

1997

Stephanie McKay v. Smith's Food Store, et al. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Case No. 970312-CA

STEPHANIE MCKAY
Plaintiff/Appellant
vs.
SMITH'S FOOD STORE, ET AL.
Defendant/Appellee

**UTAH COURT OF APPEALS
BRIEF**

UTAH
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DOCKET NO. 970312-CA

BRIEF OF DEFENDANT/APPELLEE JAMES O. CHAMBERLIN

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT

STATE OF UTAH

HONORABLE GORDON J. LOW

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NOV 26 1997

CC

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CERTIFICATION

The undersigned certifies that all parties to the litigation involving this case are listed below. In addition the undersigned certifies that the following attorneys are now or have represented an interested party in this litigation. These representations are made to enable judges of the Court to evaluate the possible need for disqualification or recusal:

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RESPECTFULLY submitted this 26th day of November, 1997.



RICHARD R. MEDSKER
Attorney for Defendant CHAMBERLIN

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STEPHANIE McKAY,
Plaintiff,

BRIEF OF DEFENDANT/APPELLEE
JAMES O. CHAMBERLIN

VS.

SMITH'S FOOD STORE AND DRUG
CENTERS, INC., UNITED STATES
ALUMINUM CORPORATION,
JAMES O. CHAMBERLIN,
CRITTENDEN PAINT & GLASS
COMPANY, and R&O CONSTRUCTION
COMPANY,

Case No. 970312-CA

Defendants.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Annotated § 78-2a-3(2)(j) (1996).

STATEMENT OF ISSUES

ISSUE 1. Having failed to reply to CHAMBERLIN'S Motion for Summary Judgment below, has Plaintiff preserved any issues for appeal?

Citation to the Record. No citation to the record appears in McKAY'S Appellant Brief.

Standard of Review. Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982), states that the Court would not consider on appeal issues which had not been previously submitted to the trial court and concerning which the trial court had no opportunity to make findings of fact or law.

ISSUE 2: Were the architect CHAMBERLIN's actions the proximate cause of Plaintiff's injury.

Citation to the Record. Again, there is no citation to the record in Appellant's Brief.

Standard of Review. If this issue were properly before the court, the standard of review would be "correctness" as to the trial courts interpretation of the law. The appellate court affords no deference to the lower court's legal conclusions. State Farm Fire & Casualty Co. v. Geary, 869 P.2d 952, 954 (Utah Ct. App. 1994); C.T. v. Martinez, 845 P.2d 246, 247 (Utah 1992).

CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES OR REGULATIONS

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this appeal.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a slip and fall case which allegedly occurred at Smith's Food & Drug Store in Logan, Utah. Plaintiff brought suit against Smith's and subsequently US Aluminum, CHAMBERLIN, Crittenden, and R&O Construction.

B. Course of Proceedings and Disposition of the Court Below.

This action was originally filed on February 12, 1994, against Smith's Food & Drug Centers, Inc., and amended on April 18, 1994, to name United States Aluminum, International Aluminum

Corporation (U.S. Aluminum, JAMES O. CHAMBERLIN, Crittenden Glass Company, and Crittenden Paint & Glass ("Crittenden") R&O Construction Company was added through a later amendment.

On August 7, 1995, Crittenden filed a motion for summary judgment, which was stayed pursuant to Rule 56(f) of the Utah Rules of Civil Procedure to permit additional discovery. R.333. On January 12, 1996, U.S. Aluminum moved for summary judgment, R.434, On March 4, 1996, Smith's filed a motion for summary judgment. R.537. Finally on April 12, 1996, R&O Construction Company filed for summary judgment, R.656. Ms. McKay responded to Crittenden's motion for summary judgment, but did not file memoranda or affidavits opposing either U.S. Aluminum's or Smith's motions or summary judgment prior to the hearing which was held on March 25, 1996.

