

1999

# Linda Ilott v. University of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LINDA ILOTT,

Plaintiff-Appellant,

-v-

UNIVERSITY OF UTAH,

Defendant-Appellee.

Case No. 990788-CA

Category 15

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OPENING BRIEF OF PLAINTIFF-APPELLANT, LINDA ILOTT

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APPEAL FROM FINAL ORDER (SUMMARY JUDGMENT)  
OF THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH  
(HONORABLE RONALD E. NEHRING)

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Julia D'Alesandro  
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PAT BARTHOLOMEW  
CLERK OF THE COURT

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COMPLETE LIST OF ALL PARTIES

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the undersigned counsel for plaintiff-appellant represents that the named parties, Linda Ilott and University of Utah, are and have been the only parties to this litigation.

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## **I. STATEMENT OF JURISDICTION**

This Appeal is from a final Order (Summary Judgment) of the Third District Court of Salt Lake County, State of Utah (Honorable Ronald E. Nehring). Linda Ilott, the plaintiff-appellant, appealed to the Utah Supreme Court, which has jurisdiction pursuant to Utah Code Ann. §78-2-2(j). The Utah Supreme Court, pursuant to Utah Code Ann. §78-2-2(4), "poured" this Appeal "over" to this Court. This Court has jurisdiction over this Appeal pursuant to Utah Code Ann. §78-2a-3(2)(j).

## **II. STATEMENT OF ISSUE PRESENTED FOR REVIEW**

The sole issue presented by this Appeal is the following: whether the District Court committed reversible error when it determined, in the face of the facts and procedural history of this case, that this is, by its nature and despite Ms. Ilott's never pursuing such a theory, a "failure-to-inspect" or "inadequate or negligent inspection" case, and only such a case, and that the University of Utah is thus immune, pursuant to Utah Code Ann. §63-30-10(4), from suit by Ms. Ilott.

### **(STANDARD OF REVIEW)**

Summary Judgment should be affirmed only if there is no genuine dispute of material fact and only if the moving party is entitled to judgment as a matter of law. The appellate court reviews the trial court's legal conclusions for

correctness. *E.g.*, Andreini v. Hultgren, 860 P.2d 916, 918 (Utah 1993). The appellate court does not defer to the trial court's ruling on appeal of a grant of summary judgment. *E.g.*, Cannon v. University of Utah, 866 P.2d 586, 588 (Utah App. 1993). On review of a grant of summary judgment, the appellate court views the facts, and all reasonable inferences drawn therefrom, in the light most favorable to the non-moving party. *Id.*

(ISSUE PRESERVED IN TRIAL COURT)

This issue was preserved in the District Court by Ms. Ilott's Memorandum in Opposition to Defendant's Motion for Summary Judgment (R. at 101-83) and at oral argument, presented May 18, 1999, in opposition to that Motion.

**III. STATEMENT OF THE CASE**

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE DISTRICT COURT

This Appeal, in this personal injury lawsuit, is from a summary judgment that was entered pursuant to the District Court's determination that this case arises from a failure to make an inspection or the making of an inadequate or negligent inspection and that the University of Utah (the defendant-appellee) is, thus, pursuant to Utah Code Ann. §63-30-10(4), immune from suit by Ms. Ilott.

Ms. Ilott alleged, in her Complaint (R. at 1-11), that the University negligently breached its duty to Ms. Ilott, a paying customer and business invitee who was attending a football game at the University's football stadium on October 29, 1994, by, among other things, failing to make and keep the subject property safe, non-dangerous, and non-defective, and that Ms. Ilott sustained substantial compensable damages, special and general, by reason of that negligence. Ms. Ilott did not allege or pursue a claim that the University had negligently failed to inspect or had negligently or inadequately inspected the subject premises.

The University filed a motion for summary judgment and supporting memorandum (R. at 35-81), contending that the subject condition (a rotten or otherwise worn-out bleacher plank that broke under Ms. Ilott's weight) constituted a non-actionable latent defect and, alternatively, that, by its nature, this was a "failure to inspect" or "negligent or inadequate inspection" case.

