

1990

# June Trapp v. Salt Lake City Corporation : Brief of Appellee

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

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JUNE TRAPP,	)	
	)	Case No. 900485
Plaintiff/Appellant,	)	
	)	Priority No. 14(b)
vs.	)	
	)	
SALT LAKE CITY CORPORATION,	)	
	)	
Defendant/Appellee.	)	

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BRIEF OF APPELLEE

---

An Appeal from the  
Third Judicial District Court of Salt Lake County  
The Honorable Richard H. Moffat Presiding

---

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JUN 10 1991  
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UTAH

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IN THE SUPREME COURT  
OF THE STATE OF UTAH  
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JUNE TRAPP,	)	
	)	APPELLEE'S RESPONSIVE
Plaintiff/Appellant,	)	BRIEF
	)	
vs.	)	Case No. 900485
	)	
SALT LAKE CITY CORPORATION,	)	Priority No. 14(b)
	)	
Defendant/Appellee.	)	
_____	)	

JURISDICTION

This Court has jurisdiction to hear this appeal. Utah Code Annotated 78-2-2(3)(j). Appellant appealed to this Court from an Order granting Summary Judgment in favor of Appellee dated September 25, 1990.

ISSUES ON APPEAL

1. Does Salt Lake City have a "special relationship" with each member of the public, including Plaintiff Trapp, creating a special duty of care to everyone who travels upon City sidewalks?
2. Are decisions by Salt Lake City officials on how and where to expend scarce resources on sidewalk repair discretionary functions to which governmental immunity attaches?
3. Is Salt Lake City strictly liable for all sidewalk trip and fall accidents, whether the City has actual notice of a sidewalk defect or not?
4. Can a plaintiff who does not know what caused her to stumble and fall on a public sidewalk and must thus rely on

conjecture and speculation to establish her case survive a Motion for Summary Judgment?

#### STANDARD FOR REVIEW

Upon review of a grant of the Motion for Summary Judgment, this Court applies the same standard as that applied by the trial court. Durham v. Margetts, 571 P.2d 1332 (Utah 1977); Briggs v. Holcomb, 740 P.2d 281 (Utah Ct.App. 1987). This Court reviews the legal conclusions made by the District Court for legal correctness. Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

#### STATEMENT OF THE CASE

Plaintiff June Trapp (hereafter "Trapp") filed the Complaint herein June 26, 1989, alleging, inter alia, that Defendant Salt Lake City Corporation (hereafter "City") was liable for injuries sustained when Trapp fell on a City sidewalk. (Record on Appeal, hereafter "R," 2). The City answered, denying liability for Trapp's alleged injuries (R. 14) and, after the completion of some discovery (Interrogatories, plaintiff's deposition) moved the District Court for Summary Judgment on June 19, 1990. (R. 25).

The City's Motion for Summary Judgment was based on several legal points. The City's primary argument was that it owed no duty of care to Plaintiff under the "Public Duty Doctrine," most recently addressed by this Court in the case of Ferree v. State of Utah, 748 P.2d 147 (Utah 1989). (R. 32-34). The City also contended that it had statutory immunity regarding the alleged causes of action and regarding the discretionary functions of



funding and scheduling sidewalk repair. (R. 32-34). The City further argued that Plaintiff was the only negligent party in the action, and that Plaintiff's alleged damages were based purely on speculation and conjecture. (R. 39-42).

Trapp's opposition argued that sufficient disputed facts existed to preclude Summary Judgment. (See, generally, R. 42-53). In support of that contention, Trapp filed an Affidavit by Trapp's son, based in part on hearsay statements regarding Trapp's accident and also on a post-accident examination of an area of sidewalk designated by Trapp as one in which she believed she could have tripped. (R. 54-58). Trapp also argued that the City's reliance on the public duty doctrine was misplaced, although she conceded that she had no special relationship to the City.

