1997

Catherine Brown v. Chris Glover dba Chick-Fil-A of Fashion Place, HAHN Property Management Corporation, a California corporation dba HAHN Company : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CATHERINE BROWN,

Plaintiff/Appellant,

vs.

CHRIS GLOVER, d/b/a CHICK-FIL-A, INC. of FASHION PLACE, HAHN PROPERTY MANAGEMENT CORPORATION, a California corporation d/b/a HAHN COMPANY,

Defendants/Appellees.

Appeal No. 970694-CA

Priority No. 15

BRIEF OF APPELLEES

APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM B. BOHLING, DISTRICT JUDGE

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the district court in a civil case. This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-3(4) and Utah Code Ann. § 78-2A-3(2)(j).

ISSUES PRESENTED

Appellant Brown asserts that there are six issues on appeal; however, the first two issues that she lists are not properly before the court. Issues 1 and 2 concern the court's supposed denial of her motion to continue and motion to compel. Judge Bohling did not rule on either of these motions, as he treated them as moot in light of his other rulings.[1] (Summary Judgment and Order of Dismissal With Prejudice, R. 449-450.) Brown does not argue that Judge Bohling erred in ruling that these motions were moot. Issue Nos. 3, 4, and 5, as described by Brown, all relate to Judge Bohling's denial of Brown's Rule 56(f) motion to continue in order to allow further discovery. Accordingly, only two issues are presented to this court for review:

1. Whether the trial court abused its discretion by denying plaintiff's motion to continue the summary judgment hearing pursuant to Utah R. Civ. P. 56(f); and

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[1] Although the court's order does not expressly find that plaintiff's motion to compel was moot, the transcript makes clear that the court felt that it did not need to consider the motion unless the motion for summary judgment had been denied. *(See* Transcript of Hearing, R. 52.) In addition, it is clear that the court did not ignore plaintiff's conflict with regard to the trial date; the court indicated that if the motion for summary judgment had been denied, the trial date would have likely been changed in order to accommodate counsel's schedule. *Id.*

2. Whether the trial court committed error by granting defendant's motion for summary judgment.

STANDARD OF REVIEW

This court reviews the trial court's decision to deny Brown's 56(f) motion for abuse of discretion. *Downtown Athletic Club v. Horman*, 740 P.2d 275, 277 (Utah App. 1987). As to the trial court's grant of Chick-Fil-A' motion for summary judgment, this court reviews the trial court's ruling for correctness. *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993).

DETERMINATIVE STATUTES

The trial court's denial of plaintiff's motion to continue and granting of defendant's motion for summary judgment are governed by Utah R. Civ. P. 56, which provides as follows:

> **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

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

Plaintiff Catherine Brown claims that she was injured due to a fall which occurred as she was walking through the Fashion Place Mall in Murray, Utah. In the Complaint, Brown alleges that she slipped and fell on a piece of chicken which was located in the walkway of

the mall. (Second Amended Complaint, R. 42.) Brown filed this case against Chris Glover, the owner and operator of a Chick-Fil-A restaurant located in the Fashion Place Mall, and against Hahn Property Management Corporation dba Hahn Company, the property manager for the Fashion Place Mall.[2]

On March 31, 1997, Chick-Fil-A filed a motion for summary judgment asserting that there was no genuine issue as to any material fact regarding the issue of liability for Brown's accident. (R. 176-219.) In response, Brown filed several motions: a motion to continue the trial and vacate the scheduling order, a motion to continue the summary judgment hearing pursuant to Utah R. Civ. P. 56(f), and a motion to compel discovery. (R.301-303, 325-327, 330-331.) Brown also filed a memorandum in opposition to the motion for summary judgment. (R. 332-390.)

At the hearing on these motions, the court denied Brown's Rule 56(f) motion based on the court's finding that the additional discovery would not be material to the issues raised by Chick-Fil-A's motion, and due to Brown's failure to conduct the discovery in a timely manner. The court then granted Chick-Fil-A's motion for summary judgment. Brown's motion to continue the trial and vacate the scheduling order was deemed moot by the grant of the motion for summary judgment. Summary Judgment and Order of Dismissal with Prejudice. (R. 449-451.) The Notice of Appeal was filed on August 6, 1997. (R. 455-456.)

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[2] Defendants will be referred to collectively as "Chick-Fil-A."

