

2017

**Candice Cohegrus, Appellant, vs. Herriman City, Rosecrest Village Homeowners Association, Inc., 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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**REPLY 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

SEP 22 2017

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## ARGUMENT

### **I: THE TRIAL COURT FAILED TO CONSIDER ALL OF THE EVIDENCE AND REASONABLE INFERENCES ABOUT HOW LONG THE DANGEROUS CONDITION EXISTED**

This case is about whether a bar that protruded above the grass after it was installed in 2006 as part of Herriman's permanent lighting infrastructure is a dangerous condition. Herriman, FCS, and Rosecrest argue that the bar was safe when it was installed in 2006, but that it inexplicably morphed into a hazard shortly before Ms. Cohegrus' injury in 2012. Moreover, they argue that it was not dangerous for a long enough period of time for Herriman, FCS, and Rosecrest to have constructive knowledge of its existence. The evidence proves that the bar existed long enough for Rosecrest, FCS and Herriman to have constructive notice of the dangerous condition:

- A. The trial court found that the bar "may have existed yesterday, it may have existed for years."<sup>1</sup> This fact alone requires the Court to make two reasonable inferences: first, copper grounding rods do not suddenly appear out of nowhere; second, viewing the facts in a light most favorable to Ms. Cohegrus, the bar likely existed as a dangerous condition for years.

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<sup>1</sup>R. 730

- B. The bar had been impacted by a lawnmower. Adam Jones and Monte Johnson both testified that the cuts were likely caused by a lawnmower.<sup>2</sup> The rod was also oxidized.<sup>3</sup>
- C. Specifically, Mr. Cohegrus testified that he examined the bar in the “near future”<sup>4</sup> after Ms. Cohegrus was injured.<sup>5</sup> He stated that it appeared rusted and that it had been hit by a blade or “something.”<sup>6</sup>
- D. Ms. Cohegrus<sup>7</sup>, Adam Jones<sup>8</sup>, Monte Johnson,<sup>9</sup> Marcel Cohegrus<sup>10</sup>, and Maria del Carmen Tirado Sanchez<sup>11</sup> all provided testimony that the rebar was visible, easy to identify, and should have been remedied.

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

<sup>3</sup>R. 588, 23:7-12.

<sup>4</sup>Mr. Cohegrus’s first language is Spanish. He is a native of Queretaro Mexico. *See* R. 324.

<sup>5</sup>R. 561, 28:7-12.

<sup>6</sup>R. 561, 29:21-23.

<sup>7</sup>R. 569

<sup>8</sup>R. 580, 581 and 583

<sup>9</sup>R. 587

<sup>10</sup>R. 348

<sup>11</sup>R. 547, 624

- E. Ms. Cohegrus testified landscaping personnel ran over the bar with their lawnmowers, and that the lawnmower blades cut the bar.<sup>12</sup>
- F. Adam Jones also testified that the lawnmower blades damaged the bar. Some of the damage appeared oxidized. Some of the damage appeared “fresh”.<sup>13</sup>
- G. Herriman City provided evidence that "Roescrest HOA and... FCS...knew about the grounding rod..."<sup>14</sup>
- H. Ms. Cohegrus referenced pictures of the grounding rod which demonstrate that it was visible.<sup>15</sup>

On a motion for summary judgment, the Court is required to consider all evidence and make reasonable inferences in the light most favorable to Ms. Cohegrus.<sup>16</sup> The facts, when viewed in the light most favorable to Ms. Cohegrus, justify the reasonable inference that Herriman, FCS and Rosecrest had constructive notice of the rebar. 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>17</sup> Appellee Herriman City references the following useful language: “A reasonable

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<sup>12</sup>R. 569.

<sup>13</sup>R. 580.

<sup>14</sup>R. 593

<sup>15</sup>R. 572-575

<sup>16</sup>*English v. Kienke*, 774 P.2d 1154 (Utah Ct. App. 1989)

<sup>17</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.*

inference is a conclusion reached by considering other facts and deducting a logical consequence from them, while speculation is the act or practice of theorizing about matters over which there is no certain knowledge.”<sup>18</sup>

If the Court would have considered the “logical consequences” arising from the undisputed facts, it would have concluded that the bar existed in a dangerous state for a long time. The trial court found that Ms. Cohegrus failed to show “when the city should have had constructive notice” of the copper bar and six-inch hole that injured Ms. Cohegrus.<sup>19</sup> This was error.