The City replied to Trapp's opposition (R. 60-65) and, after a hearing on the City's Motion, Judge Richard H. Moffat ordered that Summary Judgment be entered for the City (R. 69-75).

The Court's decision touched all the points raised by the City. With regard to the "duty of care" argument, the Court held that because no special relationship existed between Trapp and the City, Salt Lake City owed no duty to Trapp. (R. 69-70). The requirement of a "special relationship" was based on the Court's reading of Ferree v. State of Utah, 784 P.2d 147 (Utah 1989) and Beach v. University of Utah, 726 P.2d 413 (Utah 1986). (R. 70).

The Court further found that the City does not have sufficient economic resources or personnel to inspect and repair

every potential problem with the approximately 800 lineal miles of sidewalk in the corporate City limits. (R. 70). The Court also found that Trapp, who fell on the sidewalk on a sunny day, was well acquainted with the area in question, having walked in that area many times before the incident. (R. 70). An order of dismissal with prejudice was entered September 25, 1990 (R. 72).

This appeal followed, after which Trapp filed a Motion for Summary Disposition seeking summary reversal of the trial court's Order. The City countered with a Cross-Motion for Summary Disposition, seeking summary affirmance.

On December 21, 1990, this Court granted Trapp's Motion for Summary Reversal and instructed the trial court to vacate the summary judgment and reinstate the case for trial on the merits.

Ten days later, the City petitioned this Court for reconsideration of the Summary Disposition, which petition was granted on February 6, 1991.

Trapp filed her opening brief herein April 8, 1991.

#### STATEMENT OF FACTS

The facts are undisputed.

1. On or about May 11, 1988, a sunny day, between noon and 1:00 p.m., Trapp tripped and fell while walking eastbound on the north side of 300 South Street in Salt Lake City, Utah. (Trapp's Complaint, ¶3, 5; R. 2-6; Plaintiff's deposition, p. 17, 11.6-9, referenced in Memo in Support of Summary Judgment, R. 31. See also R. 69-70).

2. Trapp had traveled in that area many times prior to the

incident. (Plaintiff's deposition, p. 17, 11.6-9, R. 31).

3. Trapp did not recall what happened at the time, but concluded, after the fact, that there was a rise in the sidewalk which must have caused her to fall. (Plaintiff's deposition, p. 16, 11.12-13; p. 17, 11.12-19, R. 31).

4. Trapp did not actually notice this rise at the time of the fall, but sent her son, who had been out of town at the time of the accident, to look at the sidewalk at a later date. (Plaintiff's deposition, p. 17, 11.16-19; R. 31; See also R. 54-58).

5. Trapp has never been able to specify the exact area of her trip and fall.

6. There was no allegation or finding that the City had any actual notice of any sidewalk defect at or near the area of Plaintiff's fall until after her accident. (See R. 69-70).

7. There are approximately 800 lineal miles of public sidewalk within the corporate limits of Salt Lake City. (See R. 69-70).

8. The City does not have sufficient economic resources or personnel to inspect and/or repair every potential problem with every sidewalk within the City limits. (R. 70).

## ARGUMENT

### POINT I.

BECAUSE THERE WAS NO SPECIAL DUTY OWED BY THE CITY TO TRAPP, THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT WAS PROPER AND SHOULD BE UPHELD.

In Ferree v. State, 784 P.2d 149 (Utah 1989), this Court reiterated and refined the "Public Duty Doctrine" in Utah. Holding that a governmental entity cannot be liable for negligence absent a duty of care owed by the governmental entity to a plaintiff as an individual, the Court set out the standard by which a determination of legal duty should be measured:

To establish negligence or gross negligence, a plaintiff must first establish a duty of care owed by the defendant to the plaintiff. (Citations omitted). Duty is "a question of whether the defendant is under any obligation for the benefit of a particular plaintiff . . . ."

\* \* \*

For a governmental agency and its agents to be liable for negligently caused injury suffered by a member of the public, the plaintiff must show a breach of a duty owed him as an individual, not merely the breach of an obligation owed to the general public at large by the governmental official.

