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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DEE BLAIN, Plaintiff/Appellant, vs. WAL-MART STORES, INC., a Delaware Corporation, Defendant/Appellee.	No. 990235-CA Priority No. 15

REPLY BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM AN ORDER OF SUMMARY JUDGMENT GRANTED TO THE DEFENDANT/APPELLEE BY THE FOURTH JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING PRESIDING

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ARGUMENT

I. THE DEFENDANT RELIES ON CASE LAW WHICH REQUIRE A LITIGANT TO *SUPPORT* HIS CONTENTIONS. THOSE CASES DO NOT SAY A LITIGANT MUST *ATTACH* SUPPORTING DOCUMENTS TO THE ARGUMENTS THEY SUPPORT. THE DEFENDANT PRESENTS NO AUTHORITY REQUIRING THAT SUPPORTING DOCUMENTS BE ATTACHED TO PAPERS FILED IN THE TRIAL COURT.

Throughout its Appellee's Brief, Defendant Wal-Mart relies on authorities which require a litigant to *support* his contentions as holding that a litigant must *attach* copies of deposition pages on which he relies to the subject legal memorandum. Defendant repeatedly fails to recognize the distinction between the two concepts. None of the authorities on which Defendant relies require copies of the deposition pages on which Plaintiff relied in her trial court memoranda to be attached to that document.

In fact, in none of those cases is the issue of attaching supporting authorities to memoranda even discussed. The cases relied upon by the Defendant merely hold that a litigant is required to *support* his factual allegations. For example, Defendant relies on *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120 (Utah 1994). When the plaintiff in that case, *Thayne*, was faced with a motion for summary judgment he filed a memorandum in opposition which "simply reiterated the general allegations of his unverified complaint." *Id.* at 123. The court noted that Thayne "did not file any affidavits or other evidence in support of his complaint, *nor did he attempt to present any other evidence.*" *Id.* at 124 (emphasis added).The court held that Thayne could not rest on his unverified complaint in the face of a properly supported motion for summary

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judgment. It held that "Thayne simply did not meet his burden of presenting some evidence, by affidavit or otherwise, raising a credible issue of material fact." *Id.* at 125. There is absolutely no discussion in *Thayne* of whether the supporting documents which Thayne should have filed should have been attached to his memorandum. The court granted summary judgment because there were no supporting documents, not because Thayne had referred to supporting documents without attaching copies of them.

Defendant also relies on *Franklin Financial v. New Empire Development Co.*, 659 P.2d 1040 (Utah 1983), as did the trial judge. The portion of the opinion in *Franklin Financial* which the trial judge quoted in his Memorandum Decision states that "[w]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials" the court may conclude there are no genuine issues of fact unless the moving party's supporting evidence discloses such an issue. *Id.* at 1044. That statement fits the facts of *Franklin Financial*: The party opposing the motion for summary judgment did not file any opposing affidavits or a memorandum in opposition to the motion for summary judgment. *See id.* However, those facts are simply not present in this case. The Plaintiff here filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment. (*See* R. at 0113-0104.) Furthermore, each factual statement in the memorandum was followed by a specific reference to the deposition in which the asserted fact appeared. (*See* R. at 0112-0109.) Each of those references included the page of the deposition on which the asserted fact appeared. (*See* R. at 0112-0109.)

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In short, the cases on which Defendant relies are valid authority for the proposition that a party must *support* his factual contentions. However, there is simply nothing in either *Franklin Financial* or *Thayne* which even considers the issue raised by this case, namely whether copies of deposition pages to which a litigant refers in a memorandum for the trial court must be attached to the memorandum.

Plaintiff does not contest the proposition for which Defendant argues, namely that a litigant must *support* her allegations. Indeed, Plaintiff agrees with the Defendant on this point. The difference between the parties here is that Plaintiff contends, and asks this court to recognize, that the necessary support may be provided by references rather than by attaching copies of deposition pages. Plaintiff strenuously contends, as is detailed in her Appellant's Brief and, thus, is not repeated here, that there is no Utah authority requiring a litigant to attach copies of deposition pages to a trial memorandum. Plaintiff further asks this court to recognize that none of Defendant's authorities actually discuss this issue, much less hold that she was required to attach the deposition pages to her trial memorandum when she included detailed, accurate references to the appropriate deposition pages in the memorandum.

