1998

Gayle Babbitt v. 7-Eleven Sales Corporation dba 7-Eleven Food Stores Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GAYLE BABBITT, Plaintiff and Appellant v. 7-ELEVEN SALES CORPORATION dba 7-ELEVEN FOOD STORES CORPORATION, Defendant and Appellee	:	Case No. 981755-CA Priority No. 15

BRIEF OF APPELLEE

AN APPEAL FROM THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE ANNE M. STIRBA PRESIDING

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PARTIES ON APPEAL

The parties on appeal appear in the caption except that defendant and appellee 7-Eleven, Inc. has been mis-identified as 7-Eleven Sales Corporation dba 7-Eleven Food Stores Corporation.

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STATEMENT OF JURISDICTION

This court has jurisdiction to consider this appeal pursuant to Utah Code Annot., § 78-2-2(3)(j) and Utah Rules of Appellate Procedure 3.

ISSUE PRESENTED FOR REVIEW

Whether the trial court was correct in granting summary judgment for defendant and appellee (hereinafter "7-Eleven") where plaintiff and appellant (hereinafter "Babbitt") cannot show as a matter of law that 7-Eleven breached any duties owed to Babbitt.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

There are no determinative constitutional provisions, statutes, ordinances, rules or regulations involved in this appeal.

STATEMENT OF THE CASE

This is an appeal from the order of the Honorable Anne M. Stirba dated October 9, 1998 dismissing Babbitt's claims against 7-Eleven on its motion for summary judgment. 7-Eleven's motion for summary judgment was brought following discovery including the deposition of Babbitt.

1. On March 20, 1997, Babbitt commenced this case by filing a complaint against 7-Eleven. (R. 1.)

2. In her complaint, Babbitt alleged that on or about June 19, 1996, while walking on a sidewalk in front of a 7-Eleven store, she slipped on a mayonnaise package. (R. 2.)

3. The only evidence in this case regarding how the mayonnaise package ended up on the sidewalk or how long it had been there is Babbitt's own deposition. (R. 84.)

4. In her deposition, Babbitt testified as follows:

> Q. Let me ask you some more questions about the mayonnaise packet. Do you know how it got there?
>
> A. No.
>
> Q. Do you know how long it had been there?
>
> A. No.
>
> Q. Did anybody ever tell you how it had been there?
>
> A. No.
>
> Q. Was there anything about it that gave you any indication as to how long it had been there?
>
> A. No. Well, I figured it had only been there, you know, a short time, you know. (R. 55.)

SUMMARY OF THE ARGUMENT

The undisputed facts and law in this case demonstrate that the trial court acted appropriately in granting 7-Eleven's motion for

summary judgment dismissing all of Babbitt's claims. Summary judgment is appropriate in this case because the condition which allegedly caused Babbitt to slip and fall was of a temporary nature. Because store owners like 7-Eleven are not insurers or guarantors of the safety of their business invitees, in order for Babbitt to prevail on her claims, she must show that 7-Eleven knew or should have known of the hazardous condition and that 7-Eleven had enough time to remedy the unsafe condition.

In this case, 7-Eleven is entitled to summary judgment because: a) Babbitt has admitted through deposition testimony that she has no idea how the packet got on the sidewalk or how long it had been there; b) Babbitt failed to offer evidence that 7-Eleven, or its employees, had either actual or constructive knowledge of the condition; and, c) Babbitt has failed to establish that sufficient time had elapsed so that any exercise of reasonable care 7-Eleven could have remedied the alleged problem.

Given that there is no genuine issue of material fact that supports Babbitt's claims against 7-Eleven, 7-Eleven respectfully requests this Court to uphold the trial court's grant of summary judgment in this case.

ARGUMENT

POINT I.

IT WAS APPROPRIATE FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT IN THIS CASE.

Summary judgment is appropriate "where there are no genuine issues of material fact and the moving parties entitled to judgment is a matter of law." Mills v. Brody, 929 P.2d 360, 362 (Utah App. 1996). "Because summary judgment presents only questions of law" this Court reviews the trial court's decision under "a standard of correctness, according no defference to the trial court's legal conclusions." Id. In fact, this Court "may affirm a grant of summary judgment on any grounds available to the trial court, even if it is one not relied upon by the trial court." Otsuka Electronics v. Imaging Specialists, Inc., 937 P.2d 1274, 1277 (Utah App. 1997).

