2016

Kachina· Choate, Plaintiff-Appellant vs. Ars-Fresno LLC, a California Limited Liability Company, Defendant-Appellee.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

KACHINA CHOATE, Plaintiff-Appellant vs. ARS-FRESNO LLC, a California limited liability company, Defendant-Appellee.	PUBLIC Case No. 20151054

Reply Brief of Appellant

Appeal From the Third District Court, Salt Lake County, from an Order Denying Plaintiff-Appellant's Motion for New Trial before the Honorable Judge Paige Peterson

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INTRODUCTION

Kachina Choate submits this Brief in reply to the Brief of ARS-Fresno. Ms. Choate stands by her analysis of Utah law, and its application to the instant dispute, set forth in her Opening Brief. She seeks to refrain from unnecessarily repeating that analysis and to limit this Reply Brief essentially to the parts of ARS Fresno's response, that may fairly require reply.

SUMMARY OF ARGUMENT

Given that the jury found causal fault by both parties, certain inferences and facts are necessarily attached to the Jury's verdict. It is not possible for the verdict to be internally consistent if the Jury found that ARS had no property defect which led to the injury, as ARS would have no

legal fault. Given the requisite assumptions and the evidence available, it is possible for the jury to have found Kachina Choate 49% at fault for the slip and fall that injured her on ARS Fresno's premises, but it is manifestly against the weight of the evidence available to find her more than 49% at fault.

ARGUMENT

I. WHERE THE JURY FOUND ARS FRESNO CAUSALLY AT FAULT FOR THE SLIP AND FALL THAT INJURED KACHINA CHOATE ON THEIR WALKWAY, THERE ARE INSUFFICIENT ANCILLARY ISSUES FOR CREDIBILITY DETERMINATION ALONE TO JUSTIFY THE 60/40 APPORTIONMENT OF FAULT.

The jury, as ARS Fresno correctly argues and Jury Instruction No. 8 memorialized, are the "exclusive judges of the credibility of the witnesses and the weight of the evidence." In performing their duty, the Jury determined that ARS Fresno was causally at fault for the fall that injured Kachina Choate on their pedestrian walkway.

ARS Fresno argues in their brief that since their liability defenses included that there was enough ice melt, the roof did not "leak", and that water could not have dripped to the pavement and refrozen as it had done in the past, because the high temperature for the day at the Salt Lake Airport was 32 degrees. The jury must have made credibility

determinations on these issues sufficient to support their verdict. The error in ARS Fresno's argument is if the jury found that there were sufficient ice melt, no roof leak, and no water dripping onto the sidewalk, the jury could not have found ARS causally at fault. The jury must have found that Kachina Choate slipped on black ice, as she testified, and that the black ice condition existed as a result of ARS Fresno's inaction in properly addressing the recurrent danger of black ice on the pedestrian walkway.

If the jury believed there was ice melt, there was not enough ice melt to make the walkway safe. Mr. Jennings testified to his 90% certainty that he placed ice melt, the circumstances are that he didn't place enough of it to make the walkway completely safe, and Kachina and Bernadine Choate contend that he may not have placed any. The jury can grant no less than that he didn't place enough of it to make the walkway completely safe, given the finding of ARS Fresno's causal fault.

ARS Fresno overstates the evidence before the jury regarding the roof, and it is not merely an issue of credibility whether the jury correctly addressed that evidence. ARS Fresno's expert, Mr. Taylor, who visited the site in November of 2014, observed water dripping from the roof (he found an improperly sloped parapet cap and observed the dripping from the roof

onto the walkway, though he claims the internal membrane protecting the top plane of the structure has no leaks in it). It is accurate to say that Taylor found there was no leak in the roof *membrane*, but wholly inaccurate to state that his testimony supported a finding that there was no leaking problem with the roof of ARS Fresno's premises. Mr. Taylor testified at trial:

> "Q. And because of this situation, where does the water come out where it's not going into the drains?
> A: [Taylor] Well, it—it—I'm guessing it's headed towards that corner and dripping off the edge of that corner." (R. III 186)

> "Q. [...] you noticed like two wet spots that you associated with water coming off the building; right?
> A. [Taylor] Yes.
> Q. The—the—the wetter one being somewhat south of the corner and is right on the corner, it being damp but not quite so wet.
> A. Right.
> Q. Correct? All right.
> And do you associate those with this parapet wall thing that Mr.—Mr. Edwards and you were talking about?
> A. I don't think anyone can be sure but it could likely be from that." (R. III 190).