At the hearing, the trial court granted McKay ten days to file memoranda opposing the pending motions for summary judgment. However on April 1, 1996, the trial court inadvertently issued a memorandum decision granting the motions for summary judgment filed by Crittenden, U.S. Aluminum and Smith's. On April 2, 1996, Ms. McKay filed a memorandum opposing Smith's motion for summary judgment. R. 666. After Smith's responded, the trial court issued a memorandum decision dated May 7, 1996, granting summary judgment to Crittenden, U.S. Aluminum, R&O Construction, and Smith's. \$.825. The Order granting summary judgment was entered by the Court on May 23, 1996. R.835.

The remaining Defendant, JAMES CHAMBERLAIN, filed a motion for summary judgment on October 18, 1996. R.854. The motion was granted and on Order entered on December 23, 1996. R.900. Ms. McKay filed a Notice of Appeal on December 24, 1996.

C. Statement of Facts

1. On April 18, 1992, Plaintiff tripped on a stainless steel cap which covers the runner for the sliding glass door system at the entrance to Smith's Food and Drug Center located in Logan (R. 252-254).

2. The sliding glass door in question was manufactured and sold by U.S. Aluminum (R. 438).

3. CHAMBERLIN prepared plans for the Logan store, but principally used plans and specifications provided to him by Smith's from other stores (R. 856-857 R. 1353-1359). See also deposition of JAMES O. CHAMBERLIN.

4. R & O Construction was hired as general contractor for the store (R. 1386-1387).

5. Crittenden was sub-contracted to provide and install the sliding glass doors. (R 1584-1586, 1632-1635).

6. The plans and specifications specified Kawneer 1010 sliding glass doors or their equivalent (R. 1463-1469)

7. The sliding glass door system provided by Crittenden and manufactured by U.S. Aluminum was equivalent to the Kawneer 1010 and met the specification requirements of the architect, CHAMBERLAIN (Chamberlain Depo., R. 1376).

8. On October 17, 1996 Defendant CHAMBERLIN submitted his motion for summary judgment and no responsive pleading was filed by McKay. See Memorandum Decision attached as Appendix 1.

SUMMARY OF ARGUMENT

CHAMBERLIN's first argument is that because his motion was not addressed nor objected to by Plaintiff, there is no preservation of issues for appeal and therefore the judgment should be affirmed.

On the second issue, the Court must determine whether CHAMBERLIN met his standard of care in specifying a door which had been used in many similar applications and had never been known to fail.

ARGUMENT

POINT I

HAVING FAILED TO REPLY TO CHAMBERLIN'S MOTION FOR SUMMARY JUDGMENT HAS PLAINTIFF PRESERVED ANY ISSUES FOR APPEAL.

This Court has previously stated:

To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issues' merits... Further, the mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal.

LeBaron v. Assoc., Inc. v. Rebel Enter., Inc., 923 P.2d 479, 482 (Utah Ct. App. 1991).

While in Appellant's brief argument is set forth which independent of other facts would lead to a finding of liability on CHAMBERLIN's part (see also Appellee's Smith's brief), no such argument was brought before the trial court. CHAMBERLIN's motion for summary judgment was granted without opposition.

POINT II

WERE THE ARCHITECT CHAMBERLIN'S ACTIONS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

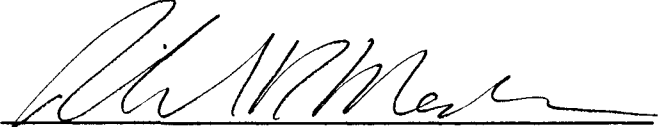
While McKay's brief sets forth what it concludes to be reasons for CHAMBERLIN's liability, their argument must fail. Smith's provided a set of plans which had been initially prepared by their in-house architect Neils Valentiner. While the written plans specified a Kawneer 1010 or equivalent, the architectural drawing specified that Smith's would provide the door. (See Appendix 2). This was the same door that had been provided in many other stores, including those along the Wasatch front and had never been known to fail. As acknowledge by all of the parties, when the written specifications for the door were provided to Mr. CHAMBERLIN for his approval, the words at the top of the page which indicated that the door was for interior use only had been removed in photocopying. Mr. CHAMBERLIN was left with the description of the door which included such comments as "rugged overall construction" and "double weatherstripping". CHAMBERLIN also had access to the specifications on the door (see Appendix 3) providing that the doors could be used for exterior application in certain conditions.

