2017

Espenschied Transport Corp., Plaintiff and Appellant vs. Wilshire Insurance Comp Any; Fleetwood Services, Inc., Defendants and Appel!ees.

Utah Supreme Court

IN THE SUPREME COURT

LAWRENCE AND SARAH JEAN COLOSIMO, individually and as the natural parents and heirs of ADAM COLOSIMO, deceased, Appellants, vs. GATEWAY COMMUNITY CHURCH, a Utah corporation; and DOES 1-50, Appellee.	**APPELLANTS' REPLY BRIEF** District Court Case No. 120414704 WD Appellate No. 20140852A Supreme Court No. 20160838 - SC

ON WRIT OF CERTIORARI TO REVIEW DECISION OF COURT OF APPEALS

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IDENTIFICATION OF PARTIES

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Sarah Jean Colosimo

Adam Colosimo

Appellee

Gateway Community Church

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

STATUTES

RULES

MISCELLANEOUS

I.

INTRODUCTION

As demonstrated in Appellants' briefs, this Court should reverse the Court of Appeals' ruling in *Lawrence Colosimo and Jean Colosimo v. Gateway Community Church*, 2016 UT App 195, 382 P.3d 667 (the "Opinion") and remand the case to the Court of Appeals to determine other issues.

In its Opposition brief ("Opposition"), Appellee Gateway Community Church ("Gateway") concedes numerous material points made in Appellants' brief concerning the Opinion's errors.

Gateway concedes that public safety ordinances *can* create duties, independent of common law duties, even toward trespassers. However, it argues that the Draper City Ordinance (Addenda B, C and D to Appellants' Opening Br.) cannot create such a duty because the class of persons it seeks to protect is allegedly too "general." Gateway cites no law for this proposition. In fact, consistent with the well-established law in Utah and other jurisdictions, this Court in *Torrie v. Weber County*, 2013 UT 48, 309 P.3d 216, recently found duties to "wrongdoers" to whom no common law duty was otherwise owed, applying a similar, if not even *more* "general" public safety statute.

The Opinion disregarded the applicable law and instead created and applied a new and erroneous "strict construction" standard which requires legislative enactments to contain an explicit statement that common law was modified and a "list of defenses," in order for a duty to attach. Applying the correct Utah law, this Court should find that Gateway owed an independent duty under the Draper City Ordinance to Adam, because

Adam was, by the plain language of the Ordinance, included in the class whom the Ordinance sought to protect.

Gateway's recycled hypothetical about liability to "burglars in the crawlspace of a private home" is also misplaced. This case involves a child being electrocuted by coming into contact with the easily accessible roof of Gateway's one-story commercial building which even Gateway's own board member agreed was essentially a public place. Adam was electrocuted and died because Gateway, undisputedly, failed to comply with a municipal ordinance intended to protect the public, including trespassers, from the potential dangers of electric outdoor signs.

As to Appellants' common law claim under Restatement (Second) of Torts section 339, Gateway concedes that the Court of Appeals ruled contrary to Gateway's material concession that there were genuine issues of material fact as to whether Gateway knew that children were likely to trespass onto Gateway's roof. Because this is the only element the Court of Appeals considered with respect to Section 339, this Court should reverse the ruling on Section 339 and remand the case to the Court of Appeals to consider the remaining Section 339 elements.

With regard to the common law claims under Restatement (Second) of Torts sections 334 and 335, Gateway also concedes that the lower courts did not require Gateway to first demonstrate an absence of genuine issues of material fact as to whether Gateway knew or had a reason to know of habitual trespassers on its roof and that they ignored Gateway's concession as to likely children trespassers on its roof.

In an effort to defend these errors, Gateway misconstrues the controlling law concerning burdens on motions for summary judgment which this Court articulated in *Orvis v. Johnson*, 2008 UT 2, 177 P.3d 600 and *Connor v. Union Pac.*, 972 P.2d 414 (Utah 1998). In that regard, Gateway claims that the lower courts were correct that Gateway did not have the initial burden to demonstrate an absence of genuine issues of material fact on its motion. Gateway also claims its concession as to likely children trespassers on its roof is irrelevant to the analysis concerning habitual trespassers. Gateway even claims that the concession was not about whether children were likely to trespass ***onto Gateway's roof***, but about children *generally* climbing roofs. Gateway's arguments are not well taken.

The well-established precedents make clear that the Opinion erred when it ignored Gateway's concession as to likely children trespassers on Gateway's roof and Gateway's failure to meet its initial burden to demonstrate the absence of genuine issues on the questions of whether Gateway had a reason to know of habitual trespassers.