Proving constructive notice in a premises liability case requires 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>20</sup>

*Rose v. Provo City* emphasized that time is not the only factor in finding constructive knowledge.<sup>21</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:

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*PacifiCorp*, 2016 UT 20, ¶ 128-129, 372 P.3d 629, 647 (discussing inferences).

<sup>18</sup>*Winegar v. Springville City*, 2014 UT App 9, ¶ 20, 319 P.3d 1 (citations and quotation marks omitted).

<sup>19</sup>R. 719.

<sup>20</sup>*Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175, 176 (Utah 1975) (emphasis added).

<sup>21</sup>*Rose v. Provo City*, 2003 UT App 77, ¶ 23, 67 P.3d 1017, 1020



the *nature and extent* of the defect, its *prominence* in location and *other factors* bearing on what could reasonably be expected of a [defendant].<sup>22</sup>

Citing *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>23</sup> 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>24</sup> The court declined to impute constructive knowledge to the defendant.

The burden that the plaintiff must meet for constructive notice is not a high one. *Mingolello v. Megaplex Theaters* states that “[a] court may impute constructive notice only when there is *some* evidence of the length of time the debris has been on the floor.”<sup>25</sup> *Some* evidence is all that is necessary—and the evidence must be construed in Ms. Cohegrus’ favor. Ms. Cohegrus provided “some” evidence of the length of time that the rebar existed in an unsafe condition.

As emphasized by the rule in *Rose* and *Mingolello*, the facts show that FCS, Rosecrest and Herriman had constructive notice of the bar. The facts show that Ms. Cohegrus was

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<sup>22</sup>*Id.* (emphasis added).

<sup>23</sup>*Pollari v. Salt Lake City*, 111 Utah 25, 36, 176 P.2d 111, 117 (1947).

<sup>24</sup>*Kreyling v. St. George City*, 2008 UT App 363, \*1 (memorandum decision).

<sup>25</sup>2017 UT App 4, ¶ 7 (quoting *Jex v. JRA, Inc.*, 2008 UT 67, ¶ 19, 196 P.3d 576) (quotations omitted and emphasis added).

injured on April 29, 2012—prior to the summer lawn-mowing season.<sup>26</sup> Adam Jones and Monte Johnson testified that the cuts in the bar were likely caused by a lawnmower and that the bar was oxidized.<sup>27</sup> Mr. Cohegrus saw the bar shortly after the accident. He testified that the bar appeared rusted and that it had been hit by a blade or “something.”<sup>28</sup> Ms. Cohegrus also testified that it had been impacted by a lawnmower.<sup>29</sup>

The only reasonable inference from the evidence is that lawn mowing personnel drove directly over the rebar, impacted it with their lawn-mowing blades, and left visible dents on the rebar prior to the spring of 2012. This likely happened as early as 2006. There is no dispute that it had been exposed to the open air for sufficient time to oxidize. The “nature and extent” of the hazardous rebar, the fact that it was originally part of the city’s lighting infrastructure, and its “prominence in location” are all proven in the record.<sup>30</sup> No less than five witnesses provided testimony that the rebar was visible, easy to identify, and should have been remedied.

The Defendants rely heavily on the case of *Goebel v. Salt Lake City Southern R. Co.*<sup>31</sup> *Goebel* is distinguishable for one important reason – the Court determined that the plaintiffs

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<sup>26</sup>R. 65, ¶¶ 15-16.

<sup>27</sup>R. 580, 12:2-15; R. 588, 22:14-24:17. 588, 23:7-12]

<sup>28</sup>R. 561, 29:21-23.

<sup>29</sup>R. 569.

<sup>30</sup>R. 542-544, 587, 589; R. 572-575.

<sup>31</sup>2004 UT 80, 104 P.3d 1185.

“ha[d] offered absolutely no evidence from which a jury could infer the length of time that [the railroad] had” notice of a dangerous gap in a railroad track.<sup>32</sup> This case is different because a lawnmower ran over the copper bar and damaged it.