II. THE DEFENDANT MISCONSTRUES SEVERAL ELEMENTS OF THE PLAINTIFF'S ARGUMENT AND THE NATURE OF A SUMMARY JUDGMENT PROCEEDING.

A. The Plaintiff Does Not Claim That The Defendant Attached "All Of The Portions Of Blain's And Freeman's Deposition Transcripts That Support Blain's Misidentification Argument."

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Defendant states, at page 19 of its Appellee's Brief, that

> Contrary to Blain's representations, Wal-Mart did not attach all of the portions of Blain's and Freeman's deposition transcripts that support Blain's misidentification argument.

The reason for Wal-Mart's failure to refer to any page of the Appellant's Brief on which this alleged representation is made is obvious: Plaintiff makes no such representation. Plaintiff states, at page 23 of her Appellant's Brief, that

> Assuming arguendo that copies of deposition pages cited in a litigant's memorandum to the court should be attached to that document, the court nevertheless erred in granting summary judgment. The evidence which was before the court establishes that a material question of fact as to the Defendant's negligence was raised by the evidence contained in the deposition pages on which the Defendant relied.

In addition, on page 25 of her Appellant's Brief, Plaintiff states that

> The trial judge appears to have ignored the fact that many of the pages relied upon by the Plaintiff in her opposing Memorandum were also cited by the Defendant in its Memoranda. Thus, the court had copies of the pertinent deposition pages. The Plaintiff strenuously contends that the facts contained in the deposition pages attached to the Defendant's Trial Memoranda, and the inferences fairly drawn from those facts, raise a material question of fact regarding the Defendant's negligence.

As these two excerpts from the Appellant's Brief make clear, Plaintiff does not in any way contend that Defendant attached "all of the portions of Blain's and Freeman's deposition transcripts that support Blain's misidentification argument." Appellee's Brief at 19. Plaintiff's contention is that the pages which were attached to the Defendant's memorandum support a finding that a material question of fact was present.[1]

---

[1]Plaintiff, of course, also contends that a great deal of additional support is present on the pages of the depositions which were not given to the court with the Defendant's trial memoranda but to which the Plaintiff referred in her trial memorandum.

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B. The Defendant's Argument Assumes That The Testimony Of Melia Freeman Is Accurate And That It Would Be Credited By A Jury. Defendant Fails To Recognize That The Credibility Of Freeman, Like That Of Any Witness, Must Be Determined By The Trier Of Fact, And That By Asking The Trial Court And This Court To Accept Freeman's Testimony Defendant Is Asking The Courts To Make Factual Determinations Which Must Be Left To The Jury.

Throughout its Appellee's Brief, Wal-Mart relies on the testimony of Melia Freeman as establishing the facts of this case. (*See* Appellee's Brief at 22 et seq.) For example, Defendant states, at pages 22-23 of the Appellee's Brief, that

> [t]he clear and substantiated evidence in the record shows that (a) Troy Guevara discovered Ms. Blain after she fell, (b) that a female employee from the fabrics department arrived at the scene after Plaintiff's fall and told Guevara that she had cleaned up the spill and that the spill started back in fabrics, (c) that Melia Freeman was that employee, (d) that when Ms. Freeman arrived at the scene, no one, including Blain, was lying on the floor, and (e) when Freeman left the scene, the spill had been completely cleaned up.