The Opinion also erroneously ignored the abundant circumstantial evidence Appellants presented (despite having no obligation to do so under *Orvis* and *Connor*) demonstrating that there are genuine issues of material fact as to whether Gateway had reason to know of habitual trespassers on its roof under Restatement Sections 334 and 335. Instead, the Opinion created a bright-line rule pertaining to Sections 334 and 335 that admitted knowledge of ***two*** trespassing incidents is insufficient, as a matter of law, to create a genuine issue of material fact as to landowner's knowledge concerning habitual trespassers, regardless of any circumstantial evidence. Utah courts have never endorsed

such bright-line rules, and this Court should also refuse to do so here. The reversal of the Opinion's rulings on Restatement Sections 334 and 335 is necessary to correct the Opinion's errors.

Finally, Gateway invites this Court to rule on "alternate grounds" and to go beyond the scope of Appellants' petition and the Court of Appeals' Opinion. This Court should decline Gateway's request because it is contrary to the Utah law which restricts the Supreme Court's review *on certiorari* to a review of only the issues raised in the *Petition for Certiorari* and the rulings made by the *Court of Appeals*. As Gateway admits, the Opinion specifically and only addressed the above referenced two issues: (1) the issue of duty under the Ordinance; and (2) whether there were genuine issue of material fact as to whether Gateway knew or had reason to know about likely children trespassers or habitual trespassers on its roof. Appellants' petition did the same. As such, much of Gateway's Opposition should be disregarded, and the proper course of action is to remand these "alternate" issues for consideration by the Court of Appeals.

II.

ARGUMENT

A. The Draper Ordinance Created a Duty Toward Adam, Independent of Any Common Law Duties, Because Adam Was a Member of the Class the Ordinance Was Designed to Protect.

In its Opposition, Gateway makes a number of arguments about creation of duties in Utah, which are addressed below. However, Gateway ultimately concedes that under Utah law, Gateway *can* be liable to Adam under a public safety ordinance, independently

of any duties under common law, ***if the ordinance protects a specific class of which Adam is a member***. (Opp'n at pp. 3, 47-48.)

This is not surprising in light of the well-established Utah law governing public safety statutes which states that an independent duty can arise, regardless of common law duties, where a party can show: "(1) the existence of the statute or ordinance, (2) the ***statute or ordinance was intended to protect the class of persons which includes the party***, (3) ***the protection is directed toward the type of harm which has in fact occurred as a result of the violation***, and (4) the violation of the ordinance or statute was a proximate cause of the injury complained of." *Hall v. Warren*, 632 P.2d 848, 850-51 (Utah 1981) (emphasis added) ("*Warren I*") and *Hall v. Warren*, 692 P.2d 737, 738-40 (Utah 1984) ("*Warren II*") (reversing the trial court's judgment adverse to plaintiff under a building code ordinance and instructing that duties by a legislative enactment are entirely independent and separate from common law duties); *Torrie v. Weber County*, 2013 UT 48, ¶¶ 10-11, 309 P.3d 216; *Tallman v. City of Hurricane*, 1999 UT 55, 985 P.2d 892, 897-98; Restatement (Second) of Torts sections 285, 286, (1965) 874A (1979).

Notably, Gateway does not dispute that Appellants satisfy prongs (1), (3) and (4) listed above. Gateway also does not dispute that the clear purpose of the Ordinance is to ***"protect the health, safety and welfare of City residents..."*** by eliminating ***"potential hazards to the public resulting from improperly constructed or installed signs."*** It also does not dispute Appellants' prior arguments that the Ordinance specifically required that the electric signs be "maintained in good and safe structural condition, ***in compliance with all building and electrical codes*** and in conformance with this code, ***at all times***."

(*See also* R.1050; 1056-57; 1126-27.) Furthermore, Gateway does not dispute "maintained the sign in an unsafe condition in violation of the ordinance," and that Adam was a resident of Draper City who was electrocuted due to Gateway's negligently installed and operated electric sign. (R.357(n.3)); *see also* 1869.) Finally, Gateway does not dispute that it was reasonably foreseeable that a trespasser such as Adam could be injured or killed if he or she came into contact with various parts of Gateway's building which were electrified due to the faulty sign.

Applying basic Utah law, and based on Gateway's own concessions, this Court should find that Adam was in the class of persons to whom Gateway owed a duty under the Draper Ordinance.

1. Gateway's Argument That a Public Safety Ordinance Must Be More Specific Than the Draper Ordinance in Order For a Duty To Exist Is Without Merit.

