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Linda Ilott v. University of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA ILOTT,

Plaintiff-Appellant,

-v-

UNIVERSITY OF UTAH,

Defendant-Appellee.

Case No. 990788-CA

Oral Argument

Priority 15

REPLY BRIEF OF PLAINTIFF-APPELLANT, LINDA ILOTT

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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I. ARGUMENT

A. THE COURT SHOULD GRANT ORAL ARGUMENT AND SHOULD ISSUE AN OPINION FOR PUBLICATION.

Ms. Ilott first addresses the last thing set forth in the University of Utah's Brief. Although the Rules do not contemplate such a thing for inclusion in a brief, the University states that it "does not request oral argument and a published opinion in this matter." Nor do the Rules appear to contemplate the statement made by the University that "[t]he questions raised in this appeal are not such that oral argument or a published opinion are necessary ." Ms. Ilott is of the view, in any event, that the issues raised in this case warrant oral argument and that a published opinion is appropriate. For it is a remarkable societal and legal proposition indeed, if the University's argument that this is an "inspection" case is accepted, that an apparently non-negligent, money-paying resident of the State of Utah is checkmated,¹ by the laws of the State of Utah, from recovering monetary compensation for personal injuries sustained as a

¹ As explained in Ms. Ilott's Opening Brief, at 10-11; 19, every governmental property is inspected or subject to inspection, to one degree or another. If the University can make itself immune in this case simply by claiming this is an "inspection" case, what is to stop any governmental entity, in any case involving a dangerous condition (see waivers set forth in Utah Code Ann. §§63-30-8 and -9), from making itself immune simply by claiming that its only failure, if any, was a failure to inspect or the making of a negligent or inadequate inspection?

result of a dangerous condition that is completely within the power of an agency of the State of Utah to correct and render non-dangerous. Similarly, if Ms. Ilott's position is correct, it would be good for all Utah governmental entities to know that they cannot succeed with such an argument, and it would be good for trial judges to be made aware of that fact.

B. THE UNIVERSITY'S PURPORTED MINIMALIST VIEW OF THE DUTY OF A PROPERTY OWNER IS INCORRECT AND CONFLICTS WITH PARTS OF THE UNIVERSITY'S OWN ANALYSIS.

In its "Statement of the Issues," appearing at pages 1-3 of its Brief, the University mysteriously casts the issues to be decided on this Appeal in declaratory sentences. The first of those sentences, set forth as purported Issue No. 1 is:

The duty of a property owner to exercise reasonable care in keeping its premises safe for business invitees is a duty to inspect for dangerous conditions.

As is clear from a review of authorities cited in Ms. Ilott's Brief² (if, indeed, such a review is even necessary), the duty of a property owner is much broader than that and includes the duty to make premises reasonably safe for business invitees or satisfactorily to warn of dangers attending the use by business invitees of the owner's

² Glenn v. Gibbons & Reed Co., 1 Utah 2d 308, 265 P.2d 1013, 1015 (1954) (Opening Brief at 18); Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d

property. Indeed, the University has in its Brief (p. 8, second paragraph) essentially acknowledged the correctness of this proposition. It is self-evident that the University did not make the premises safe. And it is completely beyond dispute that it gave no warning.

Also, the University cites Erickson (n.2, *supra*), in its Brief at 6, for the proposition that premises liability can be established if the defendant "knew or in the exercise of reasonable care should have known of [the subject] condition, and failed to exercise reasonable care to remedy said condition ." As the Court will readily observe, there is no mention of the word or concept of "inspection" in that statement of the law adopted by the University itself.

Nor is it availing to the University's position that the section from the Restatement, Second, of Torts set forth on page 6 of the University's Brief mentions, among other things, the concept of inspection. The University understandably, from an adversarial prospective, continues its campaign, waged successfully in the District Court proceedings, to make this case something it has never been, to wit: an "inspection" case. As explained in her Opening Brief, Ms. Ilott has never

210, 211-14 (1951) (Opening Brief at 16), Wagoner v Waterslide, Inc., 744 P 2d 1012, 1013 (Utah App 1987) (Opening Brief at 18, 19)

so cast this case, and, again, this Court should not be tricked into applying the analytical constructs suggested by the University.

C. MS. ILOTT HAS NEVER CONTENTED AND DOES NOT NOW CONTENTEND THAT THE UNIVERSITY FAILED TO CONDUCT AN INSPECTION OR CONDUCTED AN INADEQUATE OR NEGLIGENT INSPECTION.

