

2017

**Candice Cochegrus, Appellant, vs. Herriman City, Rosecrest Village Homeowners Association, Jnc., and Future Community Services, Inc. Dba Fcs Community Management, Appellees.**

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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CANDICE COCHEGRUS,

Appellant,

vs.

HERRIMAN CITY, ROSECREST  
VILLAGE HOMEOWNERS  
ASSOCIATION, INC., and FUTURE  
COMMUNITY SERVICES, INC. dba  
FCS COMMUNITY MANAGEMENT,

Appellees.

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Case No. 20161073-SC

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**OPENING BRIEF OF APPELLANT**

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APPEAL FROM THE FINAL JUDGMENT  
OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,  
THE HONORABLE ANDREW H. STONE

---

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FILED  
UTAH APPELLATE COURTS

JUN 19 2017

## **LIST OF PARTIES**

All current parties are listed on the case caption.

Other parties include Utah Government Local Trust-Herriman and Boulders at Rosecrest HOA. These parties were included in the original Complaint and in the Second Amended Complaint, respectively. Plaintiff dismissed these parties.

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## JURISDICTIONAL STATEMENT

The Third District Court entered summary judgment for the Appellees on October 17, 2016.<sup>1</sup> Appellant timely filed her notice of appeal on November 15, 2016.<sup>2</sup> On January 5, 2017, Appellant filed a letter requesting that the Utah Supreme Court retain jurisdiction.<sup>3</sup> On February 7, 2017, this court issued an order electing to retain this case.<sup>4</sup> This court has jurisdiction under Utah Code § 78A-3-102(3)(j).

## ISSUES PRESENTED FOR REVIEW

1. **Issue:** Did the Third District Court commit error in granting summary judgment in favor of the defendants when the plaintiff presented the following evidence: Ms. Cohegrus sustained injuries from an unsafe condition when she inadvertently tripped on a rusted metal rod protruding from a hole in land owned, or maintained by defendants; the rod was oxidized; the rod had several cuts created by lawn-mowing equipment; and the rod had existed for up to six years prior to her injury?

a. **Standard of review:** On appeal, the “analytical standard for review of a summary judgment is the same as that of the trial court: [the Court] review[s] the facts and inferences from those facts in the light most favorable to the losing party. If [the Court] conclude[s] that a genuine issue of material fact exists, the summary judgment will be overturned and the case remanded for further proceedings on that issue. Where no material

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<sup>1</sup>R. 672-674.

<sup>2</sup>R. 677-679.

<sup>3</sup>Retention Letter.

<sup>4</sup>Order Retaining Case.



facts remain unresolved, [the court must] examine the trial court's conclusions of law and review them for correctness.”<sup>5</sup> Utah courts have consistently held that summary judgment should be granted in negligence cases only in the “most clear instances.”<sup>6</sup> Summary judgment may be granted “only when the matter is clear; and in case of doubt, the doubt should be resolved in allowing the challenged party the opportunity of at least attempting to prove his right to recover.”<sup>7</sup> The purpose of “the summary judgment procedures provided for in [the] rules is to furnish a method for searching out and facilitating the resolution of issues which are not in dispute, and of settling the rights of the parties without the time, trouble and expense of a trial.”<sup>8</sup> As such, “summary judgment is a drastic remedy and should be granted with reluctance.”<sup>9</sup> Ordinarily, “[t]he plaintiffs should be granted the opportunity of producing whatever evidence” they have prepared for trial.<sup>10</sup>

b. **Preservation below.** The issue was raised by evidence and argument in the parties’ memoranda as well as in oral arguments that were held at the Third District Court’s hearing on Defendant’s motion for summary judgment.<sup>11</sup>

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<sup>5</sup>*English v. Kienke*, 774 P.2d 1154, 1156 (Utah Ct. App. 1989), *aff’d*, 848 P.2d 153 (Utah 1993) (internal citations omitted).

<sup>6</sup>*English v. Kienke*, 848 P.2d 153, 160 (Utah 1993).

<sup>7</sup>*Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977).

<sup>8</sup>*Transamerica Title Ins. Co. v. United Res., Inc.*, 24 Utah 2d 346, 348–49, 471 P.2d 165, 167 (1970).

<sup>9</sup>*Housley v. Anaconda Co.*, 19 Utah 2d 124, 127, 427 P.2d 390, 393 (1967).

<sup>10</sup>*Id.*

<sup>11</sup>*See* R. 195-205; 487-493; 540-558; 642-651; 694-732.

## DETERMINATIVE PROVISIONS OF LAW

Ms. Cohegrus does not contend that any statutes, rules, or other provisions are determinative of the issues on appeal.

### STATEMENT OF THE CASE

#### A. Nature of the Case & Course of the Proceedings Below

This is an appeal from the Third District Court's order granting summary judgment in favor of Herriman City ("Herriman"), Rosecrest Village Homeowners Association, Inc. ("Rosecrest") and Future Community Services, Inc. dba FCS Community Management ("FCS"). The case involves personal injuries that appellant ("Ms. Cohegrus") sustained when walking on property owned or maintained by Herriman, Rosecrest, and FCS.

Ms. Cohegrus filed her initial complaint on January 30, 2014.<sup>12</sup> The defendants filed their respective answers and, after conducting discovery, Rosecrest, FCS, and Herriman filed motions for summary judgment.<sup>13</sup> The Third District Court held oral arguments on the summary judgment motions on September 21, 2016.<sup>14</sup> The Third District Court granted summary judgment to all three defendants on October 17, 2016.<sup>15</sup> Ms. Cohegrus timely filed for appeal.<sup>16</sup>

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<sup>12</sup>R. 1-4.

<sup>13</sup>R. 14-18; 76-80; 91-98; 195-205; 487-493.

<sup>14</sup>R. 666.

<sup>15</sup>R. 672-674.

<sup>16</sup>R. 677-679.

B. Statement of Facts

Located southwest of the intersection of Juniper Crest Road and Mt. Ogden Peak in Herriman, Utah, there is a grass strip between the sidewalk and Juniper Crest Road.<sup>17</sup> Herriman owns this grass strip, but claims that it does not maintain it.<sup>18</sup> Herriman does maintain its lighting infrastructure.<sup>19</sup> FCS and Rosecrest maintain and remedy unsafe conditions on the property.<sup>20</sup> Ten feet west of the corner of that strip, there was a hole that was approximately six inches in diameter.<sup>21</sup> A shaft of rebar protruded two to four inches from the center of that hole.<sup>22</sup>

This rebar was installed as part of Herriman's permanent street lighting.<sup>23</sup> It was a grounding rod for the street lighting system, and Herriman maintained it as part of the city's infrastructure.<sup>24</sup> The subject property was inspected in October, 2006.<sup>25</sup> Sometime after 2006, the rebar protruded from the ground and became jagged, with numerous nicks and dings.<sup>26</sup> Lawn mowing equipment impacted the rebar on several occasions.<sup>27</sup> Some cuts in the rebar

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<sup>17</sup>R. 64, 77, 92, 572-575.

<sup>18</sup>R. 442, 10:2-23; R. 595, Request No. 1. R. 618, 15:17-16:8.

<sup>19</sup>R. 489. R. 511, 31:7-14.

<sup>20</sup>R. 548, 591-93.

<sup>21</sup>R. 64, 395, 398, 542, 563-564, 569, 573-75, 580.

<sup>22</sup>*Id.*

<sup>23</sup>R. 395-396, 7:22-8:14. R.463-464.

<sup>24</sup>R. 542-544, 587.

<sup>25</sup>R. 594.

<sup>26</sup>R. 543. R. 580, 11:24-12:20.