Ferree v. State, supra at 151. (Emphasis added.)

The requirement that a plaintiff show a "special duty" owed him as an individual exists because municipalities are not "insurers against the consequences of all injuries associated with their operations." Johnson v. Salt Lake City, 629 P.2d 432 at 434 (Utah 1981). Instead, in order for a duty to exist on the part of a defendant, "a special relationship must have existed . . . ." between the parties. Owens v. Garfield, 784 P.2d 1187, at

1189 (Utah 1989). The duty issue should be decided before the question of sovereign immunity is addressed, Ferree, supra, at 152-153. Thus, the primary issue facing the District Court in determining whether Summary Judgment was proper was whether a special relationship existed between Trapp and Salt Lake City separate and apart from the duty owed to the public in general. See Beach v. University of Utah, 726 P.2d 413 (Utah 1986); Obray v. Malmberg, 585 P.2d 160 (Utah 1971); Christensen v. Hayward, 694 P.2d 612 (Utah 1984).

In the instant case, the District Court's decision regarding duty was easy and dispositive. Trapp admitted (and has reiterated before this Court) that no "special relationship" between her and Salt Lake City existed. See Plaintiff's "Combined Memorandum in Opposition," filed herein December 4, 1990, p. 2. Under the plain dictates of the law, then, Summary Judgment was mandated.

Trapp has, however, appealed the District Court's decision on the basis of arguments that were not presented below. Trapp first argues that the City is under a legal "special duty" toward all members of the public, including plaintiff, who may traverse the sidewalks of the City. Thus, the argument seems to go, the "special relationship" requirement of Ferree is met here. In addition, Trapp then separately argues that a municipality's duty to maintain its sidewalks is somehow an exception to the "public duty doctrine." Both arguments are meritless. Both will be considered in turn.

#### A. The "Duty" Argument

In support of the proposition that the City has a non-delegable duty to keep sidewalks safe, Trapp cites five cases, Rollow v. Ogden City, 66 Utah 475, 243 P. 791 (1926), Nyman v. Cedar City, 361 P.2d 1114 (Utah 1961), Murray v. Ogden City, 548 P.2d 896 (Utah 1976), Bowen v. Riverton City, 656 P.2d 434 (Utah 1982) and Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987). Assuming, arguendo, that this position is correct, however, Trapp's point begs the question: To whom is this duty owed? Trapp responds that the duty is owed "to everyone who uses the sidewalk. By definition it is a public duty." (Appellant's Brief, page 8.)

Trapp then argues that these cases somehow create the "special relationship" required in Ferree with every member of the public. Alternatively, she suggests that the requirement of a special relationship is somehow obviated by these cases. These semantic gyrations make no sense. Ferree does not recognize a "mass special relationship." Such a construction would gut the entire concept of individual special relationship on which Ferree is based. Indeed, a "special relationship" with everyone equates to a "special relationship" with no one. Trapp's argument thus creates Orwellian definitional doublespeak that turns "special" into "general" and thus renders it devoid of meaning or purpose. The "special relationship" requirement of Ferree must mean what it says in order to have any legal or logical vitality. There must actually be an individual

relationship with an individual plaintiff before a duty to that plaintiff can exist. Otherwise, the exact result which Ferree was meant to avoid comes about: Anyone could argue that the public duty to all is a private duty to him as an individual. This translates into a form of strict liability for Utah local government. The whole concept of "duty" would be turned on its head.

The Ferree case recognizes and approves the public policy behind the public duty doctrine: The public interest is not served by imposing liability on government or its officials which would expose the government to potentially every wrong that flows from necessary government operations. See Ferree, supra at 151. There are several factors that comprise this aspect of the public interest, the most obvious being financial. Government simply does not possess the resources to insure that its operations and programs will be carried out without some risk and occasional injury. In upholding the public duty doctrine in a corrections context, this Court said, "parole and probation programs are subject to occasional tragic failures . . . but they are also practically indispensable." Ferree, at 151. The Court recognized that government cannot afford to make such programs failsafe, nor can society afford to do without the programs.