That motion was vigorously contested by Ms. Ilott, in her memorandum in opposition (R. at 101-83) and during oral argument. The District Court took the matter under advisement and ultimately determined, in its Memorandum Decision (R. at 210-20; copy appearing in Addendum), that this case is, by its

nature, a negligent or inadequate inspection or failure-to-inspect case and that the University is thus immune from suit by Ms. Ilott. The District Court on August 23, 1999 entered its formal Order (R. at 221-22) granting the University's Motion for Summary Judgment. Ms. Ilott's Notice of Appeal (R. at 223-24) was filed September 2, 1999.

On or about October 1, 1999, Ms. Ilott filed, pursuant to Rule 10 of the Utah Rules of Appellate Procedure, her Motion for Summary Disposition (reversal, on the basis of manifest error). The Utah Supreme Court, by its Order dated October 20, 1999, deferred ruling on that motion until further consideration.

By its Order (R. at 231) dated December 1, 1999, the Utah Supreme Court transferred this Appeal to this Court.

#### B. STATEMENT OF FACTS

Ms. Ilott stepped on a worn-out plank that, along with two other planks, comprised a bleacher seat at the University of Utah football stadium. The plank broke under her weight and she sustained significant knee and other leg injuries in the incident. R. at 2-3.

The University had knowledge of the general problem (old wooden bleachers rotting and deteriorating, over time, to the

point of failure). *E.g.*, Deposition of Mark Jolly, at 27 (R. at 157); Deposition of Elwin John, at 21 (R. at 177).

The wood used for the bleachers is untreated, and University crew member employees acknowledged that breakage was due to rot in the wood and/or normal wear and tear. Jolly depo., at 27 (R. at 157); John depo., at 21 (R. at 177).

The bleachers broke or otherwise needed to be replaced in all areas of the stadium. The University's Gary Ratliff testified, "[w]e saw no pattern. No rhyme or reason for where the planks broke or anything." Deposition of Gary Ratliff, at 39 (R. at 137).

The University came forward with no evidence to suggest that any of the metal bleachers in place at the stadium had ever broken, and the only University employees (the people who did the stadium bleacher inspection and replacement work) asked about that subject denied knowledge of any such problems with any metal bleachers. *E.g.*, John depo., at 21 (R. at 177). Not as a "post-incident remedial measure," but in conjunction with and as part of the stadium's overall renovation, the stadium now has all metal bleachers. *E.g.*, Deposition of Steve Pyne at 21 (R. at 124).

Every year, at the beginning of each season, University employees would walk the bleachers and look at the bleachers

and determine, by visual observation and weight testing, which bleachers or parts thereof needed to be replaced. *E.g.*, Aff. of Gary Ratliff, para. 1 (R. at 83). Many wooden planks were replaced at the beginning of every season. *E.g.*, Jolly depo. at 21-22 (R. at 156). So many bad planks were found that contests were held, on a daily basis, and the University employee who broke the fewest planks by walking on them had to buy pizza for his bleacher-busting colleagues. Depo. of Gary Ratliff, 37-38 (R. at 135-36).

It is a common occurrence for spectators at games or other events to walk on the wooden bleachers at the stadium. The University's Jeffery Thomas testified:

QUESTION: Have you seen people during football games walk on bleachers, wooden bleachers?  
ANSWER: Yes, I have.  
QUESTION: Is that something that you've seen every time, every game?  
ANSWER: Yes.  
QUESTION: People by the numbers doing that?  
ANSWER: What's that, again?  
QUESTION: Lots of people doing that?  
ANSWER: Yes.

Thomas depo., at 22 (R. at 153). See, also, deposition of Clifford Garland, at 28 (R. at 172).

Despite the knowledge that spectators routinely, and as a matter of course, walked on the old wooden bleachers, the University did not warn spectators of the risks of walking on

the bleachers, by announcement, by signs, or otherwise.

Mr. Thomas testified as follows:

QUESTION: Have you ever seen any signs up at the football stadium telling people not to do that [walk on bleachers]?

ANSWER: No.

QUESTION: Have you ever heard anything over the loudspeaker at football games telling people not to do that?

ANSWER: No.

Thomas depo., at 22 (R. at 153). See, also, John depo., at 22-23 (R. at 178-79).