<sup>27</sup>R. 580, 12:2-4. R. 588, 22:14-23:6.

looked fresher than others,<sup>28</sup> and the rebar was also oxidized.<sup>29</sup> Monte Johnson, director of operations for Herriman,<sup>30</sup> admitted that this type of rebar was hazardous and should be removed.<sup>31</sup>

Ms. Cohegrus fell and sustained injuries when she impacted the hole.<sup>32</sup> In support of their motion for summary judgment, Herriman, Rosecrest, and FCS alleged that they did not know “about the hole and metal rod prior to the accident.”<sup>33</sup>

Ms. Cohegrus presented evidence from several witnesses about the status of the six-inch hole and rusty rebar. She included this evidence in her memorandum in opposition to summary judgment, and presented it to the court as follows:

1. Candice Cohegrus

After she fell, Ms. Cohegrus watched the people mowing the lawn where she fell “and noticed that they had either gone around [the rebar] or run over it several times.” One of the mowers she observed hit the rebar.<sup>34</sup> She fell in the area where the rusty rebar protruded from the ground.<sup>35</sup> The rusty rebar appears in several photographs attached to her deposition. Ms. Cohegrus appended these photographs from her deposition to her

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<sup>28</sup>R. 580, 12:5-15. R. 588, 24:6-17.

<sup>29</sup>R. 588, 23:7-12.

<sup>30</sup>R. 586, 4:19-20.

<sup>31</sup>R. 587, 15:24-16:6.

<sup>32</sup>R. 545, 547, 568-569.

<sup>33</sup>R. 196-197, 490.

<sup>34</sup>R. 547, 568-569.

<sup>35</sup> *Id.*

memorandum in opposition to summary judgment that she subsequently filed in the Third District Court.<sup>36</sup> The photographs depict the park strip adjacent to the road and the rusty rebar situated upright, just feet from the side of the road as it protrudes through the grass. It is plainly visible.<sup>37</sup>

She provided the following deposition testimony as an exhibit to her memorandum:

A. When the grass was freshly mowed, it was visible. And I know that when they were mowing it, they had either gone around it or run over it several times.

Q. How do you know that?

A. ...as different people would mow the lawn, one gentleman went around it, and I went and took photos showing the grass concealing it, and another gentleman ran right over it.

Q. Did you see the gentleman run right over it?

A. Yes, sir.

Q. So the mower blade was high enough to go over it without hitting the rebar?

...

A. I believe it did hit it.<sup>38</sup>

## 2. Adam Jones

Adam Jones, a Herriman employee, with the title of Streetlight Tech 3, maintained the street lighting, underground wiring and Herriman street lights.<sup>39</sup> He went to the scene to remove the rod, and observed that the rod had cuts on it.<sup>40</sup> Some of the cuts were rusted.<sup>41</sup> A

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<sup>36</sup>R. 572-575.

<sup>37</sup>*Id.*

<sup>38</sup>R. 569.

<sup>39</sup>R.542-543, 578-579.

<sup>40</sup> R. 548, 580.

<sup>41</sup> R. 542, 578-580.

couple of them were clean.<sup>42</sup> Mr. Jones said it was clear to him that somebody knew that something was there because they were hitting it with the lawnmower.<sup>43</sup> The rod looked like it had been hit multiple times.<sup>44</sup> Mr. Jones thought that the rod presented a hazard when he saw it, and that it was a dangerous condition that should be removed.<sup>45</sup>

He had no problem seeing it when he arrived on site to remove it.<sup>46</sup> Mr. Jones lives in Rosecrest Village, the same subdivision as the plaintiff.<sup>47</sup> He has noticed that the same people who mow the interior lawns of Rosecrest Village also mow the park strip where Ms. Cohegrus fell.<sup>48</sup> In her opposition to summary judgment, Ms. Cohegrus attached and summarized the following deposition testimony from Adam Jones:

Q. ...did you have any problems seeing the rod in the park strip?

A. Not a problem. ...<sup>49</sup>

...

Q. But it was clear to you that even after that ground rod was placed there, that somebody knew that it was – knew that something was there, because somebody was hitting it with their lawnmower; right?

A. Correct.<sup>50</sup>

...

Q. Does it appear on the top to be more oxidized than it was when you removed it?

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<sup>42</sup> R. 580.

<sup>43</sup> R. 581.

<sup>44</sup> R. 580.

<sup>45</sup> R. 542-543, 580-581.

<sup>46</sup> R. 548. R. 583, 30:15-25.

<sup>47</sup> R. 548, 581.

<sup>48</sup> R. 548, 581-582.

<sup>49</sup> R. 583.

<sup>50</sup> R. 581.



- A. I would have to say yeah. Four years does a little bit.<sup>51</sup>
- ...
- Q. ...there appears to be cuts on [the rebar]. Did you have any idea about what that would be? Or...
- A. I would go with a lawn mower.
- Q. Okay. Were those cuts rusted? Did they look like they were rusted? Or did they look like they have been recent, and they're kind of clean?
- A. If I remember correctly, there were a couple that were clean. And I'm just trying to look at the pictures, but I can't really see. But I'm pretty sure the top, they did look more fresh than what they are now.
- Q. Were some of them rusted, though?
- A. Yes, it looked like it's been hit multiple times.
- Q. Did you think that the rod presented a hazard when you saw it?
- A. Yes.
- Q. A dangerous thing that should be removed?
- A. Yes.<sup>52</sup>

### 3. Monte Johnson

Monte Johnson, the director of operations for Herriman and the person in charge of maintenance of the streets, parks, streetlights and other facilities,<sup>53</sup> agreed that a metal bar sticking out of the ground somewhere from 1 to 3 inches presented a safety concern on a park strip.<sup>54</sup> Had he become aware of such a condition, he would have remedied it.<sup>55</sup> Ms. Cohegrus attached and summarized the following deposition testimony from Monte Johnson:

- Q. Would you agree with me that a metal bar sticking out of the ground somewhere from 1 to 3 inches, depending upon the height of the grass, presents a safety concern on a park strip?
- A. Yes.

<sup>51</sup> *Id.*

<sup>52</sup> R. 580.

<sup>53</sup> R. 547-548, 586-587.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

- Q. And if you became aware of that, that would be something you'd want to remedy?
- A. Yes.<sup>56</sup>

4. Marcel Cochegrus

Marcel Cochegrus is married to the Candice Cochegrus.<sup>57</sup> He testified that the rebar appeared rusted, and that it appeared to have been impacted by a lawnmower several times.<sup>58</sup> Ms. Cochegrus attached and summarized the following deposition testimony from Marcel Cochegrus:

- Q. Okay. And when you say it was in a hole, can you describe how big the hole was?
- A. Big enough for someone to trip on it.<sup>59</sup>

5. Maria del Carmen Tirado Sanchez

Ms. Cochegrus' mother-in-law, Maria del Carmen Tirado Sanchez, was walking to church on the day of her fall. Maria saw Ms. Cochegrus trip on something in the grass and land in the street.<sup>60</sup> When Maria looked over, she could see that Ms. Cochegrus hit a metal rod in the grass.<sup>61</sup> Ms. Cochegrus attached and summarized the following testimony from Maria del Carmen Tirado Sanchez:

<sup>56</sup>R. 587.

<sup>57</sup>R. 325.

<sup>58</sup>R. 543, 561.

<sup>59</sup>R. 348.

<sup>60</sup>R. 547, 624.

<sup>61</sup> *Id.*

On April 29, 2012, we were walking to the church and I saw my daughter-in-law Candice trip on something in the grass and land in the street. When I looked over, I could see that she hit a metal rod in the grass.<sup>62</sup>

6. Ron Gordon and Kurt Tolman

City officials, Ron Gordon and Kurt Tolman, inspected the subject property when Rosecrest Plat Q was turned over to the City.<sup>63</sup> They inspected the property in November 2005 and again in October 2006 when the final streetlight connections were completed.<sup>64</sup>

7. Defendant's Answers to Interrogatories

Herriman provided answers to Plaintiff's Interrogatories No. 4 and No. 6. Ms. Cohegrus attached these to her memorandum in opposition to Defendants' motions for summary judgment:

Kelby Electric installed the street lights, J-boxes, and grounding rod and should have completely buried the grounding rod. The Rosecrest HOA and its property maintenance crew (FCM) knew about the grounding rod protruding from the ground or should have known about it and should have done something to warn the public or remedy the alleged dangerous condition.<sup>65</sup>

8. Oral Argument

After providing this evidence to the court, counsel for Ms. Cohegrus presented additional arguments supporting her position at a hearing in front of the Third District Court. The parties engaged in the following exchanges:

<sup>62</sup> *Id.*

<sup>63</sup> R. 543, 594.