B. Statement of Facts Relevant to the Issues Presented.

1. Facts relevant to Chick-Fil-A's motion for summary judgment.

As stated in Chick-Fil-A's motion for summary judgment, the relevant facts are as follows:

1. On January 18, 1994, Brown was walking past the entrance to The Gap clothing store in the Fashion Place Mall in Murray, Utah, when she slipped on a substance which may have been a piece of chicken and fell. (Deposition of Catherine Brown, pp. 116-119, R. 190-193; Declaration of Lisa Rose, R. 209-211.)

2. The entrance to The Gap store where Mrs. Brown fell is approximately 100 feet away from the entrance to the Chick-Fil-A Restaurant. (Declaration of Lisa Rose, ¶ 5, R. 210.)

3. Defendant Hahn Property Management Corporation is the owner and operator of the Fashion Place Mall. (Second Amended Complaint, ¶ 4, R. 41.)

4. Defendant Chris Glover was the owner and operator of the Chick-Fil-A fast food restaurant located in Fashion Place Mall. (Second Amended Complaint, ¶ 2, R. 40.) Glover had been employed by Chick-Fil-A since 1982, and in management or supervisory positions since 1988. (Glover deposition, pp. 10, 15-16, 18-19, R. 194-198.)

5. As a part of his marketing efforts, defendant Glover instructed his employees to give out samples of chicken to Mall patrons as they passed by in front of the Chick-Fil-A store. (Glover deposition, pp. 23-24, R. 202-203.)

6. Handing out samples is a standard marketing technique, practiced nationwide at Chick-Fil-A Restaurants. The procedure for sampling was as follows: a Chick-Fil-A employee would stand at the entrance to the restaurant with a small table containing pieces of cut-up chicken. The employee would put toothpicks in the chicken, and offer it to mall patrons as they walked in front of the restaurant. The employees were instructed that while handing out the samples, they were to monitor the area and continuously keep it clean and clear of any debris. (Glover deposition, pp. 20-24, 37-38, R. 194-208, 199-205.)

7. Employees were also required to place a trash can at the entrance to the restaurant next to the table set up for sampling, easily available to those who accepted samples. (Glover Deposition, p. 46, R. 208.)

8. Defendant Glover never received any complaints from customers regarding the way that sampling was conducted, and has no recollection of ever seeing any chicken which had been dropped in the mall common area as a result of sampling. (Glover Deposition, pp. 44-45, R. 206-207.)

9. The Fashion Place Mall had never at any time received any information, whether from customer complaints or otherwise, to indicate or imply that the sampling procedures used by Chick-Fil-A, Defendant Glover, or any other mall tenant were unsafe or raised any risk of injury to Mall patrons. Other than the incident giving rise to this case, Fashion Place Mall has never been notified of any accidents related in any way to the practice of food sampling. (Declaration of Lisa Rose, ¶¶ 6, 7, R. 210-211.)

2. Facts relevant to Brown's Rule 56(f) motion.

Brown's original complaint, along with a set of interrogatories and requests for production of documents, were served on defendant The Hahn Company on October 19, 1995. Chris Glover dba Chick-Fil-A was substituted as a defendant on January 15, 1996, and Brown's Second Amended Complaint was filed on February 6, 1996. (R.32-47.) The parties began discovery of the facts of this case immediately thereafter, and on March 29, 1996, Chick-Fil-A noticed the deposition of Brown, which was conducted on April 29, 1996. (R. 55-57, 89-94.) Defendant Glover's deposition was taken on June 25, 1996. (R. 82-83.) On August 26, 1996, Brown served Chick-Fil-A with a set of interrogatories requesting a list of employees working on the day of Brown's accident. (R. 97-98.)

On October 30, 1996, the court entered a scheduling order in this case, setting various deadlines, including a March 14, 1997 discovery cut-off, a dispositive motion deadline of March 31, 1997, and a trial date of June 3, 1997. (R. 106-107.)

On December 3, 1996, Brown's counsel sent a letter inquiring as to the status of the outstanding discovery requests. On February 24, 1997, Chick-Fil-A responded to Brown's request for production of documents, providing, among other things, a list of all persons employed by the Fashion Place Mall Chick-Fil-A at the time of Brown's accident. (R.148-158.) This exact same information was again provided to Brown in Chick-Fil-A's responses to Brown's interrogatories, which were served on March 24, 1997. (R.168-173.) On March 13, 1997, the parties stipulated to extend the discovery period until April 15, 1997.

(R. 316.) At that time, Brown did not indicate that any additional time was necessary in order to complete discovery, or that the discovery responses which Chick-Fil-A had earlier provided were in any way inadequate.