The University does warn spectators not to walk on the seats in events in the Huntsman Center (another University facility, one used for basketball games) due to concerns that the seats might break. John depo., at 23 (R. at 179).

#### **IV. SUMMARY OF ARGUMENT**

The primary focus of Ms. Ilott's claim has been and remains that the University breached its duty of care to Ms. Ilott by failing to keep the subject premises reasonably safe, by allowing the subject premises to be unreasonably unsafe, dangerous, and defective, and by, among other things, allowing bleacher seats, one of which gave way under Ms. Ilott's weight, to be and remain in a rotted or otherwise deteriorating condition. The contentions advanced by Ms. Ilott have primarily to do with the proposition that, as

results of the University's knowledge of the generally deteriorating condition of the bleachers, replacing numerous of the old and -- by age and weathering -- deteriorated planks on only an *ad hoc* basis was an unsatisfactory and negligent response.

The University convinced the District Court that this case dealt with something it did not -- a contention that the inspections themselves were inadequate or negligent. It has never been the inspections or the inspection process of which Ms. Ilott has complained but, rather, the University's failure physically to address the general condition (as it now has, subsequent to the subject incident, by installing metal bleachers throughout the stadium) and/or satisfactorily to warn people not to walk on the old wooden bleacher seats.

This Court should recognize and act on the general proposition of law that parties ought to be allowed to pursue claims of their choosing and not have them contorted into something they are not. This Court should reverse the District Court's characterization of Ms. Ilott's claims as "failure to inspect or inadequate or negligent inspection" and its concomitant granting, on governmental immunity grounds, of the University's Motion for Summary Judgment.

## V. ARGUMENT

- A. MS. ILOTT'S INJURIES ARISE OUT OF "A DANGEROUS OR DEFECTIVE CONDITION OF ANY PUBLIC BUILDING, STRUCTURE ... OR OTHER PUBLIC IMPROVEMENT" AND NOT OUT OF A FAILURE TO MAKE AN INSPECTION OR THE MAKING OF AN INADEQUATE OR NEGLIGENT INSPECTION."

Utah Code Ann. §63-30-9 provides:

Unless the injury arises out of one or more of the exceptions to waiver set forth in §63-30-10, immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure ... or other public improvement.

Utah Code Ann. §63-30-10 provides, in pertinent part:

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from:

...

- (4) A failure to make an inspection or by making an inadequate or negligent inspection;

...

As Ms. Ilott sought to explain to the District Court, and as is clear from her Complaint, she has never advanced a claim of failure-to-inspect or of negligent or inadequate inspection. The essential paragraphs of her Complaint (R. at 1-11) are, for purposes pertinent hereto, the following:

4. On October 29, 1994, and continuously, for a substantial period of time prior thereto, defendant owned, leased, possessed, and/or controlled, and had the duty to maintain and keep safe, non-dangerous, and non-defective certain real property ("the subject premises") located, on information and

belief, on the University of Utah campus and commonly known as the University of Utah Stadium and Rice Stadium.

5. On October 29, 1994, plaintiff was an invitee of defendant and was a person to whom defendant owed the duty of reasonable care, including the duty to keep the subject premises safe and well-maintained and not dangerous, defective, or unsafe.
6. Defendant, on and prior to October 29, 1994, by and through one or more of its agents, breached its duty of care to plaintiff by failing to keep the subject premises safe, by allowing the subject premises to be unsafe, dangerous, and defective, and by, among other things,<sup>1</sup> and with actual or constructive notice of that condition, allowing a "bleacher" seat to be and remain in a rotted or otherwise deteriorated condition.

A review of that language and the entirety of the Complaint will make it clear that Ms. Ilott's claim fits the §63-30-9 "dangerous or defective condition" concept and has nothing to do with a supposedly inadequate or negligent inspection. The fact that the University, through its employees, inspected the bleacher seats does not detract from the accuracy of the proposition that this is not an inspection case.

If the mere fact that a governmental entity has conducted an inspection of its own unsafe property could, *ipso facto*,

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<sup>1</sup> Ms Ilott also contends that the University's duty of care included the duty to warn her and the other patrons of the stadium of the danger inherent in walking on the old wooden bleachers, and that the University abjectly breached that aspect of its duty of care

turn every tort case claiming that government property is defective or dangerous into a negligent inspection case, virtually no claim, regardless of its strength, regarding a dangerous or defective condition of a public building or other public improvement or, for that matter, of a public highway, tunnel, bridge, etc. (see Utah Code Ann. §63-30-9) could hope to succeed. For, to one degree or another, and with varying degrees of frequency, all such things are "inspected."