<sup>64</sup> *Id.*

<sup>65</sup> R. 593.

Mr. Church: "It is as the evidence shows a grounding rod that was put in there as part of the street lighting installation when the development was done."<sup>66</sup>

...

Mr. Church: "[W]e all admit that this *was* installed in 2006-2007..."<sup>67</sup>

...

Mr. Church: "they'd have to provide notice as to the length of time this existed, not supposition, not assumptions as to the length of time but to *the actual length of time*."<sup>68</sup>

...

Mr. Church: "...witnesses said it looked rusted or oxidized. That also is not evidence to the length of time that it was there. It's only evidence as to the fact that it was rusted or oxidized."<sup>69</sup>

...

Mr. Parkinson: "And so we know that there is a rod sticking out of the ground."<sup>70</sup>

...

Mr. Parkinson: "We know that the rod was placed there six years ago."<sup>71</sup>

...

Mr. Parkinson: "...this happened in April, so it's not the active lawn mowing season...we know that it's very likely from the prior season."<sup>72</sup>

...

The Court: "...it seems like it's either a theory that it was negligently installed in which case you'd have the [sic] show the manner it was installed or it's a case of the installation altered over time, in which case we fall into this – you have to show when the change occurred and when the city should have had constructive notice."<sup>73</sup>

...

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<sup>66</sup>R. 697.

<sup>67</sup>R. 699 (emphasis added).

<sup>68</sup>R. 698 (emphasis added).

<sup>69</sup>R. 700.

<sup>70</sup>R. 709.

<sup>71</sup>*Id.*

<sup>72</sup>R. 712.

<sup>73</sup>R. 719.

The Court: “And I recognize that it’s a hard burden to put on Plaintiffs sometimes when there’s a dangerous condition that may have existed – yesterday, *it may have existed for years.*”<sup>74</sup>

...

The Court: “But what I’m really asked to do is to allow a jury to infer from lawnmower marks that the condition had existed for a long time...I think first, it’s speculative to suggest that because there are lawnmower marks, there would have necessarily been notice, even constructive notice...”<sup>75</sup>

...

The Court: So, based on that, *I don’t think that there’s a genuine question to be presented to the jury in terms of how long the condition existed.* And on that basis, I’ll grant both motions...”<sup>76</sup>

The Order granting summary judgment stated the following:

The undisputed material facts fail to show that Defendants had notice of a temporary condition of unsafe nature prior to the incident or an adequate opportunity to remedy the condition assuming notice. Proof of such notice and opportunity is Plaintiff’s burden.”<sup>77</sup>

### SUMMARY OF ARGUMENT

The trial court erred in awarding summary judgment to Herriman, FCS, and Rosecrest. There are genuine issues of material fact in evidence that preclude summary judgment. The trial court failed to consider the facts and failed to draw reasonable inferences from those facts in the light most favorable to Ms. Cohegrus.

First, the facts presented in the summary judgment hearing show that Ms. Cohegrus injured herself on a permanent unsafe condition. The hole and rebar existed for up to six long years. The rusty rebar and six-inch hole are not temporary unsafe conditions—this is

<sup>74</sup>R. 730 (emphasis added).

<sup>75</sup>*Id.* (emphasis added).

<sup>76</sup>R. 731 (emphasis added).

<sup>77</sup>R. 672-673 (emphasis retracted).

certainly not a case involving a puddle remedied by the mere swish of a grocery clerk's mop. The law in Utah dictates that a party must remedy a permanent condition that it *creates or for which it is responsible*. Herriman, Rosecrest, and FCS undertook to maintain the property located at the intersection of Juniper Crest Road and Mt. Ogden Peak. They are liable because they failed to remove the rusty rebar and fill the six-inch hole. Ms. Cohegrus collided with these dangerous obstacles and sustained injury. Evidence of actual or constructive notice is unnecessary.

Second, assuming *arguendo* that rebar installed as part of Herriman's permanent lighting infrastructure constitutes a temporary unsafe condition, defendants are still liable. To prevail on a premises liability theory involving a temporary unsafe condition, Ms. Cohegrus must show that Herriman, Rosecrest, and FCS had *actual or constructive notice* of the unsafe condition.

Defendants had actual notice of the condition that injured Ms. Cohegrus. Ms. Cohegrus, Mr. Cohegrus, Adam Jones, Monte Johnson, and Herriman officials all provided testimony that, taken together—and with reasonable inferences drawn in favor of plaintiff—establish liability: the rebar was implanted in a hole six inches across; the hole was large enough for someone to fall and trip over; the rusty rebar and six-inch hole had likely existed for years;<sup>78</sup> the rebar was readily apparent; lawn-mowing equipment had repeatedly slashed the rebar; the rebar had sat in the hole long enough to rust and become oxidized; the rebar stuck out of the ground several inches; and the defect was promptly identified after the

<sup>78</sup>R. 730 (Even the trial court stated that the defect "...may have existed for years.").



accident. The defendants had sufficient time to remedy the condition before the accident. They failed to do so.

Defendants also had constructive notice of the condition. Even if Herriman, Rosecrest, and FCS feign ignorance of the rusty rebar and six-inch hole, knowledge is imputed to them. Sufficient time elapsed for Herriman, Rosecrest, and FCS to discover and repair the rusty rebar and six-inch hole.

## ARGUMENT

### **I: THE TRIAL COURT ERRED IN AWARDING SUMMARY JUDGMENT BECAUSE IT FAILED TO DRAW REASONABLE INFERENCES IN FAVOR OF MS. COCHEGRUS**

This Court should overturn the trial court's summary judgment award. Specifically, trial courts may not award summary judgment unless "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law."<sup>79</sup> Utah courts have consistently held that summary judgment should be granted in negligence cases only in the "most clear instances."<sup>80</sup> And, it "should be granted with extreme caution where the negligence of the property owner is alleged."<sup>81</sup>

On appeal, the court has previously stated the following:

...[the] analytical standard for review of a summary judgment is the same as that of the trial court: [the Court] review[s] the *facts and inferences from those facts in the light most favorable to the losing party*. If [the Court] conclude[s] that a genuine issue of material fact exists, the summary judgment will be

<sup>79</sup>Utah R. Civ. P. 56.

<sup>80</sup>*English v. Kienke*, 848 P.2d 153, 160 (Utah 1993).

<sup>81</sup>*Canfield v. Albertsons, Inc.*, 841 P.2d 1224, 1226 (UT Ct. App. 1992).

overturned and the case remanded for further proceedings on that issue.<sup>82</sup>

In making inferences, the court need not speculate: an “inference is a deduction as to the existence of a fact which human experience teaches us can reasonably and logically be drawn from proof of other facts.”<sup>83</sup>

In this case, the trial court stated that the rusty rebar and six-inch hole “may *have existed – yesterday, it may have existed for years.*”<sup>84</sup> The court was required to draw reasonable inferences in the light most favorable to Ms. Cohegrus. That is, the latter was true—the rebar and hole existed for years. Despite this, the trial court found that there was no “*genuine question to be presented to the jury in terms of how long the condition existed.*”<sup>85</sup> These two statements are inconsistent.

The trial court heard evidence that the rusty rebar and six-inch hole may have existed since 2006. Ms. Cohegrus, Maria del Tirado Sanchez, and Adam Jones all testified that the rebar was readily apparent and visible.<sup>86</sup> Ms. Cohegrus and Adam Jones testified that the lawnmower blades damaged the rusty rebar.<sup>87</sup> It was installed as part of the city’s

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<sup>82</sup>*English v. Kienke*, 774 P.2d 1154, 1156 (Utah Ct. App. 1989), *aff’d*, 848 P.2d 153 (Utah 1993) (emphasis added).

<sup>83</sup>*Heslop v. Bear River Mut. Ins. Co.*, 2017 UT 5, ¶ 22, 390 P.3d 314, 321 (*quoting Manchester v. Dugan*, 247 A.2d 827, 829 (Me. 1968)); *See also USA Power, LLC v. PacifiCorp*, 2016 UT 20, ¶ 128-129, 372 P.3d 629, 647 (discussing inferences).