Further, in Mr. Taylor's report which was admitted into evidence, he concluded "Conclusion No. 1: The roof is in need of repair to correct the cause of the dripping on the northeast corner." (R. III 195-196). The area onto which the water "leaked" or "dripped" is a pedestrian walkway in

front of a retail establishment. As argued extensively in Ms. Choate's initial briefing, knowledge of the hazardous condition was widespread among ARS Fresno employees. They all knew about, they didn't fix it, black ice consistently formed and Kachina slipped on it, fell, and was injured.

Kachina observed the black ice the day of the incident, two other witnesses who checked the scene later claimed they did not. If there had been no ice there would have been no fault, the jury's verdict contains a credibility judgment on this issue as a necessary facet of its existence. The evidence must be construed in the light most favorable to the Jury's verdict, and had the Jury found that no dangerous condition existed, they could not have found ARS-Fresno causally at fault.

II. KACHINA CHOATE EXERCISED REASONABLE CAUTION SUCH THAT A VERDICT FINDING HER MORE THAN 49% AT FAULT IS NOT SUPPORTED BY THE EVIDENCE

There was no evidence presented at trial that could support the conclusion that Kachina Choate was acting so recklessly that she could be appropriately apportioned anything more than 49% of the fault. Where pedestrian walkways are created and maintained they must be maintained safely, and "almost" making premises safe is not sufficient effort to be

apportioned anything less than 51% of the fault when a pedestrian walking normally injures themselves on the hazard a defendant permits to exist in the pedestrian's invited path on that defendant's commercial premises.

ARS-Fresno's causation defense was that Kachina Choate should have been more careful walking in winter weather conditions, the jury found Kachina to be causally at fault for the fall that injured her, however, examining the comparative fault of the parties in this case makes it clear that finding Kachina more at fault than ARS is against the great weight of the evidence.

In determining the relative fault of the parties, "the kind of comparison of fault that a jury ought to make[in] allocate[ing] liability should be made on the basis of the relative culpability of both parties. Harris v. Utah Transit Auth., 671 P.2d 217, 222 (Utah 1983). In terms of relative culpability it is manifestly unreasonable for the jury to weigh the contributions of both parties 60/40, or even equally. ARS failed in its duty to make its premises safe, and Kachina Choate walked on a sidewalk.

A. ARS DID NOT INSPECT AND MAKE SAFE ITS PREMISES

The evidence at trial demonstrated that ARS knew of both a structural defect in the roof of their building, as well as the recurrent

development of dangerous black ice on a pedestrian walkway beneath that roof as a result of dripping or leaking water. The expert testimony provided at trial, both by Plaintiff and Defendant's experts, suggested that the defect with the roof and resulting dripping or leaking which created the dangerous condition on the walkway should have been repaired upon discovery of the same.

Further evidence, including the testimony of Tonya Howard, showed systemic failures on the part of ARS to address the hazard on their walkway, including the lack of a communications journal for Stefan Jennings to escalate to his superiors the complaints of customers who had witnessed the slippery condition on the walkway and reported to him. ARS argues in reply only that Jennings did not judge the threat severe enough to warrant escalation. The systemic failures in this case were even more egregious, as Ms. Howard testified that there were leaks and structural issues with a number of ARS's stores of similar construction to the store where Kachina Choate was injured.

ARS failed in its duty to make its premises safe. The jury's finding that they were at fault for Kachina's injury in slipping on the pedestrian walkway in front of the store confirms that there was a danger which had

been inadequately addressed. No other conclusion can be supported in light of the jury's verdict.