On March 31, 1997, the final day allowed under the court's scheduling order for dispositive motions, Chick-Fil-A filed a motion for summary judgment. (R.218-219.) In response to this motion, Brown filed twenty-seven notices of depositions to be taken during the last week of May, 1997, well after the close of discovery, and only days before the trial was scheduled to begin on June 3, 1997. (R. 222-231, 253-298.) These notices were to schedule depositions of the employees listed in Chick-Fil-A's discovery responses, along with Mall personnel and a Rule 30(b)(6) deposition of defendant Hahn Property Management Co.

ARGUMENT

A. The Trial Court Did Not Abuse its Discretion in Denying Brown's Rule 56(f) Motion to Continue.

In considering whether a trial court has abused its discretion in denying a Rule 56(f) motion to continue, the appellate court should consider whether there is a reasonable basis for the court's ruling. *See Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993) (trial court's action reviewed on abuse of discretion standard should be reversed only if found to be without any reasonable basis).

The trial court denied Brown's request for a Rule 56(f) continuance for two reasons: first, because the discovery which Brown sought to conduct could have been done well

before the summary judgment motion was filed, and second, because the information sought was not material to the grounds for Chick-Fil-A's motion.

1. There is a reasonable basis for the trial court's finding that Brown could have conducted all necessary discovery prior to the summary judgment motion.

The court's ruling that Brown had an adequate time to complete her discovery is based upon several simple facts. First, although there was some delay in Chick-Fil-A's responses to Brown's discovery requests, all requested discovery was provided well before the close of discovery and the dispositive motions deadline which had been established by the court. Second, even after this information had been provided, Brown made no effort to follow up within the known deadline, and even stipulated to an extension of that deadline without making any effort to conduct further discovery by scheduling depositions or seeking additional information from Chick-Fil-A.

Brown asserts that the list of employees was vital to her discovery efforts, implying that they had been anxious to receive this information, but even after the employee list had been provided to Brown on February 24, 1997, she made no effort to follow up on that information and schedule depositions until after Chick-Fil-A's motion had been filed and the discovery deadline was about to pass. At that point, Brown's only effort was to issue notices which attempted to schedule depositions long after the discovery deadline, and only a matter of days before the trial was scheduled to begin.

Thus, even though Brown was aware of the impending deadlines, both for the end of discovery and the upcoming trial, no attempt was made to notice the depositions within the time allowed. Brown even stipulated to an extension of the discovery period until April 16, 1997, with no hint that this would not be sufficient time in which to conduct all necessary discovery. It was thus apparent to Judge Bohling that Brown had not seen any need to depose the Chick-Fil-A employees until after Chick-Fil-A's motion made it apparent that the evidence would not support Brown's claims.

In all of the cases cited by Brown, the party seeking a Rule 56(f) continuance was still properly conducting discovery within the time allowed under any existing scheduling orders. *See Drysdale v. Ford Motor Co.*, 947 P.2d 678 (Utah 1997); *Cox v. Winters*, 678 P.2d 311 (Utah 1984); *Auerbach's Inc. v. Kimball*, 572 P.2d 376 (Utah 1977). In contrast, this is not a case in which a motion for summary judgment was granted before discovery was complete. Rather, Judge Bohling's denial of Brown's request for a continuance was reasonably based upon the fact that Brown made no attempt to conduct the discovery until after the long-established deadlines for conducting that discovery had passed.

Brown was obviously aware of the impending deadlines for completing all discovery. If it is true, as Brown asserts, that she always intended to depose these employees, and was only prevented from doing so by Chick-Fil-A's failure to provide the list earlier, there is still no explanation for Brown's complete failure to seek to depose these employees within the discovery deadline even after they knew the employees' identities. There is thus no

explanation for Brown's failure to abide by the scheduling order set by the court, and Judge Bohling reasonably found that Brown's untimely attempt to re-open discovery at that point was an insufficient basis for allowing a continuance pursuant to Rule 56(f).

Chick-Fil-A's motion for summary judgment was filed on the last day such motions would be allowed under the scheduling order, and only two weeks before the end of the discovery period as it had been extended by stipulation. In essence, Brown is arguing that Chick-Fil-A's motion for summary judgment is premature, even though it was filed on the last day allowed for such motions under the court's order. In denying Brown's motion to continue, Judge Bohling did nothing more than require Brown to abide by the long-established scheduling order in this case. Far from being unreasonable, such a result should be expected, if a court's scheduling order is to have any meaning at all.

2. There is a reasonable basis for the trial court's finding that the additional discovery sought by Brown would not have been material to the issues presented by Chick-Fil-A's motion for summary judgment.