Such is also the case with public streets and sidewalks. They are a public necessity. They are also the scene of occasional failure and tragedy. Government cannot afford to be exposed to every potential problem in connection with its

sidewalks, nor does it have the resources to insure that problems with the sidewalks will never arise.

Here, the District Court found that Salt Lake City has over 800 miles of sidewalk within in City limits. (R. 70.) Over time, problems of maintenance and repair of those sidewalks will arise. However, Salt Lake City is, and has been, in a budget crisis which severely limits the financial resources which are available for sidewalk repair and other governmental programs and needs. Given these realities, it does not serve the public interest to impose strict liability on the City in connection with injuries which may be connected with sidewalks. See, generally, Gillman v. Dept. of Financial Institutions, 782 P.2d 506, (Utah 1989). ("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, quoting 4 Calif. Law Revision Comm'n, Reports, Recommendations and Studies (1963).) Similarly, it does not serve the public interest for court to second-guess a policy maker's decisions on the allocation of limited funds for sidewalk repair. Traditional notions of separation of powers preclude judicial interference into executive decision-making.

Here, the public interest is best served by imposing liability only where a plaintiff can show that government failed to fulfill a specific need created by an individual "special relationship" between the plaintiff and the government.



Thus, a simple recitation that a public entity owes a non-delegable duty is not dispositive of any issue unless a plaintiff can show that the duty extends specifically to her as an individual. Trapp here cannot meet this requirement. The cases cited by Trapp do not relieve her of this requirement. Trapp's generalized "duty to maintain sidewalks" argument must fail.

B. The "Sidewalk Exception" Argument

Trapp's second point presents her alternative defense that although the public duty doctrine remains the law in Utah, cases involving sidewalks are an exception to this doctrine. Trapp admits that there is no explicit "sidewalk exception" to be found in the cases. Instead, this Court is expected to divine this concept by more subtle means. Trapp posits that because the cited "sidewalk cases" co-existed with the pre-Ferree public duty doctrine cases, the "sidewalk exception" is implicit under her reading of Utah law.

Trapp's argument on this point is fraught with problems. There is no language, either general or specific, in any of the cases cited by Trapp which creates or recognizes this claimed exception to the Public Duty Doctrine. In fact, Trapp has cited no language from those cases in which the issue of public duty was ever addressed. It does not appear from the cases that the Public Duty Doctrine defense was ever submitted by the affected municipalities or considered by the Court. In any case, this Court did not explicitly deal with the doctrine in any of those cases. It appears that this is the first case in which the

application of the public duty doctrine to sidewalk defect cases has been squarely presented before this Court. It thus cannot be maintained that in any of those pre-Ferree cases this Court somehow created a definite exception to the rule most definitively stated in the Ferree case. Therefore, the District Court could not have erred in failing to recognize an "exception" which does not exist.

In addition, Trapp is raising this "sidewalk exception" argument for the first time on appeal. The record is bereft of any reference to this newly-discovered "exception" to the rule being pointed out to the District Court. If for no other reason, this argument should be rejected on that ground. General Appliance Corp. v. Howe Inc., 516 P.2d 376 (Utah 1973); Simpson v. General Motors Corp., 470 P.2d 399 (Utah 1970). Again, the District Court can hardly be charged with committing error in not recognizing an "exception" which Trapp also did not recognize when presenting her case before the Court.

Trapp's arguments in opposition to the District Court's conclusion on legal duty are groundless. Summary Judgment was proper and should be affirmed.

#### POINT II

#### SUMMARY JUDGMENT SHOULD BE UPHELD ON ALTERNATE POLICY GROUNDS.

Viewed in its broad policy context, this matter is much more than a simple trip and fall case. Here, this Court must resolve important issues of public policy which may appear, at first blush, to be in conflict.

