

1997

McKay v. Smith's Food Store : Brief of Appellee

Utah Court of Appeals

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Karra J. Porter; Christensen .

Lyle W. Hillyard; Herm Olsen; Hillyard, Anderson and Olsen.

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UTAH COURT OF APPEALS

STATE OF UTAH

STEPHANIE McKAY,

Plaintiff and

vs.

SMITH'S FOOD STORE & F
CENTERS, INC., UNITED
ALUMINUM CORPORATION,
JAMES O. CHAMBERLAIN
CRITTENDEN GLASS CO.,
CRITTENDEN PAINT AND GLASS
COMPANY, and R&O CONSTRUCTION
COMPANY,

Defendants and Appellees.

Priority 15

APPEAL FROM A FINAL JUDGMENT AND ORDER
HONORABLE GORDON J. LOW
FIRST JUDICIAL DISTRICT COURT IN AND FOR
CACHE COUNTY, STATE OF UTAH

BRIEF OF APPELLEE CRITTENDEN PAINT AND GLASS COMPANY

Karra J. Porter, 5223
CHRISTENSEN & JENSEN, P.C.
Attorneys for Appellee Crittenden
175 South West Temple, Suite 510
Salt Lake City, Utah 84101

Lyle W. Hillyard
Herm Olsen
HILLYARD, ANDERSON & OLSEN
Attorneys for Appellant
175 East 100 North
Logan, Utah 84321

Stephen G. Morgan
MORGAN & HANSEN
Attorneys for Appellee Smith
136 South Main Street, 8th Floor
Salt Lake City, Utah 84101

Robert Gilchrist
RICHARDS BRANDT MILLER & NELSON
Attorneys for Appellee U.S. Aluminum
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, Utah 84110

Michael W. Homer
H. Michael Drake
SUITTER AXLAND
Attorneys for Appellee R&O Construction
175 South West Temple, Suite 700
Salt Lake City, Utah 84101

Richard R. Medsker
FARR, KAUFMAN, SULLIVAN, GORMAN
JENSEN, MEDSKER & PERKINS
Attorneys for Appellee Chamberlin
205 26th Street, Suite 34
Ogden, Utah 84401

UTAH COURT OF APPEALS

STATE OF UTAH

STEPHANIE McKAY,)	
)	
Plaintiff and Appellant,)	
)	
vs.)	Case No. 970312-CA
)	
SMITH'S FOOD STORE & DRUG)	
CENTERS, INC., UNITED STATES)	
ALUMINUM CORPORATION,)	
JAMES O. CHAMBERLAIN,)	Priority 15
CRITTENDEN GLASS COMPANY,)	
CRITTENDEN PAINT AND GLASS)	
COMPANY, and R&O CONSTRUCTION)	
COMPANY,)	
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Attorneys for Appellee Crittenden
175 South West Temple, Suite 510
Salt Lake City, Utah 84101

Lyle W. Hillyard
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HILLYARD, ANDERSON & OLSEN
Attorneys for Appellant
175 East 100 North
Logan, Utah 84321

Stephen G. Morgan
MORGAN & HANSEN
Attorneys for Appellee Smith's
136 South Main Street, 8th Floor
Salt Lake City, Utah 84101

Robert Gilchrist
RICHARDS BRANDT MILLER & NELSON
Attorneys for Appellee U.S. Aluminum
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, Utah 84110

Michael W. Homer
H. Michael Drake
SUITTER AXLAND
Attorneys for Appellee R&O Construction
175 South West Temple, Suite 700
Salt Lake City, Utah 84101

Richard R. Medsker
FARR, KAUFMAN, SULLIVAN, GORMAN
JENSEN, MEDSKER & PERKINS
Attorneys for Appellee Chamberlin
205 26th Street, Suite 34
Ogden, Utah 84401

LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are listed in the caption on appeal.

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JURISDICTION

Jurisdiction in this Court is pursuant to Utah Code Ann. § 78-2a-2(3)(j); jurisdiction in the Utah Supreme Court prior to transfer was pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES FOR REVIEW

1. Did appellant McKay waive a challenge to the dismissal of Crittenden by failing to offer any analysis in her brief?

Standard of Review: The sufficiency of argument in a brief on appeal is a question of law. Burns v. Summerhays, 927 P.2d 197, 199-200 (Utah App. 1996).

Preservation in record: The absence of argument in appellate briefing is not an issue which was subject to presentation to the district court.

