

1990

June Trapp v. Salt Lake City Corporation : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Trapp v. Salt Lake City*, No. 900485.00 (Utah Supreme Court, 1990).
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UTAH SUPREME COURT

BRIEF

900485

IN THE SUPREME COURT OF THE STATE OF UTAH

JUNE TRAPP,

:

Plaintiff/Appellant,

:

v.

:

Case No. 900485

SALT LAKE CITY CORPORATION,

:

Priority No. 14(b)

Defendant/Appellee.

:

APPELLANT'S REPLY BRIEF

AN APPEAL FROM THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE RICHARD H. MOFFAT PRESIDING

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FILED

JUL 31 1991

CLERK SUPREME COURT,
UTAH

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REPLY TO APPELLEE'S STATEMENT OF FACTS

Appellee Salt Lake City Corporation's ("Salt Lake") Statement of Facts contains matters not relevant to this appeal. The sole issue presented is whether Salt Lake has a duty to maintain its sidewalks. Because Appellant June Trapp ("Mrs. Trapp") admits she has no special relationship with Salt Lake different from that of any other member of the public, the nature of the relationship between the parties is irrelevant. The only inquiry necessary to resolve this appeal is purely a legal inquiry: Does Utah impose on municipalities the nondelegable duty to maintain their sidewalks?

In addition to being irrelevant, several of Salt Lake's fact statements are disputed, were disputed in Mrs. Trapp's Memorandum in Opposition to Motion for Summary Judgment¹ and were not found to be facts by the trial court in ruling on the motion. First, Salt Lake claims that

¹ R. 43-45.

Mrs. Trapp "did not recall what happened at the time" of her fall.² As noted in the "Disputed Facts" section of Mrs. Trapp's Memorandum in Opposition to Motion for Summary Judgment, Mrs. Trapp's deposition testimony is that she was walking east along 300 South, she stubbed the toes on her right foot and fell onto her face.³ Mrs. Trapp did recall what happened.

Second, Salt Lake claims that Mrs. Trapp was never able to specify the exact area of her fall.⁴ As Mrs. Trapp noted in the "Disputed Facts" section of her Memorandum in Opposition to Motion for Summary Judgment, this claim ignores that fact that pictures of the site showing its location in relation surrounding objects were provided to Salt Lake both before and at Mrs. Trapp's deposition. When counsel for Salt Lake showed the pictures to Mrs. Trapp at her deposition, she identified the location of her fall.⁵

Finally, Salt Lake claims that there was no allegation or finding that it had actual notice of any sidewalk defect at the site of Mrs. Trapp's fall.⁶ This statement is correct. At the time Salt Lake filed its motion, however, discovery was continuing. The question of whether Salt Lake had notice of the defect was not relevant to the issues presented in Salt Lake's motion. Neither Salt Lake nor Mrs. Trapp mentioned the issue of notice and, appropriately, the trial

² Brief of Appellee, Statement of Facts, Fact No. 3.

³ R. 43-45.

⁴ Brief of Appellee, Statement of Facts, Fact No. 5.

⁵ R. 43-45.

⁶ Brief of Appellee, Statement of Facts, Fact No. 6.

court made no finding concerning notice. In short, Salt Lake raises this point for the first time on appeal and calls it "undisputed." If for no other reason, the Court should ignore the claim because it was not made before the Trial Court.⁷

ARGUMENT

POINT I: SALT LAKE READS TOO MUCH INTO THE HOLDING OF *FERREE V. STATE*.

Salt Lake argues that the public duty doctrine as applied in *Ferree v. State*, 784 P.2d 149 (Utah 1989), and similar Utah case law adds a new element to negligence causes of action: the existence of a "special relationship." Salt Lake misreads the public duty doctrine cases. They do not represent a departure from long-held negligence principles. The first element of any negligence cause of action is the existence of a duty of reasonable care owed by defendant to plaintiff.⁸ Whether a duty is owed to a particular Plaintiff depends on whether the Plaintiff falls within the scope of Defendant's duty. The scope of duty is defined by what is reasonably foreseeable.⁹ Thus, at the core of the duty concept is foreseeability.