Through good lawyering and the citation of cases such as Darrington v. Wade, 812 P.2d 452, 458 (Utah App. 1991) (cited at page 7 of its Brief), the University attempts to make a duty satisfactorily to inspect the subject bleachers an integral part of Ms. Ilott's claim. What this Court needs to understand is that Ms. Ilott has never suggested and is not now suggesting that the University failed in its inspection efforts, with respect to its non-discovering of the particular plank that broke, or otherwise. Ms. Ilott herself acknowledges that the University's inspection process was, for purposes pertinent hereto, satisfactory. For the University acquainted itself with the generally dangerous nature of the bleachers. Ms. Ilott's contention is that the University's response to what it knew, with respect to the general condition, was wholly unsatisfactory. It is Ms. Ilott's contention that the University should have made the wholesale change to metal bleachers (which it did after the occurrence of the subject incident) or otherwise physically remedied the

stadium-wide condition, prior to the time she was injured, and/or should have satisfactorily warned paying customers, such as Ms. Ilott, of the generally dangerous condition.

D. THE UNIVERSITY ERRONEOUSLY ATTEMPTS TO FOCUS THE COURT'S ATTENTION ON THE DANGEROUS NATURE OF THE SPECIFIC PLANK IN QUESTION RATHER THAN ON THE GENERALLY DANGEROUS CONDITION OF THE STADIUM BLEACHERS.

The University acknowledges, at page 8 of its Brief, that

The duty of the landowner is to either correct a dangerous condition or to give adequate notice of the same. A landowner has no duty to do either until it becomes aware that such a dangerous condition exists.

The University, at least as a matter of triable fact, did not "correct [the subject] dangerous condition" (i.e., the epidemic problem, discussed in Ms. Ilott's Opening Brief at 4-6, and not contested by the University) of rotted and deteriorating planks; and it clearly did not give any notice or warning of that condition to customers such as Ms. Ilott. The University was, at least as a matter of triable fact, well aware of the generally dangerous condition long before the occurrence of the subject incident. The University's attempt to cram the entire analysis of this case, given these realities, into a plank-by-plank analysis, is unfair to Ms. Ilott and other members of the public, and makes, in the big picture and at least as a matter of triable fact, no sense.

E. THE UNSAFE CONDITION OF THE BLEACHERS CONSTITUTED, AT LEAST AS A MATTER OF TRIABLE FACT, A NON-LATENT DEFECT.

Although the District Court's determination that the University was entitled to summary judgment did not reach the question of "latent defect" immunity, the University has raised that alternative argument in its Brief.

The University (focusing, again, only on the plank that broke under Ms. Ilott's weight) contends, in its effort to checkmate Ms. Ilott in her effort to recover damages for her personal injuries sustained as a result of the subject dangerous condition, that, if neither it nor Ms. Ilott discovered the defect in the particular plank, the defect must have been "latent." The University curiously suggests that this Court should conclude that, because Ms. Ilott, who was simply attending a football game and was not charged with any duty of making the subject premises safe, did not notice anything dangerous about the plank on which she was about to step, the subject condition was "latent." It goes without saying, of course, that if Ms. Ilott had acknowledged that she knew the plank on which she was about to step was dangerous, the University would no doubt be arguing that the incident was her fault, either entirely or on a 50% or more basis, and

that, accordingly, Ms. Ilott would not be entitled to recover damages.

It does not follow, as a matter of law or as a matter of logic, that if neither the University nor Ms. Ilott knew that the particular plank in question was dangerous, the condition in question was "latent," and that the University is immune from liability. The focus should, as stated hereinabove and at least as a question of triable fact, not be on the particular plank that broke, but on the generally unsafe (known to the University and not known to Ms. Ilott) deteriorated condition of the wooden bleachers.

Cases from other jurisdictions have appropriately rejected defendants' attempts to cram the focus of the "latent" defect analysis on a particular item, in situations in which it is more appropriate to look at the general condition of the situation in which the item in question is a part. In, for example, Schon v. James, 28 So.2d 531, 533 (La. App. 1946), the court cogently held, in the course of rejecting the defendant's argument that the defective condition in question was a "latent" condition, that the focus should not be on the detection of a specific leak but on the generally deteriorated condition of a water heater.

II. CONCLUSION

Based on the analysis set forth in her Opening Brief and in this Brief, and in the interest of public safety and the ability of people injured on public property to obtain compensation for their injuries, Ms. Ilott urges this Court to reverse the District Court's granting of summary judgment and to allow this case to proceed to jury trial.

Lest there be any doubt with respect to what is set forth in Point A of the foregoing Argument, Ms. Ilott urges the Court to convene oral argument and, ultimately, to issue an opinion for publication with respect to the issues raised in this Appeal.

Respectfully submitted this 4th day of May, 2000.



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CERTIFICATE OF SERVICE

I hereby certify that, on the 4th day of May, 2000, I caused to be served two true and correct copies of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT, LINDA ILOTT by the method indicated below, and addressed to the following:

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