It is certainly true that there is evidence in the record supporting the five contentions made by the Defendant. The fact that there is such evidence, however, is practically irrelevant to the current proceedings. Defendant moved for summary judgment. On such a motion, the court must consider the facts and inferences in the light most favorable to the nonmoving party and resolve any doubts or uncertainties in favor of that party. *Canfield v. Albertsons, Inc.*, 841 P.2d 1224 (Utah Ct. App. 1992); *English v. Kienke*, 774 P.2d 1154 (Utah Ct. App. 1989), *aff'd*, 848 P.2d 153 (Utah 1993). Defendant's entire argument, both in the trial court and on appeal, *assumes* that Freeman's testimony is accurate and would be accepted by a jury. There is simply no

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basis for such an assumption. As Plaintiff discussed in her Appellant's Brief, Freeman's deposition testimony provides ample evidence (in the deposition pages attached by the Defendant to its trial memoranda) to raise serious questions regarding Freeman's credibility. (*See* Appellant's Brief at 31-32.) Furthermore, Freeman had been an employee of the Defendant and was involved in the incident. She has an obvious bias toward her former employer and wanted Wal-Mart to believe that she performed her job adequately. Those incentives, as well as the substance of Freeman's testimony, clearly indicate that a question of Freeman's credibility was raised and, thus, that her testimony should not be considered authoritative. Instead, consistent with the well-established standard for evaluation of summary judgment motions, Freeman's testimony must be considered in the light most favorable *to the Plaintiff.* Considered in that light, and speaking bluntly, Freeman's testimony must be considered to at least be biased or a complete fabrication. If a jury chose to disbelieve part or all of Freeman's testimony, the Defendant's factual assertions are completely unfounded. In short, a jury's evaluation of Freeman's credibility is important to this case.[2] By

---

[2]Defendant contends that Freeman's credibility should not be considered because the matter was not raised below. (*See* Appellee's Brief at 26.) Defendant cites two cases which state the general rule that issues raised at trial cannot be considered for the first time on appeal. The issues to which the courts in those cases were referring involved substantive theories on which a litigant relied to obtain relief; none involved the credibility of a key witness. Plaintiff contends that the credibility of a key witness is always before the court. See *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (Ct. App. 1997) and *Sansevere v. United Parcel Service, Inc.*, 581 N.Y.S.2d 317 (App. Div. 1992). See also Utah Code Ann. §78-24-1, and *Lucas v. Murray City Civil Service Commission*, 949 P.2d 746 (Ut. App. 1997). Furthermore, the trial judge here made an implicit determination regarding Freeman's credibility when he entered summary judgment based on her testimony. In such a situation, there is simply no reasonable basis for the Defendant's contention that Freeman's credibility was not an issue before the trial court.

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accepting the Defendant's arguments based on that testimony, the trial court implicitly made an inappropriate determination of credibility rather than leaving that issue to be determined by a jury. Such a determination was improper. *See Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah Ct. App. 1996).

The Defendant attempts to distract this court from the point of Plaintiff's argument regarding Freeman's credibility. Defendant states, at page 25 of its Appellee's Brief, that Plaintiff argues in her Appellant's Brief that

> a jury could infer that Freeman avoided aspects of her job, such as looking for safety hazards, because she admitted to sometimes removing her smock to avoid interacting with customers. *Id.* at 31-32. This argument is an unreasonable and unfounded stretch of the evidence. Furthermore, Blain takes the testimony out of context. A review of the transcript shows that Freeman testified she sometimes takes off her smock so that she can quickly and efficiently, without customer distraction, clean the floor in the event of a spill. Deposition of Melia Freeman at 60; R. 118. This testimony is supportive of Wal-Mart's position, and it in no way advances Blain's case..

Careful consideration of this portion of Defendant's argument reveals that it misrepresents Plaintiff's argument and ignores the fact that this case involves a summary judgment motion.

As an initial matter, Defendant completely ignores the fact that the argument contained on pages 31 and 32 of Plaintiff's Appellant's Brief is contained in a paragraph which begins "[t]he jury's evaluation of Freeman's credibility is critical to this case." Plaintiff relies on Freeman's testimony regarding her removal of her smock to illustrate that Freeman's own testimony contains statements which render her credibility suspect. . Stated briefly, Plaintiff contends that a jury could very reasonably

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doubt the credibility of a retail employee who admits in a deposition that she removes her uniform in order to avoid helping customers.