<sup>84</sup>R. 730 (emphasis added).

<sup>85</sup>R.731.

<sup>86</sup>R. 543, 547, 548, 569, 624, 580-581.

<sup>87</sup>R. 569, 580.

permanent lighting infrastructure.<sup>88</sup> Multiple pictures provided to the court indicate that it protruded several inches out of the ground.<sup>89</sup> All of these facts suggest a “reasonable and logical” inference based on ordinary “human experience”: the six-inch hole and the rusty rebar existed for a sufficient time that Herriman, FCS, and Rosecrest should have discovered and remedied them.<sup>90</sup>

The trial court failed to make reasonable and logical inferences as required by Rule 56 and the attendant case law. This Court should overturn the trial court’s decision to grant summary judgment.

**II: NOTICE OF THE REBAR OR HOLE IS NOT REQUIRED IN ESTABLISHING LIABILITY BECAUSE THEY WERE PERMANENT CONDITIONS THAT CAUSED INJURY**

Rebar installed as part of Herriman’s lighting infrastructure is a permanent unsafe condition. *Schnuphase v. Storehouse Markets* defines permanent unsafe conditions:

The second class of cases involves some unsafe condition of a *permanent* nature, such as: in the *structure* of the building, or of a stairway, etc. or in *equipment or machinery*, or in the *manner of use*, which was *created or chosen* by the defendant (or his agents), *or for which he is responsible*. In such circumstances, where the defendant either created the condition, or is responsible for it, he is deemed to know of the condition; and no further proof of notice is necessary.<sup>91</sup>

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<sup>88</sup>R. 542-544, 587, 589.

<sup>89</sup>R. 572-575.

<sup>90</sup>*Heslop*, 2017 UT at ¶ 22, 390 P.3d at 321 (quoting *Manchester v. Dugan*, 247 A.2d 827, 829 (Me. 1968)); See also *USA Power*, 2016 UT at ¶ 40, 372 P.3d at 647.

<sup>91</sup>*Schnuphase v. Storehouse Markets*, 918 P.2d 476, 478 (Utah 1996) (emphasis added).

Under the rule in *Schnuphase*, a permanent condition is a *structure*, *equipment* or a *building*. It may also be the condition of a *structure*—such as rebar—that a property owner creates, chooses, or for which he is responsible.<sup>92</sup>

Herriman provided the following response to one of Ms. Cohegrus's interrogatories:

No. 6: Kelby Electric installed the street lights, J-boxes, and grounding rod and should have completely buried the grounding rod. The Rosecrest HOA and its property maintenance crew (FCM) knew about the grounding rod protruding from the ground or should have known about it and should have done something to warn the public or remedy the alleged dangerous condition.<sup>93</sup>

Kelby Electric originally installed the rebar sometime between 2006 and 2007.<sup>94</sup> It was inspected in October of 2006.<sup>95</sup> However, Herriman owned the planter strip where Ms. Cohegrus sustained injuries.<sup>96</sup> The rebar was part of the city's street lighting system and was maintained as part of the city's infrastructure.<sup>97</sup> Herriman was responsible for its planter strip.<sup>98</sup> Rosecrest and FCS were also responsible for it because they had a statutory duty to

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<sup>92</sup>*Id.*

<sup>93</sup>R. 593.

<sup>94</sup>R. 593-594, 699.

<sup>95</sup>R. 594.

<sup>96</sup>R. 595, Request No. 1.

<sup>97</sup>R. R. 542-44, 587, 589.

<sup>98</sup> See e.g. *Canfield v. Albertsons, Inc.*, 841 P.2d 1224, 1226 (Utah Ct. App. 1992) (owner responsible for conditions that he created or took responsibility for); See also *Kerr v. City of Salt Lake*, 2013 UT 75, ¶ 38, 322 P.3d 669, 679 (city has general obligation to maintain sidewalk).

maintain it.<sup>99</sup> Simply stated, this was no puddle or patch of ice. The rusty rebar is a permanent condition and defendants should have fixed it.<sup>100</sup>

The ground was inspected in October of 2006.<sup>101</sup> Some cuts in the rebar, likely placed there by a lawn mower,<sup>102</sup> were fresher than others.<sup>103</sup> The rebar was also oxidized.<sup>104</sup> The evidence suggests that the rebar is a permanent condition. The lighting system of a city is not temporary. It is the city's "equipment or machinery" and is a structure built to last.

Per the rule in *Schnuphase*, if a condition is permanent, then the defendant "is deemed to know about the condition; and no further proof of notice is necessary."<sup>105</sup>

Utah law has at least two cases that involve a "permanent unsafe condition" – *Carlile v. Wal-Mart*<sup>106</sup> and *Canfield v. Albertsons, Inc.*<sup>107</sup> *Carlile* argued that Wal-Mart created a "foreseeable, dangerous condition" through their use of electric carts.<sup>108</sup> The court reversed

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<sup>99</sup>Herriman Code 7-6-1.

<sup>100</sup>R. 395-396, 7:22-8:14. R. 542-544.

<sup>101</sup>R. 594.

<sup>102</sup>R. 580, 12:2-4. R. 588, 22:14-23:6.

<sup>103</sup>R. 580, 12:5-15. R. 588, 24:6-17.

<sup>104</sup>R. 588, 23:7-12.

<sup>105</sup>*Schnuphase*, 918 P.2d at 478.

<sup>106</sup>2002 UT App 412, ¶ 16, 61 P.3d 287, 290.

<sup>107</sup>841 P.2d 1224, 1227-228 (Utah 1992) (*Schnuphase v. Storehouse Markets*, 918 P.2d 476, 479 (Utah 1996), refers to *Canfield* as a temporary condition case while *Jex v. JRA, Inc.*, 2008 UT 67, ¶ 13, 196 P.3d 576, 579, refers to it as a permanent condition case).

<sup>108</sup>*Carlile*, 2002 UT at ¶¶ 14-15, 61 P.3d at 289-90.

summary judgment and remanded Carlile's case to determine whether or not the use of electrical carts presented a danger and whether or not Wal-Mart took reasonable precautions for the safety of their customers.<sup>109</sup> The carts fell under the "permanent" condition classification because Wal-Mart created their "manner of use."<sup>110</sup>

*Canfield* was also a "manner of use" case that stated the following:

there is no logical distinction between a situation in which the storeowner directly creates the condition or defect, and where the storeowner's method of operation creates a situation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect.<sup>111</sup>

In *Canfield*, Albertsons displayed lettuce through a "farmer's pack display" that customers would visit.<sup>112</sup> The customers removed and discarded damaged or wilted lettuce leaves from lettuce they intended to purchase.<sup>113</sup> Ms. Canfield slipped on these leaves and sustained injuries.<sup>114</sup> The court determined that Albertsons did not need notice because "it was reasonably foreseeable that the expectable acts of third parties would create a dangerous condition."<sup>115</sup>

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<sup>109</sup>*Id.* at ¶¶ 16-17, 290.

<sup>110</sup>*Id.* at ¶¶ 14-15, 289-90.

<sup>111</sup>*Canfield*, 841 P.2d at 1226.

<sup>112</sup>*Id.* at 1225.

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

<sup>115</sup>*Id.* at 1227-228.



Interestingly, outside of the context of lettuce leaves and rogue electric carts, there are few (if any) other cases that analyze permanent, unsafe conditions in Utah jurisprudence. It is unclear what places a condition in the “permanent” category under the *Schnuphase* rule.

For example, many temporary unsafe conditions involve sidewalks,<sup>116</sup> asphalted planter strips,<sup>117</sup> street lighting,<sup>118</sup> sprinkler systems,<sup>119</sup> pot holes in parking lots,<sup>120</sup> holes in parking strips,<sup>121</sup> or railroad crossings.<sup>122</sup> These are hardly temporary structures. However, Utah courts have treated them as temporary, unsafe conditions on the assumption that the defects in these structures evolved over time; i.e. the defect was originally unintended.<sup>123</sup>

The other temporary condition cases generally come from grocery stores, retail

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<sup>116</sup>*Kerr v. City of Salt Lake*, 2013 UT 75, ¶ 2, 322 P.3d 669, 672.

