

1998

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

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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FILED

JUN 16 1999

COURT OF APPEALS

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CONSTITUTIONAL PROVISIONS

IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

JURISDICTION OF THE COURT AND
NATURE OF THE PROCEEDINGS

This is an appeal from an Order and Judgment of the Third District Court granting Defendant's Motion for Summary Judgment. Appellant's appeal was originally filed in the Utah Supreme Court, however, it was subsequently assigned to the Utah Court of Appeals and assigned appellants' new case number of 981755-CA. This court has jurisdiction to consider the appellant's appeal pursuant to Utah Code Annot. § 78-2-2(3)(j) and Utah App. Proc. R. 3. This court has jurisdiction to review a final decision entered by a district court of the State of Utah.

ISSUES PRESENTED FOR REVIEW

Whether the Defendants were entitled to summary judgment

where a material issue of fact existed.

STANDARD OF REVIEW

The standard of review to be applied in this case is contained in Rule 56(c), Utah R. Civ. P. The standard is whether the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Since a summary judgment addresses only questions of law, the decision of the trial court is reviewed for correctness and accorded no deference. Hebertson v. Willowcreek Plaza, 895 P.2d 839, 840 (Utah Ct. App. 1995).

A timely notice of appeal was filed in this case on November 6, 1998.

CONSTITUTIONAL PROVISIONS, STATUTES AND APPLICABLE RULES

This case is governed by Rule 56(c), Utah R. Civ. P.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a final order of the Third district Court granting Summary Judgment to Defendant.

B. Course of Proceedings

This is an appeal from the granting of Summary Judgment by the Honorable Anne M. Stirba which was appealed to the Utah Supreme Court and then sent to the Utah Court of Appeals.

C. Statement of the Facts

1. Plaintiff Babbitt fell on a mayonnaise package which was on the handicap ramp at a 7-11 store located at approximately 2100 South and State Street in Salt Lake City, on June 19, 1996 and fractured her hip.

2. That Plaintiff has lived across the street from that 7-11 store since approximately January of 1994 up until the present time.

3. That Plaintiff spoke with an employee/agent of 7/11 on the date of the accident by the name of Donna.

4. That this employee/agent of 7/11 stated that they only police the area at 2:00 a. m. in the morning. She stated that "we can't get out there in the day time because we are always busy." Affidavit of Babbitt, R. at 67, 68.

SUMMARY OF THE ARGUMENTS

A material issue of fact exists which should be determined at trial and not through a motion for summary judgment.

ARGUMENTS

I. WHETHER SUMMARY JUDGMENT WAS APPROPRIATE IN THIS MATTER

The owner of a business 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.d. 476, 478 (1996). In outlining a store owner's duty the Utah Supreme Court identified two classes of negligence cases.

The first case involves some unsafe condition of a temporary nature, such as a slippery substance on the floor and usually where it is not known how it got there. In this type of case fault is imputed to the Defendant when (A) he had knowledge of the condition, that is, either actual knowledge, or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it. Schnuphase v. Storehouse Markets, 918 P.d. 476 (1996).

In the second type of case, negligence is based upon a showing that the store owner created the hazardous condition. The second class of classes involved some unsafe condition of a permanent nature, such as, in the structure of the building, or of a stairway, etc. or in equipment or machinery, or in the manner of use, which was created or chosen by the Defendant, or for which he is responsible. In the circumstances, where the defendant either created the condition, or is responsible for it,

he is deemed to know of the condition; and no further proof of notice is necessary. Id.

When determining whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law, the Court is required to construe all facts liberally in favor of the party opposing the motion, and draw all reasonable inferences from the record in favor of the non-moving party. Katzenberger v. State, 735 P.d. 405, 408 (Utah App.1987). Further, because summary judgment presents only questions of law, no deference is given to the trial court's ruling and it is reviewed for correctness. Mumgord v. ITT Commercial Fin. Corp. , 848 P.d. 1041, 1043 (Utah Ct App.1993).

Plaintiff is entitled to prevail on the second theory in that its agents created or were responsible for creating a dangerous condition. Their method of operation creates a situation wherein they sell small mayonnaise packets to be used in and around the store where it was reasonably foreseeable that the expected acts of third parties would create a dangerous condition. A once a day policing of the grounds is not sufficient to insure the floors and grounds are sufficiently clear of the self help packages of mayonnaise, mustard, and ketchup which might be discarded. These packages on the floor are inherently dangerous. A jury could find that defendant

should have been more vigilant in finding and removing the expected slippery litter left behind by the customers.

