsed
12 that in the exercise of reasonable care he should have
13 remedied it."

14 **THE COURT:** It's the old law school example of green
15 bean slip and fall in a grocery store case.

16 **MS. HUTTON:** Exactly. But they go on to cite to
17 Deets vs. Commercial Security Bank, which -- stating that --
18 and that's a case where the plaintiff slipped and fell on the
19 employer's icy parking terrace. And the courts said that the
20 plaintiff testified in her deposition that she knew that
21 there was ice on the terrace. And she also knew that there
22 was alternative parking available. Therefore, fault could
23 not be imputed to the employer because she didn't have to
24 walk across the icy parking lot.

25 The same can be argued here regardless of whether

1 it's the city or one of the construction companies. The
2 plaintiff testified that he was -- I mean, he was aware of
3 the construction. He had been parking there. He just
4 assumed that it was okay, because there were no cones, there
5 was no fence. There was no barricade, which is also required
6 by ordinance to be put up. And because of that, although he
7 knew there was construction there, he didn't think that it
8 was unsafe. He also testified that he knew that there was
9 alternative parking. But he particularly liked this place
10 because of the driveway ramp that made it easier for him to
11 get his wife across the gutter and onto the sidewalk. So,
12 the county was inviting its citizens to utilize this ramp in
13 a manner that actually exposed them to this construction
14 site. And without even putting up a barricade.

15 **THE COURT:** And, counsel, concomitant with the
16 encroachment permit is the hole barricade warning system set
17 up within the county ordinance, mandating, if you are going
18 to cut our streets and put holes in them, you have to let the
19 public know.

20 **MS. HUTTON:** That's correct. In fact, the ordinance
21 says that if the barricade has to be in place until that area
22 is restored to its previous or similar to previous condition.
23 So, there should have been something there to --

24 **THE COURT:** Mess with our grade, you better barricade
25 it until it's back to the way it was.

1 **MS. HUTTON:** Exactly. And Bob Coulter testified that
2 the reason they didn't do that was because it was
3 particularly inconvenient when they were moving big trucks
4 back and forth out of the site with this debris and other
5 materials. And, you know, I understand that's always one of
6 the construction problems. But they had an active facility
7 right next door that was parking increasingly close to this
8 construction site. In fact, you can tell from the
9 photographs they couldn't have gotten much closer from using
10 this particular ramp. Which also brings up the theory of the
11 special use doctrine. The plaintiff argued against special
12 use because the case that Rose vs. Provo City basically said
13 that the liability of the private property owner using the
14 park strip for a special purpose did not automatically make
15 the city immune because they still had knowledge of this, if
16 they had knowledge or had created the same issue that comes
17 up in the latent defect argument. The difference between
18 Rose and our case is that in Rose, Provo City had actually
19 dug up the park strip themselves. In fact, they had dug up
20 the park strip on at least two occasions to replace a pipe,
21 some kind of a drainage pipe. Rose, or the property owner
22 that was also involved in the case, he had called, he had
23 documentation that he had called the city and recorded his
24 special use. And he had called and reported that they had
25 made it hazardous by digging it up. So, he could establish

1 that the city had the awareness that can not be established
2 here. So, for the special use doctrine, there is -- there is
3 no evidence that the city created this hazard. But there is
4 evidence the county was aware of this special use that was
5 being made of these driveways.

6 **THE COURT:** Okay. Mr. Olson, if I rule in favor of
7 the city, what are you going to tell the court of appeals
8 that I have erred on?

9 **MR. OLSON:** Well, I think the first thing I would
10 like to do for you, Your Honor, is to make sure we do have
11 the facts a little bit straight. You are looking at the
12 pictures, one of which depicts my client pointing at the
13 ground. That's the pictures that shows the excavation and
14 that sort of thing. And I think it's understood that those
15 pictures were taken several weeks after the fall and after
16 excavation. So, you know, the excavation is apparent in
17 those pictures. Although, it's the same area, that
18 excavation wasn't there. So, when the court says, hey, that
19 looks like a 8, 9-inch dip there, that's not really the
20 issue. In fact, that's where our biggest dispute of fact
21 takes place is the nature of this hole. My client's
22 testimony is that he stepped into a cylindrical hole that fit
23 his entire leg, and he was still not touching bottom. He
24 went into his groin, not touching bottom. The city's put
25 forth undisputed facts that says it was a depression. It was

1 a nine-inch hole. It was this and that. No, it clearly
2 wasn't.