Ms. Ilott urges the Court to recognize that it cannot, in light of Utah Code Ann. §63-30-8 and §63-30-9, be the law of Utah that a person who is injured by reason of a dangerous public building or highway can be checkmated in her effort to obtain compensation by the governmental entity's simply making the argument that the plaintiff's claim is necessarily one of negligent inspection. Otherwise, and by reason of the fact that governmental entities always conduct some manner of "inspection" of their own properties, the presumptive waiver of immunity that is set forth in Utah Code Ann. §§63-30-8 and 63-30-9 would be rendered essentially meaningless. And, as numerous Utah appellate decisions have explained, related statutes such as those comprising the Utah governmental immunity act need to be construed in a fashion that harmonizes the statutes and renders none meaningless. *E.g.*, Lyon v.

Burton, 2000 Utah 19, ¶ 17; Roberts v. Erickson, 851 P.2d 643, 644 (Utah 1993).

The Court should determine that this case is not a negligent inspection case and should reverse the District Court's ruling.

B. SECTION 63-30-10(4) "APPLIES ONLY TO CONCLUSIONS AND RESULTS OF AN INSPECTION WHERE THE INSPECTOR MAY HAVE OVERLOOKED SOMETHING OR MADE A FAULTY JUDGMENT IN DECIDING WHETHER TO APPROVE OR REJECT THE SUBJECT OF THE INSPECTION."

In Ericksen v. Salt Lake City Corp., 858 P.2d 995 (Utah 1993), the Utah Supreme Court affirmed the denial of Salt Lake City's motion for summary judgment and a judgment on a jury verdict for an employee of a contractor that was doing work for Salt Lake City at the Salt Lake City International Airport. That person was injured when an employee of the City, while in the course of his job duties, as a construction inspector, inspecting the contractor's work, negligently pushed a button that activated a large garage-type overhead door against which the plaintiff's ladder was leaning. The opening of the door caused the ladder and the plaintiff to fall and caused the plaintiff to sustain injuries. The City contended that it was immune, under the governmental immunity "inspection" statute (then codified at Utah Code Ann. §63-30-

10(1)(d), contending that its employee's negligent conduct occurred

at the very core of the inspection process in that (1) he was attempting to raise a door to make a more thorough inspection, and (2) it was not an incidental act which happened to occur during the course of the inspection, unrelated to the inspection itself.

*Id.* at 997. The Supreme Court acknowledged that the City's employee was acting "as an inspector for the City as the owner of the property and as a party to the construction project" (*id.*) but stated:

We believe that the legislation intended to preserve a narrow immunity for inspections to allow inspectors to perform their work without fear that an oversight which later causes injury would give rise to liability on the part of the governmental entity. The conclusions and results of the inspection are not to be second-guessed by courts and juries.

*Id.* at 998 (emphasis added). The Supreme Court then held, in part, as follows:

We ... conclude that the immunity granted in section 63-30-10(1)(d) was intended to immunize only the conclusions and results of an inspection where the inspector may have overlooked something or made a faulty judgment in deciding whether to approve or reject the subject of the inspection.

*Id.* (emphasis added).

There is nothing in the record of this case to support the proposition that the University employees were professional inspectors or the proposition that Ms. Ilott

contends that any of them erred "in deciding whether to approve or reject the subject of the inspection." The workers in question were maintenance and repair workers and not inspection professionals. *E.g.*, deposition of crew leader Mark Coburn at 9-10 (R. at 160-61).