B. KACHINA CHOATE ACTED AS A REASONABLE PEDESTRIAN ON A COVERED PEDESTRIAN WALKWAY

ARS-Fresno next argues that a primary causation issue decided by the jury was that Kachina Choate should have been more careful. Under this banner, ARS argues that the route Kachina Choate took through ARS-Fresno's property could have contained some danger, that she was a trespasser, and questions surrounding Kachina carrying her shopping and purse and wearing tennis shoes in the winter time were sufficient to support the allocation of more than 49% of the fault to her.

Kachina's duty in ambulating is to act reasonably, not gingerly. Had she purchased her bags of shopping inside ARS' store she would have been owed a duty of care that would allow her to traverse the walkway designated for her use as a pedestrian without being subject to hidden dangers ARS Fresno knew of and refused to repair. Given the invisible nature of the hazard on ARS-Fresno's premises, it is manifestly against the weight of the evidence to find that any pedestrian on the walkway, sidewalk, or catwalk as it is called, could have reasonably done more to

avoid the type of injury Kachina suffered. Kachina carried grocery bags in front of a store that sells products, and presumably bags them for their customers upon request. Kachina's shoes were not unreasonable for the task of walking on wintertime sidewalks. There was no evidence of horseplay, drunkenness, or in fact any other behavior other than normal walking.

When she slipped and was injured, Kachina Choate was walking on a pedestrian walkway on ARS Fresno's property which was open to the use of the public. That she was cutting through the property is irrelevant, ARS does not restrict pedestrians from walking through their property, is explicitly aware that this is a regular practice, and the testimony to which ARS draws light, especially points out the fact that it was common enough that the employees had noticed specific patterns. ARS took absolutely no steps to curtail the practice, but little of this is relevant considering Kachina had already stepped onto the pedestrian walkway, and taken a few steps before she hit the hidden danger.

At that point, she was just a pedestrian in a place she had a right to be, and unlike the lucky pedestrians before her who had encountered the repeated slippery condition on ARS Fresno's property and reported it

directly to ARS Fresno's employees, she was the unlucky pedestrian who slipped on the slippery condition. ARS Fresno's argument that there had been no injury as a result of the icy issue prior to Kachina's injury is irrelevant. Given the knowledge imputed to ARS through its employees, it is no defense that no one had slipped yet. The duty to make premises safe pre-exists the manifestation of injury; it is not the position of this Court that premises liability enjoys its first bite free.

III. THE JURY'S VERDICT CAN BE REVIEWED FOR ITS INTERNAL INCONSISTENCIES GIVEN THE FINDING OF CAUSAL FAULT BY BOTH PARTIES AND THEREFORE A NEW TRIAL IS WARRANTED

ARS argues that since the evidence adduced at trial must be reviewed in the light most favorable to the jury's verdict, Kachina Choate cannot meet her burden to demonstrate that the jury's finding that she was more at fault for the accident on ARS Fresno's walkway than ARS was is manifestly against the great weight of the evidence. ARS cites Proctor v. Costco Wholesale Corp., 2013 UT App 226, a case where a customer at a store injured himself while lifting spilled cones to assist a store employee,

for the proposition that "in reviewing a jury verdict, the appellate court views the evidence in the light most supportive of the verdict." *Id.*

ARS then appears to conflate the deference afforded to the jury's verdict with deference to ARS Fresno's trial arguments. The Jury found that there was an accident, and that ARS was at fault for that accident. It is not correct to assume that the jury could have found as ARS invited that there was no leak, sufficient ice melt, and no uncorrected danger on its property, or the jury could not have found ARS at fault at all. The crucial point, then, is to draw inferences and weigh evidence in support of the verdict that made these findings, and determine whether that verdict can be consistent with the division of fault.

Certainly this is a fact-intensive question, the *Proctor* case is easily distinguishable, for example, because of the voluntary actions by the *Proctor* Plaintiff undertaken to assist a store employee by lifting spilled traffic cones are of a completely different character to the actions of Kachina Choate walking on a pedestrian walkway.