3 Mr. Kreyling's deposition is, I stepped into that
4 thing up to my groin. And I wasn't touching bottom. Of
5 course, (inaudible) at the city, if you look at my client's
6 picture, he doesn't have much of an inseam but, nonetheless,
7 it was much more than nine inches.

8 **THE COURT:** Neither do I, counsel. I'll give the
9 city that break.

10 **MR. OLSON:** So, I think it is important that there is
11 that dispute of fact from the nature of the hole from the
12 get-go.

13 Now, looking at this thing, one thing the city really
14 hasn't argued today that it certainly argued in the motion, is
15 that there are city ordinances that require abutting property
16 owner to keep property in good condition. Well, the problem
17 with that city ordinance is that there is also significant case
18 law that says the entity has a non-delegable duty to maintain
19 the streets and sidewalks. That's Ingram vs. Salt Lake City.

20 **THE COURT:** But, counsel, if I were the owner of a
21 backhoe, sometimes I wish I was, but I'm not, and I went to
22 the city street in front of my old house, which was in St.
23 George, my new house is in Ivins. But if I went to my old
24 house and just decided to dig into the street out there
25 because I didn't like the way my water line seemed to be

1 leaking, if I don't file a permit request and be granted that
2 encroachment permit, how is the city going to know that I
3 have put a hole in their street until one of their squad cars
4 drops in it or one of their garbage trucks falls in it and
5 they get a call from the garbage contractor that says you
6 have hole in front of this house? How is the city going to
7 know?

8 **MR. OLSON:** Sure. And I understand what you are
9 saying. I think the first thing to understand is that it's
10 not a standard action notice. It's a standard or knew or
11 should have known. So that the lack of encroachment permit
12 in itself doesn't say, hey, latent defect. They don't get to
13 stand up and say, hey, we didn't know anything about it.
14 There wasn't an encroachment permit. Using your example,
15 let's say the city rise by that hole in the street, through
16 its officers, agents, whoever it may be for five months and
17 says no encroachment permit. We are not liable. That's just
18 not the way it works. It's a knew or should have known
19 standard.

20 **THE COURT:** Counsel, let's look at the factual basis
21 around your client's injury, of the should have known side of
22 it. It's your client's position that, certainly, when he
23 took the photographs that are in the record now, what we have
24 been looking at, on or about the 19th of November at the
25 earliest day, that, certainly, anybody driving by that should

1 have known. And the city should have known by that time that
2 there was a hole there. But let's go back to the time of the
3 injury, somewhere in the range of mid-September, let's say.
4 What facts can you point me to that are in the record that
5 support that "should have known" that make me want to give
6 this to a jury and let them make that decision?

7 **MR. OLSON:** Sure, Your Honor. And, of course, I
8 think one of the things that is important to understand,
9 there are not indicators that this hole was created at the
10 time the county began its construction on the senior center.
11 In fact, there is not a lot of indicators as to when this
12 hole was created but for the fact that we have a driveway
13 that was poured going into what was an old LDS Church and
14 then was owned by the county and used as a senior center,
15 presumably a driveway, I'm making assumptions, was there when
16 the church went in. It goes through the back parking lot.
17 But if you look at the pictures that contain my client and
18 what he's pointing to, you see a half circle cut out of the
19 driveway that went around something that once was there that
20 became a hole. In fact, if we look at that half circle and
21 the discoloration of dirt, my client's testimony is that's
22 where the hole was. So, at some point in time, whether there
23 was encroachment permit or otherwise, there is a driveway
24 poured across the city's property going around an object that
25 at least came up to the ground in order for concrete to form

1 around it. And, at some point in time, that object was
2 removed.

3 Now, we have the double-edged sword of they say,
4 well, it's latent because when plaintiff, you know, walked
5 into it he didn't see it. It was covered with cobwebs. It
6 was covered with leaves. It was covered with this and that.
7 You know, obviously, if he saw it he wouldn't have stepped
8 into it. But it goes back to the old law school case you are
9 referring of, the typical case of a slip in a grocery store.
10 I always refer to it as the banana peel case. And you look
11 at it and say, how brown was the banana peel? That's how we
12 know how long it was sitting there.