<sup>117</sup>*Rose v. Provo City*, 2003 UT App 77, ¶ 15, 67 P.3d 1017, 1022.

<sup>118</sup>*Fishbaugh v. Utah Power & Light, a div. of PacifiCorp*, 969 P.2d 403, 403-04 (Utah 1998).

<sup>119</sup>*Porter v. Farmington City Corp.*, 2014 UT App 12, ¶ 6, 318 P.3d 1198, 1200.

<sup>120</sup>*Johnson v. Gold's Gym*, 2009 UT App 76, ¶¶ 3, 18, 206 P.3d 302, 304, 307.

<sup>121</sup>*Kreyling v. St. George City*, 2008 UT App 363, \*1 (memorandum decision).

<sup>122</sup>*Goebel v. Salt Lake City Southern R. Co.*, 2004 UT 80, ¶¶ 4-6, 104 P.3d 1185, 1189.

<sup>123</sup>*See e.g. Porter*, 2014 UT App at ¶ 2, 318 P.3d at 1199 (broken water joint not intended).

establishments, or similar venues.<sup>124</sup> Ironically, none of these cases help the Court understand the rule for permanent unsafe conditions as stated in *Schnuphase*.

The Court should take this opportunity to clarify when a permanent structure is a temporary unsafe condition and when a permanent structure is a permanent unsafe condition. Ms. Cohegrus emphasizes that a piece of rusty rebar installed as part of a city's infrastructure is a permanent unsafe condition.

There are other issues with the temporary versus permanent dichotomy. *Goebel v. Salt Lake City Southern R. Co.* vastly limits the "responsible for" language in *Schnuphase* by stating that a party is not responsible for a condition if the party's responsibility is "only in the context of maintenance, and not for its existence in the first place."<sup>125</sup> In *Goebel*, the plaintiff argued that he was injured because of a gap in the field panels of a railroad crossing.<sup>126</sup> The court required notice of the gap because Salt Lake City Southern Railroad Company did not create the condition, and therefore was only responsible for maintenance.<sup>127</sup> *Matheson v. Marbec Investments, LLC* dealt with a defective stair in an

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<sup>124</sup>*Long v. Smith Food King Store*, 531 P.2d 360, 361-62 (Utah 1973); *Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175, 175-77 (Utah 1975); *Ohlson v. Safeway Stores, Inc.*, 568 P.2d 753, 754-55 (Utah 1977); *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 477-80 (Utah 1996); *Jex v. JRA, Inc.*, 2008 UT 67, ¶¶ 1-7, 196 P.3d 576, 577-78; *Price v. Smith's Food and Drug Centers, Inc.* 2011 UT App 66, ¶¶ 2-4, 17, 252 P.3d 365, 366-67, 369; *Berrett v. Albertsons Inc.*, 2012 UT App 371, ¶¶ 2-3, 22-24, 293 P.3d 1108, 1110, 1114.

<sup>125</sup>2004 UT 80, ¶ 20, 104 P.3d 1185, 1193.

<sup>126</sup>*Id.* at ¶ 6, 1189.

<sup>127</sup>*Id.* at ¶ 20, 1193.

apartment complex.<sup>128</sup> This case might have fit well within the rule for permanent conditions because it was part of the “structure of a building, or of a stairway.” However, the court again stated that defendant was only responsible in terms of maintenance.<sup>129</sup>

*Goebel* and *Matheson* have allowed the “temporary” rule to subsume the “permanent condition” rule. The original rule acknowledged that if a party created a condition, notice was not required.<sup>130</sup> However, the “responsible for” language from *Schnuphase* is now a vestigial organ to the “permanent unsafe condition” rule. Basically, there is no such thing as a “permanent unsafe condition” in Utah law; every permanent structure—even a rusty rebar jutting out of the ground—is *actually* a temporary condition à la *Goebel* and its progeny of cases.

The rebar in the hole in the ground that injured Ms. Cohegrus was a permanent condition. Proving that defendants knew about the rebar and the hole is not necessary. This Court should reverse the decision of the trial court to award summary judgment.

### **III: THE TRIAL COURT ERRED IN AWARDING SUMMARY JUDGMENT BECAUSE DEFENDANTS HAD KNOWLEDGE OF THE RUSTY REBAR AND SIX-INCH HOLE**

This court should overturn the trial court’s summary judgment award. The trial court entered judgment on the basis that Ms. Cohegrus failed to show “when the city should have had constructive notice” of the rusty rebar and six-inch hole that injured Ms. Cohegrus.<sup>131</sup>

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<sup>128</sup>2007 UT App 363, ¶ 3, 173 P.3d 199, 201.

<sup>129</sup>*Id.* at ¶ 6, 201.

<sup>130</sup>*Canfield*, 841 P.2d at 1226.

<sup>131</sup>R. 719.

In fact, Ms. Cohegrus *did* provide evidence that Herriman, FCS, and Rosecrest knew or should have known about the unsafe condition. Notice can be established either through actual or constructive notice.<sup>132</sup> Premises liability cases involving temporary unsafe conditions must prove the following:

(A) that [Defendants] had knowledge of the condition, that is, either *actual knowledge*, or *constructive knowledge* because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care [they] should have remedied it.<sup>133</sup>

The following will establish that (A) defendants had actual knowledge of the unsafe condition, or, in the alternative, that (B) they had constructive knowledge.

***A. Defendants had actual notice of the condition***

*Herriman, FCS, and Rosecrest* had actual notice of the condition that injured Ms. Cohegrus. “Actual knowledge is defined as ‘direct and clear knowledge’ or ‘actual awareness’ of facts or information”.<sup>134</sup> To prove liability under actual knowledge, a plaintiff must show that the defendants knew about the condition and had time to remedy it.<sup>135</sup> This is a high burden. Absent an outright admission by one of the defendants, Ms. Cohegrus must demonstrate they had actual knowledge by other evidence.

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<sup>132</sup>*Ohlson v. Safeway Stores, Inc.*, 568 P.2d 753, 755 (Utah 1977).

<sup>133</sup>*Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175, 176 (Utah 1975) (emphasis added).

<sup>134</sup>*Anderson v. Kriser*, 2011 UT 66, fn. 15, 266 P.3d 819, 824 (*quoting* Black's Law Dictionary 950 (9th ed. 2009)).

<sup>135</sup>*Allen*, 538 P. 2d at 176.

In *De Weese v. J.C. Penney Co.*, the Utah Supreme Court found that a unique design in the terrazo of a department store routinely became “slippery” and dangerous “during stormy weather.”<sup>136</sup> In finding that the Defendant “knew...that a dangerous condition existed,” the court reasoned “the terrazzo surfacing is part of the permanent structure of the building.”<sup>137</sup> It periodically became dangerous, and there was sufficient evidence that the defendant knew of this danger because they purchased and occasionally placed abrasive mats for the use of their customers.<sup>138</sup>

In *Kerr v. City of Salt Lake*, a plaintiff was injured when he tripped on an uneven sidewalk and shattered his kneecap.<sup>139</sup> The defendant argued that it did not receive sufficient notice to remedy the condition.<sup>140</sup> However, the court held that evidence of a call to the city eight days before the injury, along with evidence of how long it could take to remedy the condition, was sufficient to survive a motion for directed verdict.<sup>141</sup> The *Kerr* court stated:

Kerr also presented evidence that Salt Lake City had sufficient *actual notice* of the defect... [an] employee called the city eight days before the accident to request that the sidewalk be repaired because laundry carts were catching on the displacement.<sup>142</sup>

<sup>136</sup>*De Weese v. J.C. Penney Co.*, 5 Utah 2d 116, 121, 297 P.2d 898, 901 (1956).

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>2013 UT 75, ¶ 2, 322 P.3d 669, 672.

<sup>140</sup>*Id.* at ¶¶ 6, 32, 672, 678.

<sup>141</sup>*Id.* at ¶¶ 42-43, 680.

<sup>142</sup>*Id.*

As in *Kerr*, the evidence shows that *Herriman*, *Rosecrest*, and *FCS* knew about the rusted rebar and six-inch hole.