One of the recognized grounds for denying a request for a continuance under Rule 56(f) is that the requested discovery would not be likely to provide evidence relevant to the specific issues raised by the pending motion for summary judgment, or that the reasons stated for the discovery indicate that the party seeking the continuance is "merely on a 'fishing expedition' for purely speculative facts after substantial discovery has been conducted without producing any significant evidence." *Downtown Athletic Club v. Horman*, 740 P.2d 275, 278 (Utah App. 1987), *quoting Cox v. Winters*, 678 P.2d 311, 313-14 (Utah 1984).

In her Rule 56(f) affidavit, Brown's counsel asserted that additional discovery was necessary in order to establish eight listed factual issues:

a. The skill of the employees serving the chicken;

b. The policies and procedures actually in place for handing out chicken samples;

c. The method for handing out chicken samples, specifically: how often the servers went over the lease line into the mall common area; how often the area was cleaned; how far into the mall the cleaning extended; how the chicken was prepared; how large the pieces were cut; how often chicken was dropped on the floor; who was served chicken;

d. The substance of the lease agreement between Defendant Hahn and Defendant Chick-Fil-A;

e. Whether warnings were issued from Defendant Hahn to Defendant Chick-Fil-A regarding Defendant Chick-Fil-A's activity within the mall common area;

f. Defendant Hahn Management's responsibilities for the care and upkeep of the mall common area, including any cleaning records;

g. The sum and substance of any discussions between Defendant Hahn and Defendant Chick-Fil-A regarding Plaintiff and the accident in question; and

h. The sum and substance of any accident reports for the years 1990 through present.

Affidavit of Nancy Mishmash. (R. 393-396)

As the trial court found, none of these factual issues had any substantial likelihood of altering the court's ruling on the motion for summary judgment. Issues "d" through "h" are not even relevant to the claims Brown has made in her Complaint. The Second Amended Complaint asserts only that Chick-Fil-A was negligent due to the fact that the sampling practice was allegedly an inherently dangerous activity. There is no allegation that Chick-Fil-A's cleaning practices were inadequate or that Chick-Fil-A was aware of the specific hazard which caused Brown's fall. Accordingly, the relationship between the Hahn Company and Chick-Fil-A, and the cleaning practices of the mall, are both irrelevant to the claims. Likewise, the existence of other slip-and-fall accidents throughout the mall is not relevant to a determination of whether the sampling done by Chick-Fil-A was "inherently dangerous" under the law.[3]

With regard to the factual issues "a" through "c" listed above, Brown was apparently seeking to discover additional details about the specific sampling practices of Chick-Fil-A, and the qualities of the food itself. However, additional details about these sampling procedures would not have been relevant to the court's consideration of the motion, which was based on the well-established fact (which is mirrored in the allegations of the complaint)[4] that the employees were handing out pieces of chicken on toothpicks. Defendant

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[3] Indeed, Chick-Fil-A had already provided Brown with all records of slip-and-fall accidents which had occurred at the mall, and Brown had not found this information significant in opposing Chick-Fil-A's motion.

[4] The complaint alleges only that chicken samples were being handed out, and does not assert that there is anything unusual about the method of distribution itself, instead

Glover had already testified as to the policies and procedures followed in conducting the sampling, and this evidence was presented to the court. There is no hint in the record that there is anything unusual about the practice as conducted at Chick-Fil-A, and Brown herself did not assert that the employees were doing anything other than simply handing out samples of chicken on a toothpick.[5]

Thus, Brown's desire to depose 27 Chick-Fil-A employees is nothing more than a "fishing expedition," which is insufficient to support a Rule 56(f) continuance. *See Downtown Athletic Club v. Horman*, *supra*, 740 P.2d at 278. The court's ruling was based on the clear law, as explained in section "B" below, which establishes that the practice of handing out food to store patrons is not an inherently dangerous activity, and that the particular qualities of the food, i.e., whether the pieces were large or small, or whether the chicken was greasy, is immaterial to the liability issue. If Brown believed or suspected that some other, more dangerous, activity were taking place with regard to the chicken sampling, such is not even alleged to have taken place.

Indeed, Brown's "pinnacle" argument, as described in their brief, is that "Defendant's method of operation, i.e., offering samples of greasy chicken in the mall concourse, created

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alleging only a failure to prevent mall patrons from carrying the chicken samples away from the store. (*See* Second Amended Complaint, ¶¶15, 18-19, 21-24, R. 40-47.)