On the one hand, as pointed out above, this Court has pronounced the "public duty doctrine" in Ferree, having taken consideration of the costs and benefits to the public of necessary government functions, concluding that without a showing of a special relationship between the plaintiff and the government, no duty to the plaintiff exists.

On the other hand, this Court has pronounced that a municipality owes a non-delegable duty to maintain its sidewalks.

The philosophical and policy underpinnings for these two positions would appear to be at odds. If the public duty doctrine is strictly adhered to in sidewalk cases, it may seem that a form of absolute immunity would attend the government's construction and maintenance of its sidewalks. It is difficult to conceive of a situation in which any one-to-one "special relationship" between government and any particular member of the public could exist as far as sidewalk safety is concerned. The government would come away from every sidewalk accident a winner.

If the "non-delegable duty" doctrine is carried to its logical extreme, at least as characterized here by Plaintiff Trapp, just the opposite result would obtain. The government would be absolutely liable for every sidewalk trip and fall, being unable to ever relieve itself from its duty to keep the public sidewalks safe for everyone. This would, by definition, read the public duty doctrine out of existence. The government would come away from every sidewalk case a loser.

A middle ground between these two extremes must provide a

means for a plaintiff to recover without doing violence to government's discretionary ability to allocate its limited resources as its executives and policymakers think best.

In order to resolve these apparent conflicts, it may be necessary to look at a policy picture larger than the limited determination of "duty" only, and analyze issues of foreseeability of harm and the reasonableness of efforts to alleviate the risk of harm.

The best way the "public duty doctrine" and the "non-delegable sidewalk duty" doctrines can be reconciled is within the context of analyzing the foreseeability of injury. Simply put, if the injuries to a particular plaintiff or class of plaintiffs are reasonably foreseeable by the government, the requisite "special relationship" would be met by an injured plaintiff. If, on the other hand, an action by government could not be reasonably foreseen to cause the particular harm to a particular plaintiff or class of plaintiffs, no special relationship would exist and no recovery could follow.

The first question in such an analysis is what would trigger the "reasonable foreseeability of harm?" In order to insure that public policy is best served, there must be a "bright line" in sidewalk cases: actual notice of a sidewalk defect. If the City is on actual notice of a dangerous sidewalk condition, a "special relationship" would thus develop between the City and a claimant injured at that location. The "duty" threshold being reached, a court would then go on to the next step; determining governmental

immunity (and deciding whether a decision to repair or not repair a defect upon which notice has been given is subject to the immunity which attends discretionary actions).

Adoption of the "actual notice" standard is also consistent with this Court's pronouncements regarding "non-delegable" duties in sidewalk cases. Under this standard, the City's non-delegable duty arises only when the City knows there is a problem. It is only at that point that the City can do anything about it. It is only at that point that the City can reasonably foresee injuries to particular people from that particular defect.

It is against the backdrop of actual notice that the reasonableness of the City's response should be measured, thus perpetuating a standard in sidewalk cases long accepted by this Court. In Gordon v. Provo City, 391 P.2d 430 (Utah 1964), this Court affirmed the standard set out in the cases of Erickson v. Walgreen Drug Co., 232 P.2d 210 (Utah 1951) and DeWeese v. J.C. Penney, 297 P.2d 898 (Utah 1956). In Gordon, the Court approved a jury instruction relieving the government of liability if no actual notice was given or no reasonable opportunity to remedy the dangerous condition existed.

This standard is also consistent with this Court's holdings that a landowner is not liable for injuries he does not create nor can reasonably foresee would lead others to reasonable harm. See English v. Kienke, 774 P.2d 1154 (Utah App. 1989); Stevenson v. Warner, 581 P.2d 567 (Utah 1978).