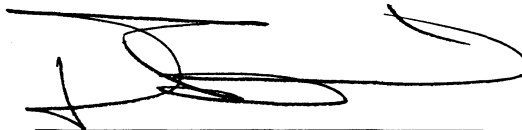
This case is similar to Canfield v. Albertson, Inc., 841 P.d. 1224 (Utah.Ct.App. 1992) In Canfield, Albertsons' created a temporary condition by placing empty boxes around a display of lettuce, expecting that customer would discard some of the outer leaves in the empty boxes. The Plaintiff slipped on a leaf which had fallen or which a customer had dropped on the floor the Court of Appeals reversed the trial court's grant of summary judgment on the grounds that there was a material issue of fact involving the question of whether Albersons took reasonable precautions to protect its customers from the condition it created.

As in Canfield, Defendant could foresee that when they sell take out items which are eaten on the premises which could include all types of various food items that food items would regularly fall to the floor and create the hazard of a slip and fall. The total lack of monitoring is a breach of the appropriate duty. The Defendant regularly maintains trash recepticals around the 7/11 store for customers to discard the packets of mayonnaise when used, therefore the Defendant knew of the potential hazard by placing the trash recepticals around the store for the customers use.

CONCLUSION

The trial court's granting of Summary Judgment for Defendant, was error, as a material issue of fact exists as a hazardous situation was allowed to exist by the Defendant.

DATED this 14th day of June 14, 1999.

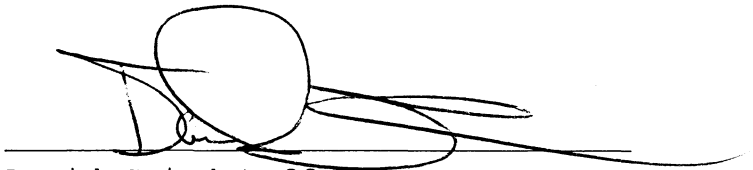
A handwritten signature in dark ink, appearing to be 'David Grindstaff', written over a horizontal line.

David Grindstaff
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing **BRIEF OF THE APPELLANT** were **MAILED**, postage prepaid, on this 14th day of 1999 to

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Salt Lake City, Utah 84180



David Grindstaff

ADDENDUM A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GAYLE BABBITT, Plaintiff, vs. 7-ELEVEN SALES CORPORATION dba 7-ELEVEN FOOD STORES CORPORATION, Defendants.	MINUTE ENTRY Case No. 970901995PI Honorable ANNE M. STIRBA Court Clerk: Marcy Thorne October 7, 1998
--	--

The above-entitled matter comes before the Court pursuant to Rule 4-501 of the Code of Judicial Administration. Specifically, on May 21, 1998, defendant, Southland Corporation, improperly identified in Plaintiff's Complaint as 7-Eleven Sales Corporation dba 7-Eleven Food Stores Corporation, filed their "Motion for Summary Judgment." On June 5, 1998, plaintiff filed "Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment." Also on June 5, 1998, plaintiff filed "Plaintiff's Affidavit in Opposition to Defendant's Motion for Summary Judgment." On June 15, 1998, defendant filed "Defendant's Reply Memorandum to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment." On August 27, 1998, the matter was submitted for decision. Neither party requested oral argument.

The Court having considered the motions, memoranda, affidavit,

and for the good cause that has been shown hereby enters the following ruling.

This negligence action comes before the Court the result of an accident in which plaintiff contends that as she was walking up a handicap ramp, entering into the defendant store, she slipped and fell on a mayonnaise packet allegedly on the ramp.

With this motion, defendant seeks summary judgment against plaintiff asserting her claim is invalid as (1) she has failed to offer evidence that defendant, or its employees, had either actual or constructive knowledge of the condition; and (2) that after such knowledge, sufficient time had elapsed that in the exercise of reasonable care, defendant should have remedied it.