While Gateway concedes that the Ordinance protects the class of Draper City residents of which Adam was a member, Gateway ultimately argues that the Draper Ordinance is too "general" and that legislative enactments *must* specify a more "narrow" class than the Draper Ordinance does, in order to create duties. (Opp'n at pp. 3, 48.) Gateway cites no Utah law for this proposition. Not surprisingly, Utah law (*see* prong (2) above) does not limit the size of the "class" which a legislative enactment can seek to protect. As demonstrated in the opening brief, this Court and courts in other jurisdictions have imposed duties based on language concerning classes protected by "public safety" enactments that is similar to the language found in the Draper Ordinance. (*See*

Appellants' Opening Br. at pp. 18-23.) As discussed in Appellants' opening brief, this Court's recent decision in *Torrie*, 2013 UT 48, is a compelling example.

In *Torrie*, this Court specifically found a duty was owed to fleeing suspects under a public safety statute similar to Draper City Ordinance, to whom no duty was otherwise owed. *Torrie*, 2013 UT 48, ¶ 11. However, in a strained attempt to distinguish *Torrie*, Gateway argues that it was appropriate for the Court in *Torrie* to impose a duty toward wrongdoers "in derogation of the common law" because the statute in *Torrie* was purportedly more "narrow" than the Draper Ordinance. (Opp'n at pp. 48-49.) To that end, Gateway states that the *Torrie* statute "narrowly" *stated* that it sought to protect "***all persons using the highways***" as opposed to Draper City Ordinance which used the terms "***[Draper] City residents***," "***people of the City***" and "***public***" to describe the class of persons it intended to protect. (*Id.*; *see also* Appellants' Opening Br., Statement of Material Facts ("SOF") ¶ 5.) Gateway's argument is not well taken.

Gateway misstates the statute applied by the *Torrie* court. The *Torrie* court applied Utah Code section 41-6a-212, which does not contain the language "all persons using the highways." *Torrie*, 2013 UT 48, ¶ 11. In fact, as the *Torrie* court recognized, section 41-6a-212 merely states that operators of authorized emergency vehicles had a duty to "act as a reasonably prudent emergency vehicle operator in like circumstances… in the pursuit of an actual or suspected violator of the law." *Id.*[1] Based on that language

[1] While the *Torrie* court discussed its prior decision in *Day v State ex rel. Utah Dept. of Public Safety*, 1999 UT 46, ¶ 14, 980 P.2d 1171, it clarified that the *Day* decision was based on the prior statutory language, which unlike the *Torrie* statute, stated "all persons using highways." Notably, even where section 41-6a-212 contained no language as to

alone, the Court determined that the plain meaning of the statute indicates that the statute intended to protect all members of the public, including the fleeing suspects. *Id.*

Ironically, the Draper Ordinance states quite explicitly that it was promulgated to protect specifically the "[Draper] City residents" from faulty electric signs, while *Torrie*'s section 41-6a-212 does not contain such specific language. But even if the *Torrie* statute stated it sought to protect "***all persons*** using highways," this would not help Gateway because such "class" would not be any more "narrow" than the class of Draper City residents whom the Draper Ordinance seeks to protect. Logically, "all persons using highways" could include persons driving, hitchhiking, or biking on the highways – which essentially means all members of the "public" who may be in contact with highways. In fact, the language "using highways" is superfluous because it would be absurd to expect that the statute would seek to protect persons at their *homes*, when the statute deals with highways. In the same fashion, the Draper Ordinance seeks to protect all Draper City residents who may come into contact with public *commercial* buildings which are electrified due to faulty electric signs. By the same token, this Ordinance, of course, was ***not*** designed to protect people from electrified buildings who would ***not*** be in contact with such building; i.e. a competitor complaining about an electric sign used by a business across the street.

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the protection of "all persons using the highways," the *Torrie* court found that the duty imposed is "nearly identical" because, under either statute, fleeing suspects are members of general public whom the statute sought to protect. *Torrie*, 2013 UT 48, ¶ 13.

2. Gateway's Arguments Concerning Statutory Construction Are Erroneous.

Gateway also adopts the Opinion's erroneous application of *strict* construction to ordinances and argues that *Torrie* is inapposite because standard construction applies to *statutes* and *strict* constriction applies to *ordinances.* (Opp'n at pp. 48-49, 53.) As demonstrated in Appellants' opening brief, Gateway's (and the Opinion's) analysis is in error. (*See* Appellants' Opening Br. at pp. 25-28.)