*Fishbaugh v. Utah Power & Light* is distinguishable for the same reason – no admissible evidence was provided as to the length of time that the unsafe condition existed, and no evidence was provided as to how long the utility company had to remedy an unsafe condition.<sup>33</sup> Ms. Cohegrus has provided evidence that was lacking in *Goebel* and *Fishbaugh*. An overwhelming amount of evidence is unnecessary, only “some” is required.<sup>34</sup>

FCS, Rosecrest and Herriman argue that the bar was not examined by the city until months after Ms. Cohegrus’ injury. This ignores the evidence because Mr. Cohegrus, Ms. Cohegrus and several other witnesses observed oxidation, and lawn-mowing nicks and dings shortly after Ms. Cohegrus’ injury. Mr. Johnson noted that the bar was oxidized.<sup>35</sup> Ms. Cohegrus testified that lawn-mowing personnel ran over it shortly after the injury.<sup>36</sup>

FCS, Rosecrest and Herriman also argue that the rebar was not rusted, but that it was oxidized, or otherwise rust-colored. Mr. Johnson did not state that the rebar was naturally rust-colored, the exchange actually went as follows:

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<sup>32</sup>*Id.* at ¶ 25.

<sup>33</sup>969 P.2d 403, 408 (Utah 1998).

<sup>34</sup>*Jex v. JRA, Inc.*, 2008 UT 67, ¶ 19, 196 P.3d 576.

<sup>35</sup> R. 455, 23:7-12.

<sup>36</sup> R. 569.

Q. (Mr. Parkinson): Okay. The metal up at the top is kind of oxidized looking, or rusted looking to some extent or another. At least I would describe it that way. Is that a fair way to describe it?

A. (Mr. Johnson): I would say oxidized. I would not say rust. It's copper. Copper doesn't rust.<sup>37</sup>

Mr. Johnson correctly stated what copper does when exposed to air – it oxidizes rather than rusts. “Oxidize” is defined as follows: “to combine with oxygen or with more oxygen.”<sup>38</sup> Oxidation does not happen overnight. This is a fact understood by common experience. For oxidation to appear, the rebar would have needed to be exposed to air for a significant amount of time, i.e., the rebar existed in a dangerous condition for a significant amount of time.

It is not speculation to infer the facts in favor of Ms. Cohegrus. In fact the opposite is true. FCS, Rosecrest and Herriman's version of events require some fairly impressive mental gymnastics: the rebar suddenly materialized out of the ground after having been safely installed in 2006, lawn mowing personnel only started running over it after the accident occurred, and despite being plainly visible, no one could see it while mowing the lawn, day-in-and-day-out, for years and years. These “inferences” are illogical and strain credulity.

Ms. Cohegrus' conclusions are logical from the facts at hand. The trial court failed to make these reasonable and logical inferences as required by Rule 56 and the attendant case law. Therefore, this Court should overturn the trial court's decision to grant summary judgment.

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<sup>37</sup>R. 455, 23:7-12.

<sup>38</sup>Webster's Third New International Dictionary, “oxidize,” page 1613.

## II. THE DISTINCTION BETWEEN A TEMPORARY CONDITION VS. A PERMANENT CONDITION IS CONFUSING AND SHOULD BE REVISED

Counsel for Ms. Cohegrus conceded that “[t]he hazard in this case was, admittedly, a temporary condition” during oral argument.<sup>39</sup> This concession was not based on the permanent nature of the copper bar originally installed as part of Herriman City’s permanent infrastructure. Instead, counsel for Ms. Cohegrus was pigeon-holed into a difficult position by existing case law. *Goebel v. Salt Lake City Southern R. Co.*, and its progeny, hold that permanent installations—like railroad tracks<sup>40</sup> and street lights<sup>41</sup>—are actually temporary unsafe conditions when they do not continue to work as originally intended. In other cases, lettuce leaves which fall on a supermarket floor, and self starting shopping carts are permanent, unsafe conditions.<sup>42</sup>

The temporary/permanent distinction is confusing. It makes it difficult for lawyers to properly advise their clients, and provides uncertain guidance for Judges deciding premises liability cases. The Utah Supreme Court should take this opportunity to clarify the law and eliminate this confusion.

In 1996, *Schnuphase v. Storehouse Markets* defined permanent unsafe conditions:

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<sup>39</sup>R. 555.

<sup>40</sup> *Goebel*, 2004 UT 80, 104 P.3d 1185

<sup>41</sup> *Fishbaugh*, 969 P.2d at 405.