In tackling this fact intensive question, ARS invites the Court to consider what it curiously calls "additional" facts, all of which, save one,

were included in Ms. Choate's brief.[1] Ms. Choate's argument in response is broadly simple, if a jury finds, as this jury found, that Kachina Choate was injured, and that both Kachina and ARS were at fault for that injury, there is no reasonable set of facts or inferences in the record to support that Kachina was more at fault than ARS-Fresno. The verdict is internally inconsistent given the totality of facts, and the apportionment of fault is against the weight of the evidence. More specifically, in addressing ARS' facts:

1. ARS argues that Jenning's 90% certainty he placed ice melt would be sufficient evidence to justify the verdict. This is incorrect, the jury found that Kachina was injured as a result of ARS's fault, the jury's

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[1] (1) Jennings was 90% sure he placed ice melt (Appellant's Brief, pg. 12)
(2) Observed the sidewalk looked wet, walked normally on it (Appellant's Brief, pg. 14)
(3) Took a shortcut through the property with a route that led them onto the pedestrian walkway, (Appellant's Brief, pg. 7)
(4) Freezing temperatures, saw snow and ice on the gound (Appellant's brief p. 21)
(5) Wearing shoes from Trial Exhibit #13 (Appellant's Brief p. 21)
(6) Carrying a purse and grocery bags (Appellant's Brief pg. 14)
(7) Ice is dependent on weather conditions (Appellant's Brief p. 15)
(8) Disputed evidence regarding where the accident happened on the walkway (Appellant's Brief pg. 15)
(9) That Jennings had just started working but there was double coverage previously (Appellant's Brief P. 13)
(10) Mr. Taylor (ARS's Expert Witness)'s opinion regarding the breach of the duty of care was not briefed by Appellant as it is not a fact that inheres to the jury's verdict. If the jury had found as invited that there was no breach, they could not have found legal fault on the part of ARS. Mr. Taylor's opinion is addressed in Appellant's brief (Appellant's Brief p. 26). Taylor did testify that the roof *membrane* was not leaking, but in the context of the dripping water he observed and the conclusions from his report, it is a misrepresentation of testimony to ignore the issue of water dripping from a roof that shouldn't be dripping water and state only that Taylor testified there was not a roof leak.

verdict contains the conclusion that whatever remedial measures were taken by ARS, which fell short of repairing the cause of the hazard, were insufficient to prevent the injury.

2. ARS argues that Kachina walking normally on the sidewalk even though she observed it to be wet is sufficient evidence for her to be apportioned more than 49% of the fault. ARS argues that she was not using "extreme caution" when walking, which she is not required to do. Exhaustive analysis regarding the hidden condition on ARS's premises in Kachina's initial brief is inadequately answered by arguing that she should have taken more care when she took three steps on the sidewalk to assess its condition before being felled by the invisible black ice.

ARS points out that the Choates took a "weird" shortcut through the property. This point has been discussed above, but given that ARS had an established practice of allowing pedestrians seeking shortcuts to walk through its property, that Kachina Choate's path seemed weird to the cashier is irrelevant. Had Kachina deviated just off the sidewalk and tripped on a curb, it would be likewise irrelevant how weird the path looked, the inquiry should be the same. Was there a hidden danger, which ARS knew of, which posed threat of the exact type of injury and accident

that befell Mrs. Choate? There must have been, for the jury to find fault. In Sharp v. Williams, 915 P.2d 495; 497-99 (Utah 1996), a "dog-confrontation" case, the Supreme Court reversed (915 P.2d 495, 497-99) the trial court's denial of the plaintiff's Rule 59(a)(6)-based motion for a new trial in a situation where the jury had determined that the plaintiff's injuries were 50% attributable to her own negligence. The court there held (id. at 499), citing Nelson, 657 P.2d 730, 732 (Utah 1982), that "the evidence in support of the jury's finding of fifty percent contributory negligence is so slight and unconvincing as to make the verdict plainly unreasonable and unjust." (Emphasis added).