[5] The only complaint that Brown could make regarding the specific sampling methods of Chick-Fil-A was that the employees would approach mall patrons beyond the store's lease line to offer the samples. (R. 334) This fact was assumed for purposes of the court's ruling on the motion for summary judgment and Brown's counsel argued this point extensively at the summary judgment hearing.

a dangerous condition such that Plaintiff need not prove actual or constructive notice of the condition. . . . In order to advance this theory, Plaintiff needed to talk with the Chick-Fil-A employees that actually distributed the chicken to the mall patrons." Brief of Appellant, pp. 20-21. To the contrary, Brown did not need to depose any Chick-Fil-A employees to establish this theory; the fact that these employees were handing out food in the mall was assumed for purposes of the summary judgment motion, and Brown made extensive argument based upon this theory to the trial court.

The theory Brown proposed is exactly the fact situation that the trial court assumed when it made its ruling; the court accepted Brown's version of the facts for purposes of making the argument on summary judgment, and found that such facts did not support a finding of liability under the applicable law. *(See* Transcript of Hearing, pp. 48-51.) Whether Brown might actually have been able to prove such a theory by additional discovery was thus deemed by the court to be irrelevant. The law which forms the basis for the court's ruling in this case does not depend upon a factual issue of whether the food is handed out inside or outside the lease line of the store, and how many other people are nearby. Rather, the court simply applied the clearly established law to hold that these details are not relevant to the liability issue.

B. The Trial Court Was Correct in Finding That Chick-Fil-A's Food Sampling Is Not an Inherently Dangerous Activity.

It should be noted that although Brown states that the substance of the trial court's ruling on the summary judgment motion is an issue before this court (*see* Brief of Appellant,

p.--), Brown's brief fails to make any argument whatsoever on this issue. Brown has not set forth the facts in the record which they claim support their theory of liability, and Brown has made no argument that the facts as presented to the trial court could support a finding of liability. The only argument submitted to this court in Brown's brief challenges the trial court's denial of Brown's motion to continue. Thus, Brown apparently concedes that, if only the facts in the record before the court are considered, the trial court correctly found that there was no factual issue preventing summary judgment, and that this case was properly dismissed. "It is well established that an appellate court will decline to consider an argument that a party has failed to adequately Brief." *Valcarce v. Fitzgerald*, 331 Utah Adv. Rep. 68, 1997 Utah Lexis 105 (Utah 1997), *citing State v. Price*, 909 P.2d 256, 263 (Ct. App. 1995), *cert. denied*, 916 P.2d 909 (Utah 1996); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989).

Nevertheless, even if the court is inclined to review the substance of the trial court's decision, the law relating to the practice of food sampling is clear. And the facts clearly show that simply handing out chicken samples does not give rise to any liability for Brown's injuries as a matter of law. The general principle is well-established:

> This court has held that "[t]he owner of a business is not a guarantor that his business invitees will not slip and fall. He is charged with the duty to use reasonable care to maintain the floor of his establishment in a reasonably safe condition for his patrons."

Schnuphase v. Storehouse Markets, 918 P.2d 476, 478 (Utah 1996), *quoting Preston v. Lamb*, 436 P.2d 1021, 1022 (Utah 1968). There are two basic approaches to storeowner liability for a slip and fall. In the primary class of cases, involving an unsafe condition of a temporary

nature (such as the spilled food alleged in this case), a storeowner is not liable for a patron's fall unless the owner had either actual or constructive knowledge of the dangerous condition. Here, there was no allegation that Chick-Fil-A knew or should have known of the existence of the piece of chicken which allegedly caused Brown's fall.

Brown attempted to characterize the facts of this case as falling into a secondary class of cases, in which courts have found a business liable when it engages in a "dangerous activity." *See Schnuphase*, 916 P.2d at 479-80. In *Schnuphase*, the Utah Supreme Court held that a storeowner's distribution of ice cream to deli customers was not a basis for liability when one customer slipped and fell because of food that had been dropped on the ground by another customer. Because food distribution was not, as a matter of law, inherently dangerous, the court refused to require a higher duty of care or additional safety precautions. *Schnuphase*, 918 P.2d at 479.