13 **THE COURT:** Or whether or not it got into the
14 petrified stage.

15 **MR. OLSON:** Exactly. Exactly. So, we have a hole
16 that's been there long enough for leaves and cobwebs and that
17 sort of thing to form. we've got a driveway that has been
18 there for a very long time that was poured around something
19 that was there. But you are right, we are not terribly sure
20 what was pulled out to cause that hole. What we do know, it
21 was a deep cylindrical hole. And it was very close to a
22 walking area.

23 So, I think what's important for the court to ask
24 itself, and I think that the court had it well under hand when
25 you first looked at it. The biggest hurdle in this case is the

1 city is asking for summary judgment on what is, essentially, a
2 standard of reasonableness. And if we look at the definition
3 of latent defect, and that's what's required to get the
4 immunity, it's one in which reasonable care upon full
5 inspection would not reveal. It's reasonable care upon
6 inspection. So, it's a question of reasonableness or question
7 of negligence.

8 If we look at the -- there's a case called Pig's Gun
9 Club vs. Sanpete County. It says, "Determination of latent.
10 The definition of "latent" is for a finder of fact." We will
11 get -- the other case was Bowen vs. Riverton City. "Summary
12 judgments are more frequently given in contract cases.
13 However, when it comes to determining negligence,
14 contributory negligence and causation, courts are not in such
15 a good position to make a total determination, for here
16 enters a prerogative of the jury to make a determination of
17 its own. And that is, did the conduct of a party measure up
18 to that of a reasonably prudent man and, if not, was it a
19 proximate cause of the harm done?"

20 If we look at the Ingram vs. Salt Lake City case, that
21 was a manhole case where someone, you know, fell into something
22 that was either a defective lid or open or something like that.
23 It state's, "What constitutes a defective, unsafe or dangerous
24 condition of a parkway where a latent defect of a water meter
25 lid presents a question of fact that is properly answered by a

1 jury."

2 So, we are really left with a situation, Your Honor,
3 where you are going to have to make a judgment call if you
4 rule today, that this defect would not have been found upon
5 reasonable inspection.

6 That's the judgment that would have to be made today.
7 And I would assert to you, number one, that we've got a big
8 dispute of fact as to what the nature of this hole was in the
9 first place. That, yet, to take the next step and determine
10 would it have been discovered upon reasonable inspection.

11 **THE COURT:** Well, counsel, are we going to call the
12 directors of the streets departments from Washington City,
13 Santa Clara City, Ivins City, St. George City, Hurricane City
14 and have them all come in and testify as to how they inspect
15 their streets to determine whether or not St. George City was
16 reasonable in its treatment of this location where the injury
17 occurred?

18 **MR. OLSON:** I guess what I would assert to that, Your
19 Honor, is it's not a question of how much inspection is
20 reasonable. It's a question of -- or even what kind of
21 inspection is reasonable. Rather, it's a question on if they
22 reasonably inspected the property, would they have noticed?
23 So, it's not a question of, well, they had a duty to come out
24 and inspect their streets and sidewalks every other day.
25 That's really not the issue. The issue is, if they had given

1 it a reasonable inspection, would they have noticed it? And
2 that goes to a question of the reasonable man viewing this
3 property, would you have noticed the defect upon a reasonable
4 inspection.

5 **THE COURT:** Counsel, you are the moving party. You
6 do get last say.

7 **MS. HUTTON:** Thank you, Your Honor. Well, in
8 response to that, I would have to remind the court that all
9 of the evidence, and we are talking about testimony after the
10 fact, 20/20 hindsight, all of these witnesses said even
11 knowing that someone had fallen, we didn't see a hole.

12 Mr. Kreyling himself parked there every day. He made
13 a better inspection than the city is going to do. I mean,
14 absent going around sticking a pole in the ground throughout
15 St. George City, we are not going to know what's going to
16 cave in. We don't know what this hole looked like before.

17 Now, the photographs, the photographs in here, they
18 show this property. And the photographs are actually dated.
19 The photograph was taken February 2002 -- February 7th, 2002.
20 You can see the telephone pole. That's the one that's marked
21 WC008.

22 **THE COURT:** And there is no indication of any round
23 object being placed inside the hole there.