When summary judgment is sought, the movant bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and affidavits, if any, he believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In a case where a party moves on an issue for which he would not bear the burden of persuasion at trial, his initial burden of

production may be satisfied by the showing the court there is an absence of evidence in the record to support the non-movant's case. "There can be no issue as to any material fact ... when a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all facts immaterial. Id.

For purposes of its motion for summary judgment, 7-Eleven did not dispute that Babbitt slipped and fell as alleged. Rather, Babbitt failed to establish the necessary elements of negligence in a slip-and-fall case based on the standards set forth by the Utah Supreme Court and Utah Court of Appeals. Specifically, Babbitt is unable to show that 7-Eleven had any knowledge of the condition, that is, either actual knowledge or constructive knowledge, because the condition had existed long enough that it should have been discovered. Furthermore, Babbitt failed to show that 7-Eleven had a reasonable amount of time to remedy the problem. Under these circumstances, Utah Appellate Courts have universally held that there is no liability on the part of landowners, like 7-Eleven.

POINT II.

BABBITT OFFERED NO EVIDENCE THAT 7-ELEVEN EITHER KNEW OR SHOULD HAVE KNOWN OF THE MAYONNAISE PACKAGE OR THAT 7-ELEVEN HAD A REASONABLE AMOUNT OF TIME TO REMEDY THE ALLEGED PROBLEM.

Following the briefing of 7-Eleven's motion for summary judgment, the Utah Supreme Court decided the case of Merino v. Albertsons, 975 P.2d 467 (Utah 1999), a case strikingly similar to the case at bar.

According to the Supreme Court:

> We have repeatedly held that "a business owner is not a guarantor that his business invitees will not slip and fall." *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 478 (Utah 1996) (quoting *Preston v. Lamb*, 20 Utah 2d 260, 436 P.2d 1021, 1023 (Utah 1968). Accordingly, we have recognized only two legal theories under which a plaintiff may recover against a business owner for injuries arising from a slip-and-fall accident. See 918 P.2d at 478.
>
> The first theory applies in cases involving an unsafe condition of a temporary nature. In these cases, liability cannot be established unless two conditions are met. First, a plaintiff must show that the business owner knew or should have known of the hazardous condition. Second, a plaintiff must show that the business owner had enough time to remedy the unsafe condition had the owner exercised reasonable care, and that the owner failed to do so.

> The second theory giving rise to liability for slip-and-fall accidents on business premises involves unsafe conditions of a permanent nature. In such circumstances, it is not necessary for the plaintiff to show that the defendant had knowledge of the condition; notice is presumed.

Id. at 468.

The Utah Supreme Court applied these rules in reversing a trial court's failure to grant a directed verdict.[1] In Merino, the plaintiff slipped and fell on a kiwi fruit while shopping in Albertsons produce department. Id. at 467. Approximately one year later, the plaintiff had another slip-and-fall accident at almost precisely the same location. This time, she slipped on a jalapeno.

The plaintiff brought suit against Albertsons alleging that there was a dangerous condition and that Albertsons was liable for her slip and fall.

Albertsons brought a motion for a directed verdict following trial, which was denied. The Supreme Court overturned the trial court's decision stating,

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[1]According to the Utah Supreme Court, "the standard of review used in reviewing a district court's legal conclusions in an entry of declaratory judgment is the same standard used in reviewing a summary judgment. That is, we review the district court's conclusions of law for correctness." Board of Education of Alpine School District v. Ward, 1999 Utah Lexis 21. Therefore, although Merino is a case involving a directed verdict, it is controlling in this case as the standard of review is the same.

> The present case does not involve an unsafe condition of a permanent, or even semi-permanent, nature. Ms. Merino slipped on a kiwi in 1993 and then slipped on a jalapeno a year later. There is not testimony that the floor was permanently covered with fruit or vegetable debris. The testimony of plaintiff's investigator regarding the condition of the floor was gathered from some nine visits over a period of approximately two years and cannot be said to establish a permanently unsafe condition at the time of either accident.
>
> In short, this is a case arising from an unsafe condition of a temporary nature. As plaintiff, Ms. Merino was required to provide evidence that Albertsons knew or should have known of the existence of the kiwi on the floor (on the first occasion) and the jalapeno on the floor (on the second). No such evidence was produced. Consequently, the trial court erred in not granting defendant's motion for directed verdict. We reverse and direct the trial court to enter judgment for Albertsons.