Proving actual knowledge does not require that Ms. Cohegrus force a confession from Herriman, FCS, or Rosecrest. Many jurisdictions have held that “actual knowledge of an unreasonably dangerous condition can be proven through circumstantial evidence.”<sup>143</sup> In other contexts, courts frequently rely on circumstantial evidence to prove actual knowledge to sustain criminal convictions or uphold judgments in civil actions.<sup>144</sup> In Utah, many tort cases proceed on the basis of circumstantial evidence only.<sup>145</sup>

This case is brimming with evidence that the defendants knew about the rusty rebar and the six-inch hole. It is more like *Kerr* and *De Weese* than *Porter v. Farmington City Corp.* *Porter* is a case where the plaintiff failed to demonstrate constructive knowledge when a cemetery sprinkler system created a sinkhole—but there was no other evidence of the sink

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<sup>143</sup>*Pitts v. Winkler Cty.*, 351 S.W.3d 564, 574 (Tex. App. 2011); *City of Irving v. Seppy*, 301 S.W.3d 435, 444 (Tex. App. 2009); *City of Wylie v. Taylor*, 362 S.W.3d 855, 861 (Tex. App. 2012); *Ortega v. Kmart Corp.*, 26 Cal. 4th 1200, 1206, 36 P.3d 11, 15 (2001); *Elston v. Circus Circus Mississippi, Inc.*, 908 So. 2d 771, 775 (Miss. Ct. App. 2005); *Caldwell v. Wal-Mart Stores, Inc.*, 229 F.3d 1162 (10th Cir. 2000) (Circumstantial evidence may be used to prove actual or constructive notice of a dangerous condition); *Fleming v. Allied Supermarkets, Inc.*, 236 F.Supp. 306, 309 (W.D. Okla. 1964) (actual or constructive knowledge “established by circumstantial as well as by direct evidence”); *Hennessey v. Hennessey*, 145 Conn. 211, 214, 140 A.2d 473, 475 (1958).

<sup>144</sup> See e.g. *United States v. de Francisco Lopez*, 939 F.2d 1405, 1408 (10th Cir. 1991) (constructive knowledge imputed to criminal defendant by circumstantial evidence); *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811 (1994) (actual knowledge imputed to defendant through circumstantial evidence).

<sup>145</sup>*Dalley v. Utah Valley Reg'l Med. Ctr.*, 791 P.2d 193, 197 (Utah 1990).



hole's existence.<sup>146</sup> Plaintiff failed to prove his case in *Porter* because he speculated—with little evidentiary support—that the defendant would have known about a sink hole had its employees driven past it.

Here, the evidence suggests that defendants *actually drove* over the rusty rebar with a lawnmower—probably many times over the course of six years. They not only drove over the rusty rebar, but slashed it with lawnmower blades. The rebar had numerous cuts in it, some fresher than others.<sup>147</sup> The rod was oxidized,<sup>148</sup> suggesting that it had been exposed to the open air for an appreciable amount of time. Adam Jones and Monte Johnson testified that the cuts were likely caused by a lawnmower.<sup>149</sup> The fact that some cuts were fresher than others establishes that the defendant knew about the condition and had sufficient time to remedy it.

The testimony of Ms. Cohegrus, though she made the following observations after her injury, demonstrates that the defendant maintaining the grass strip knew about the condition:

Q. Are you aware of any facts that would lead you to believe that Herriman knew about this rebar or this hole in the grass prior to your trip?

A. When the grass was freshly mowed, it was visible. And I know that when they were mowing it, they had either gone around it or run over it several times.

Q. How do you know that?

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<sup>146</sup>*Porter v. Farmington City Corp.*, 2014 UT App 12, ¶ 12, 318 P.3d 1198, 1201.

<sup>147</sup>R. 580, 12:2-15. R. 588, 22:14-24:17.

<sup>148</sup>R. 588, 23:7-12.

<sup>149</sup>R. 580, 12:2-15. R. 588, 22:14-24:17.

A. After my injury I noticed because I would watch to see how they would react to it. And as different people would mow the lawn, one gentleman went around it, and I went and took photos showing the grass concealing it, and another gentleman ran right over it.

Q. Did you see the gentleman run right over it?

A. Yes, sir.

Q. So the mower blade was high enough to go over it without hitting the rebar?

...

A. I believe it did hit it.<sup>150</sup>

She also testified that she had seen people in the past walking around with clipboards, taking notes on needed maintenance and repairs.<sup>151</sup>

The evidence shows that the gentlemen mowing that grass strip were aware of the rusty rebar. Their knowledge is imputed to FCS and Rosecrest directly, and Herriman by the law of agency.<sup>152</sup> Because the defendants had actual knowledge of the rusty rebar and six-inch wide hole, summary judgment should be overturned and remanded.

***B. Defendants had constructive notice of the condition***

The rusty rebar and six-inch hole existed a sufficient amount of time that FCS, Rosecrest, and Herriman should have noticed and remedied it. *Allen v. Federated Dairy Farms, Inc.* held that notice can be established through constructive knowledge.<sup>153</sup> “Constructive knowledge” is different than actual knowledge. Under a constructive

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<sup>150</sup>R. 569, 98:10-99:6.

<sup>151</sup>R. 569, 99:11-21.

<sup>152</sup>See e.g. *Hodges v. Gibson Products Co.*, 811 P.2d 151, 157 (Utah 1991). See also *Steiner Corp. v. Johnson & Higgins of California*, 118 F.Supp.2d 1174, n. 6 (D. Utah 2000).

<sup>153</sup>*Allen*, 538 P.2d at 176.

knowledge theory, Ms. Cohegrus does not have to show that FCS, Rosecrest, or Herriman actually knew about the rusty rebar and six-inch hole. Knowledge is imputed to them “because the condition had existed long enough that [they] should have discovered it; and (B) that after such knowledge, sufficient time elapsed...[that they] should have remedied it.”<sup>154</sup>

Utah courts must impute knowledge to the defendant “when there is some evidence of the length of time” that the condition existed.<sup>155</sup> In *Price v. Smith's Food & Drug Centers, Inc.* the Court of Appeals found that a puddle which had existed for “ten to twenty-two minutes” was sufficient evidence as to the length of time.<sup>156</sup> For a puddle on a grocery store floor, this was an “appreciable amount of time,” and was sufficient to impute constructive knowledge to the defendant.<sup>157</sup>

In fact, since the court’s 1956 decision in *De Weese v. J.C. Penney Co.*, the law on temporary, unsafe conditions is divided into cases where a sufficient period of time passed

<sup>154</sup>*Id.*

<sup>155</sup>*Jex v. JRA, Inc.*, 2008 UT 67, ¶ 19, 196 P.3d 576, 581.

<sup>156</sup>2011 UT App 66, ¶ 17, 252 P.3d 365, 369.

<sup>157</sup>*Id.*

that a landowner had constructive knowledge,<sup>158</sup> and cases where an insufficient period of time passed.<sup>159</sup>

Of the cases cited, twelve involve some type of commercial, retail establishments, *usually* grocery stores.<sup>160</sup> These cases establish a very clear rule. When an appreciable amount of time has passed, an owner has constructive knowledge of the unsafe, temporary condition. The law in the grocery store context is well-established.

This case does not involve a grocery store. It involves a rusty rebar on a planter strip. While the rule in *Allen* and *Price* still applies in general terms, the court must turn to the remaining body of case law to determine how much time must pass for a defendant to have

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<sup>158</sup>*De Weese v. J.C. Penney Co.*, 5 Utah 2d 116, 118, 297 P.2d 898, 899 (1956); *Ohlson v. Safeway Stores, Inc.*, 568 P.2d 753, 755 (Utah 1977); *Kerr v. City of Salt Lake*, 2013 UT 75, ¶ 47, 322 P.3d 669, 681; *Price v. Smith's Food & Drug Centers, Inc.*, 2011 UT App 66, ¶ 17, 252 P.3d 365, 369; *Berrett v. Albertsons Inc.*, 2012 UT App 371, ¶ 22, 293 P.3d 1108, 1114; *Rose v. Provo City*, 2003 UT App 77, ¶ 15, 67 P.3d 1017, 1022.