The requirement of the public duty doctrine that a Plaintiff show a special duty owed to him as an individual is simply another way of saying that Plaintiff must show that his particular injury was foreseeable. The Court's discussion in *Ferree* is illustrative of the point. In

⁷ *General Appliance Corp. v. Howe, Inc.*, 516 P.2d 346 (Utah 1973).

⁸ *Williams v. Melby*, 699 P.2d 723 (Utah 1985).

⁹ *Hoffman v. Life Ins. Co. of N. America*, 669 P.2d 410, 416 (Utah 1983).

distinguishing a case out of Alaska involving the same factual framework but different circumstances, the *Ferree* Court stated:

Given those circumstances, the Court held that there was a threat of injury to a reasonably foreseeable potential victim by a clearly "dangerous" individual and that these facts gave rise to a duty of care on the part of the state and its employees.

Ferree, 784 P.2d at 152, citing *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986).

The facts of *Ferree* did not involve a reasonably foreseeable threat of injury:

. . . [T]here is nothing to indicate that the officials were aware of anything more than a generalized possibility that Ferguson might cause difficulties because of his drug abuse. There was no reason to suspect that Ferguson was violent in general or would be violent toward a particular person or a particular type of person. Ferguson had no prior history of violence or of making threats, and corrections officials had no reason to know of any physical threat that Ferguson may have posed to the victim. Indeed, Ferguson and the victim were apparently unknown to each other. In short, officials had no duty of care to the victim apart from their general duty to the public at large.

784 P.2d at 152.

Thus, the "special relationship" requirement found in the public duty doctrine cases is not a "requirement" in the strict sense of the word, but a shorthand way of saying that a public Defendant owes a particular Plaintiff a duty of care only if Defendant's conduct poses a reasonably foreseeable risk of harm to Plaintiff. The starting point for the analysis is foreseeability. Given a foreseeable risk of harm, a duty of care exists regardless of the nature of the relationship between the parties.

A Plaintiff can, therefore, establish the existence of a duty owed to her by a public

Defendant without establishing a "special relationship." A "special relationship" is not a requirement, as argued by Salt Lake, but a means of establishing duty. In the context of this case, Mrs. Trapp need not establish a foreseeable risk of harm or a special relationship. Years ago this Court determined *as a matter of law* that Salt Lake owes a duty to maintain its sidewalks for the benefit of Mrs. Trapp and all other members of the public. Therefore, in this case, the public duty doctrine has no application.

**POINT II: SALT LAKE MISCHARACTERIZES MRS. TRAPP'S
ARGUMENTS BY TAKING THEM OUT OF CONTEXT.**

Salt Lake claims Mrs. Trapp interprets the sidewalk maintenance cases to create the "special relationship required in *Ferree* with every member of the public."¹⁰ This mischaracterization of Mrs. Trapp's arguments illustrates Salt Lake's misunderstanding of the holding in *Ferree*. The sidewalk cases do not create the special relationship referred to in *Ferree*; rather, these cases establish Salt Lake's duty to maintain as a matter of law, obviating the need to show a duty by some other means such as through a special relationship. Salt Lake simply misses the point. The special relationship idea is not a requirement in public negligence cases. It is simply one way of defining the limits of the public entity's duty.

Salt Lake's argument that Mrs. Trapp's position, if adopted, "would gut the entire concept of individual special relationship on which *Ferree* is based,"¹¹ ignores the very limited

¹⁰ Brief of Appellee at 8.

¹¹ *Id.*

context of the present matter. This Court has determined as a matter of law that Salt Lake owes a duty of reasonable care in the context of sidewalk maintenance. There may be other areas in which duty is established as a matter of law, but generally the facts of a case govern the existence of a duty. The public duty doctrine applies in these cases.

POINT III: SALT LAKE'S PUBLIC INTEREST ARGUMENTS ARE NOT PERSUASIVE IN THIS CONTEXT.

