

2009

Judy Price v. Smith's Food and Drug Centers, Inc., PYGGY, Inc., Market Source West, and John Does I-V : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JUDY PRICE,
Plaintiff/Appellant,

v.

SMITH'S FOOD AND DRUG CENTERS,
INC., an Ohio Corporation, PYGGY, INC.,
an expired Nevada Corporation, dba
MARKET SOURCE WEST, and JOHN
DOES I-V,
Defendants.

Court of Appeals No.: 20090397

District Court No.: 060401509

REPLY BRIEF OF APPELLANT JUDY PRICE

Appellant's Reply Brief in an Appeal from a judgment and order after a hearing on Defendant's, Smith's Food and Drug Centers, Inc., Motion for Summary Judgment, in Fourth Judicial District Court, Utah County, the Honorable Steven L. Hansen Presiding.

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. There are disputed evidentiary matters necessary for a trier of fact regarding Smith’s constructive notice.	1
II. Smith’s should be vicariously liable for Pyggy’s negligence..	3
III. Smith’s regular floor inspections are irrelevant because Smith's should have checked the demonstrator area when Pyggy checked out	6
CONCLUSION.....	7

TABLE OF AUTHORITIES

Cases

<i>Allen v. Federated Dairy Farms, Inc.</i> , 538 P.2d 175 (Utah 1975).....	2, 3
<i>Bowen v. Riverton City</i> , 656 P.2d 434 (Utah 1982).....	1
<i>Jex v. JRA, Inc.</i> , 166 P.3d 655 (Utah Ct. App. 2007), <i>aff'd</i> , 196 P.3d 576 (Utah 2008).....	3, 4
<i>Little v. Butner</i> , 348 P.2d 1022 (Kan. 1960).....	5
<i>Lucky Seven Rodeo Corp. v. Clark</i> , 755 P.2d 750 (Utah Ct. App. 1988).....	1
<i>Ohlson v. Safeway Stores, Inc.</i> , 568 P.2d 753 (Utah 1977).....	2
<i>Silcox v. Skaggs Alpha Beta, Inc.</i> , 814 P.2d 623 (Utah Ct App. 1991).....	4

Other sources

<i>Handbook of Law of Torts</i> § 61 (4 th ed. 1971).....	5
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ARGUMENT

I. THERE ARE DISPUTED EVIDENTIARY MATTERS NECESSARY FOR A TRIER OF FACT REGARDING SMITH'S CONSTRUCTIVE NOTICE.

It must be remembered that, "[i]t is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment. It matters not that the evidence on one side may appear to be strong or even compelling. One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment." *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah Ct. App. 1988) (citations omitted).

Smith's raises issue with two important issues of fact: (1) the source of the water, and (2) how long the spill had been on the floor prior to Mrs. Price's fall.

One compelling statement made under oath by Smith's store manager was that "I am almost 100 percent sure [the water] came from . . . I am sure that that water belonged to [Pyggy]." R. 298.

Mr. Brown's sworn statement goes well beyond "speculation and conjecture" to establish the source of the water.

Precluding a jury from deciding the sufficiency of the time elapsed between the cleanup of Pyggy's workstation and the injury, as would be necessary to show constructive knowledge, is precisely the type of issue of material fact that is outside of the prerogative of the District Court to decide. Specifically, "if there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party." *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). Smith's store manager has already established in deposition that approximately ten minutes passed from the time of the alleged spill to the time of the injury. R.

278. However, it remains a stark issue of material fact as to whether that time frame is accurate, and whether such time created constructive knowledge for a reasonable time for Smith's to remedy the dangerous condition.

Construing the facts most favorably to Mrs. Price would entitle her to go forward. Contrary to the findings of the Trial Court, significant evidence was presented which requires a trier of fact to determine whether or not such an amount of time passing between the alleged spill and the injury was reasonable for the Defendant to create constructive knowledge and remedy the hazard, thus precluding Summary Judgment from being rendered. Again, only some evidence of the length of time the problem existed is required. *Ohlson v. Safeway Stores, Inc.*, 568 P.2d 753 (Utah 1977) (where the court found the Plaintiff produced evidence of the length of time the problem existed by merely discussing the condition of the broken spaghetti that caused the Plaintiff to fall).

Here, Pyggy took down its demonstration table at 4:40 p.m., and left the store by 5:00 p.m. R. 177. Shortly after 5:00 p.m. Judy Price went with her granddaughter to buy strawberries. R. 250, 303. Mrs. Price thinks the accident happened after 5:00, around 5:20. Mr. Brown thought the water was on the floor for maybe ten minutes. R. 278, 301.

The conflicting evidence as to the time elapsed between the spill and the fall is the precise issue of material fact that requires weighing by a jury.