As was the case in *Schnuphase*, Brown's claim in this case is based on a theory that Chick-Fil-A's food distribution imposed some higher duty of care because it was somehow "inherently dangerous." The complaint suggests that Chick-Fil-A was negligent in failing to "request the Mall patrons to enter the restaurant to sample the chicken . . ." (Complaint, ¶ 18); or to "ensure that those Mall patrons that accepted samples of chicken from the defendant Chick-Fil-A remain in the restaurant and not continue walking until they had finished eating the samples of chicken." (Complaint, ¶ 23.)[6] What Brown apparently seeks

[6] Brown also suggests that Chick-Fil-A should have roped off an area and put up signs warning of the dangers of spilled chicken. (Complaint, ¶ 24.) However, aside from the fact

is a requirement that whenever food is distributed, the storeowner must supervise its consumption by patrons in order to make certain that food is not carried away and possibly disposed of improperly. These suggestions are actually more intrusive and more impractical than those suggested by the plaintiff in *Schnuphase* and explicitly rejected by the Court:

> Specifically, Schnuphase claims that Storehouse Markets failed to take the following precautionary measures: installation of nonskid mats or any other traction-enhancing coverings, placement of warning signs indicating the possibility of encountering spilled ice cream, appointment of a spill monitor in the deli section, or installation of a lower counter to facilitate employee monitoring in the area.

Schnuphase, 918 P.2d at 479.

Brown also seeks to extend the duty considerably beyond that sought by the plaintiff in *Schnuphase* by alleging that Chick-Fil-A was negligent not only because of the lack of special safety measures with regard to the immediate area, but also due to their failure to extend such special measures to guarantee safety elsewhere in the Mall. However, the problem with this argument is that there are no facts alleged that are sufficient to show that *any* special measures were reasonably required as a result of the sampling. The court in *Schnuphase* ruled as a matter of law that no special safety measures were required at all in distributing food (regardless of how simple they might be), even in the immediate area.[7]

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that the immediate area was kept clean and that these measures are entirely impractical, the facts of this case indicate that such measures would not have prevented Brown's accident, which took place at some distance away from the sampling. Failure to take precautions which would not have prevented Brown's injury cannot form a basis for a suit by her.

[7] Indeed, regardless of the reasonableness of defendant's efforts at preventing patrons from dropping chicken in the area where the sampling was taking place, such would not have

There is thus no issue of fact in this case regarding the adequacy of any special safety measures that Chick-Fil-A did take, because no special measures were required.

As stated by the Utah Supreme Court in *Long v. Smith Food King Store*, 531 P.2d 360 (Utah 1973), Chick-Fil-A in this case need only have acted reasonably in distributing the samples:

> In applying that standard to the question as to whether the defendant should have been expected to take further precautions to avoid injury to its customers, it is only fair and proper to make that determination from the standpoint of foresight and not hindsight. If its duty required further safety measures, we are made to wonder what they would be, and how far the defendant would have to go in protecting the customers, both in method and in area. There does not appear to be any reasonable and practical answer to that inquiry.

531 P.2d at 362. The absurd logical extensions feared by the Court in *Long* with regard to the "area" in which a storeowner must take special precautions are directly presented by Brown's theory in this case. There simply are no reasonable efforts by defendant which could address the circumstances which led to Brown's injury, because any attempt to address them would seemingly require Chick-Fil-A to follow each patron around the mall until they have either swallowed their chicken sample or thrown it away. Brown suggests that Chick-Fil-A failed to require patrons to consume the samples in the immediate vicinity of the sampling. However, such a requirement would effectively prevent any distribution of food

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prevented Brown's injuries in this case. What is at issue here is not the foreseeability of patrons simply dropping chicken samples; rather, it is the foreseeability of patrons carrying a sample through the mall for 100 feet and then dropping it.

samples, and as *Long* and *Schnuphase* directly hold, it is not negligent to give out food merely because there is a possibility that patrons will drop it.

In *Canfield v. Albertsons*, 841 P.2d 1224 (Utah App. 1992), the Utah Court of Appeals considered a storeowner's liability for a slip and fall inside the store which was alleged to have been caused by lettuce leaves dropped on the floor by store patrons as they served themselves from display boxes of lettuce. The court reversed the trial court's granting of summary judgment due to the fact that there was evidence upon which a fact finder could believe that the storeowner should have foreseen a danger to his customers and taken additional reasonable steps to compensate for it. The ruling in *Canfield* is based the existence of direct evidence that the store was aware of an unusual hazard which actually caused the plaintiff's injury. In *Canfield*, the store actually *intended* customers to handle the lettuce and discard leaves, and the issue was whether the store had adequately provided for the disposal of the leaves that customers were *expected* to drop. "Albertsons chose a method of displaying and offering lettuce for sale where it was expected that third parties would remove and discard the outer leaves from heads of lettuce they intended to purchase." *Canfield*, 841 P.2d at 1227. As noted by the Court in *Schnuphase*, the liability found in *Canfield* was based entirely on the court's finding that these facts provided sufficient evidence of actual notice of the leaves on the floor. In distinguishing *Canfield*, the Supreme Court held that it was the existence of such actual notice which formed the basis for liability, and that the mere distribution of food to customers did not provide any such evidence of

