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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JULE KREYLING,

Plaintiff-Appellant,

vs.

CITY OF ST. GEORGE, a Utah
municipal corporation,

Defendant-Appellee.

Court of Appeals No. 20070882-CA

REPLY BRIEF OF APPELLANT

Appeal from the Orders Entering Summary Judgment for Defendant St. George City
by the District Court of the Fifth Judicial District, the
Honorable James L. Shumate, Presiding

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ARGUMENT

The trial court's grant of Summary Judgment below is improper for two very significant reasons. First, there exists significant genuine issues of material fact as to the existence and nature of the hole that led to the Plaintiff's injuries. Even in the Defendant's Appellate Brief they continue to question the existence of the hole. The existence of the hole is a question of fact that precludes Summary Judgment in this case. Second, the trial court's grant of Summary Judgment on an issue of negligence, and specifically on an issue of latent defect, is based upon a question of reasonableness that must be left for the trier of fact.

I. DEFENDANT HAD, AT LEAST, CONSTRUCTIVE NOTICE OF THE DANGEROUS AND DEFECTIVE CONDITION UPON ITS PROPERTY

Amazingly, even in Defendant's Appellate Brief, Defendant continues to question the existence of the hole. Defendant asserts, "Indeed, Kreyling has presented no one to confirm the cause of his fall, or the presence of the hole he describes." Defendant, in its Summary Judgment, relied upon statements of undisputed fact that indicated Plaintiff stepped into an "alleged hole." (R. at 274), that "it had been dishd out, it was not a hole," (R. at 278), and "the size of the area Plaintiff alleges was a "hole" was nine inches deep near the gutter covered with leaves all over." (R. at 278). To the contrary, Mr. Kreyling testified that the hole into which he stepped was at least deep enough to fit his entire leg from foot to groin. (R. at 387-389). In Summary Judgment, the court was required to construe the facts in a light most favorable to Plaintiff, the non-moving party.

The existence and nature of the hole go directly to the question, for the finder of fact, as to the Defendant's negligence. In Utah, to determine whether a property owner had constructive notice of a dangerous condition resulting in a slip-and-fall accident, "constructive notice is imputed when the condition had existed long enough that the [store] owner should have discovered it." Jex v. JRA Inc., 166 P.3d 655, 658 (Utah App. 2007). Although there exists disputes as to the size and nature of the hole, it was undisputed that the hole had been there for quite some time. Defendant's statement of undisputed fact, although mischaracterizing the hole as "nine inches deep" concedes it was covered by leaves all over. R. at 278. Mr. Kreyling testifies that he did not see the hole as "it was covered with cobwebs and leaves and stuff like that." Deposition of Jule Kreyling, hereinafter "Kreyling Depo." page 35 lines 15-16. Clearly, the hole had existed long enough for the gathering of debris and cobwebs. More telling, however, is the concrete driveway, poured on Defendant's property, with a semi-circle forming one side of the hole clearly being poured around some object in the ground. An examination of the photographs, supplied as Addendum C to the Defendant's Brief, shows that the concrete driveway, when originally formed, was poured around an object that was extending above the ground, creating a semi-circle edge of the driveway. Consequently, Defendant knew, or should have known, when concrete for the driveway was poured on their property that an object was in the ground next to the driveway.

The trial court granted Summary Judgment even though it appeared that the defect in question had been present for a significant amount of time. More troubling, however, is that Summary Judgment was granted based upon a standard of "reasonable inspection."

Again, in Defendant's Brief, at page 21, Defendant argues that Plaintiff has not presented evidence that the hole was even present. Obviously, the prior quotations to Plaintiff's deposition testimony suggest otherwise. Again, the significant disputed fact of the existence, and the nature of, the hole causes great question in determining whether it would have been found upon "reasonable inspection." The question of whether latent defect exists is a determination of whether the defect would not be discovered upon a reasonable and careful inspection. Vincent v. Salt Lake County, 583 P.2d 105, 107 (Utah 1978) (emphasis added). Consequently, the trial court issued Summary Judgment, asserting that such defect would not be found upon reasonable and careful inspection, even when there was a significant dispute as to the very existence of the hole. Again, the facts at Summary Judgment must be construed in a light most favorable to the non-moving party. If the facts are construed, consistent with Mr. Kreyling's deposition, that a hole, the diameter of his thigh and deeper than his entire leg existed upon Defendant's property, it seems a significant enough defect that it would have been discovered upon reasonable and careful inspection. The trial court took this question away from the trier of fact. Utah law is clear, that when it comes to determining negligence, "courts are not in such a good position to make a total determination for here enters a prerogative of a jury to make a determination of its own, and that is: did the conduct of a party measure up to that of the reasonably prudent man and, if not, was it the proximate cause of the harm done?" Bowen v. Riverton City, 656 P.2d 434, 436-37 (Utah 1982). The trial court erred in making a determination of the Defendant's reasonableness.