In addition, the amount of time the problem existed for the first prong of the *Allen* test should be irrelevant. *Allen v. Federated Dairy Farms*, 538 P.2d 175, 176 (Utah 1975). In order to prove constructive notice *Allen* requires (1) that the condition existed long enough that defendant should have discovered it, and (2) that after such constructive knowledge, sufficient time elapsed that in the exercise of reasonable care the defendant should have remedied it. *Id.*

Mrs. Price's theory of duty and breach is that Smith's should have checked Pyggy's demonstration area at the moment Pyggy checked out of the store, which they admittedly did not do. Kent Steele, previously a Health and Safety Manager for 1300 Safeway stores, stated that demonstrator areas are typical areas to anticipate spillage and that Smith's conduct fell below the standard of care by not providing a clean area upon the demonstrator's departure from the store. R. 253-256. Smith's admittedly did not check that area of the store upon the demonstrators' departure. R. 280, 295, 299, & 359. Thus, the first prong of *Allen* should be irrelevant—the condition existed long enough that the defendant should have discovered it. Further, it is clear that Smith's did not clean up the mess in a reasonable time. Mr. Brown testified that the mess was cleaned up quickly with paper towels. R. 278-279 at p. 47. It certainly wouldn't have taken ten minutes to gather paper towels and wipe up a small water spot. Therefore, Mrs. Price can meet the second element of *Allen*—that after such constructive knowledge, sufficient time elapsed that in the exercise of reasonable care the defendant should have remedied the problem.

Mrs. Price has met both elements of the *Allen* test and this matter should be remanded to the trial court. Yet, if Mrs. Price has not met the first element of the *Allen* test it should be irrelevant because Smith's should have had constructive notice, by not exercising reasonable care, when they failed to check the demonstrator's area when Pyggy checked out.

II. SMITH'S SHOULD BE VICARIOUSLY LIABLE FOR PYGGY'S NEGLIGENCE

Because Pyggy failed in its obligation to maintain the area of the Smith's store where it demonstrated products, Smith's should be vicariously liable for the harm that resulted from Pyggy's failure to use reasonable care.

The actual or constructive notice test would not apply to Pyggy's negligence because Pyggy created the dangerous condition. "[I]f the condition...was created by the defendant...the

notice requirement does not apply.” *Jex v. JRA, Inc.*, 166 P.3d 655, 658 (Utah Ct. App. 2007), quoting *Silcox v. Skaggs Alpha Beta, Inc.*, 814 P.2d 623, 624 (Utah Ct App. 1991). *Silcox* held that it is for the jury to decide whether one of defendant’s employees created the risk of harm, or whether a phantom shopper created the spill, regardless of whether the store was on notice of the spill. *Id* at p. 625. Thus, Pyggy can be negligent, regardless of actual or constructive notice, if they created the dangerous condition.

It was previously undisputed that Pyggy created the spill. R. 150 & 260. Smith’s answered an interrogatory stating that “[t]he water on the store’s floor came from a cup of water that Stephen Tyler, an employee of independent contractor [Pyggy] spilled and failed to clean up before leaving the store premises shortly before Plaintiff’s alleged accident.” R. 260.

Therefore, it was undisputed that Pyggy created the water spill and that they failed to clean it up.

The question then becomes whether Smith’s can be vicariously liable for Pyggy’s negligence. Section II of Mrs. Price’s Appellate brief discusses the question of whether Smith’s can be liable for Pyggy’s actions. *See* Judy Price’s Appellate Brief at pp.12-16. Smith’s raised two arguments in response to this issue. First, it is important to note that Smith’s did not deny that the law should recognize liability for independent contractors where a “non-delegable duty” or “absolute duty” exists. In addition, they did not dispute that a non-delegable or absolute duty exists here.

The issues raised by Smith’s are that (1) there is no evidence that Smith’s ever delegated its duty to maintain its store in a reasonably safe condition to Pyggy, (2) that there is no evidence Pyggy was an independent contractor retained by Smith’s to maintain Smith’s premises, and (3) that there is no evidence that the demonstrator was the origin of the water spill. *See* Smith’s Appellate brief at p.11.

Did Smith's delegate its duty to maintain its store in a reasonable safe condition? Pyggy was abiding by "store policy" by being responsible for cleaning the floor of the demonstration area. R. 281 at p.22. *See also* R. 283 at p.15 (where Smith's store manager said that Smith's doesn't oversee the operation of the demonstrators because the demonstrators are on their own), R. 281 p. 23 (where the demonstrators bring their own cleaning supplies). Thus, Smith's delegated its duty to maintain the area of the fall to Pyggy.