2. Did the district court correctly rule that Crittenden was entitled to judgment because there was no evidence that the specifications provided to Crittenden were so patently dangerous that no reasonable person would have followed them?

Standard of Review: Whether a genuine issue of material exists regarding the elements of a claim is a question of law. Mills v. Brody, 929 P.2d 360, 362 (Utah App. 1996).

Preservation in record: This issue was raised in the district court in connection with defendant Crittenden's motion for summary judgment and the memoranda filed by the parties. (R. 333, 392, 597).

STATUTES, ORDINANCES, AND RULES

There are no determinative statutes, ordinances, or rules.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, and disposition in the court below.

Appellant Stephanie McKay was injured when she allegedly caught her heel on an exposed cable from a sliding glass door system of a Smith's Food Store & Drug Center in Logan, Utah. She filed an action against defendant Smith's Food Store & Drug Centers (R.1), who in turn brought a third-party complaint against the installer of the system, Crittenden Glass Company and its successor, Crittenden Paint and Glass Company (hereinafter collectively "Crittenden"), the manufacturer, United States Aluminum Corporation, and the architect, James O. Chamberlin (R. 28). Subsequently, plaintiff filed amended complaints adding the general contractor, R & O Construction, and naming the other defendants directly. (R. 52, 252).

Crittenden, U. S. Aluminum, and Smith's filed motions for summary judgment. (R. 333, 434, 528). Oral argument was heard on all pending motions, at the conclusion of which McKay was given additional time to respond to defendant Smith's motion. (R. 666). Defendant R & O subsequently filed a motion for summary judgment (R. 656).

Upon completion of all briefing, the district court issued a memorandum decision dated May 7, 1996, granting the motions of Crittenden, R & O, U.S. Aluminum, and Smith's. (R. 825). An Order and Judgment to that effect was entered May 23, 1996 (R. 836). McKay filed a notice of appeal from that order on June or July 5, 1996. (R. 848).¹

¹ While the district court's records indicate that the notice was filed on July 5, 1996, the court's file reflects that the notice was received June 5, 1996. (R. 848).

McKay subsequently filed a Motion for Determination of Final Order, asking the district court to designate the May 23, 1996, Order and Judgment as final for purposes of appeal, because plaintiff's claims against defendant Chamberlin and Smith's third-party claims against the other defendants remained unresolved. (R. 840). A memorandum decision granting the motion was issued by the district court on August 15, 1996, instructing plaintiff's counsel to prepare an order. (R. 852).

On October 15, 1996, defendant James Chamberlin filed a motion for summary judgment. (R. 854). The motion was unopposed, and a memorandum decision granting the motion was issued by the district court. (R. 898). Accordingly, on December 23, 1996, the district court entered an Order Dismissing Defendant James O. Chamberlin. (R. 900). A Notice of Appeal was filed December 24, 1996, appealing that order. (R. 903).

On March 27, 1997, a Notice to Submit for Decision was filed by McKay regarding her motion for determination of final order. (R. 914). On April 3, 1997, the district court entered a Final Order pursuant to Rule 54(b), which encompassed the May 23, 1996, order dismissing the plaintiff's claims against Crittenden and the other defendants. (R. 920).

Statement of Facts

For purposes of Crittenden's motion for summary judgment, the following facts were assumed true or were uncontroverted below:

On April 18, 1992, Stephanie McKay was injured while entering a Smith's grocery store in Logan, Utah. McKay allegedly tripped over a cable which had come loose from the track of sliding glass doors in the storefront entrance. (R. 252).

Defendant Crittenden had installed the sliding glass door system in approximately July/August 1989. (R. 336).

Defendant James O. Chamberlin was the architect of record hired by Smith's for the Logan project. (R. 336, 348-349). Chamberlin has nearly 30 years' experience as an architect in Utah and surrounding states. (R. 336, 384). Chamberlin's architectural firm "has executed designs for a large number of outstanding projects, including office buildings, government facilities, banks, educational buildings, correctional facilities, hospitals and many others." (*Id.*)

Smith's has utilized Chamberlin's services as an architect on several occasions, both before and since the Logan project. (R. 336, 350-352). When Chamberlin was contacted by Smith's regarding the Logan project, he was provided with a specification book utilized by the architect on a recent Smith's store in Arizona. (R. 337, 350-355). Chamberlin reviewed the specification book, and made modifications as he deemed necessary. (R. 337, 352, 355-357, 361). Prior to installation, Chamberlin personally observed the setting into which the sliding glass door system was to be placed. (R. 337, 365-366).