As a preliminary matter, Gateway's cited cases, like the cases cited in the Opinion, specifically and only concerned *zoning* or *land use* ordinances and the issue of whether these ordinances prohibited a "proposed use." *See Carrier v. Salt Lake Cty.*, 2004 UT 98, ¶ 31, 104 P.3d 1208; *Rogers v. W. Valley City*, 2006 UT App 302, ¶ 15, 142 P.3d 554; *Patterson v. Utah Cty. Bd. Of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995). Again, even in *Patterson*, on which both Gateway and the Opinion rely, the Court of Appeals specifically warned that there could *not* be a strict interpretation of the zoning ordinance as *a whole* where there were requirements related to promoting public health, safety and welfare. 893 P.2d at 608; *see also Jackson v. Mateus*, 2003 UT 18, ¶¶ 9, 20-21, 70 P.3d 78 ("[i]n interpreting the meaning of ***ordinances***, [courts] are guided by the ***standard rules of statutory construction...***") (emphasis added) (internal citations omitted). Here, Gateway does not argue that the Draper Ordinance impinged on Gateway's "proposed use" or that Gateway wished to use the Electric Sign for some other purpose not permitted by the Ordinance. As such, this line of cases is simply inapposite.

However, it is ultimately of no consequence whether the Court applies strict or standard construction to the Draper Ordinance because both require that the Court first apply the plain meaning to the Ordinance. Therefore, the *Torrie* analysis is appropriate. Indeed, in looking at the plain language of the *Torrie* statute which, like the Draper Sign Ordinance, "***did not carve out any exceptions for [wrongdoers such as] fleeing suspects***," this Court concluded that, like innocent third parties, even fleeing suspects are included in the class of the general public to whom a duty is owed under the statute. *Torrie*, 2013 UT 48, ¶ 11 (emphasis added). The Court did not and could not restrict the class which the statute sought to protect - the public who may reasonably be anticipated to be harmed by vehicle operators' negligence. *Id.* at ¶ 12, n.18. The Court should, in this case, also "decline to "depart from [its] established plain language analysis" and to go out of its way to "carve out" an exception for certain members of the class (trespassers) from the class of persons to whom the duty is owed under the Draper City Ordinance. *Id.*[2]

Contrary to the plain language of the Ordinance and the controlling Utah law, the Court of Appeals did impermissibly carve out an exception for wrongdoers such as trespassers. As explained in the opening brief, the Opinion did so based on its newly

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[2] Gateway also tries to distinguish *Utah County v. Butler*, 2008 UT 12, ¶ 20, 179 P.3d 775, which instructs that under the plain language of a statute which derogates land user's common law rights, the term "public" obviously includes even criminal trespassers, on the grounds that *Butler* did not involve a *safety* enactment. (Opp'n at p. 52.) As stated above, this distinction is inapposite. Certainly, the *Torrie* statute *was* a public safety enactment, and in that case the Court found that even wrongdoers are members of the public that the public safety enactment sought to protect.

created, unprecedented standard of "strict construction" which the Court of Appeals patched together based on antiquated and inapposite cases. The "new" standard is bad law. As such, the Court of Appeals' ruling concerning duties owed to Adam under the Draper City Ordinance should be reversed.

3. Gateway's Remaining Arguments Concerning Duties Owed Under an Ordinance Are Also Without Merit.

Gateway presented additional arguments which are meritless and immaterial in light of Gateway's ultimate concession that, under Utah law, an ordinance *can* create a duty to the members of a class which it seeks to protect. Appellants, nevertheless, address those arguments.

For example, relying on a flawed premise that the Draper City Ordinance should be considered a "general" safety ordinance, as opposed to a "specific" ordinance, Gateway goes on to argue that "general safety ordinances ... do not create *independent duties* ***in tort***" because, if they did, "a homeowner would be liable to a burglar who is injured in the crawlspace of the home due to a violation of a general safety code in the crawlspace." (Opp'n at pp. at 3, 47 (emphasis added).) Gateway solely relies on *Davencourt At Pilgrims Landing Homeowners Assoc. v. Davencourt At Pilgrims Landing*, 2009 UT 65, 221 P.3d 234 ("*Davencourt*"), for this proposition. However, *Davencourt* does *not* stand for that proposition. *Davencourt* did not even involve any personal injury, health or safety claims. Instead, it only concerned a plaintiff's (unsuccessful) effort to avoid the *economic loss rule* for ***property damages*** under a safety statute. *Id.*, ¶ 43. In fact, contrary to Gateway's argument, the *Davencourt* court

acknowledged that a duty *can* be created "to the public" by the safety statute such as the statute in *Davencourt*. *Id.*, ¶¶ 43, 44 (emphasis added).

As demonstrated above, Gateway's argument is also directly undermined by Utah cases, such as *Warren I* and *Warren II*, where this Court permitted recovery under a similar public safety building ordinance and found that a duty was owed to persons under the *building code ordinance*, independent of any common law duties. *Warren I*, at 850-51; *Warren II*, at 738-40. Notably, in this case, Draper City even anticipated litigation and explicitly stated in the Ordinance that there would be no limitation to recovery for damages due to the violation of the Ordinance. *See* Draper City Ordinance (R.1141).