It should be emphasized that adoption of an "actual notice"

threshold should not pave the way down the slippery slope of strict liability, imposing on government an absolute duty to inspect for defects. Such a requirement would not only fly in the face of the statutory provisions of §63-30-10 Utah Code Annotated providing immunity for negligent inspection or failure to inspect, but would open the door to judicial interference into executive and legislative discretionary functions, violating separation of powers. Adoption of the standard would, however, provide a workable basis upon which cases may be analyzed and outcomes predicted, safeguarding the public's interests in maintaining a fiscally sound government and in being able to recover damages where government is responsible for sidewalk injuries.

Viewed even within this alternative policy framework, however, summary judgment was justified in this case. There was no evidence presented that Salt Lake City was on notice of any sidewalk defect or potential problem at the alleged accident site. In fact, Trapp does not know the exact location of her fall. The City is thus without specific notice of a defect upon which Trapp was injured. The "notice" trigger lacking, no duty to Trapp arose.

### POINT III

THE UTAH GOVERNMENTAL IMMUNITY ACT PRECLUDES  
A FINDING OF LIABILITY ON DEFENDANT'S PART  
AND THE SUMMARY JUDGMENT SHOULD BE UPHELD.

Under Ferree, a District Court should first consider whether an individualized duty is owed by a governmental entity toward a specific plaintiff in a negligence case. If the Court concludes that no duty is owed, there is no need to make further inquiry as to whether governmental immunity applies. Ferree, supra, at 152-153.

In sorting out "first things first," the District Court properly confined its legal conclusions to the issue of duty, making no legal finding on governmental immunity. Judgment on the basis of governmental immunity is justified in this case, however. Because a District Court's judgment should be sustained even if a correct basis for the ruling was not specified, this Court should review the District Court's decision in light of the governmental immunity issue as well as the duty issue. Foss Lewis & Sons Constr. Co. v. Gen. Ins. Co. of America, 517 P.2d 539 (Utah 1973); Green Ditch Water Co. v. Salt Lake City, 390 P.2d 586 (Utah 1964). Here, the District Court found that the City has neither the manpower nor the money to inspect and repair every potential sidewalk problem on the 800 miles of sidewalk within the City limits. (R. 69-70). A factual basis thus exists upon which this Court may uphold the District Court's judgment on the basis of immunity.

The inspection, installation and repair of sidewalks is, in

an era of limited governmental resources, a discretionary function over which Utah law specifically retains statutory immunity. Utah Code Annotated 63-30-10(1)(A).<sup>1</sup> The Utah Court of Appeals recognized this principle in the case of Duncan v. Union Pacific Railroad, 790 P.2d 595 (Utah Ct.App. 1990), holding that highway maintenance and improvement are fiscal matters which require the discretionary allocation of limited funds. The action of making priorities for the application of those funds is not properly reviewable by the Court, and is properly immune from legal challenge:

Highway maintenance and improvements are predominately fiscal matters. Every highway could probably be made safer by further expenditures but we will not hold UDOT (and implicitly the legislature) negligent for having to strike a difficult balance between the need for greater safety and the burden of funding improvements . . . it is not fiscally feasible to equip [all crossings] with the best possible means of assuring traffic safety . . .

[I]n a tort action such as this, [judicial] deference to a governmental function is absolute unless waived, and we do not review it at all under tort principles.

Duncan, supra, at 597. See also Gillman v. Department of Financial Institutions, 782 P.2d 506 (Utah 1989).

Section 63-30-10(1)(D), Utah Code Annotated, provides that governmental immunity is not waived for negligent inspections, inadequate inspections or failure to inspect. The express intent of the Utah legislature is to totally exempt municipalities from liability for failure to discover any one of the myriad things

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<sup>1</sup>In fact, the legislature's broad grant of immunity extends essentially to all governmental functions, discretionary or not. See Utah Code Annotated 63-30-2(4)(a).



which may go wrong in the conduct of public business. As recognized in the Duncan case:

Much of everyday life presents hazards; driving or walking along the street are hazardous, and so are stairs, electricity, and many other things, but we tolerate those hazards because of the impracticability of eliminating them. In determining whether a mishap involving one of those hazards is tortious, the question is not whether a hazard existed, but rather, whether, under prevailing community standards, the defendant should bear the responsibility to discover and meliorate a hazard, in light of the practicability of doing so and the costs and benefits to society requiring the defendant so to act.