The specifications prepared by Chamberlin relevant to the entry systems included the following language:

Part 1 - General

* * *

Drawings are based on one manufacturer's standard aluminum sliding entrance and storefront system. Another standard system of a similar or equivalent nature will be acceptable when differences do not materially detract from design concept or intended performances, as judged solely by Architect. Aluminum system standards shall be based on Kawneer 1010 Sliding Mall Front and Kawneer Trifab 450/451 framing system.

* * *

Available manufacturers: Subject to compliance with requirements, manufacturers offering products which may be incorporated in the work include, but are not limited to, the following:

Amarlite/Acro Metals Co.
Arcadia, Northrop Architectural Systems
Kawneer Company, Inc.
Tubelite Div., Indal Inc.
United States Aluminum Corpo., International Alum. Corp.

* * *

Part 2 - Products

* * *

SLIDING EXTERIOR ENTRANCE DOORS

Provide aluminum sliding glass entrance doors as identified on drawings, and as follows:

Quality Assurance: Drawings and specifications are based upon the 1010 Sliding Mall Front system as manufactured by the Kawneer Company, Inc. Whenever substitute products are to be considered, supporting technical literature, samples, drawings and performance data must be submitted ten (10) days prior to bid in order to make a valid comparison of the products involved.

Materials: Extrusions shall be 6063-T5 alloy and temper (ASTM B 221 alloy G.S. 10A-T5). Fasteners, where exposed, shall be aluminum stainless steel or plated steel in accordance with ASTM A 164. Perimeter anchors shall be aluminum or steel, providing the steel is properly isolated from the aluminum. Glazing gaskets shall be vinyl extrusions. [T]rack inserts shall be 22 gauge, roll formed stainless steel.

Fabrication: Sliding panels shall have a nominal depth of 1-1/2" (38.1 mm) each to insure rigidity and prevent racking. The weight of each panel shall be supported by the base tracks. Sliding panels shall be equipped with two center pivoted spring loaded, tandem wheel assemblies, each capable of supporting a moving weight of 275 pounds (4664.7 Kg) and shall be equipped with two self-contained, steel ball bearing rollers. Sliding panels shall not be removable when in a locked position.

(R. 337-339, 388-391) (original emphasis).

Chamberlin reviewed the specifications regarding the sliding glass door system and concluded they were adequate for their intended purpose. (R. 339, 357, 359-360).

The door installed by Crittenden was manufactured by United States Aluminum Corp., one of the manufacturers approved in Part 1. (R. 259, para. 34). Chamberlin approved the use of the United States Aluminum 2000 door system as equivalent to the Kawneer 1010. (R. 362-363, 375). There is no dispute that the U.S. Aluminum 2000 is equivalent to the Kawneer 1010, as called for in the specifications, and that the sliding glass door system installed by Crittenden complied with specifications. (R. 259, para. 34, 340, 380).

The U. S. Aluminum 2000 and Kawneer 1010 sliding glass systems are both designated by their manufacturers as for interior use. (R. 339). Chamberlin testified that in his view, the Smith's storefront where the sliding glass door system was installed is essentially interior in nature, because the area is covered and the doors are utilized only once a year (on Christmas). (R. 339, 364-369).

Chamberlin believed that the U.S. Aluminum 2000 doors and their track were sufficient to meet the purposes for which the store would be used, and that he "had no reason to think that [the track] would fail." (R. 340, 366, 370-372, 381). Chamberlin believed that the track as installed would be impervious to the weather, because it is aluminum and stainless steel, and is set in concrete. (R. 340, 366). Chamberlin further considered that the entrance would be subject to foot traffic and grocery carts, not heavy traffic, as the store had a loading dock at the rear of the store. (R. 340, 367-368).

Chamberlin and the project manager for Smith's inspected the sliding glass door system as part of a final inspection on the project. (R. 341, 376-378). Chamberlin did not observe any problems with the doors or threshold. (R. 341, 378). Chamberlin concluded that the doors and threshold were properly installed, and McKay did not allege otherwise. (R. 341, 379, 382).

The same or equivalent storefront has been utilized in many other Smith's stores in Utah and elsewhere. (R. 340, 357-358). Other than the present claim asserted by McKay, there have been no problems with the system. (R. 340, 373-374).

SUMMARY OF ARGUMENT

McKay's brief on appeal does not offer any analysis of why the district court's order dismissing Crittenden was allegedly erroneous. Crittenden's motion for summary judgment was separate from, and based upon different grounds than, the other defendants, yet there is no discussion of those grounds in McKay's brief, and it would be patently unfair and in violation of appellate rules for McKay to assert any such arguments in her reply brief. The lack of analysis or authority is sufficient grounds in itself to affirm the judgment.