Two other troublesome matters are also raised by Defendant's attempt to dismiss Plaintiff's comments regarding Freeman's testimony that she sometimes removed her smock in order to avoid customers. First, Defendant mischaracterizes Freeman's testimony. Freeman stated:

> I may have even taken my smock off to clean it up so that nobody even knew I was a employee to stop me.
>
> Q. Is that something you would do now and then to avoid that problem?
>
> A. Sometimes, yeah, like if you had to get to do something. But I usually kept it in my back pocket. I never hid it. It was always there, and the employees knew who I was so—[.]

(R. at 0118.) It is clear that Freeman testified that she would remove her smock when there was "something" she needed to do. Defendant states, however, that "Freeman testified that she sometimes takes off her smock so that she can quickly and efficiently, without customer distraction, clean the floor in the event of a spill." (*See* Appellee's Brief at 25.) A comparison of Freeman's actual testimony with Defendant's description of it shows an obvious discrepancy: Freeman stated that she would remove her smock if "she had to get to do something" but Defendant restates this testimony by saying Freeman testified that she would remove her smock to clean up a spill. Certainly one inference which can be drawn from Freeman's testimony is that she would remove her smock to clean spills, but that is obviously not the only reasonable inference which can be drawn from the testimony. Another equally reasonable inference is that Freeman

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would remove her smock whenever, in her own opinion, there was something she needed to do. The plain language of her testimony in no way restricts the times at which she would remove her smock to circumstances involving removing safety hazards.

More importantly, Defendant's argument on this point once again ignores the fact that this case was decided on a motion for summary judgment. Thus, any inference to be drawn from Freeman's testimony must be drawn in the light most favorable to *Plaintiff*, not the light most favorable to Defendant. Although a jury might accept the inference for which Defendant argues, that inference cannot be considered in the procedural posture created by the Defendant's motion for summary judgment. *Canfield v. Albertsons, Inc.*; *English v. Kienke.*

C. The Defendant Repeatedly Discusses The Point At Which It Had Actual Notice Of The Dangerous Condition Which Caused Plaintiff's Injury, But Ignores The Controlling Legal issue, Which Is The Time At Which The Defendant *Should Have Had* Knowledge Of The Condition.

Defendant argues that Plaintiff "seems to ignore the governing legal standards that are required to be met by an injured party to make out a prima facie case of negligence against a defendant store owner." (Appellee's Brief at 27.) Plaintiff contends that it is the Defendant, not Plaintiff, who is ignoring the controlling legal standards applicable to this case. The Defendant states that Blain must establish that it had notice of the spill in order to recover. It then ignores the evidence on which Blain relies to make the required showing. Wal-Mart dismisses Plaintiff's arguments

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on this point as "nothing more than bare allegations unsupported by facts in the record." (Appellee's Brief at 31.)

The evidence supporting Plaintiff's contention that Defendant had ample time to discover and locate the spill before Plaintiff fell on it is detailed in Plaintiff's Appellant's Brief and will not be repeated at length here. Briefly summarized, however, the evidence (contained in the deposition pages which Defendant attached to its trial memoranda) shows that the Plaintiff fell in the front part of Defendant's store. Freeman had cleaned the spill starting at the back of the store and working her way to the front of the store. Freeman testified that it took her several minutes to clean the entire spill after she discovered it. Defendant's store manager, Troy Guevara, testified that Wal-Mart employees should have passed over the area in which the spill was located about every five minutes. Thus, the spill should have been discovered within five minutes by Wal-Mart employees who routinely passed over the area. Nonetheless, Freeman is apparently the only Wal-Mart employee who noticed the spill or took any actions toward cleaning it up.

Plaintiff recognizes that her case, at this point, is based in part on circumstantial evidence and on inferences. It is clear, however, that jury verdicts may be based on such evidence. *See John Q. Hammonds, Inc. v. Poletis*, 954 P.2d 1353 (Wyo. 1998); *Lohse v. Faultner*, 860 P.2d 1306 (Ariz. 1992). Plaintiff asks this court to recognize that her evidence was sufficient to support a jury verdict in her favor and thus that the trial judge erred in granting summary judgment.