Duncan, supra, at 596.

Clearly, the decision as to whether and/or how to apply government funds for the inspection, repair, and maintenance of sidewalks is a discretionary function which the legislature clearly intended to include within the ambit of the Utah Governmental Immunity Act. Otherwise, either the government would be held to a strict liability standard relative to any injuries which occur on its sidewalks or the Courts would be set up as a sort of super-legislature, questioning and ultimately passing judgment on the wisdom of all challenged discretionary decisions which have been reserved for the executive and legislative branches of government. Such a scenario would make public administration all but impossible and thus must be avoided. As stated by the U.S. Supreme Court in United States v. Gaubert, \_\_\_ U.S. \_\_\_, 59 USLW 4244 (1991), in which discretionary immunity was extended for any administrative act "that involves choice or judgment," Id. at 4247, the purpose of immunity is to "prevent judicial 'second guessing' of legislative

and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id. at 4246. Hansen v. Salt Lake County, 794 P.2d 838 (Utah 1990). Frank v. State of Utah, 613 P.2d 517 (Utah 1980).<sup>2</sup>

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<sup>2</sup>As noted in the "Recent Developments" article of 79 Utah Law Review 247 (1987), the determination of governmental immunity under the Utah Governmental Immunity Act involves a three-step analysis:

To determine whether immunity applies in a particular case, the Act establishes a three-step analysis. First, the court determines whether the injury complained of resulted from the exercise of a governmental function. Footnote 22; see Utah Code Annotated §63-30-3 (1986). . . .

Classifying a government activity as a governmental function, however, does not automatically signal unconditional immunity under the Act. The Act expressly waives immunity for specific governmental functions. Under step two of the analysis, the court determines whether the state has waived its immunity for the particular governmental function in question. Footnote 28: See id. §63-30-4. For example, the state has waived its immunity from suit in instances involving negligence. The negligence exception waives immunity for injuries proximately caused by the negligent acts or omissions of state employees committed within the scope of their employment. Footnote 29: id. 63-30-10.

In the final step the court determines whether the waiver of immunity itself is subject to any exception. Footnote 30: id. §63-30-7, -9, -10. For example, the waiver of immunity for injuries caused by negligent acts or omissions of state employees is subject to a number of exceptions, including the discretionary function exception. Under the discretionary function exception the state retains immunity from suit when injuries arise "out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." Footnote 31: id. §63-30-10(1).

Under this analysis, immunity under the "discretionary function exception" clearly applies to the City's acts, as a third-step "exception to the exception" found in Utah Code Annotated 63-30-

Here, then, summary judgment is proper on the basis of governmental immunity as well as the duty issue upon which the lower court based its judgment.

POINT IV.

SUMMARY JUDGMENT WAS JUSTIFIED ON THE FACTS OF THIS CASE.

The District Court specifically made a factual finding that Trapp fell in an area with which she was very familiar, having walked there many times prior to the incident, on a sunny day at approximately noon. The undisputed facts before the Court further demonstrated that Trapp was simply not sure of the cause of her trip and fall. (R. 31). In fact, it was only after the trip and fall that Trapp decided she had tripped on a sidewalk defect. (R. 31, 54-58). She does not know exactly what caused her fall, and has never been able to specify the exact area of her fall. (R. 31). The facts also show that Trapp had traveled in the area many times prior to the accident, and that on that day the sun was shining and the weather was clear. (R. 31, 69-70). With these facts as a backdrop, Summary Judgment in City's favor was mandated as a matter of law, regardless of the other

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8. That statute creates, under step two of the three-step analysis, a waiver of immunity for injuries "caused by a defective, unsafe, or dangerous condition of any . . . sidewalk . . . ." It is the City's position that this statute applies to the negligent repair of a condition once notice of a problem is received and work has been done in response. The statute does not create a duty to repair every potential sidewalk problem nor negate the third-step discretionary function exception. The immunity attendant to the initial discretionary decision on whether to expend the funds and resources to repair a specific sidewalk, in competition for government resources for other needed repairs is not impacted by this statute.

issues addressed above, and should thus be upheld by this Court. Foss Lewis v. Gen. Ins. Co. of America, supra; Green Ditch Water Co. v. Salt Lake City, supra.