The scenario involving some "burglars in the crawlspace" and some hypothetical, unknown, legislative enactment is not before the Court. Here, Draper City promulgated a very specific ordinance concerning the use of commercial electric signs and did not carve out trespassers from the class it sought to protect because trespassers, by definition, are capable of making, and do make, contact with Draper City's commercial buildings. This was especially foreseeable in Draper's busy, commercial areas such as Gateway's one-story strip mall where Gateway used its electric outdoor sign for advertising and attracting business, and where, according to various Draper city officials, it was well known that children climbed commercial buildings all over Draper. (R.903-904 (47:8-48:12); 1023 (96:5-13); 1026 (112:15-21); *see also* R.560 (29:23-30:4); 572 (77:23-78:1).) Of course, contacts with the outside parameters of a building could kill a trespasser, an employee, or an invitee all the same, regardless of whether these persons made contact with the electrified rain gutter immediately next to the main entrance to

Gateway; the electrified one-story, easily accessible roof; or some other part of the electrified building. It is common sense that Draper City intended to protect the lives of each of those persons.

Likewise, Gateway's reliance on the antiquated 1926 case, *Daley v. Salt Lake & U.R. Co.*, 247 P. 293, 294 (Utah 1926), for the proposition that there can be no duty to trespassers under a statute is misplaced. As an initial matter, *Daley* does not even stand for that proposition. Also, as stated before, *Daley* is inapposite as it relied on long-rejected principles that wrongdoers cannot recover for injuries. *See id.* (finding that court's error concerning a city ordinance jury instruction was harmless because there was evidence to preclude the trespasser from recovering any judgment at all). Of course, Gateway's (and the Opinion's) interpretation of *Daley* flies in the face of the well-established analysis which courts must apply, such as the analysis in *Torrie*.

Finally, Gateway tries to distinguish the numerous cases cited by Appellants where courts found a duty to trespassers, independent of common law duties, arguing that those cases were *negligence per se* jurisdiction, whereas Utah is a *prima face negligence* jurisdiction. (Opp'n at pp. 47-48.) However, as an initial matter, some of those jurisdictions were, in fact, "prima facie evidence" jurisdictions like Utah. *See e.g. Allen v. Dackman*, 991 A.2d 1216, 1231 (Md. Ct. App. 2010); *Paul v. Blackburn Ltd. P'ship*, 63 A.3d 1107 (Md. Ct. App. 2013). In any event, Gateway tries to create a distinction without meaning to this appeal. The distinction regarding *negligence per se* jurisdictions concerns what the standard of care is – not whether a duty exists. *See Thompson v. Ford*, 395 P.2d 62, 33-34 (Utah 1964); Restatement (Second) of Torts sections 286; 288A. It is

undisputed that Gateway here breached the standard of care. In any event, as Gateway itself ultimately conceded, a duty *can* be created toward a person "where the ordinance protects a specific class" even in a "prima facie evidence" jurisdiction like Utah. (Opp'n at pp. 3, 47.)

B. This Court Should Also Reverse the Court of Appeals' Ruling As to Appellants' Common Law Claims.

In addition to showing that Gateway owed a duty to Adam under the Draper City Ordinance, Appellants also demonstrated to the lower courts that there are genuine issues of material fact precluding summary judgment on Appellants' common law claims under Restatement (Second) of Torts sections 334, 335 and 339.

However, both the trial court and the Court of Appeals committed fundamental procedural errors in their consideration of Appellants' common law claims. As a result, the Court of Appeals erroneously affirmed the trial court's finding that Gateway owed no common law duties to Adam on the sole ground that Appellants purportedly did not prove that, under Sections 334-339, Gateway knew or had a reason to know that children were likely to trespass *or* that there were habitual trespassers onto Gateway's roof.

1. Gateway's Arguments Concerning the Applicable Burdens on Motions for Summary Judgment Are Wholly Erroneous.

Both the trial court and the Court of Appeals completely disregarded and misapplied the basic Utah law governing evidentiary burdens on summary judgment. As Gateway now admits, neither court imposed the initial burden on Gateway to demonstrate an absence of genuine issues of material fact on various issues. (Opp'n at pp. 38-39.) Also, they ignored, among other things, Gateway's explicit concession that there were

genuine issues of material fact as to the question of whether Gateway knew that children were likely to trespass onto its roof. (Opp'n at p. 36; R.357(n.3).)

Recognizing the errors in the Opinion concerning the parties' burdens on Gateway's motion for summary judgment, Gateway first argues that this Court should not address this problem because it did not grant review of the issue of *burdens* on the summary judgment. (Opp'n at pp. 38-39.) However, the issue of burdens and the application of correct standard on a motion for summary judgment is inherent in this Court's analysis, and a necessary prerequisite before the Court can determine whether the Opinion correctly ruled that Gateway had no knowledge or reason to know of the trespassers.