In all of the depositions, the deponents clearly stated that they had never heard of such a failure of the subject door in any condition. As the facts attested, this was a sliding door which was open 364 days a year, being closed only on Christmas. An airlock adjacent to the rail system kept out the cold and storm. The door was also set back from the front of the building. CHAMBERLIN would have had no reason to anticipate any failure thereof.

CONCLUSION

Based upon the foregoing, CHAMBERLIN requests that summary judgment in his favor be affirmed.

DATED this 26th day of November, 1997.


RICHARD R. MEDSKER
Attorney for Defendant/CHAMBERLIN

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Brief of Defendant/Appellee Chamberlin to the following, postage prepaid this 26th day of November, 1997:


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RICHARD R. MEDSKER
Attorney for CHAMBERLIN

IN THE FIRST DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

STEPHANIE MCKAY,

Plaintiff,

vs.

SMITH'S FOOD STORE AND DRUG
CENTERS INC., et al

Defendant.

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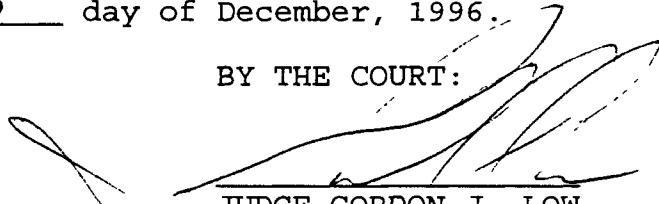
MEMORANDUM DECISION

Case No. 940000025

THIS MATTER IS BEFORE THE COURT upon Defendant Chamberlin's Motion for Summary Judgment. No responsive pleadings having been filed thereto, the Motion is granted. Counsel for Defendant Chamberlin is directed to prepare a formal Order in conformance herewith.

DATED this 5 day of December, 1996.

BY THE COURT:


JUDGE GORDON J. LOW
FIRST DISTRICT COURT

EXHIBIT

#7 Chamblai

F

E

32'-10"

35'-11"

EXTEND SINGLE-PLY ROOF
MEMBRANE UP FULL HT. OF
REAR OF PARAPETS, ETC.

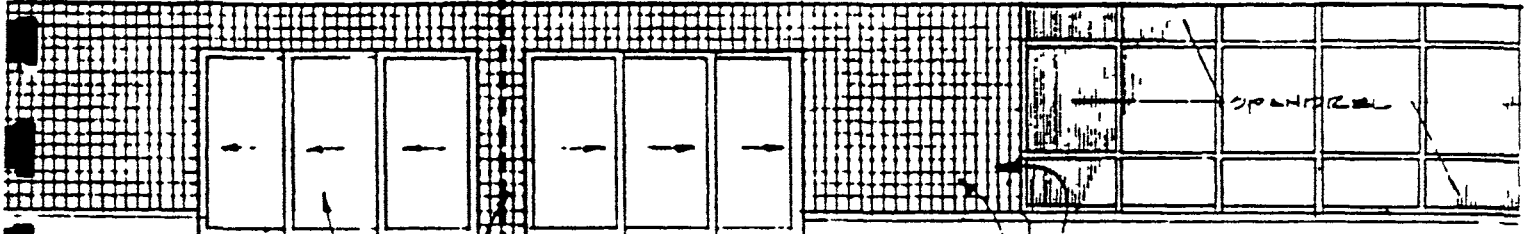
SYNTHETIC FINIS
SYSTEM ON LIGHT
FRAMING

SIGNS BY OWNER
SEE ELEC.