Contrary to Salt Lake's claims, the public interest arguments supporting the *Ferree* decision do not apply in the area of sidewalk maintenance. The *Ferree* decision balances the public interest in the "practically indispensable" and "necessary programs of rehabilitating and paroling of prisoners" against the "occasional tragic failures" of such programs.¹² *Ferree* rejects a broadly defined duty of care in the interest of operating parole and probation programs free from liability for their "uncertain success."¹³

No such public interest claims can be made for sidewalk maintenance decisions. Simply put, there is no utility in failing to maintain a section of sidewalk other than Salt Lake saves the expense of maintenance. In contrast, the public interest is served by the state's parole and rehabilitation programs. Overcrowding in the prison system is alleviated and rehabilitated, useful citizens are returned to the work force. The failure to maintain a section of sidewalk and the act of releasing a prisoner are qualitatively different matters.

¹² *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989).

¹³ *Id.*

Even in the parole and rehabilitation context, the balance does not always tip in favor of the state. There is a line past which the interest of the individual transcends the interest of the public. Thus, in *Ferree*, the Court recognized that "when officials have good reason to believe that a particular person may be jeopardized by the release of a prisoner who has demonstrated capacity for violence, the result may be otherwise." Citing *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986), the Court recognized circumstances where "there was a threat of injury to a reasonably foreseeable potential victim by a clearly 'dangerous individual' giving 'rise to a duty of care on the part of the state and its employees.'" *Ferree*, 784 P.2d at 152. The public interest only carries so much weight. When the Plaintiff falls within the category of a reasonably foreseeable victim, public interest concerns are outweighed by the government's duty to the individual.

In the sidewalk maintenance context, the dubious public interest of saving the expense of maintaining sidewalks is outweighed by the pervasive risk to every member of the public of the government's failure to maintain. The theoretical underpinnings of the government's duty to maintain its streets and sidewalks is that they are necessary for the public use at all times and under all conditions.¹⁴ Salt Lake's failure to maintain its sidewalks has potential to impact every member of the public everyday. In recognition of this widespread, foreseeable risk, the law in this state imposes on Salt Lake a duty to maintain.

Mrs. Trapp is not suggesting that Salt Lake be an insurer of the persons using its

¹⁴ See *Grantham v. City of Topeka*, 411 P.2d 634, 639 (Kans. 1966).

sidewalks. Contrary to Salt Lake's claim, Mrs. Trapp's reading of the law does not result in the imposition of "strict liability on the City in connection with injuries which may be connected with sidewalks."¹⁵ The sidewalk maintenance cases establish as a matter of law only the duty element of a negligence claim. Trapp must still prove a breach of that duty, causation and damages.

In summary, the public interest concerns that guided the Court's decision in *Ferree* have no bearing in this context. Salt Lake argues that the public interest is best served by imposing a "special relationship" requirement in this kind of case, but neglects to mention that the result is absolute immunity. Under no circumstances can a Plaintiff in a case such as this show a "special relationship." If the public interest is best served by providing Salt Lake absolute immunity from sidewalk maintenance lawsuits, the job of providing the immunity must fall on the body responsible for representing the public, the legislature.

POINT IV: THE "ACTUAL NOTICE" STANDARD URGED BY SALT LAKE SHOULD NOT BE ADOPTED.

Admitting that application of the public duty doctrine in this context creates "a form of absolute immunity,"¹⁶ and claiming that the sidewalk maintenance cases make the government "absolutely liable for every sidewalk trip and fall,"¹⁷ Salt Lake urges the adoption of "a middle

¹⁵ Brief of Appellee at 10.

¹⁶ Brief of Appellee at 13.

¹⁷ Id.

ground between these two extremes . . . [to] provide a means for a plaintiff to recover."¹⁸ The "middle ground," according to Salt Lake, is an "actual notice" standard. That is, Salt Lake argues that its duty to maintain its sidewalks should arise only when it receives actual notice of a sidewalk defect.