In any event, the district court correctly ruled that Crittenden was entitled to summary judgment because there was no evidence that the specifications followed by Crittenden were patently dangerous. It is well established in Utah, and was not disputed below, that a contractor is not liable to a third party for complying with specifications, unless those specifications are so obviously dangerous that no reasonable person would follow them. In this case, there was no such evidence.

ARGUMENT

I. THE JUDGMENT IN FAVOR OF CRITTENDEN SHOULD BE AFFIRMED BECAUSE MCKAY HAS NOT OFFERED ANY ANALYSIS IN HER BRIEF AS TO HOW THE DISTRICT COURT ALLEGEDLY ERRED.

McKay's brief on appeal appears to be devoted primarily to challenging the dismissal of defendant Smith's. The only "argument" contained within it pertaining to Crittenden is the following single paragraph:

5. Crittenden Paint & Glass Company admitted that the bid documents it sent to the architect James Chamberlain and the general contractor, R&O Construction, did not have the words "for interior use application only" as a part of its submission, and that Crittenden would likely have been the one to have cropped that language off.

McKay does not make any legal argument from that contention, does not cite any authority, does not analyze any part of the district court's ruling or the parties' prior briefing incorporated in that ruling as they pertained to Crittenden. "Rule 24(a)(9) of the Utah Rules of Appellate Procedure states that the parties' briefs to this court 'shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.'" First Security Bank of Utah v. Creech, 858 P.2d 958, 962 (Utah 1993) (contention on appeal not considered where appellant "presents no analysis or reasoning and cites no authority"). "A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." Butler Crockett v. Pinecrest Pipeline, 909 P.2d 225, 230 (Utah 1995), quoting State v. Bishop, 753 P.2d 439, 450 (Utah 1988).

It is impossible to discern from McKay's brief which, if any, aspects of the district court's analysis concerning Crittenden she claims to be erroneous. There is scarcely a recognition that Crittenden filed a separate motion for summary judgment, including grounds entirely distinct from defendant Smith's. There is no acknowledgment of the basis for the court's ruling in favor of Crittenden, no discussion of the legal issues raised by Crittenden's motion, no effort made to show this court how the district court supposedly erred in granting the motion. "[T]o permit meaningful appellate review, briefs must comply with the briefing requirements sufficiently to 'enable us to understand what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities, those errors are material ones necessitating reversal or other relief.'" Burns v. Summerhays, 927 P.2d 197, 199-200 (Utah App. 1996) (appellate review not permitted where "appellant failed to provide adequate legal analysis and legal authority in support of his claims").

Because McKay has not provided any analysis or authority for overturning the dismissal of Crittenden, and because Crittenden would not have an opportunity to respond if McKay sought to make such assertions in her reply brief, the judgment should be affirmed.

**II. CRITTENDEN CANNOT BE HELD LIABLE
BECAUSE THE SLIDING GLASS DOOR SYSTEM
COMPLIED WITH SPECIFICATIONS WHICH
WERE NOT PATENTLY DANGEROUS.**

It was undisputed in the court below that the sliding glass door system installed by Crittenden complied with the specifications provided to it. Consequently, under well-established Utah law, liability could not be imposed upon Crittenden unless those specifications were "so obviously

dangerous that no reasonable man would follow them.” Leininger v. Stearns-Roger Manufacturing Co., 17 Utah 2d 37, 404 P.2d 33 (1965), quoted in Baxter v. Weldotron Corp., 840 F.Supp. 111, 114 (D.Utah 1993); Benson v. Ames, 604 P.2d 927, 929 (Utah 1979); Andrus v. State, 541 P.2d 1117 (Utah 1975).

"The rule of law in this area, as stated by the Utah Supreme Court, is that:

A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury."

Baxter, 840 F.Supp. at 114 , *quoting* Leininger, 404 P.2d at 33 (1965). Thus, as the Utah Supreme Court has observed,

An important limitation on the rule placing building contractors on the same footing as sellers of goods is that the contractor is not liable if he has merely carried out the plans, specifications and directions given him, since in that case the responsibility is assumed by the employer, at least when the plans are not so obviously dangerous that no reasonable man would follow them.