<sup>42</sup> *Canfield v. Albertsons, Inc.*, 841 P.2d 1224 (UT Ct. App. 1992); *Carlile v. Wal-Mart*, 2002 UT App 412, 61 P.3d 287

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>43</sup>

Under the rule in *Schnuphase*, a permanent condition is a *structure*, *equipment* or a *building*. It may also be the condition of a *structure* that a property owner creates, chooses, or *for which he is responsible*.<sup>44</sup> In theory, this rule seems straightforward. In practice, hardly any condition is labeled as “permanent,” even when it fits the above description.

There are numerous cases that, at first glance, fit the description of a permanent condition. For example, cases that involve sidewalks,<sup>45</sup> asphalted planter strips,<sup>46</sup> street lighting,<sup>47</sup> sprinkler systems,<sup>48</sup> pot holes in parking lots,<sup>49</sup> holes in parking strips,<sup>50</sup> or railroad

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<sup>43</sup>*Schnuphase v. Storehouse Markets*, 918 P.2d 476, 478 (Utah 1996) (emphasis added).

<sup>44</sup>*Id.*

<sup>45</sup>*Kerr v. City of Salt Lake*, 2013 UT 75, ¶ 2, 322 P.3d 669, 672.

<sup>46</sup>*Rose*, 2003 UT App at ¶ 15, 67 P.3d at 1022.

<sup>47</sup>*Fishbaugh v. Utah Power & Light, a div. of PacifiCorp*, 969 P.2d 403, 403-04 (Utah 1998).

<sup>48</sup>*Porter v. Farmington City Corp.*, 2014 UT App 12, ¶ 6, 318 P.3d 1198, 1200.

<sup>49</sup>*Johnson v. Gold's Gym*, 2009 UT App 76, ¶¶ 3, 18, 206 P.3d 302, 304, 307.

<sup>50</sup>*Kreyling v. St. George City*, 2008 UT App 363, \*1 (memorandum decision).

crossings<sup>51</sup> are “structure[s], equipment, or machinery.” However, in each case, these are labeled temporary conditions. If the above-listed conditions are not permanent structures, what is? Even more telling is *Matheson v. Marbec Investments, LLC*, which dealt with a defective stair in an apartment complex.<sup>52</sup> The facts of *Matheson* fall squarely within the language from *Schnuphase*. The *Schnuphase* court stated that when a person is “responsible” for a “stairway,” a defect in the stairway is a permanent, unsafe condition. Then, in 2007, the *Matheson* court decided that a stairway is a temporary unsafe condition following the rule in *Goebel*. The *Matheson* court did not apply the permanent condition rule from *Schnuphase*. The court stated that defendant was only responsible for “maintenance” of a defective stairway.<sup>53</sup>

This highlights an additional problem with the temporary/permanent distinction. The “for which he is responsible” language from *Schnuphase* has been rendered useless. *Goebel v. Salt Lake City Southern R. Co.* limited the “for which he is responsible” 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>54</sup> In *Goebel*, the plaintiff argued that he was injured because of a gap in the field

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<sup>51</sup>*Goebel*, 2004 UT at ¶¶ 4-6, 104 P.3d at 1189.

<sup>52</sup>2007 UT App 363, ¶ 3, 173 P.3d 199, 201.

<sup>53</sup>*Id.* at ¶ 6, 201.

<sup>54</sup>2004 UT at ¶ 20, 104 P.3d at 1193.

panels of a railroad crossing.<sup>55</sup> The court found no notice of the gap because Salt Lake City Southern Railroad Company did not create the condition, and therefore was only responsible for maintenance.<sup>56</sup>

*Goebel* and *Matheson* have eroded the “permanent condition” rule in *Schnuphase*. They have eliminated a property owners duty to maintain property for which he or she takes responsibility. To be blunt, Ms. Cohegrus conceded that the bar was a temporary condition only because there is no clear understanding of what constitutes a permanent unsafe condition under current Utah law. The *Schnuphase* rule acknowledged that if a party takes responsibility for a condition, notice was not required.<sup>57</sup> In the post *Goebel*, *Fishbaugh* and *Matheson* landscape, this is no longer the case. This Court should do away with the temporary/permanent distinction and clarify the conflict between *Schnuphase* and *Goebel*.

This recommendation is not without support. Section 343 of the Restatement (Second) of Torts states the following:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees [.]<sup>58</sup>

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<sup>55</sup>*Id.* at ¶ 6, 1189.

<sup>56</sup>*Id.* at ¶ 20, 1193.

<sup>57</sup>*Canfield*, 841 P.2d at 1226.