The argument is flawed in several respects. First, the "absolute immunity" versus "absolute liability" premise is incorrect. Application of the public duty doctrine in this context does create absolute immunity, but the sidewalk maintenance case law does not result in absolute liability. As noted, the sidewalk maintenance cases establish only one element of a negligence cause of action. Only the duty element is established as a matter of law. Salt Lake's liability ultimately depends on failure to meet its duty of maintaining its sidewalks, causation and damages.

Second, Salt Lake argues that the best way to reconcile the public duty doctrine with the sidewalk maintenance cases "is within the context of analyzing the foreseeability of injury."¹⁹ As previously discussed, this Court has already analyzed the public duty doctrine and the sidewalk maintenance cases within the conceptual framework of foreseeability. The public duty doctrine is ultimately based on the idea that, absent a special relationship, the governmental entity cannot reasonably foresee particular harm to a particular plaintiff. The sidewalk maintenance cases impose a nondelegable duty based on the obvious conclusion that the failure

¹⁸ Id.

¹⁹ Id. at 14.

to maintain a structure used by thousands of people everyday makes injury reasonably foreseeable. Salt Lake suggests nothing new when it argues that the issues should be analyzed based on the foreseeability of harm.

Finally, Salt Lake's argument that actual notice of a defect be the "trigger" for foreseeability renders meaningless the concept of reasonable foreseeability. By definition, an actionable defect is foreseeable if it should be seen or known before it causes injury. A good synonym for the ability to foresee is anticipation. Thus, if it is reasonable to anticipate harm from a failure to maintain, a duty arises.

Under Salt Lake's "actual notice" standard, foreseeability is a meaningless test because Salt Lake need not anticipate. As Salt Lake points out, "under this standard, the city's non-delegable duty arises only when the city knows there is a problem."²⁰ In essence, Salt Lake would have this Court dispose of the long established reasonable foreseeability test in favor of an absolute foreseeability test. Thus, only when harm is absolutely foreseeable as a result of injury caused by a sidewalk defect does Salt Lake have a duty to maintain.

This conclusion is not warranted by the case law cited by Salt Lake. *Gordon v. Provo City*, 391 P.2d 430 (Utah 1964) does not adopt an "actual notice" standard. The Court in *Gordon* found no fault in the following jury instruction:

[I]f any defect ' . . . had been caused by anyone other than the defendant' and that the latter did not have actual notice thereof, or did not have a reasonable opportunity to remedy any such dangerous condition so caused, then they should

²⁰ Id. at 15.

find for the defendant.

391 P.2d at 433. The *Gordon* Court's finding that this jury instruction was adequate does not amount to an adoption of an "actual notice" standard. Even assuming it did, however, it provides no support for Salt Lake's position. First, Salt Lake must show that the defect in question was caused by someone other than Salt Lake. There is no evidence in the record concerning the cause of the defect. This simply was not at issue below. Second, as previously noted, the question of notice to Salt Lake was not at issue below. Trapp had done no discovery concerning notice at the time of Salt Lake's Motion for Summary Judgment and had no reason to object to the timing of the Motion for Summary Judgment based on a lack of discovery because notice was not an issue in the motion. Finally, there is no evidence concerning whether Salt Lake had a reasonable opportunity to remedy the defect prior to the injury to Mrs. Trapp. Again, this was not an issue before the Trial Court.

Likewise, the cases cited by this Court in support of *Gordon*, and cited by Salt Lake provide no support for Salt Lake's position. For example, the issue of notice came up in *Erickson v. Walgreen Drug Co.*, 232 P.2d 210 (Utah 1951). In dismissing the claim that notice was required, the Court stated:

While there is no evidence of any incident occurring which would have put the Appellant on notice that the terrazzo was slippery when wet, such evidence is not necessary to establish liability on the part of the Appellant. The latter 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.

232 P.2d at 212.

In short, the Court's earlier decisions do not support the adoption of the "actual notice" standard urged by Salt Lake. The public duty doctrine and the sidewalk maintenance cases are based on the well established reasonable foreseeability standard. This is not the case to dispose of this traditional test for establishing duty.