Gateway then argues that the trial court and the Opinion applied the correct standard governing motions for summary judgment. (Opp'n at p. 39.) However, Gateway misconstrues the basic Utah law, which is stated in Rule 56(c)(1), *Connor v. Union Pac.*, 972 P.2d 414 (Utah 1998), and *Orvis v. Johnson*, 2008 UT 2, 177 P.3d 600, when it argues that Gateway had no burden and that the burden is "borne by the party with the ultimate burden of proof at trial." (Opp'n at p. 39.) Again, *Orvis* could not be clearer when it states:

> ***Unless*** the ***moving party meets its initial burden*** … 'the party opposing the motion is under ***no obligation*** to demonstrate that there is a genuine issue of material fact for trial'…Utah law does not allow a summary judgment movant to merely point out a **lack of evidence in the nonmoving party's case**, but instead requires a movant to **affirmatively provide factual evidence** establishing that there is no genuine issue of material fact.

Orvis, 2008 UT 2, ¶ 16 (emphasis added) (internal citations omitted). Also, in *Connor*, which specifically dealt with the issue of genuine issue of material fact as to habitual trespassers, Utah Supreme Court reversed the trial court's summary judgment, explaining:

> ***[B]efore*** determining whether the nonmoving party has met its burden, the court hearing the motion for summary judgment must be satisfied that the moving party has met its burden of proving that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.... In the instant case, the district court improperly granted [defendant's] motion for summary judgment because [***defendant] failed to meet its burden***.... For example, [defendant] states in its summary judgment memorandum that '[t]here is no evidence indicating that trespassers 'habitually' congregate, loiter or otherwise trespass the area of track where plaintiff was injured.' [Defendant], however, fails to support this argument with an affidavit or any other evidence. Its argument is nothing more than a mere assertion, which is wholly insufficient to support a summary judgment motion.... ***Because [defendant movant] failed to show by affidavit or otherwise that the area where [plaintiff] was injured was not a limited area upon which trespassers constantly intruded, we hold that there was a genuine issue of material fact and that the district court erred in granting [defendant's] motion for summary judgment.***

Connor, 972 P.2d at 418 (emphasis added).

Like the defendant in *Connor*, here Gateway failed to meet its initial burden to demonstrate the absence of genuine issues of material fact with respect to the only issue decided by the Opinion - whether Gateway knew or had reason to know that children were likely to trespass onto its roof, or that persons habitually trespassed onto Gateway's property. As stated above, Gateway conceded in its motion that Gateway knew or had a reason to know that children were likely to trespass onto its roof. (R.357 n.3.) As such, had the Opinion followed the basic principles iterated in *Connor* and *Orvis*, the burden

should not have shifted to Appellants to demonstrate *presence* of genuine issues of material fact on these issues.

While Gateway ultimately admits that the Court of Appeals erroneously found that there were no genuine issues of material fact as to the issue of whether *children were likely to trespass onto Gateway's roof*,[3] Gateway argues that its concession as to the issue of likely children trespassers is irrelevant to the question of Gateway's belief as to the likelihood of habitual trespassers on Gateway's roof. (Opp'n at pp. 26-27.) Not so. The two issues are inextricably related because the fact that Gateway conceded that children were likely to trespass demonstrates that Gateway *also* did not meet its initial burden of demonstrating absence of genuine issue of material as to whether Gateway had reason to know that persons habitually visited its roof.

Connor is instructive. In *Connor*, defendant conceded to even less than Gateway did here, only generally arguing that, while there were trespassers in some *neighboring* areas, defendant was simply unaware of any trespassers in the limited area in question. Still, this Court found that was insufficient to demonstrate absence of issues of material fact as to whether defendants had reason to know of habitual trespassers, and it refused to

[3] Gateway argues that the Court of Appeals erred when it failed to consider Gateway's concession because Appellants allegedly failed to distinguish the Section 339 element (that Gateway knew or had reason to know that children were likely to trespass) from Section 334 and 335 elements (that Gateway knew or had reason to know of habitual trespassers). That is incorrect. *See e.g.* Apr. 7, 2015 Appellants' Opening Br., 2015 WL 12646934, at pp. 36-37; 48-50; Aug. 19, 2015 Appellants' Reply Br., 2015 WL 12646933, at pp. 15-17.

shift the burden to plaintiff to present evidence creating a genuine issue of material fact. *Connor*, 972 P.2d at 418. The Court should do the same here.

2. There is an Issue of Fact as to Whether Gateway Knew or Had Reason to Know that Persons Habitually Trespassed Onto Its Roof.

Notwithstanding Gateway's failure to meet its initial burden to demonstrate the absence of genuine issues of material fact as to whether Gateway had a reason to know of habitual trespassers, Appellants presented compelling arguments and evidence that there *are* genuine issues of material fact on this element.