Is there evidence that Pyggy was an (a) independent contractor (b) retained by Smith's to maintain Smith's premises? Smith's answered an interrogatory explaining that the water came from the "independent contractor" Pyggy. R. 260. Smith's motion for summary judgment also termed Pyggy as an independent contractor. R. 246. Next, Smith's improperly frames the issue regarding maintenance to require that the independent contractor be "retained." The occupier will be liable for the negligence of an independent contractor to whom he entrusts maintenance and repair." *Handbook of Law of Torts* § 61 (4th ed. 1971). There is no requirement that the independent contractor be retained. *Id.* In addition, in a case very similar to this matter, the court was careful to point out that the exact nature of the relationship between the store and the food demonstrator was unimportant because the store, like Smith's here, stood to gain from the demonstrator's activities. *Little v. Butner*, 348 P.2d 1022, 1032 (Kan. 1960).

Is there evidence that the demonstrator was the origin of the water spill? On numerous occasions Smith's admitted that Pyggy was the source of the water spill. R. 260 (in Smith's answers to Mrs. Price's interrogatories Smith's stated that the water on the floor came from a cup of water that Pyggy spilled and failed to clean up), R. 278-279 at p.44-45 (where Smith's store manager stated that he was almost 100 percent sure the water came from Pyggy). *Please note that although pages 44 and 45 of Mr. Brown's deposition were included in Mrs. Price's response*

to Smith's motion for summary judgment those pages were somehow skipped when the record was paginated for appeal. Smith's now seeks to back off its prior answers to interrogatories and responses to deposition questions to muddy the waters regarding the source of the water. Clearly there is evidence that Pyggy was the source of the water.

Smith's also argues that holding Smith's liable in this case would create a strict liability standard for stores for any problems that arise inside a store. Defendant's conclusion is incorrect. Every plaintiff would still be required to prove negligence on the part of the independent contractor in the independent contractor's maintenance of an absolute or non-delegable duty in order to prove his/her claim. Stores cannot be vicariously liable for the negligence of their independent contractors if their independent contractors are not negligent.

In summary, there is convincing evidence that Pyggy was the source of the water spill, and that Pyggy was an independent contractor to whom Smith's delegated the duty of maintenance. For those reasons, Smith's should be vicariously liable for Pyggy's negligence.

III. SMITH'S REGULAR FLOOR INSPECTIONS ARE IRRELEVANT BECAUSE SMITH'S SHOULD HAVE CHECKED THE DEMONSTRATOR AREA WHEN PYGGY CHECKED OUT.

Again, Mrs. Price's theory of duty and breach is that Smith's should have checked Pyggy's demonstration area when Pyggy checked out of the store, which they admittedly did not do. R. 280, 295, 299, & 359. Smith's has argued that it simply could not be negligent because it conducted twelve formal floor inspections between 4:24 p.m. and 5:59 p.m. Smith's Appellate Brief at p.11. First, Mrs. Price's theory of negligence is that if Smith's would have checked the area of the store where Pyggy had been when the demonstrator checked out then Mrs. Price's fall would not have occurred, regardless of who created the water spill. Kent Steele, previously a Health and Safety Manager for 1300 Safeway stores, stated that demonstrator areas are typical

areas to anticipate spillage and that Smith's conduct fell below the standard of care by not providing a clean area upon the demonstrator's departure from the store. R. 253-256. Thus, the number of regular floor inspections is irrelevant to Mrs. Price's theory of duty and breach.

Second, it is somewhat troubling that Smith's claims it inspected a nearly 80,000 square foot store eight times in a thirty-four minute period. R. 278-79, at p.46 (stating that the store is nearly 80,000 square feet). This highlights the need for a jury to determine the reasonableness of Smith's assertions.

Nevertheless, the alleged number of inspections should not protect Smith's from their breach of reasonable care in this matter.

CONCLUSION

Mrs. Price respectfully requests that the Court reverse the District Court's ruling granting Smith's Motion for Summary Judgment. Mrs. Price has produced evidence of the amount of time the water was on the floor sufficient to survive summary judgment. In addition, Smith's should be vicariously liable for Pyggy's actions. Mrs. Price respectfully requests that the Court remand this matter to the trial court for further proceedings.

YOUNG, KESTER & PETRO

By: 

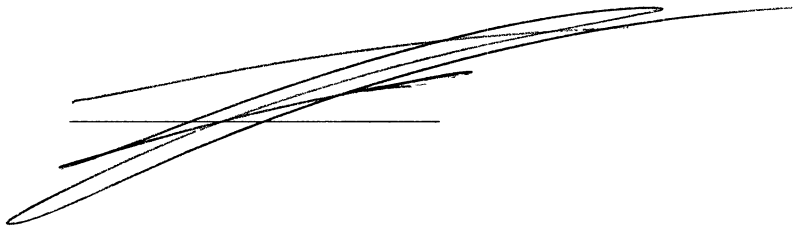
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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing, Brief of Plaintiff/Appellant Judy Price, and an electronic copy of the brief on a computer disc were mailed U.S. Mail, postage paid, to the following this 16th day of June, 2010:

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