<sup>159</sup>*Koer v. Mayfair Markets*, 19 Utah 2d 339, 344, 431 P.2d 566, 570 (1967); *Long v. Smith Food King Store*, 531 P.2d 360, 361 (Utah 1973); *Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175, 177 (Utah 1975); *Martin v. Safeway Stores Inc.*, 565 P.2d 1139, 1140 (Utah 1977); *Matheson v. Marbec Investments, LLC*, 2007 UT App 363, ¶ 14, 173 P.3d 199, 204; *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 478 (Utah 1996); *Goebel v. Salt Lake City S. R. Co.*, 2004 UT 80, ¶ 22, 104 P.3d 1185, 1194; *See also Fishbaugh v. Utah Power & Light, a Div. of PacifiCorp*, 969 P.2d 403, 407 (Utah 1998); *Jex v. JRA, Inc.*, 2008 UT 67, ¶ 21, 196 P.3d 576, 581; *Porter v. Farmington City Corp.*, 2014 UT App 12, ¶ 12, 318 P.3d 1198, 1201; *Kreyling v. St. George City*, 2008 UT App 363 (memorandum decision); *Johnson v. Gold's Gym*, 2009 UT App 76, ¶ 26, 206 P.3d 302, 309; *Mingolello v. Megaplex Theaters*, 2017 UT App 4, ¶ 2, 391 P.3d 361, 362.

<sup>160</sup>*See supra, fn. 158 & 159.*

constructive knowledge in this case.<sup>161</sup> In short, when a rusty rebar and a six-inch hole are involved, how long is long enough?

In *Kerr v. City of Salt Lake*, the plaintiff “produced evidence” that an unsafe sidewalk “existed in approximately the same condition a year and a half before [the] accident.”<sup>162</sup> The court found that the defendant had constructive notice of the condition.<sup>163</sup>

In *Rose v. Provo City*, someone installed an asphalted planter strip which was subsequently used as a driveway into a restaurant.<sup>164</sup> Defectively designed, the driveway caused an accident.<sup>165</sup> The plaintiff provided evidence that although the restaurant owner did not create the asphalt driveway—and the city did not provide a permit for it—it had existed for six years, from “1989 to the date of [the] accident in 1995.”<sup>166</sup>

In *Rose* and *Kerr* the unsafe condition in a sidewalk and planter strip existed for somewhere between one-and-a-half to six years before constructive notice applied. However,

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<sup>161</sup>See e.g. cases finding liability: *Rose v. Provo City*, 2003 UT App 77, ¶ 15, 67 P.3d 1017, 1022; *Kerr v. City of Salt Lake*, 2013 UT 75, ¶ 47, 322 P.3d 669, 681; But See also cases finding no liability: *Fishbaugh v. Utah Power & Light, a Div. of PacifiCorp*, 969 P.2d 403, 407 (Utah 1998); *Goebel v. Salt Lake City S. R. Co.*, 2004 UT 80, ¶ 22, 104 P.3d 1185, 1194; *Matheson v. Marbec Investments, LLC*, 2007 UT App 363, ¶ 14, 173 P.3d 199, 204; *Kreyling v. St. George City*, 2008 UT App 363 (memorandum decision); *Johnson v. Gold's Gym*, 2009 UT App 76, ¶ 26, 206 P.3d 302, 309; *Porter v. Farmington City Corp.*, 2014 UT App 12, ¶ 12, 318 P.3d 1198, 1201.

<sup>162</sup>*Kerr v. City of Salt Lake*, 2013 UT 75, ¶ 41, 322 P.3d 669, 680.

<sup>163</sup>*Id.*

<sup>164</sup>*Rose v. Provo City*, 2003 UT App 77, ¶ 3, 67 P.3d 1017, 1019.

<sup>165</sup>*Id.* at ¶ 5, 1020.

<sup>166</sup>*Rose v. Provo City*, 2003 UT App 77, ¶ 24, 67 P.3d 1017, 1024 (quoting *Pollari v. Salt Lake City*, 111 Utah 25, 36, 176 P.2d 111, 117 (1947)).

the rule is more nuanced—Ms. Cohegrus cannot merely tick off the years and claim that defendants had constructive notice. *Rose* emphasized that time is not the only factor in finding constructive knowledge.<sup>167</sup> The obvious nature of the unsafe condition also plays a role. Referencing a litany of older cases, *Rose* noted that other factors are relevant:

the *nature and extent* of the defect, its *prominence* in location and *other factors* bearing on what could reasonably be expected of a [defendant] charged with the duty of supervising miles of streets and sidewalks.<sup>168</sup>

In citing to *Pollari v. Salt Lake City*, *Rose* emphasized that it is not just the amount of time that has elapsed but the “nature,” “extent,” and “prominence” of the defect that is relevant.<sup>169</sup> *Pollari* is good law and it makes good sense. A party will have constructive knowledge of *large, obvious dangers* in a shorter period of time. *Small, hidden dangers* require longer. This principle is demonstrated in *Kreyling v. St. George City*, where a hole “camouflaged by debris, leaves, and cobwebs” injured a person.<sup>170</sup> The camouflaged hole was not prominent, obvious, or visible and constructive knowledge was not appropriate.<sup>171</sup>

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<sup>167</sup>*Id.* at ¶ 23.

<sup>168</sup>*Id.* (emphasis added).

<sup>169</sup>*Pollari v. Salt Lake City*, 111 Utah 25, 36, 176 P.2d 111, 117 (1947).

<sup>170</sup>*Kreyling v. St. George City*, 2008 UT App 363, \*1 (memorandum decision).

<sup>171</sup>*Id.* at \*2.

*Fishbaugh v. Utah Power & Light, a Div. of PacifiCorp*, and its progeny demonstrate this principal. In *Fishbaugh*, a city did not have sufficient time to remedy a broken streetlight when only four days or less had expired since the city learned of the condition.<sup>172</sup>

In *Goebel*, a small gap in the “field panels” of a railroad track—merely inches wide—caused a cyclist injuries.<sup>173</sup> Similar to the camouflaged hole in *Kreyling*, the *Goebel* gap was small and unknown to the defendant. The court reasoned that while gaps in “field panels” may evolve over time, there was no evidence that the gap existed for a sufficient time for constructive notice to apply.<sup>174</sup> The trial court found that “no competent evidence that...a dangerous gap existed prior to the accident or that ...a dangerous gap existed for a period of time sufficient to allow [the defendant] to discover it and a sufficient amount of time ...to remedy it.”<sup>175</sup> This Court affirmed that decision.<sup>176</sup>

Finally, in *Porter v. Farmington City Corp.*, a plaintiff fell in a sink hole in a cemetery and sustained injuries.<sup>177</sup> Like the *Kreyling* camouflaged hole and the *Goebel* gap, the *Porter*

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<sup>172</sup>*Fishbaugh v. Utah Power & Light, a Div. of PacifiCorp*, 969 P.2d 403, 404 (Utah 1998).

<sup>173</sup>*Goebel v. Salt Lake City S. R. Co.*, 2004 UT 80, ¶ 22, 104 P.3d 1185, 1194 (the gap was wide enough for a narrow bicycle tire to get caught in).

<sup>174</sup>*Id.* at ¶ 25, 1194.

<sup>175</sup>*Id.* at ¶ 18, 1192.

<sup>176</sup>*Id.* at ¶¶ 25, 41, 1194, 1198.

<sup>177</sup>2014 UT App 12, ¶ 2, 318 P.3d 1198, 1199.

sink hole was “one foot wide and three feet deep... it was covered by grass, and ... it ‘could not [have been] detected by reasonable visual inspection of the area.’”<sup>178</sup>

The *Goebel*, *Kreyling*, and *Porter* line of cases demonstrate one thing: constructive notice is inappropriate when an unsafe condition is virtually invisible. This case is distinguishable. This was no invisible gap à la *Goebel*. It bears no resemblance to the hidden sink hole in *Porter*. It is nothing like the camouflaged hole in *Kreyling*. This case is similar to *Kerr* and *Rose*. As in *Kerr* and *Rose*, this case has a municipal defendant (Herriman) and third parties that undertook to maintain city property.