Id. at 468-69.

In so ruling, the Supreme Court followed well-established Utah law regarding slip-and-fall cases. See, Schnuphase v. Storehouse Markets, 918 P.2d 476, 478 (Utah 1996) ("the owner of a business is a not a guarantor that his business invitees will not slip and fall."); Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1140 (Utah 1977)(upholding summary judgment for store owner slip-and-fall case where plaintiff failed to meet its burden of proof.) Babbitt, in

her brief, does not dispute that she has failed to offer any evidence that 7-Eleven or its employees knew, or should have known, about the mayonnaise package, or that 7-Eleven had a reasonable time to remedy the alleged problem. Instead, Babbitt argues that this case falls into the second category of slip-and-fall cases identified in Merino. In other words, Babbitt claims that the mayonnaise package she allegedly slipped and fell on constitutes a "permanent" condition such that 7-Eleven is deemed to have had knowledge of its existence and is therefore liable for the fall. Babbitt's argument is without merit.

First, as in Merino, a food item on the ground is not a permanent condition. There has been no evidence offered that the ground outside the 7-Eleven was permanently littered with mayonnaise packages or other food products. In fact, Babbitt herself testified that it appeared the package had only been there a short period of time. Clearly, such a condition is not "permanent".

In the face of this, Babbitt cites Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah. App. 1992). According to Babbitt, Canfield stands for the proposition that a defendant landowner can be held liable for his "method of operation." (See Brief of Appellant at pg. 5.)

Babbitt argues that 7-Eleven placed trash cans outside of its store, that it sold food to be consumed on the premises and that therefore, it had knowledge that mayonnaise packages could be dropped by its customers and that it was therefore foreseeable that Babbitt could have slipped and fell on these packages. Babbitt fails to cite to any evidence in the record that 7-Eleven in fact sells food to be consumed on the premises or that 7-Eleven has any consistent problem with people spilling food outside this particular 7-Eleven store. In the absence of this evidence, there is nothing to show that 7-Eleven had any knowledge of the allegedly dangerous condition.

Therefore, Canfield is not applicable to this case. Unlike Canfield, there is no evidence that 7-Eleven created a dangerous condition simply by placing garbage cans outside of its building. As the trial court stated in its order granting 7-Eleven's motion for summary judgment:

> While on its face Canfield appears instructive, a closer reading of the case indicates it is factually distinguishable. Indeed, central to the court of appeal's finding in Canfield, was the determination that Albertsons had notice of the potentially hazardous condition as evidenced by the store's placement of empty boxes and its instituting a regular schedule for inspecting and cleaning the produce section. In the

> instant case, no similar evidence has been offered by the plaintiff.

Simply placing garbage cans outside of one's place of business does not make a landowner liable when someone allegedly fails to use those recepticals and litters. If anything, the fact that garbage cans are present shows that 7-Eleven took reasonable steps to avoid the very accident which occurred.

Wherefore, because the alleged mayonnaise package constituted an unsafe condition of a temporary nature, Babbitt must show that 7-Eleven knew or should have known of the hazardous condition and that 7-Eleven had enough time to remedy the unsafe condition. Babbitt has failed to offer any evidence whatsoever on these two issues. Therefore, the trial court acted appropriately when it granted 7-Eleven's motion for summary judgment.

CONCLUSION

7-Eleven respectfully requests that this Court affirm the trial court's grant of summary judgment dismissing all of Babbitt's claims against 7-Eleven.

DATED this 14th day of July, 1999.

PLANT, CHRISTENSEN, WALLACE & KANELL

SCOTT W. CHRISTENSEN
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 14th day of July, 1999, two true and correct copies of BRIEF OF APPELLEE to the following:

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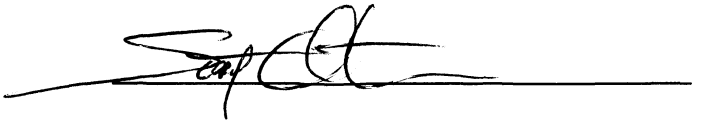

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