The instant case is somewhat analogous to Nixon v. Salt Lake City Corporation, 898 P.2d 265 (Utah 1995), a case in which, among other things, the Supreme Court rejected the City's argument that its "failure to maintain floor scrubbers [owned by the City] was, at least in part, attributable to inadequate or negligent inspection as that term is used in section 63-30-10(4)." *Id.* at 270. Even in the face of the fact that "for some period prior to Nixon's injuries, the SLC employees failed to open the battery cells daily to check the fluid level in the batteries and failed to test the battery fluid on a regular schedule with a hydrometer" (*id.* at 267), the Supreme Court held that "as a matter of law, the acts complained of are acts of maintenance rather than acts of inspection." *Id.* at 570 (emphasis added). The unanimous Nixon court then, *id.*, favorably quoted from Ericksen, 858 P.2d at 997:

[T]he question of whether a governmental entity is liable for the negligent inspection of property most frequently arises when the entity undertakes inspections to assure

compliance with building, fire, electric and other safety codes.

It is, of course, manifest that nothing of this sort was going on in connection with the subject work done and not done on the University's own property.

Just as in Nixon the Supreme Court appropriately focused on the negligent maintenance of the machines in question and refused to buy into Salt Lake City's stretch of an argument that what went on there was a negligent "inspection" (something apparently not alleged or pursued by Mr. Nixon), this Court should recognize that the essence of the fault of the University in this case has nothing to do with the "inspection" process, *per se*, but is its negligent failure satisfactorily to maintain and repair the bleachers or to address the overall deteriorated condition of the old wooden bleachers by wholesale replacement. This Court should, accordingly, reverse the District Court's grant of summary judgment.

C. THE DUTY OF REASONABLE CARE OWED BY THE UNIVERSITY TO MS. ILOTT INCLUDED THE DUTY TO WARN, AND THAT DUTY EXISTS APART FROM "INSPECTION" ANALYSIS.

A pertinent Utah case, given the big picture of this case and the duty of the University to keep its premises reasonably safe for business invitees such as Ms. Ilott, and satis-

factorily to warn them<sup>2</sup> of dangers attending the use of parts of its premises, is Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210 (Utah 1951). The plaintiff's primary contention in Erickson was that the premises owner

knew or should have known of the propensities of the floor to become slippery when wet and was negligent in failing to warn customers using the entrance way of the hazard involved or to obviate the slippery condition ....

232 P.2d at 211.

The Utah Supreme Court's analysis in Erickson includes its instructive and favorable discussion of a jury instruction given in that case:

With respect to the duty upon [the defendant], the jury was instructed that ... 'it was the duty of [the defendant] to exercise reasonable care to keep the entranceway to its store reasonably safe for the use of its customers; and in this regard you are instructed that if you shall find from a preponderance of the evidence that the entranceway was not reasonably safe in that the floor of the entranceway had become wet from rainwater and slick and slippery and that [the defendant] knew or in the exercise of reasonable care should have known of said condition, and failed to exercise reasonable care to remedy said condition and make said entranceway reasonably safe for the use of its customers, by means of warning signs to advise of the slick condition or by covering the terrazzo entrance with rubber mats or other substances to prevent slipping, then [the defendant] was negligent.'

*Id.* at 212-14 (emphasis added).

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<sup>2</sup> Please note that there is, unlike the "negligent inspection" provision, no even arguable governmental immunity defense on which the University can rely for its failure to warn Ms. Ilott.

No development in Utah law since the Erickson case was decided has detracted from the accuracy of that instruction. No Utah case vitiates the duty to make safe and/or warn, even if it is somehow determined that "inspection" analysis is applicable. It is nearly indisputable, on the record of this case, that the premises were not safe and it is entirely indisputable that the University gave no warning.

University employees understood the risk that persons walking or running on the bleachers might break the bleachers and injure themselves (Ratliff depo., at 57 (R. at 142)), but the University did nothing, by any warnings or by systemically physically addressing this problem, to address that reality.

Even in the face of the University's knowledge that the wooden planks would often break when walked upon (e.g., Thomas depo. at 15 (R. at 152); John depo. at 28-29 (R. at 182-83)), that they could break when spectators or athletes walked or ran on them, and that at every game spectators walked on the bleachers (Thomas depo. at 22 (R. at 153)), the University did not warn spectators to refrain from walking on the bleachers (*id.*; see, also, John depo. at 22-23 (R. at 178-79)).