24 **MS. HUTTON:** There is nothing there. Plus, this
25 location that is being pointed to is right at the seam of the

1 curb and the driveway. I mean right in the corner there.
2 Other than the possibility now, you know, for a possibility,
3 the county, apparently, did use this property. And there's
4 this, these photographs where the County Sheriff's Office is
5 using this property for some type of maneuvers. I don't know
6 what they are. And they have barricaded this. Whether or
7 not in order to do that, if that's WC005, whether or not --
8 do you have that there?

9 **THE COURT:** Let me take a look at what you've got.

10 **MS. HUTTON:** The fact of the matter is, we just don't
11 know -- he definitely has this picture.

12 **THE COURT:** Oh, that's just a SWAT team working out,
13 counsel.

14 **MS. HUTTON:** Well, yeah.

15 **THE COURT:** We have seen a lot of them.

16 **MS. HUTTON:** And they have put in some post and
17 drapes, some crime scene tape there. And we know that that
18 occurred before the construction occurred because the houses
19 are there.

20 "The United States Supreme Court has held on several
21 occasions that the non-movement -- nonmovant must produce
22 evidence in support of his claim that creates a genuine issue
23 for trial. Viewing the evidence in the light most favorable
24 to the nonmovant, it is not enough that the evidence is
25 merely colorable or anything short of significantly probative

1 to defeat summary judgment." That's Anderson vs. Liberty
2 Lobby. "This is because when the record taken as a whole
3 could not lead a rational trier of fact to find for the
4 nonmoving party there is no genuine issue. Once the movant
5 points out an absence of proof on essential element of the
6 nonmovant's case, the burden shifts to the nonmovant to
7 provide evidence to the contrary."

8 That just can not be done here. There is no evidence
9 that the City of St. George created a hole there. And there
10 is no evidence that they knew or should have known that there
11 was any defect in this park strip. And I would request that
12 summary judgment be granted on behalf of the city.

13 **THE COURT:** Your motion is granted, counsel. I'm
14 just satisfied on the basis of this record that as a matter
15 of law under these facts one can not stretch liability to the
16 City of St. George.

17 If you'll prepare an order to that effect, circulate
18 it under the rules, and I'll sign it when I get it. Thank
19 you, counsel. And I'm going to give you your courtesy copies
20 back. Do I get recycling credit?

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CERTIFICATE

STATE OF UTAH

COUNTY OF WASHINGTON

THIS IS TO CERTIFY THAT THE FOREGOING
PROCEEDINGS WERE TAKEN BEFORE ME, RUSSEL D. MORGAN, A
CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF
UTAH, RESIDING AT WASHINGTON COUNTY, UTAH;

THAT THE PROCEEDINGS WERE TAKEN BY ME
IN STENOGRAPHY FROM AN ELECTRONIC RECORDING, AND
THEREAFTER CAUSED BY ME TO BE TRANSCRIBED INTO
TYPEWRITING, AND THAT A TRUE AND CORRECT TRANSCRIPTION
OF SAID TESTIMONY SO TAKEN AND TRANSCRIBED TO THE BEST
OF MY ABILITY IS SET FORTH IN THE FOREGOING PAGES
NUMBERED FROM 3 TO 23 INCLUSIVE.

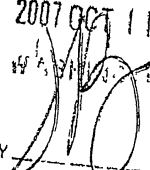
RUSSEL D. MORGAN, CSR
LICENSE #87-108442-7801

DECEMBER 10, 2007

7-59

ADDENDUM “B”

Linette B. Hutton (#6408)
Dennis Flynn (#10399)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222
Facsimile (801) 322-2282
Attorneys for Defendant City of St. George

FILED
FIFTH JUDICIAL DISTRICT COURT
2007 OCT 11 AM 11:29
WASHINGTON COUNTY
BY 

**IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR THE STATE OF UTAH, WASHINGTON COUNTY**

JULE W. KREYLING,

Plaintiff,

vs.

CITY OF ST. GEORGE, *et al.*,

Defendants.

**ORDER GRANTING DEFENDANT ST.
GEORGE CITY'S MOTION FOR
SUMMARY JUDGMENT**

Case No. 050501129

Judge James L. Shumate

RICHARD WATTS CONSTRUCTION,
INC., d/b/a WATTS CONSTRUCTION
CO., INC., a Utah Corporation

Third-Party Plaintiff,

vs.