II. DEFENDANT’S APPELLATE BRIEF DOES NOT DISAGREE THAT THERE EXISTS GENUINE ISSUES OF MATERIAL FACT.

Plaintiff’s Appellate Brief clearly questions the trial court’s determination of Summary Judgment based upon genuine issues of material fact. Those issues deal with the nature and the existence of the hole in question. Defendant’s Appellate Brief does not address this issue or even assert that there were no genuine issues of material fact. Rather, Defendant’s Appellate Brief perpetuates those disputes of fact by continuing to question the existence of the hole. Consequently, it is clear that there exists genuine issues of material fact precluding summary judgment.

III. PLAINTIFF DID NOT FAIL TO REASONABLY FORESEE A DANGEROUS CONDITION UPON THE PROPERTY.

Defendant asserts that Plaintiff was somehow negligent in failing to foresee or notice the dangerous condition which caused his injury. Defendant’s Brief at page 20. For this proposition, Defendant asserts that Plaintiff admitted he was aware of construction of the new senior center in the area, that an unidentified construction worker assisted him at the time of the accident, that there was no fence or barricade where he parked, and that he had the option of parking in a church parking lot, or at another location.

Defendant fails to point out other very important factors. First, it is well established, contrary to Defendant’s assertions that no excavation of the sidewalk or park strip area had occurred at the time of the accident. Mr. Kreyling testified as follows:

Q. Let me ask you: on the date of the accident, was this area, if we’re looking here, let me direct your attention to photograph #1. And this area to the – if you ‘re holding that photograph so that you’re looking at it right

side up, in the top right hand corner of Exhibit Number 6, just to the bottom edge of his sidewalk area, you see on this particular photograph taken, whenever it was, that area is, you know, heavily excavated?

A. It wasn't. It was just plain dirt right from there. It would look like this other side here.

...

Q. It was all filled in roughly level with the sidewalk?

A. Right.

Kreyling Depo page 36, lines 12-23, page 37 lines 11-13.

Mr. Kreyling testified that there were not cones, ribbons, or other safety devices marking off this area. Kreyling Depo at page 37.

It is well established in this case, that at the time of the accident there was a construction site of the new senior center next door to the old senior center, but that the excavation that is apparent in the photos attached as Addendum C to Defendant's Brief, had not yet taken place. Consequently, it is misplaced to argue that Plaintiff should have been aware of a dangerous condition on the property, being the park strip, just because there was construction going on on the other side of the sidewalk and in the inner portion of the city block.

IV. DEFENDANT CITY HAD A SPECIAL DUTY TO USE REASONABLE CARE TO PREVENT MR. KREYLING'S INJURY.

Defendant asserts that it had no duty to Mr. Kreyling under the special use doctrine. Defendant attempts to assert that the adjoining property owner, being Washington County, made special use of driveways for the ingress and egress of its patrons thus creating a special use. Defendant's analysis is completely misplaced in that

the defective or dangerous condition was not the driveway. Rather, the defective or dangerous condition is a deep cylindrical hole abutting one of the driveways that crossed its property. City cannot rely upon the “special use” doctrine just because special use is made of a structure that is next to the dangerous condition.

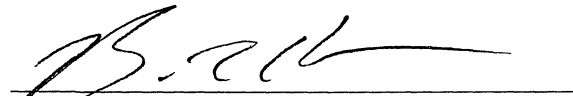
Furthermore, Defendant’s Brief misconstrues the analysis of Rose v. Provo City, 67 P.3d 1017 (Utah App. 2003). Defendant seems to suggest that the analysis of Rose required that the City “create” some dangerous condition in order to be jointly liable with the abutting property owner. Rather, the ruling in Rose, is that “it is long been the law in Utah...that a [city] has a duty to exercise ordinary care to keep streets which it has open for travel and which it has invited the public to use in a reasonably safe condition for travel.” Rose v. Provo City, 67 P.3d 1017, 1022-1023 (Utah App. 2003). There is nothing in that stated duty that suggests that it applies only to those dangerous conditions created by the city but, rather, applies to any dangerous condition upon the property.

CONCLUSION

Based upon the foregoing, it is apparent that this case, at its core, must be remanded to the trial court due mainly to a significant dispute of material fact. In this case, the parties hotly contest the existence and the nature of the hole into which Mr. Kreyling fell and was injured. Based upon that contest, the court cannot reasonably rule upon issues of constructive notice or latent defect wherein the standard is discovery of the condition upon “reasonable and careful inspection.” Even looking to issues of special use, the court must have a clear grasp of exactly what the dangerous condition was. Construing the facts in a light most favorable to the Plaintiff, that there existed a deep

cylindrical hole next to a walking surface in the city-owned park strip questions of constructive notice and reasonable inspection must go to the trier of fact.

DATED this 10 day of June, 2008.



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