Certainly, Gateway's concession that there are genuine issues of material fact as to whether Gateway knew that children were likely trespassing onto its roof, raises an issue of fact under Restatement Sections 334 and 335 as to whether Gateway also knew that *persons habitually trespassed onto Gateway's roof.*

So, in an effort to escape reversal, Gateway now, for the first time, argues that this concession was not specific as to *Gateway's roof*, but that it "concerned only whether youth are likely to access roofs – ***any roofs.***" (Opp'n at pp. 1-2.) But, this Court need not look any further than the plain language of the pertinent subsection of the Restatement and Gateway's original concession to see that Gateway is misstating the facts. Indeed, the pertinent subsection of Restatement Section 339 states that "***the place where the condition exists*** is one upon which the possessor knows or has reason to know that children are likely to trespass." Clearly, this subsection refers to Gateway's roof, not just any random place where children are likely to trespass.

In addition to Gateway's concession as to the likely trespassing by children, Appellants raised a genuine issue of material fact as to the knowledge of habitual trespassers when they presented both direct evidence of two admitted instances of trespass, and abundant circumstantial evidence. Indeed, Gateway's own board member agreed that, based on what he understood, the roof was a "public" place. (R.560 (29:23-30:4); 572 (77:23-78:1).) There was also evidence demonstrating that Gateway knew for a long time that there had been a box by the ladder leading to the roof which made access to this one-story building's roof even easier. (*See* R.792-93.) There were many instances of persons loitering around the ladder, using graffiti, and even break-ins around the ladder. *Id.* Based on the totality of the evidence, viewed in the light most favorable to Appellants, the Opinion should have found that there were genuine issues of material fact as to whether Gateway had a reason to know of habitual trespassers on its roof.

Instead, the Opinion created a bright-line rule that two instances of admitted trespasses cannot be sufficient to create an issue of fact as to habitual trespassers, regardless of any concessions or circumstantial evidence. The Opinion's disregard of the circumstantial evidence presented by Appellants was in direct violation of the well-established law that all evidence must be viewed in totality. *See Lopez v. Union Pacific R.R. Co.*, 932 P.2d 601, 606 (Utah 1997) and *Connor*, 972 P.2d at 417-18. Relatedly, the Opinion improperly instructs that courts should invade the province of a jury and weigh the evidence in determining issues related to reasonableness and credibility. As explained in the opening brief, the Opinion's analysis is flawed on numerous other

grounds, warranting a reversal of the Court of Appeals' ruling. (Appellants' Opening Br. at pp. 33-35.)

Notably, in its Opposition, Gateway concedes that the Opinion creates a bright-line rule, but Gateway argues that it was appropriate for the lower courts to disregard all circumstantial evidence and only consider the two *admitted* known instances of trespass. (Opp'n at pp. 25-26.) Gateway relies on several cases from other jurisdictions, discussed below. However, such cases are not helpful to Gateway, especially in light of *Lopez* and *Connor* decisions which demonstrate that Utah law does not endorse such bright-line rules governing landowner's reasonable belief as to likelihood of habitual trespassers on its roof. *Connor*, 972 P.2d 417-18 and *Lopez*, 932 P.2d at 605.

The cases cited by Gateway not only fail to support the Opinion's bright-line rule, they are also distinguishable on various other material grounds. *See e.g. City of Kansas v. New York-Kansas Bldg.*, 96 S.W.3d 846, 861 (Mo. Ct. App. 2002) (no evidence that the building owner knew about *any* trespass); *Seward v. Terminal*, 854 S.W.2d 426, 429 (Mo. 1993) and *Lindquist v. Albertsons*, 748 P.2d 414 (Id. Ct. App. 1987) (single, *accidental* trespass); *Boyd v. Conrail*, 677 A.2d 1182, 1187 (N.J. Super. 1996) (irrelevant issue whether the area in question was "limited"); *Politte v. Union Elec.*, 899 S.W.2d 590, 593 (Mo. Ct. App. 1995) (expressing it was "questionable" that Missouri courts adopted Section 335 and focusing on whether the area was "limited"); *Vega v. Northeast Illinois Reg'l R.R.*, 863 N.E.2d 733 (Ill. App. Ct. 2007) (inapposite, because Utah courts have not required that a limited area must be a "beaten" or "well-worn path"); *Burgess v.*

State, 74 A.3d 581, 587-91 (Conn. 2012) and *Humphrey v. Glenn*, 167 S.W.3d 680, 685 (Mo. 2005) (defendants admitted they knew of many trespassers).