*Kerr* and *Rose* involved unsafe conditions in a makeshift asphalt driveway across a planter strip and a sidewalk—largely similar to the planter strip in this case. Most importantly, *Kerr* and *Rose* included evidence that an unsafe condition should have been discovered within a period of time ranging from one and a half to six years. The evidence in this case suggests that the rusted rebar and six-inch hole existed for up to six years—a sufficient time for Herriman, Rosecrest, or FCS to remove the rebar and fill the hole.

In conclusion, Defendants had constructive notice of the rusty rebar and six-inch hole. Plaintiff is only required to produce *some evidence* of the length of time that the rusty rebar and six-inch hole existed.<sup>179</sup> It is not necessary to prove the exact length of time to an

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<sup>178</sup>*Id.* at ¶ 3, 1199.

<sup>179</sup>*Mingolello v. Megaplex Theaters*, 2017 UT App 4, ¶ 7, 391 P.3d 361, 363 (constructive notice appropriate “when there is some evidence of the length” of time that the unsafe condition existed).



absolute certainty.<sup>180</sup> As in *Rose*, there is substantial evidence that the rusty rebar and six-inch hole were prominent, visible, and that they existed for a very long time.

Ms. Cohegrus was injured on April 29, 2012.<sup>181</sup> The installation of the rebar occurred six years prior. Ms. Cohegrus, Mr. Cohegrus, Maria del Carmn Tirado Sanchez, and Adam Jones all saw the rusty rebar. They had no problem identifying it. Their testimony is corroborated in the numerous photographs of the injury scene. It is clear that the rusty rebar and six-inch hole were readily apparent, visible, and prominent. The rebar extended out of the grass several inches. It was exposed to the air for a long enough time to rust. The rebar had numerous cuts in it, most likely caused by a lawnmower.<sup>182</sup> On the date of the accident, April 29, 2012, it is likely that the lawn mowing season had only just began and that the rebar had been struck in previous years. Ms. Cohegrus testified that the lawnmowers “hit” the rebar and Adam Jones’ testimony corroborates her conclusion.

All of these facts taken together—the size and prominence of the rusty rebar, its oxidation, the date of injury, the older versus fresher cuts, the impact by numerous lawnmower blades—provide a mountain of evidence that the rusty rebar and six-inch hole existed for a long enough time that defendants had constructive knowledge of them.

Accordingly, summary judgement should be reversed and the case remanded to the Third District Court.

<sup>180</sup>*Id.*

<sup>181</sup>R. 496, 31:3-7.

<sup>182</sup>R. 580, 12:2-4. R. 588, 22:14-23:6.

## CONCLUSION

The Third District Court's grant of summary judgment should be reversed. This case involves rebar that was involved as part of Herriman's lighting infrastructure. The rebar was a permanent condition on the property and was a structure intended to exist for a long time. Even if not permanent, the rusty rebar and six-inch hole were temporary, unsafe conditions. Defendants had actual notice and sufficient time to fill the hole and remove the rebar. The evidence also shows that Defendants had constructive notice and sufficient time to fill the hole and remove the rebar.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Utah R. App. 24(g)(5)(B).  
The brief contains 8,918 words.

DATED June 15, 2017.

/s/ Peter Lattin

PETER LATTIN for:  
HOWARD, LEWIS & PETERSEN, P.C.  
Attorneys for Appellant

**MAILING CERTIFICATE**

I hereby certify that two true and correct copies of the foregoing were mailed and emailed to the following, postage prepaid, on June 15, 2017.

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/s/ Laurie Dinehart

## ADDENDUM

Ut. R. Civ. P. 56

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

(a)(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.

(c) Procedures.

(c)(1) Supporting factual positions. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

(c)(2) Objection that a fact is not supported by admissible evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) Materials not cited. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) Affidavits or declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it without prejudice;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a nonmoving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.







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**IN THE 3<sup>rd</sup> DISTRICT COURT  
OF Salt Lake COUNTY  
STATE OF UTAH**

Candice Cohegrus,  Plaintiff,  vs.  Herriman City, et al.,  Defendants.	<b>ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS AND DISMISSAL OF PLAINTIFF'S CLAIMS WITH PREJUDICE</b>  Case Number: 140900711  Tier: 2  Judge Andrew H. Stone
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**The Court has made corrections to the proposed order submitted, shown below in bold underline and in strike outs.**

DEFENDANT Herriman City ("City"), Rosecrest Village Homeowners Association, Inc. ("Association") and Future Community Services, Inc. d/b/a FCS Community Management ("Manager") motions for summary judgment came before this Court on September 21, 2016 pursuant to Utah Rules of Civil Procedure Rule 7. Kenneth Parkinson represented the Plaintiff. Cory D. Memmott appeared on behalf of the Defendants Association and Manager. David Church



appeared on behalf of City. The Honorable Andrew H. Stone presided. Based upon the pleadings, motions, the legal argument of the parties, and for good cause:

IT IS HEREBY ORDERED that Defendants City, Association and Manager's Motions For Summary Judgment are GRANTED. There are no issues of material fact that would preclude summary judgment in favor of Defendants. Furthermore, the undisputed material facts **fail to** show that Defendants ~~did not have~~ **had** notice of a temporary condition of unsafe nature prior to the incident or an adequate opportunity to remedy the condition assuming notice. **Proof of such notice and opportunity is Plaintiff's burden.**

IT IS HEREBY FURTHER ORDERED that all claims asserted by Plaintiff against Defendants are dismissed with prejudice, with costs to Defendants.

The order is entered by the Court as evidenced by the dated electronic signature at the top of this document.

Approved as to Form

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Kenneth Parkinson  
Attorney for Plaintiff

Approved as to Form

*/S/ David Church*

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David Church  
Attorney for City

**CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2016, I caused a copy of the foregoing document to be served upon any person with an electronic filing account who is a party or attorney in this case by submitting the document for electronic filing pursuant to Utah Rules of Civil Procedure Rule 5(b)(1)(A)(i) or by sending a copy of this document via email.

Ray Lego & Associates

*/s/ Cory D. Memmott*

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Cory D. Memmott



1 or our obligation.

2           And then last but not least, it was an  
3 interesting argument on that same point is that we  
4 didn't -- we weren't possessor of that land because we  
5 couldn't exclude people from it. We couldn't make  
6 those repairs in these infrastructure areas. And the  
7 city has pointed out why Mr. Parkinson had a  
8 non-delegable duty towards that area.

9           So they can't hide behind well, we  
10 delegated it to somebody else. It's the City's  
11 property. It's the City's duty.

12           And what I have, Your Honor. Thank you.

13           THE COURT: Thanks.

14           Well, I think the constructive notice  
15 cases are pretty tough. And I recognize that it's a  
16 hard burden to put on Plaintiffs sometimes when  
17 there's a dangerous condition that may have existed --  
18 yesterday, it may have existed for years.

19           But what I'm really asked to do is to  
20 allow a jury to infer from lawnmower marks that the  
21 condition had existed for a long time, and I just  
22 don't think that meets the Gobel standard. I think  
23 first, it's speculative to suggest that because there  
24 are lawnmower marks, there would have necessarily been  
25 notice, even constructive notice, to the mower. It's

1 about it speculative, as well to assume that -- just  
2 assume and allow a jury to speculate that their  
3 lawnmower marks and not something else.

4           So, based on that, I don't think that  
5 there's a genuine question to be presented to the jury  
6 in terms of how long the condition existed.

7           And on that basis, I'll grant both motions  
8 I ask the Defendants to submit proposed orders.

9           A VOICE: Thank you, Your Honor.

10          THE COURT: Thanks everybody it's a  
11 challenging tort case; well-briefed and well-argued.

12          A VOICE: As to orders, would you like to  
13 prepare? You're going to prepare something or --

14          THE COURT: No. The Defendants will  
15 prepare that proposed order and let the Plaintiff take  
16 a look at it.

17          A VOICE: You want separate or joint?

18          THE COURT: I think because I briefed it  
19 on a single basis, then you two fellows can work that  
20 out.

21          A VOICE: We'll figure it out together.  
22 Thank you.

23          THE COURT: All right.

24          (Hearing Adjourned at 3:33 p.m.)  
25