This Court should recognize, whatever it does with the "inspection" versus maintenance/repair/replacement aspect of this Appeal, that Ms. Ilott's injuries "arise," at least in

part, "out of" the University's failure to warn her of the danger of which the University knew, at least as a matter of triable fact, to be present in its stadium. The Court should, accordingly, reverse the District Court's granting of summary judgment.

#### **VI. CONCLUSION AND STATEMENT OF RELIEF SOUGHT**

The Utah Supreme Court long ago, in Glenn v. Gibbons & Reed Co., 1 Utah 2d 308, 265 P.2d 1013, 1015 (1954), restated the general common law rule that a premises owner owes a business visitor the duty to keep its premises in a condition that is reasonably safe for the business visitor. This Court should keep in mind, as it analyzes the specifics of this case, the University's general duty to act reasonably to make and keep its premises safe for Ms. Ilott. As with nearly all negligence cases, the question of whether the University breached its duty to act reasonably is a question of fact to be resolved, based upon the totality of the circumstances.

A central question for jury determination in this case will be, unless the District Court on remand grants Ms. Ilott a directed verdict on the question, whether the condition of the bleachers in the stadium was such that an unreasonable risk of harm was present. The Utah Court of Appeals, in the premises liability case of Wagoner v. Waterslide, Inc., 744

P.2d 1012 (Utah App. 1987), addressed that question. In Wagoner, the Court held:

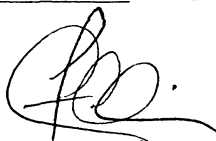
The initial issue is whether or not the condition of the water slide presented an unreasonable risk of harm to defendant's patrons. Whether an unreasonable risk of harm existed is a determination of fact to be made by the jury. 'The standard upon which negligence is gauged is that of ordinary, reasonable care under the circumstances, which standard it is peculiarly fitting that juries determine.' DeWeese v. J.C. Penney, Co., 5 Utah 2d 116, 119, 297 P.2d 898, 901 (1956).

744 P.2d at 1013.

It appears, as suggested hereinabove, that, if the District Court's analysis is correct, any time a piece of property owned by a governmental entity is defective or dangerous and any time there has ever been any "inspection" of that property by the governmental entity itself, or, indeed, a total failure of the governmental entity ever to "inspect" the property, an injured person such as Ms. Ilott will never be allowed to recover, regardless of the abysmal nature of the condition, regardless of the abject lack of warnings, and regardless of how the case is pleaded and developed in discovery. Ms. Ilott urges the Court to recognize that that would be bad public policy, would render Utah Code Ann. §§63-30-8 and 63-30-9 essentially meaningless, and cannot be the law.

Ms. Ilott urges the Court to reverse the District Court's grant of summary judgment and to remand this case for trial.

Respectfully submitted this 31<sup>st</sup> day of January, 2000.



PETER C. COLLINS  
TARA L. ISAACSON  
BUGDEN, COLLINS & MORTON, L.C.  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that, on the 31<sup>st</sup> day of January, 2000, I caused to be served two true and correct copies of the foregoing OPENING BRIEF OF PLAINTIFF-APPELLANT, LINDA ILOTT by the method indicated below, and addressed to the following:

Brent A. Burnett  
J. Wesley Robinson  
Assistant Attorney General  
160 East 300 South, Sixth Floor  
Post Office Box 140856  
Salt Lake City, UT 84114-0856

<input type="checkbox"/>	HAND-DELIVERED
<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	OVERNIGHT MAIL
<input type="checkbox"/>	TELECOPY (FAX)



## ADDENDUM

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

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LINDA ILOTT,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 960906196
vs.	:	
UNIVERSITY OF UTAH,	:	
Defendant.	:	

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This case came before me for hearing on defendant University of Utah's Motion for Summary Judgment on May 18, 1999. I then took the matter under advisement. Since then, I have examined the legal authorities cited by counsel in support of their respective positions and considered counsels' oral argument. For the reasons stated below, I grant defendant's motion based on my conclusion that the conduct of the defendant claimed to be actionable arose from an inspection for which the University, as a governmental entity, is immune from suit.

FACTUAL BACKGROUND

The plaintiff alleges that on October 29, 1994, she attended a football game at Rice Stadium, a facility owned by the defendant. The plaintiff was returning to her seat when one of the planks used as bleacher seats in the north end-zone collapsed as she stepped on it, injuring her.