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III. THE DEFENDANT ADOPTS THE CASE OF *BLOIS V. FRIDAY*, 612 F.2D 938 (5TH CIR. 1980), AND ATTEMPTS TO DISTINGUISH THAT CASE ON ITS FACTS, BUT IGNORES THE HOLDING OF THE CASE WHICH ESTABLISHES THE STANDARD FOR GRANTING RELIEF FROM A JUDGMENT SUCH AS THE ONE ENTERED BY THE TRIAL COURT.

Defendant attempts to distinguish the case of *Blois v. Friday*, 612 F.2d 938 (5th Cir. 1980), on which Plaintiff relied for the standard controlling decisions under Utah R. Civ. P. 60(b), from this case on the facts. Although Plaintiff discussed the facts of *Blois* in order to make the court's statement of its holding intelligible, Plaintiff did not in any way contend that *Blois* and this case were factually similar. The holding in *Blois* was not restricted to cases involving similar facts. Instead, the court there held that a plaintiff's motion under Fed. R. Civ. P. 60(b) for relief from summary judgment should be granted where there is no proof that the judgment resulted from serious misconduct and where there would be no prejudice to the opposing party from granting the relief.

As Plaintiff discussed at length in her Appellant's Brief, the trial court may have entered summary judgment in this case because plaintiff did not attach copies of deposition pages to her memorandum in opposition to Defendant's Motion for Summary Judgment. The absence of the copies resulted from counsel's reading of the controlling authority, which Plaintiff stills contends is correct, but which is clearly at the very least reasonable. There is simply no basis for a holding that acting in accordance with the plain language of controlling legal authority is "serious misconduct" sufficient to deprive a litigant of her cause of action.

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In response to Plaintiff's argument that her motion for relief from judgment should have been granted, Defendant states that

> Blain further claims that the court committed error by raising the question of attachment *sua sponte.* Brief of Plaintiff/Appellant at 14 and 35-36. Contrary to Blain's assertion that the court voluntarily raised the issue, Wal-Mart, in its Reply Memorandum to Blain's Memorandum Opposing Summary Judgment, specifically called the court's attention to the fact that Blain predicated her misidentification argument "wholly on speculation" and failed to offer "specific facts". Defendant Wal Mart Stores' Memorandum in Reply to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment at 13-14; R. 154-155.

(Appellant's Brief at 34-35.) This statement requires comment for two reasons. First, statements to the court below that Plaintiff's argument was based on speculation and not specific facts did not in any way complain of the absence of copies of the deposition pages on which Plaintiff relied. Read in context, they merely refer to Defendant's contentions that Plaintiff had not raised a material question of fact.

Secondly, Plaintiff does not claim that it was error for the trial court to raise the matter *sua sponte.* Plaintiff discussed the fact that the court, not the Defendant, raised the issue of the lack of attached copies as part of its discussion showing that there was no prejudice from the lack of the copies. Plaintiff's argument was, and remains, simple. Defendant did not complain of the lack of the copies. Thus, there can be no finding, as is required under the standard announced in *Blois*, that the opposing litigant would have been prejudiced by granting a relief from the summary judgment. Plaintiff did not, and does not, contend that it was error for the trial court to raise the issue.

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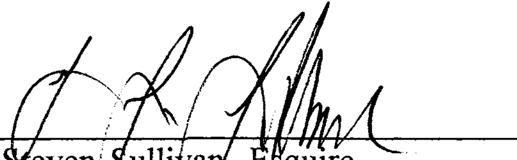
CONCLUSION

For all the reasons discussed above, Plaintiff/Appellant Dee Blain requests that this court REVERSE the summary judgment entered by the trial court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Appellant's Reply Brief was mailed, postage prepaid, on the 10 day of December 1999, to the following:

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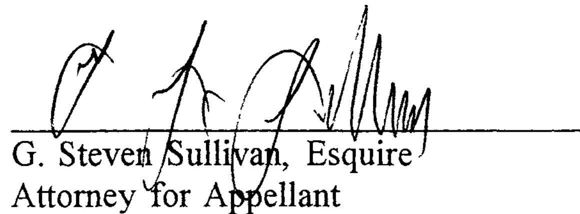

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