In Sharp, a mail carrier encountered a dog while taking a shortcut across the defendant's lawn, the Utah Supreme Court gave, 915 P.2d at 497-99, short shrift to the defense contention that taking a shortcut was evidence of negligence. Just as the Sharp court concluded, id. at 498-99, that the plaintiff letter carrier could not be considered negligent for cutting across the defendant's lawn because he could reasonably assume that the dog was inside the house as he always had been on prior deliveries, Ms. Choate should not be considered negligent for cutting across the ARS property. For she had no reason to think there would be any danger

lurking on the northeast corner of a pedestrian walkway in front of the store, an area that other people frequently walked in and one of whose recurrent hazardous condition she, unlike ARS, had no prior knowledge.

3. ARS argues that given the three days of snow and ice there could have been no melting on the property. As argued in her initial brief, Kachina directs this Court to the observations of ARS employees that there was a problem on the premises of melting and refreezing throughout winter days. The temperature evidently must be hovering around freezing for the water dripping from the roof to refreeze, and the water must be dripping from the roof for this known issue to occur. Irrespective of the fact that it was 32 degrees at the Salt Lake airport the day of the accident, there was melt and refreeze consistent with the hazard that had been reported to ARS employees on numerous occasions.

4. ARS argues that Kachina's lack of "winter shoes" justified the verdict. The shoes are in evidence, they are fit for use and Kachina had no issues until she hit the invisible, slippery black ice. It was not the fault of her shoes.

5. ARS argues that Kachina's actions in carrying a purse and grocery bags were sufficiently dangerous that this fact could support the

division of fault. Given that pedestrians in front of a retail establishment are wont to carry purses to purchase there, as well as bags of purchases, this activity was more than invited by ARS and ARS should maintain its premises such that they are safe for these invited activities to occur without injury.

6. ARS argues that the fact that ice is dependent on weather conditions is an additional fact sufficient to support the jury's verdict. Kachina disagrees, but irrespective, the weather conditions on the day of the accident were ripe for the harm invited by the dangerous condition ARS permitted.

7. ARS argues that since there was disputed evidence about whether the ice on which Kachina slipped was under the drip visible on November 14, 2014 by Mr. Taylor or under one of the other places dripping had been noticed, or some other ice caused by some third factor, Kachina must have been more causally at fault. This improperly shifts the burden from ARS to inspect and make its premises safe. The Jury found that ARS was at fault, the walkway was unsafe due to conditions known to ARS. This does not serve to support a division of fault away from ARS.

8. ARS argues that the shifts of its employees are sufficient to support the allocation of fault, Kachina disagrees. Irrespective of how the jury weighed this fact it did not alter the verdict that ARS was causally at fault.

9. ARS argues that their expert, Mr. Taylor's testimony that the parapet cap was not a breach of their duty of reasonable care and that the roof did not leak is sufficient to support the allocation of fault. Mr. Taylor's testimony that there was no *leaking* from the roof membrane was contrasted with his testimony that he observed water *dripping* from the parapet cap, an area which comprised, in his opinion "less than ten percent [of the whole roof]" (R. III. P. 187 ln. 4-9). A semantic argument between the words leaking and dripping is not the type of reasonable inference necessary to support the verdict.

CONCLUSION

For the reasons argued above and in Ms. Choate's initial Brief, Ms. Choate urges this Court to overturn the trial court's denial of her motion for a new trial.

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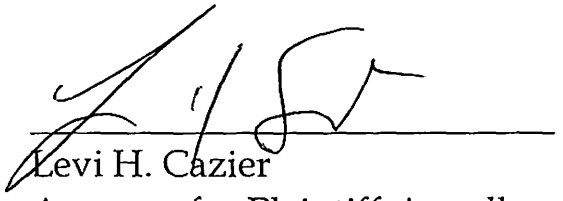
Respectfully submitted this 31st day of August, 2016



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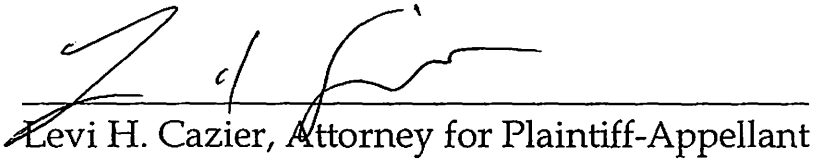

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