In support of their Motion, the University presents the Affidavit of Gary Ratliff, who notes that "[e]ach summer before football season begins, the University does a visual and weight inspection of all of the bleachers and seats in the Rice Stadium." (Affidavit of Gary Ratliff at para. 1). The plaintiff contests Mr. Ratliff's assertion that each of the three planks of every bleacher was visually or weight inspected by citing to the deposition testimony of Steven Pyne that he did not have specific recollection of conducting any inspections and repairs immediately prior to the October 29, 1994, football game. (Deposition of Steven Pyne at pp. 32-33). Mr. Pyne's deposition testimony creates an issue of fact concerning the scope of the defendant's inspection, but it is an issue which is rendered immaterial by Utah Code Annotated §63-30-10(4).

LEGAL ANALYSIS

The defendant contends that the governmental immunity provisions of Utah Code Annotated §63-30-10(4) and (17) bar the plaintiff's lawsuit. Section 63-30-10(4) provides as follows:

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of:

. . .

(4) a failure to make an inspection or by making an inadequate or negligent inspection.

The defendant asserts if its inspection should have disclosed a defective bleacher, then it is immune under subsection 4 because the plaintiff's injuries arose out of its "failure to make an inspection or by making an inadequate or negligent inspection."

In response to the defendant's immunity argument, the plaintiff suggests, unfortunately without discussion or analysis, that paragraph (4) does not apply because her claims do not involve a failure to inspect or negligent inspection. After reviewing the plaintiff's Complaint and the record developed pursuant to the

University's Motion, I am persuaded when the plaintiff's claim that the University breached its duty to keep Rice Stadium safe and well-maintained is coupled with the undisputed fact that the University conducted regular inspections of the bleacher planks, inspection immunity bars plaintiff's suit as a matter of law.

The plaintiff herself supplies the primary impetus for my determination that her claims are subject to inspection immunity in her Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Memorandum"). The legal authority cited by plaintiff as "most instructive with respect to the issues before this Court" is quoted with emphasis for the proposition that "[The defendant] was in the actual possession of the building and had a duty to search out defects in the premises in order that they be reasonably safe for the presence of business visitors." Memorandum, at 9,10, citing Erickson v. Walgreen Drug Co., 232 P.2d 210 (Utah 1951). The inspections of the bleachers conducted by the University were undertaken in clear recognition of the duty articulated in Erickson. Since the weakened condition of the plank that failed beneath Ms. Ilott was not apparent, she could only establish the

University's negligence by proving that a reasonable inspection would have revealed its true condition. Accordingly, the crux of the plaintiff's case is in fact premised on the defendant's negligent or inadequate inspection.

Having determined that the plaintiff's claims are based on the theory of negligent inspection, I turn to the question of whether the defendant's inspection of the bleachers falls within the ambit of immunity granted under paragraph (4). The Utah Supreme Court has addressed the scope of paragraph (4) in two cases: Ericksen v. Salt Lake City Corp., 858 P.2d 995 (Utah 1993), and Nixon v. Salt Lake City Corp., 898 P.2d 265 (Utah 1995). Each of these cases pares back the application of inspection immunity in different ways.

In Ericksen, the court decided whether immunity should be granted when the negligent conduct complained of occurred incidental to the actual inspection. The court indicated that "[t]he question of whether a governmental entity is liable for the negligent inspection of property most frequently arises when the entity undertakes inspections to assure compliance with building,

fire, electric and other safety codes." Id. at 997 (citing 57A Am.Jur.2d Negligence §376 (1989)). The court also noted its belief that "the legislature intended to preserve a narrow immunity for inspections to allow inspectors to perform their work without fear that an oversight which later causes injury would give rise to liability on the part of a governmental entity." Id. at 998. The court held that immunity related to negligent inspection "was intended to immunize **only the conclusions and results of an inspection** where the inspector may have overlooked something or made a faulty judgment in deciding whether to approve or reject the subject of the inspection." Id. (emphasis added). Therefore, under Ericksen, the first component of immunity for negligent inspection is that inspectors who conduct themselves negligently while making an inspection are not immunized - the Ericksen inspector negligently opened the wrong overhead door while conducting the inspection of a building under construction dislodging a ladder which was placed against the door and injuring the worker who occupied it - while inspectors that reach incorrect conclusions and results from an inspection enjoy immunity.