While issues of negligence are generally factual questions for jury resolution, where the undisputed facts indicate that an accident is due to the plaintiff's own negligence, or that the plaintiff's case is based entirely on conjecture and speculation, judgment for a defendant is appropriate as a matter of law.

This Court, in Whitman v. W.T. Grant Company, 16 Utah 2d 81, 395 P.2d 918 (1964) held that a plaintiff confronted with a plainly visible hazard is charged with the duty of seeing and avoiding it. If the plaintiff fails to do so, it may be concluded as a matter of law that the plaintiff was negligent. In Eisner v. Salt Lake City, 361 P.2d 1114 (1961), this Court held that a plaintiff's forgetfulness of the condition of a sidewalk was negligence as a matter of law.

More importantly, this Court has held that where the plaintiff does not know what caused her to stumble and fall, the plaintiff's case is based on conjecture and speculation, precluding the plaintiff from establishing a case which could be properly given to a trier of fact. Judgment against such a plaintiff is proper in such a case as a matter of law. In McAllister v. Bybee, 19 Utah 2d 40, 425 P.2d 778 (1967), this Court upheld the dismissal of a plaintiff's case in which the allegation of negligence against the City of Kanab was founded on the assumption that the plaintiff had fallen on a plainly visible

defect. The Court stated:

The plaintiff alighted from her car alongside the curb of a Kanab City, Utah, street, and was injured when she fell over something in the unpaved, weedy area between the curb and the sidewalk. With unusual candor, months later, she said she did not know what caused her to stumble and fall.

. . .

Viewing the facts in a light most favorable to anybody, we feel that plaintiff did not establish a factually possible compensable case that could be given to a jury except by way of conjecture and speculation. Even had there been no speculation as to whether she tripped over the cement obstruction, she had known of its existence for many years, that it was in plain sight on a clear day,--and there to see if anyone but looked.

Id. at 779.

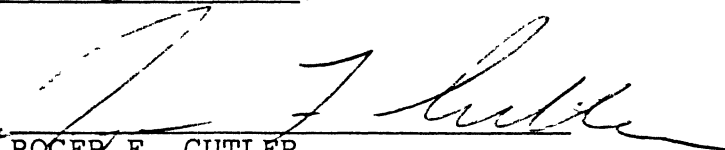
Here, even if Trapp was not precluded from proceeding on the basis of the duty defense or the immunity defense, Summary Judgment would have been properly rendered on the basis of the merits of the case. The Court's grant of Summary Judgment was, thus, proper and should be affirmed.


#### CONCLUSION

In the instant case, Summary Judgment was merited on several bases. Defendant Salt Lake City owed no specific duty to Plaintiff and thus cannot be held liable for her injuries. Furthermore, Salt Lake City is precluded from liability on the basis of governmental immunity. Finally, the undisputed facts in this matter mandate Summary Judgment in Defendant's favor.

For the reasons set forth above, Defendant requests that this Court affirm the District Court's decision in this case and uphold the Summary Judgment in Defendant's favor.

DATED this 10<sup>th</sup> day of June, 1991.

  
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CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing  
Brief to Craig G. Adamson and Eric P. Lee, DART, ADAMSON &  
KASTING, 310 South Main, Suite 1330, Salt Lake City, Utah 84101,  
by depositing the same in the U.S. mail, postage prepaid, this  
10<sup>th</sup> day of June, 1991.

Rudall Edwards