CURTIS DEMILLE CONSTRUCTION,
INC., a Utah Corporation


Third-Party Defendant.

The above entitled matter came before the Court on September 4, 2007 on Defendant City of St. George's Motion for Summary Judgment. The Plaintiff was represented by Brian L. Olson of Gallian,

Wilcox, Welker & Olson and Defendant City of St. George by Linette B. Hutton, of Winder & Haslam. Following oral argument from counsel, the Court's examination of the pleadings and being fully advised in the premises, the Court finds there is no probative evidence that the City of St. George created the defect or condition in the park strip, or knew or should have known of any defect or condition. Therefore, the Court hereby GRANTS Defendant City of St. George's Motion for Summary Judgment.

DATED this 5 day of ~~September~~ ^{Oct} 2007.

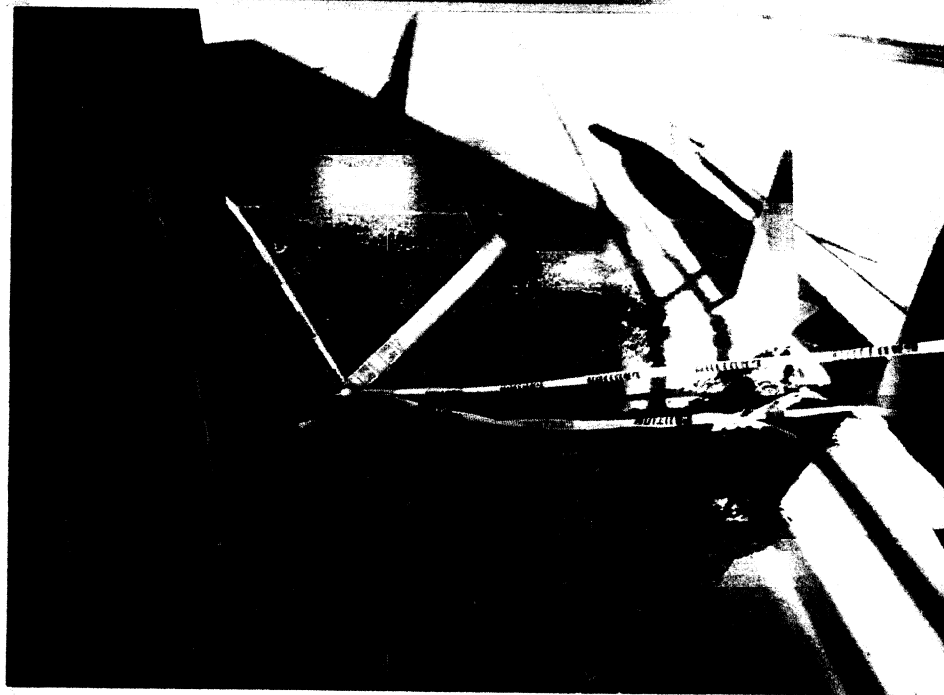
BY THE COURT



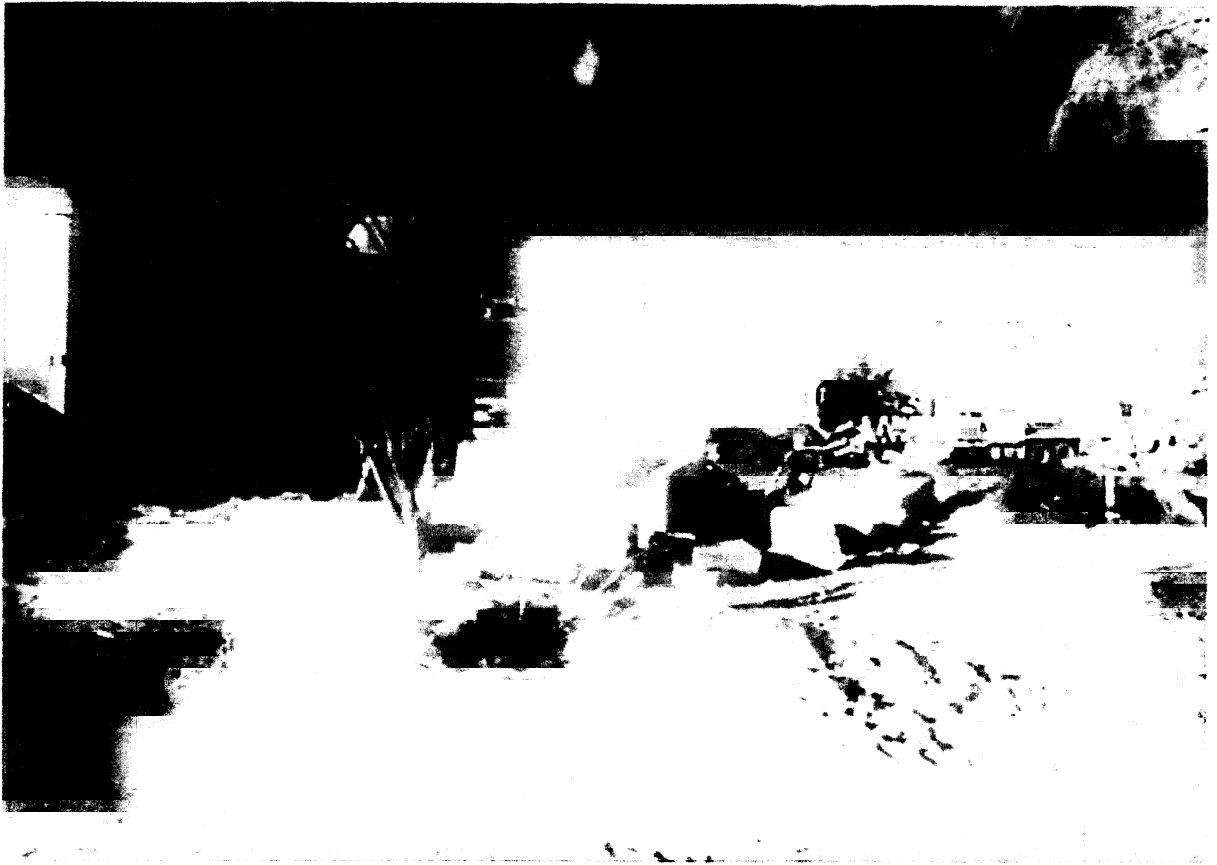
Honorable JAMES L. SHUMATE
Judge, Fifth Judicial District Court

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ADDENDUM “C”



R304



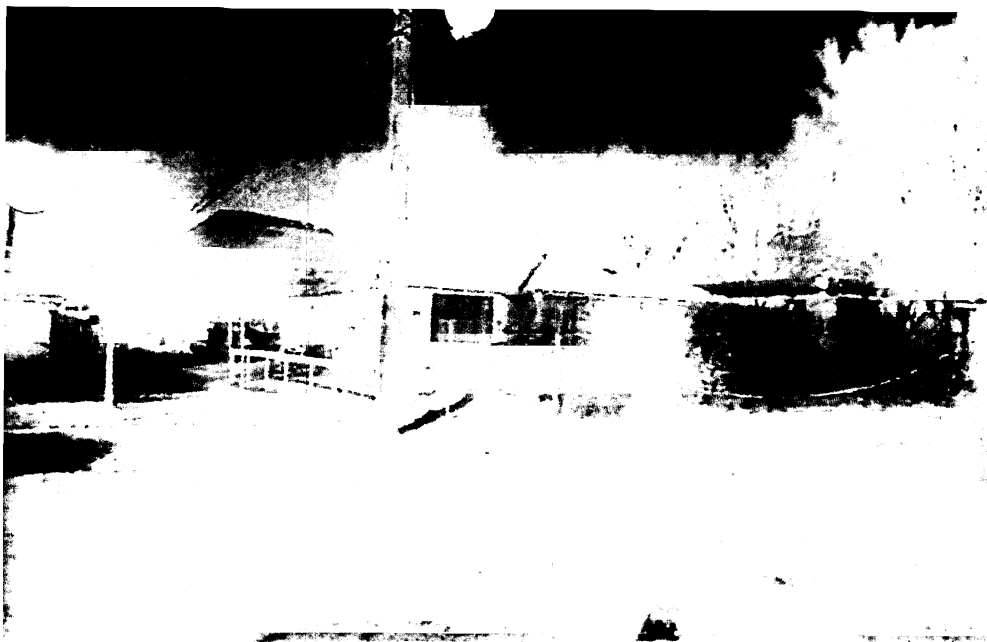




WC005



02 2 7



R. 564

WC009