In Nixon, court restricted the reach of inspection immunity by denominating the failure to identify and repair faulty cleaning equipment as a shortcoming in maintenance and not inspection. The court determined that this was not a case "where an inspector failed to determine that a particular building or piece of equipment was unsafe for the public as whole." Id. at 269. In reaching this decision, the court discussed the genesis of immunity for negligent inspection as being the "public duty doctrine" which "'operates to disallow recovery by individuals for such inspections on the ground that the [inspection] was intended to protect the general public, and to provide a means of enforcing a third-party's duty to repair defects, rather than to protect a particular individual or class of individuals.'" Id. (citing 57A Am. Jur. 2d Negligence §376) (Emphasis added). Therefore, while the Ericksen court reiterated its view that the inspection immunity is to be parceled out parsimoniously, it is properly invoked where the inspection is undertaken to safeguard the general public.

Various rationales for the public duty doctrine exist. Foremost among them is the notion that the governments interest in

safeguarding the public interest predominates over the interests of any one individual. The Utah Supreme Court in Gillman v. Department of Financial Institutions, 782 P.2d 506, 513 (Utah 1989), discussed the reasoning behind the public duty doctrine in the context of immunity granted in connection with the issuance, denial, suspension, or revocation of licenses. The court quoted 4 California Law Revision Comm'n, Reports, Recommendations and Studies 817-18 (1963):

"Public entities and public employees should not be liable for failure to make arrests or otherwise to enforce any law. They should not be liable for failing to inspect persons or property adequately to determine compliance with health and safety regulations. Nor should they be liable for negligent or wrongful issuance or revocation of licenses and permits. The government has undertaken these activities to insure public health and safety. To provide the utmost public protection, governmental entities should not be dissuaded from engaging in such activities by the fear that liability may be imposed if an employee performs his duties inadequately. Moreover, if liability existed for this type of activity, the risk exposure to which a public entity would be subject would include virtually all activities going on within the community. There would be potential governmental liability for all building defects, for all crimes, and for all outbreaks of contagious disease. No private person is subjected to risks of this magnitude.... Far more persons would suffer if government did not perform these functions at all than would be benefitted by permitting recovery in those cases

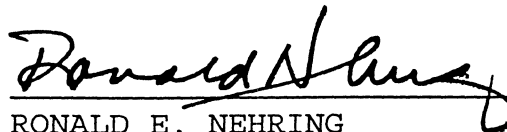
where the government is shown to have performed inadequately.'"

Id. at 513.

Pursuant to the analytical model established in Ericksen and Nixon, I conclude that the defendant has established both components of immunity for inspection. First, the plaintiff's injuries stem from the incorrect conclusion reached by the individuals who inspected the bleachers that all of the bleachers were safe for the public using Rice Stadium. In other words, the plaintiff's injuries resulted directly from an alleged oversight related to the actual inspection process. The second component of public duty is also met because the University's inspectors allegedly failed to determine that at least one of the bleachers, which collapsed when the plaintiff stood on it, was unsafe for public use. It is evident that the inspection of the bleachers was undertaken to insure public health and safety. Since the plaintiff's injuries arose as a result of incorrect conclusions and results of an inspection which was undertaken for the public in general, the exception to the waiver of immunity found in §63-30-10(4) applies to bar the plaintiff's action.

Counsel for the defendant is to prepare an Order consistent with this Memorandum Decision.

Dated this 19 day of July, 1999.

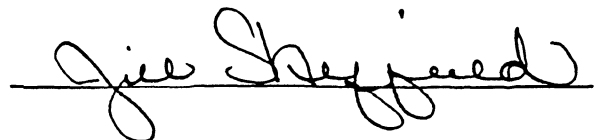
  
\_\_\_\_\_  
RONALD E. NEHRING  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 19 day of July, 1999:

James E. Morton  
Attorney for Plaintiff  
4021 South 700 East, Suite 400  
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Valden P. Livingston  
Assistant Attorney General  
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A handwritten signature in cursive script, appearing to read "Julie Skaggs", is written over a horizontal line.