Plaintiff opposes the motion arguing the affidavit she submitted in opposition raises a disputed issue of material fact. Specifically, notes plaintiff, in her affidavit she states that a store employee admitted that because the employees are so busy, they are unable to police the business for potential problems except at 2:00 a.m. In this case asserts plaintiff, the store created a hazardous condition by selling mayonnaise containers to be eaten on the premises and yet, failed to take any steps to remove fallen material when dropped, except at 2:00 a.m.

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c).

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"In considering a summary judgment motion, the Court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in the light most favorable to the party opposing summary judgment." Cinder v. A.L. Williams & Assocs., 739 P.2d 634, 634 (Utah Ct. App. 1987).

In outlining a store owner's duty of reasonable care in slip and fall cases, the Utah Supreme Court identified two classes of negligence cases. In the first class, a store owner must have either actual or constructive knowledge of the hazardous condition, specifically:

The first [class] involves some unsafe condition of a temporary nature, such as a slippery substance on the floor and usually where it is not known how it got there. In this class of cases it is quite universally held that fault cannot be imputed to the defendant so that liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge, or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it.

Schnuphase v. Storehouse Markets, 918 P.2d 476, 478 (quoting Allen v. Federated Dairy Farms, Inc., 538 P.2d 175, 176 (Utah 1975)).

With respect to the second class, the Court stated the following:

The second class of cases involves some unsafe condition of a permanent nature, such as: in the structure of the building, or of a

stairway, etc. or in equipment or machinery, or in the manner of use, which was created or chosen by the defendant (or his agents), or for which he is responsible. In such circumstances, where the defendant either created the condition, or is responsible for it, he is deemed to know of the condition; and no further proof of notice is necessary.

Id.

In the instant case, plaintiff's allegations center around an unsafe condition of a temporary nature, therefore, plaintiff must demonstrate (1) that defendant had actual or constructive knowledge of the condition; and (2) that after such knowledge, defendant had a reasonable amount of time to remedy it.

To satisfy these requirements, plaintiff has submitted her affidavit in which she states she spoke with an employee of defendant who stated they don't police the area until 2:00 a.m. There is nothing in plaintiff's affidavit, however, which indicates defendant knew of the condition or had a reasonable time after learning of the condition to fix the problem. Indeed, the only evidence regarding time is plaintiff's deposition in which she states she figured the packet "had only been there, you know, a short time. . . ." (Babbitt Deposition, page 35, lines 6-18).

In further support of her position, plaintiff cites the case of Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah Ct. App. 1992). In Canfield, Albertsons created a temporary condition by placing boxes around a "farmer's pack" display of lettuce, expecting that

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customers would discard some of the outer leaves in the empty boxes. Id. at 1225. The plaintiff in Canfield, slipped on a leaf which had fallen on the floor. The court of appeals reversed the trial court's grant of summary judgment on the ground "there was a material issue of fact involving the question of whether Albertsons took reasonable precautions to protect its customers from the dangerous condition it created." Id. at 1227.

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.

While most cases involving claims of negligence are not susceptible to a summary judgment ruling, where the evidence "is free from doubt so that all reasonable [persons] would come to the same conclusion," summary disposition is appropriate. Anderson v. Toone, 671 P.2d 170, 172 (Utah 1983), rev'd on other grounds, Randle v. Allen, 862 P.2d 1329, 1336 (Utah 1993); accord Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021, 1022 (Utah 1968). In the case at bar, plaintiff has merely made "bare contentions, unsupported by any specification of facts in support thereof, [which] raise no

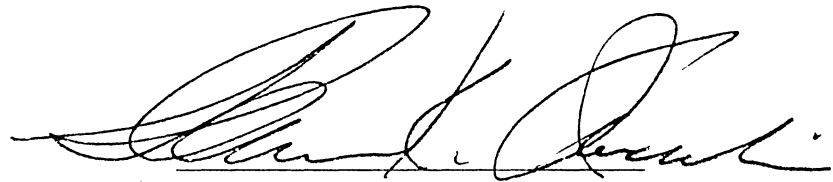
material question of fact as will preclude the entry of summary judgment." Massey v. Utah Power & Light, 609 P.2d 937, 938 (Utah 1980).

Based upon the aforementioned, defendant's Motion for Summary Judgment is granted.

This Memorandum Decision constitutes the order regarding the matters addressed herein. No further order is required.

DATED this 7th day of October, 1998.

BY THE COURT


for: ANNE M. STIRBA