actual notice of a hazardous condition. It is the combination of the store's intent and design in *Canfield* that the customers would have to dispose of the leaves, coupled with a factual dispute as to the adequacy of the means provided for disposing of them, that precluded summary judgment. In this case, there is obviously no intent or design by Chick-Fil-A that those accepting samples would discard the chicken. Thus, there can be no inference of knowledge.[8]

Accordingly, the rule set out in *Schnuphase* clearly governs here. As in that case, Brown here "makes the bare assertion that [defendants'] method of operation created a situation where it was reasonably foreseeable that the expectable acts of third parties would create a dangerous condition or defect." However, as was the case in *Schnuphase*, "*Canfield* does not support liability in this case because [plaintiff] failed to provide evidence of the foreseeability of an inherently dangerous condition." 918 P.2d at 479.

In addition, the common practice of sampling has been expressly approved by Utah courts, and has been held not to require any special safety precautions. The Utah Supreme Court stated in *Long* that giving away food samples:

> is a well known and widely practiced method of merchandising and we see no reason why the same rules should not apply as to the other operations of the market. Neither do we believe that the giving away of samples of pie should be regarded as inherently dangerous.

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[8] Brown cites to the fact that there was a trash can nearby as evidence of knowledge, but the only thing that Chick-Fil-A intended for customers to dispose of was the toothpick. Although Chick-Fil-A could thus be charged with the knowledge that customers would discard toothpicks, toothpicks do not present any danger, and, indeed, Brown does not allege that she slipped on a toothpick.

531 P.2d at 362. Likewise, in *Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175 (Utah 1975), defendants had been distributing samples of cottage cheese on small crackers. The plaintiff slipped on cottage cheese which was dropped by a customer who had accepted a sample. The court granted defendant's motion for summary judgment, finding that the practice of sampling did not constitute a dangerous condition, even though the plaintiff argued that defendants had used a negligent method in conducting the sampling. *Id.*, 538 P.2d at 177.

Other cases involving the practice of distributing food samples are to the same effect. In *Morgan v. American Meat Co., Inc.*, 46 N.E.2d 669 (Ohio 1942), the defendant had been distributing samples of olives to customers, and the plaintiff was injured when she slipped on an olive which had been dropped in the store. In granting defendant's motion for summary judgment, the court held that:

> the giving away of articles of food in grocery stores, as samples, has long been a recognized method of advertising and there is no rule of law which will charge the merchant with knowledge that the customers will dispose of what remains of the sample in such a way as to make the store dangerous to other customers.

46 N.E. 2d at 672. *See also Stanley Stores, Inc. v. Veazy*, 838 S.W.2d 884 (Texas 1992) (distribution of soft drink samples was not a "negligent activity" which could form the basis for liability when patron slipped on a spilled drink).

Brown has not presented or even alleged any facts which would indicate that the sampling done by Chick-Fil-A was unusual or differed from the practices at issue in

Schnuphase, *Long*, and *Allen*. For example, Brown argued that the mall was busy on the day of her accident, and that Chick-Fil-A intentionally conducted their sampling during busy times. That is exactly the circumstance alleged in *Long*, in which the plaintiff pointed out that the samples of pumpkin pie were deliberately handed out on the day before Thanksgiving, and "it was to be expected that the store would be filled with shoppers." 531 P.2d at 361.

Brown also alleges that Chick-Fil-A's actions posed a foreseeable risk due to the inherently dangerous qualities of chicken on a toothpick. However, all three of the plaintiffs in *Schnuphase*, *Long*, and *Allen* made similar arguments, i.e., that the particularly slippery and unstable qualities of, respectively, ice cream in a cone, pie on a plate, or cottage cheese on a cracker made distribution an unusually dangerous activity. However, in none of those cases did the Court feel the need undertake any analysis regarding the particular qualities of the food given out, and no such analysis is required here.[9] Certainly there can be no serious argument that there is a legally significant difference between the inherent dangerousness of chicken on a toothpick as opposed to ice cream in a cone, pie on a plate, or cottage cheese on a cracker.