C.I. CURTAIN
RESTRICTED ETC.

WINDOUT
PIER

SPANDREL



FRONT W/
SLOPE

CERAMIC TILE VENEER

SEE DATA IN ASI -
CERAMIC TILE LAY

GLAZED ROOM SLIDING
DOORS BY OWNER

ELECT. CHASE BELOW DOORS

WEST ELEVATION

SCALE 1/8" = 1'-0"

A
A2.1

48'-10"

UNITED STATES ALUMINUM CORPORATION

SERIES 2000 SLIDING DOORS SPECIFICATIONS

I. GENERAL

DESCRIPTION

Work Included The glazing contractor shall furnish all necessary materials, labor, and equipment for the complete installation of aluminum sliding doors as detailed on the drawings and specified herein

Work Not Included. Structural support of the framing system, wood framing, structural steel masonry, final cleaning

QUALITY ASSURANCE

For purposes of designating type and quality for work in this section, drawings and specifications are based on United States Aluminum Corporation Series 2000 sliding doors.

When substitute products are to be considered, supporting technical literature, samples and drawings must be submitted ten (10) days prior to bid date in order to make a valid comparison of the products involved.

PERFORMANCE REQUIREMENTS

Series 2000 sliding doors are designed for interior application. They can be used at exterior only when water penetration, air infiltration and structural performance are not critical

II. PRODUCTS

MATERIALS

Door and frame members shall be extruded architectural aluminum 6063 T5 alloy and temper. Major portion of all door sections, except glazing beads shall be nominal 1/2

inch. Wall thickness of frame members shall be nominal .093 inch. Screws, nuts, washers, bolts, rivets, and other fastening devices shall be aluminum, stainless steel, or other non-corrosive materials. Sliding door floor track shall have stainless steel cover cap. Perimeter fasteners shall be aluminum or steel providing that the steel is properly isolated from the aluminum.

DOOR CONSTRUCTION

Fixed and sliding panels shall be 1 1/2" deep. Stiles and rails shall be tubular sections, accurately joined at corners with heavy concealed reinforcement brackets secured with bolts and screws.

Doors shall have snap-in stops with bulb glazing gaskets on both sides of glass. No exposed screws shall be permitted. A hard-backed poly-pile weatherstrip shall be installed in all interlockers and in meeting stiles of biparting doors. Sliding panels shall be equipped with two tandem ball bearing rollers, each capable of supporting 250 pounds of moving weight

HARDWARE

Hardware for Series 2000 sliding doors shall be the manufacturer's standard. Maximum Security hook lock with two five pin cylinders, flush finger pulls and adjustable tandem steel rollers.

If custom hardware is to be furnished by others, template and physical hardware must be submitted prior to any fabrication.

FINISH

All exposed framing surfaces shall be free of scratches and other serious blemishes. Aluminum extrusions shall be given a caustic etch followed by an anodic oxide treatment to obtain (Specify one of the following).

_____ an Architectural Class I anodic coating conforming to Aluminum Association Standard AA-M12 C22 A44. Specify #125 Dark Bronze or #130 Black

_____ A #100 Clear anodic coating conforming to Aluminum Association Standard AA-M12 C22 A31

III. EXECUTION

INSTALLATION

All items under this heading shall be set in their correct locations as shown in the details and shall be level, square, plumb, and at proper elevation and in alignment with other work in accordance with the manufacturer's installation instructions and approved shop drawings.

Upon completion of the installation of the entrances, it shall be this contractor's responsibility to make all necessary final adjustments to attain normal operation of each door and its mechanical hardware.

PROTECTION AND CLEANING

After installation, the General Contractor shall adequately protect exposed portions of the aluminum entrance work from damage by grinding and polishing compounds, plaster, lime, acid, cement, or other contaminants. The General Contractor shall be responsible for final cleaning.

EXHIBIT

#10 Chamberlain