This Court should remand this issue to the Court of Appeals and instruct that juries (and certainly the court) must view *all* evidence, both direct and circumstantial, in the light most favorable to Appellants. Based on the totality of the evidence presented, a reasonable jury could, like Gateway's own board member, believe that Gateway had a reason to know that its roof was treated by trespassers as a "public" place and as such, that persons habitually trespassed onto Gateway's roof.

Where the Opinion applied the wrong evidentiary burden to the common law elements and adopted a *per se* rule on the issue of habitual trespassers, and where Appellants presented abundant circumstantial evidence on the issue of Gateway's knowledge concerning habitual trespassers, this Court should reverse the Opinion's ruling on the common law claims.

3. <u>This Court Should Decline Appellee's Request to Affirm Lower Courts' Decisions On "Alternate Grounds."</u>

On a writ of certiorari, the Supreme Court is limited to addressing only the rulings by the Court of Appeals *and*, only the rulings which were specifically addressed in Appellants' petition for writ of certiorari. *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 855 (Utah 1998) ("Review of certiorari is limited to examining the court of appeals' decision and is further circumscribed by the issues raised in the petitions."); *see also* Utah Code section 78A-3-102(5); Utah R. App. P. 45, 49(a)(4)("[o]nly the questions set forth in the petition or fairly included therein will be considered by the Supreme Court."); *State*

v. Topanotes, 2003 UT 30, ¶ 8, 76 P.3d 1159 ("on certiorari, [Supreme Court] review[s] the decision of the court of appeals, not the … trial court").

Appellee concedes that the Court of Appeals made only two specific rulings: (1) that Gateway did not owe Adam a duty under the common law Restatement sections 334, 335 or 339 *because Gateway allegedly did not know there were trespassers*; and (2) that Gateway did not owe a duty, independent of common law duties, to Adam under the Draper City safety ordinance. (Opp'n at pp. 15-16.) Yet, in its brief, Appellee asks this Court to affirm the trial court's decision based on "alternate grounds." Specifically, Gateway argues that the Court can affirm the decisions below because, for example, (1) the dangerous condition allegedly was unrelated to Gateway's activities (*see* Opp'n sections 1.1.2 and 1.2.2); (2) because Gateway allegedly did not know about the dangerous condition (Opp'n sections 1.1.3, 1.2.3, and 1.3.1); (3) and because Adam allegedly realized that the condition on the roof would kill him (Opp'n section 1.3.2).

Putting aside the fact that there are genuine issues of material fact as to those additional issues, this Court should strike those arguments because they were not considered and not ruled on by the Court of Appeals. Additionally, none of the arguments related to the proposed "alternate grounds" were "raised in [Appellants'] petition," nor did Gateway file a "cross petition" asserting such alternative grounds. *See Coulter*, 966 P.2d at 855.

Appellee invites this Court to err when it cites *Bailey v. Bayles*, 2002 UT 58, ¶ 13, 52 P.3d 1158, for the proposition that *this Court can affirm the Court of Appeals on an "alternate ground."* Appellee completely misconstrues the *Bailey* decision. The Utah

Supreme Court in *Bailey* stated that, when exercising its certiorari jurisdiction, it "review[s] the ***decision of the court of appeals***, not of the trial court.'" *Bailey*, 2002 UT 58, ¶ 8 (internal citations omitted) (emphasis added). Additionally, this Court in *Bailey* specifically and only addressed the issue of whether the ***Court of Appeal could affirm "the trial court's order on alternate grounds."*** *Id.* at ¶¶ 11-13 (emphasis added). It had nothing to do with issues related to a review on *certiorari.* Indeed, while Appellee's alternate arguments may have been acceptable had this Court retained original jurisdiction and was directly reviewing the trial court's decision, Utah law is clear that different rules apply on *certiorari. See e.g. Coulter*, 966 P.2d at 855.[4] As such, this Court should strike Gateway's "alternate grounds" arguments.

III.

CONCLUSION

For the foregoing reasons, the Opinion should be reversed and Appellants should be awarded their costs on appeal. Furthermore, this case should be remanded to the Court of Appeals for issuance of a new opinion consistent with this Court's decision and to address Appellants' other issues on appeal which were not addressed or fully resolved by the Opinion.

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[4] Consistent with *Coulter*'s statement of the law, this Court has instructed that, for example, where the court of appeals reversed the trial court's ruling without considering alternate grounds argued by the appellee, the Supreme Court is not to consider alternate grounds on certiorari, but to ***remand*** the case to the *court of appeals* to consider such alternate grounds. *See e.g. State v. Krukowski*, 2004 UT 94, ¶ 24, 100 P.3d 1222; *State v. Davis*, 972 P.2d 388, 395 (Utah 1998).

DATED this 5th day of May, 2017.

BURBIDGE MITCHELL & GROSS

By _____
Attorneys for Appellants

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