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[9] For example, the plaintiff in *Long* pointed out that "due to the unique character of pumpkin pie with whipped cream, it would be slippery and dangerous if dropped on the floor." *Long*, 531 P.2d at 361. Likewise, in *Allen*, the plaintiff argued that the defendant used an unreasonable method because the cottage cheese samples were placed on a small cracker, which plaintiff asserted made it likely that some would be spilled. Similarly, the Court in *Schnuphase* did not find that the specific circumstances involved in the case (i.e. giving ice cream to a child in a busy deli area) precluded summary judgment.

Indeed, the only fact which distinguishes this case from *Schnuphase*, *Long*, and *Allen* is that in those cases the food was spilled inside the defendants' stores in the immediate area of the distribution. If it is not reasonable to impute knowledge of spilled food located within the store itself, it is even less reasonable to impute to the business owner knowledge of food which has been carried away and dropped some 100 feet away from the business.

Any finding of liability under the facts presented by this case would essentially be a finding that selling or giving away food is *per se* an inherently dangerous practice, and would completely undercut the general principle that storeowners are not guarantors of patrons' safety. As the court in *Schnuphase* recognized, the distribution of food for consumption either on or off the premises of the store is a common practice, and one which requires only that ordinary care be exercised to inspect regularly and clean up known spills. Brown has made no allegation that Chick-Fil-A failed to fulfill this duty.

Indeed, this analysis only serves to emphasize the correctness of Judge Bohling's ruling with regard to Brown's Rule 56(f) motion. The specific details Brown sought to further investigate regarding the sampling procedures and the "skill" level of the employees handing out the samples is simply irrelevant in the face of the well-established law holding that handing food to store patrons is not an inherently dangerous activity.[10]

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[10] In addition to the grounds stated in Judge Bohling's order granting summary judgment, defendant The Hahn Company also sought summary judgment based on the lack of any evidence which would provide a basis for holding it liable for the actions of Chick-Fil-A. Brown did not respond to this argument at all, and it was not resolved by Judge Bohling, in light of his other rulings. However, this argument provides an alternative basis for affirming the judgment as to The Hahn Company. *See* Memorandum in Support of Defendants' Motion for Summary Judgment, p. 11-12; (R. 186-187).

CONCLUSION

Judge Bohling's decision to deny Brown's Rule 56(f) motion to continue was based upon Brown's failure to complete her discovery within the long-established deadlines, and due to the fact that the proposed discovery was not relevant to the issues presented by the motion. Such is sufficient to constitute a reasonable basis for the denial, and that decision should be upheld. In addition, Utah law clearly provides that distribution of food to customers is not an inherently dangerous condition, and Judge Bohling's order granting summary judgment should be affirmed.

DATED this 10 day of August, 1998.

SNOW, CHRISTENSEN & MARTINEAU

By: _____
John R. Lund
Scott K. Wilson

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached was served by mailing, postage prepaid, on the 10th day of August, 1998, on the following:

Nancy A. Mismash
ROBERT J. DEBRY & ASSOCIATES
3575 South Market Street, #206
Salt Lake City, Utah 84119

Pam Thompson

CATHERINE BROWN vs.
CHRIS GLOVER, d/b/a CHICK-FIL-A, INC. of FASHION PLACE, HAHN PROPERTY MANAGEMENT CORPORATION, a California corporation d/b/a HAHN COMPANY,
Court of Appeals No. 970694-CA
District Court No. 950905823 PI

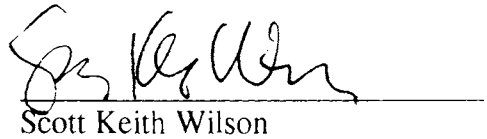
NO ADDENDUM REQUIRED

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of August, 1998, that I caused two true and correct copies of Brief of Appellees Chris Glover (dba Chick-Fil-A, Inc. Of Fashion Place) and Hahn Property Management Corporation (dba Hahn Company) to be served upon the following by mailing, postage prepaid.

Nancy A. Mismash
ROBERT J. DEBRY & ASSOCIATES
3575 South Market Street, #206
Salt Lake City, Utah 84119

SNOW, CHRISTENSEN & MARTINEAU

By: 
Scott Keith Wilson

N:\11359\43\SKW\ADDENDUM.NO

IN THE COURT OF APPEALS
STATE OF UTAH

CATHERINE BROWN,

Plaintiff/Appellant,

vs.

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Defendants/Appellees.

Appeals No. 970694-CA

District Court No. 950905823 PI

Priority No. 15

CERTIFICATE OF SERVICE

APPEAL FROM A FINAL JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE WILLIAM B. BOHLING, DISTRICT JUDGE

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