POINT V: THERE IS NO IMMUNITY FOR THE CAUSE OF ACTION ALLEGED.

A. Salt Lake Specifically Waived Immunity.

The Trial Court based its decision on the issue of duty alone. It made no finding concerning governmental immunity. For this reason, the Court should ignore Salt Lake's arguments concerning immunity.

Assuming they are considered, however, the immunity issue is easily resolved by reference to Utah Code Anno. §63-30-8 (Utah 1965), which states:

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk

The question presented by this lawsuit is whether Salt Lake property maintained the sidewalk pursuant to its affirmative duty to do so. It is apparent that Salt Lake enjoys no immunity from a suit presenting this claim.

B. The Duty to Maintain a Sidewalk is Not Subject to "Discretionary Function" Immunity.

Utah Code Anno. §63-30-8 waives immunity for an injury caused by a defective sidewalk. Section 63-30-10(1)(a) (1989) excepts from the general negligence waiver of immunity claims based on injury arising out the performance of a "discretionary function." In

other words, although immunity is generally waived for negligence, it is specifically retained when the negligence arises out of the exercise of a discretionary function.

Almost 20 years ago this Court was faced with the issue of whether the discretionary function exception applies to the waiver of immunity for injury caused by defective sidewalks. In *Sanford v. University of Utah*, 488 P.2d 741 (Utah 1971), this Court stated the following with reference to §63-30-8, 9 and 10:

Since the waiver of immunity in Sections 8 and 9 encompasses a much broader field of tort liability than merely negligent conduct of employees within the scope of their employment, the legislature could not have intended that Section 10, including its exceptions, should modify Section 8 and 9, even though it be conceded that the negligent conduct of an employee might be involved in an action for injuries caused by the creation or maintenance of a dangerous or defective condition.

Sanford at 745.

Although the *Sanford* decision dealt with a much broader issue than that present here, more recent pronouncements of this Court follow the reasoning in *Sanford*. In *Gleave v. Denver and Rio Grande Western Railroad*, 749 P.2d 660 (Utah App. 1988), the Court cited *Sanford* in noting that the waiver of immunity contained in §63-30-8 "is not subject to the 'discretionary function' exception in §63-30-10(1)." 749 P.2d at 667, n.6.²¹

Even if the waiver of immunity for injuries caused by defective sidewalks is subject to the discretionary function exception, Salt Lake's actions in maintaining its sidewalks are not the

²¹ See *Richards v. Leavitt*, 716 P.2d 276, 278 (Utah 1985) (per curiam); *Bigelow v. Ingersoll*, 618 P.2d 50, 54, n.3 (Utah 1980).

kind of discretionary functions contemplated by the statute. In *Carroll v. State Road Commission*, 496 P.2d 888 (Utah 1972), the Court held that discretionary functions are those requiring evaluation of basic governmental policy matters and do not include acts and decisions at the operational level -- those everyday routine matters not requiring "evaluation of broad policy factors." 496 P.2d at 891.

Whether Salt Lake spends its sidewalk maintenance dollars on 300 South or 700 East is not the kind of decision requiring evaluation of basic governmental policy matters. Instead, it is an operational level decision, a routine matter requiring nothing more than an evaluation of the state of repair of each sidewalk. Accordingly, even if the *Sanford* and *Gleave* cases are ignored, the discretionary function exception does not apply.

DATED this 30 day of July, 1991.

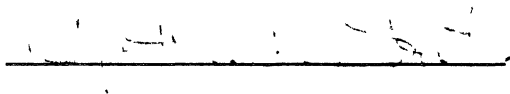
DART, ADAMSON & KASTING



CRAIG G. ADAMSON
ERIC P. LEE

MAILING CERTIFICATE

I hereby certify that on the 30 day of July, 1991, I caused a true and correct copy of the foregoing to be mailed, postage prepaid, to Roger F. Cutler, 451 South State, Suite 505, Salt Lake City, Utah 84111.

A handwritten signature, possibly reading "Roger F. Cutler", is written above a horizontal line.