404 P.2d at 36.

The Supreme Court reaffirmed applicability of this general rule in Benson v. Ames, 604 P.2d 927, 929 (Utah 1979), stating:

As a general rule, a construction contractor who adequately follows a defective set of plans submitted to him by the owner of the property is not liable to third persons injured as a result of the defect, unless the plans submitted by the owner were so obviously dangerous that under the circumstances no reasonable contractor would have followed them.

Id. at 929, *citing* Andrus, *supra*.

This rule of law was not disputed below. The sole issue to be determined by the court, therefore, was whether a genuine issue of material fact existed as to whether the specifications for the Logan Smith's store were so obviously dangerous that no reasonable person would follow them. The evidence adduced below not only did not raise any such inference, but rather soundly showed that the specifications were reasonable on their face.

After personally observing the setting into which the door system would be installed, the architect of record for the project, a Utah resident with substantial experience in this area and in grocery store design, concluded that the system installed was appropriate for the Logan store. Chamberlin further concluded that the U. S. Aluminum 2000 system was fit for the purpose intended, and that it was properly installed by Crittenden.

The identical sliding glass door system specified for the Logan store has been used in other stores for years. There has been no other accident involving the system. (R. 340, para. 18, 608-610). The director of store planning for Smith's, who is a licensed architect and has worked for Smith's for ten years, testified that the U.S. Aluminum system was fit for its intended purpose at the Logan store, and that "from the experience of other stores, it seemed to function quite well." (R.604-607, 611).

McKay's complaint that the door installed was designated for "interior use" does not affect the result. In Chamberlin's opinion as an architect, the sliding glass door area of the Logan store was essentially interior in nature because of its particular location and characteristics. Moreover, the informational material provided by U.S. Aluminum expressly indicates that the system may be used as an exterior door system under certain conditions. Lee Crittenden testified, without contradiction, to his belief that those conditions would be satisfied at the Logan store. (R. 615-622).

For similar reasons, McKay's complaint that catalog pages submitted by Crittenden to the architect for approval did not include the words "for interior use only" at the top could not create a fact issue. It was undisputed that U.S. Aluminum was an approved manufacturer, and that the system installed by Crittenden was equivalent to the Kawneer system identified in the specifications.. (R. 614) Moreover, the project architect was familiar with the U.S. Aluminum system from other projects, and testified that inclusion of the words "for interior use only" would not have made any difference in his approval of the system. (R.625-626).

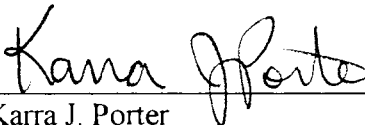
There simply was no evidence in the court below that the specifications were "obviously dangerous," let alone to such a degree that no reasonable person would follow them. In light of the long and successful use of these identical specifications, the reasonable interpretation of U.S. Aluminum promotional material to allow this particular use, and approval of the U.S. Aluminum system by knowledgeable architects, all of which was undisputed below, the district court correctly concluded that there was is no genuine issue of material fact precluding summary judgment.

CONCLUSION

For the reasons set forth above, Crittenden respectfully requests the Court to affirm the judgment dismissing defendant Crittenden.

RESPECTFULLY SUBMITTED this 27th day of October, 1997.

CHRISTENSEN & JENSEN, P.C.



Karra J. Porter
Attorneys for Appellee Crittenden Paint and Glass Co.

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of October, 1997, two true and correct copies of the foregoing **BRIEF OF APPELLEE CRITTENDEN PAINT AND GLASS COMPANY** were mailed, first-class postage prepaid, to:

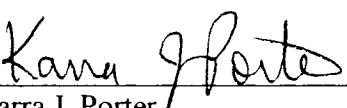
Lyle W. Hillyard
Herm Olsen
HILLYARD, ANDERSON & OLSEN
Attorneys for Appellant
175 East 100 North
Logan, Utah 84321

Stephen G. Morgan
MORGAN & HANSEN
Attorneys for Appellee Smith's
136 South Main Street, 8th Floor
Salt Lake City, Utah 84101

Robert Gilchrist
RICHARDS BRANDT MILLER & NELSON
Attorneys for Appellee U.S. Aluminum
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, Utah 84110

Michael W. Homer
H. Michael Drake
SUITTER AXLAND
Attorneys for Appellee R&O Construction
175 South West Temple, Suite 700
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FARR, KAUFMAN, SULLIVAN, GORMAN
JENSEN, MEDSKER & PERKINS
Attorneys for Appellee Chamberlin
205 26th Street, Suite 34
Ogden, Utah 84401



Karra J. Porter
Attorneys for Appellee Crittenden Paint and Glass Co.