<sup>58</sup>Restatement (Second) of Torts, §343, Dangerous Condition Known to or Discoverable by Possessor (1965).



A possessor of land is liable if he knows – either through creation, actual knowledge, or constructive knowledge—about a dangerous condition.

Other jurisdictions have adopted the same rule. *Kyte v. Mid Hudson Wendico, Inc.*, a New York case, states, “[i]n a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that *it neither created the alleged defective condition nor had actual or constructive notice of its existence.*”<sup>59</sup>

It makes good sense to adopt a standard that requires actual or constructive notice, save in the instance when a party created the condition. When a party creates the unsafe condition, or sets in motion a method of operation that creates the unsafe conditions, such as in *Canfield*,<sup>60</sup> then no notice would be required.

Adopting this model would eliminate the confusion surrounding the temporary/permanent distinction and allow for the analysis to concentrate on creation or notice. While the temporary/permanent distinction may have had some validity historically, it now does nothing but muddy the water in premises liability cases. It makes more sense to first determine if a defendant created or had notice of the unsafe condition. If a party creates the condition, then no notice would be required. If a party did not create the condition, then actual or constructive notice would be necessary, and those determinations would depend on

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<sup>59</sup>131 A.D. 3d 452, 453 (N.Y. App. Div. 2015) (emphasis added).

<sup>60</sup>*Id.* at 227-228.

the facts of the case – whether the condition is water on the floor of a grocery store or rebar sticking out of the ground.

In this case, there is ample evidence that Herriman, FCS, and Rosecrest had actual notice of the copper bar that caused Ms. Cohegrus's injuries. Assuming *arguendo* that they did not have actual notice, knowledge should be imputed to them. As detailed in point I, the bar existed long enough and was conspicuous enough for Herriman, FCS, and Rosecrest to have constructive notice.

### **III. ROSECREST AND FCS HAD A DUTY TO MAINTAIN THE PARKING STRIP.**

Rosecrest and FCS argue that they had no duty to maintain the parking strip. They are wrong.<sup>61</sup> Herriman Code 7-6-1 places a duty on Rosecrest and FCS. The code states, “[i]t shall be the duty of each owner of real property abutting or fronting upon any street, highway or alley within the city, to repair and maintain in good condition all public curbs, curb ramps, gutters, park strips and sidewalks across or immediately abutting their property.”<sup>62</sup> There is no question that Rosecrest and FCS had a duty “to repair and maintain in good condition” the parking strip and to remedy the unsafe condition that injured Ms. Cohegrus.

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<sup>61</sup>Herriman City did not argue that it had no duty to maintain the parking strip in its appellate brief.

<sup>62</sup>Herriman Code 7-6-1.

Rosecrest and FCS dispute whether they maintained the parking strip in question. There is evidence to the contrary. Adam Jones, who lives in Rosecrest Village,<sup>63</sup> stated the following in his deposition:

Q. (Mr Parkinson): Okay. So tell me what you know about who mows.

A. (Mr. Jones): I don't know the company who does our snow or our mowing. But from – since I've lived there – which is five years – they've mowed the park strip and the lower section, which is on the west side of the sidewalk. There's a grassy section, then a rock wall, then another grassy section. And they've mowed and maintained that whole section.

Q. Are they the same company that does the interior?

A. Yes<sup>64</sup>

Ms. Cohegrus is entitled to the inference, through the testimony of Adam Jones, that the same company that mows the interior of Rosecrest Village maintained the parking strip in question. Rosecrest and FCS maintained the grounds of Rosecrest Village and thereby they also maintained the parking strip.

Rosecrest and FCS may not have had the right to cut the rebar or maintain Herriman City's lighting infrastructure, but that hardly is the limit of their options in maintaining the parking strip. They could have placed a flag in the ground to warn pedestrians of the location of the rebar. They could have called Herriman City and informed them of the condition, and then made sure that Herriman City resolved it. They could have asked Herriman City for permission to cut the rebar themselves. They could have spray-painted the rebar a bright color so it was more visible. The rebar and the hole were an unsafe condition on the parking

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<sup>63</sup>R. 408, 19:21-22, 20:1-9.

<sup>64</sup>R. 408, 20:10-22.

strip that Rosecrest and FCS had a statutory duty to maintain. Removal of the rebar was not the only option in regards to maintenance. Rosecrest and FCS could have undertaken any number of remedies to prevent Ms. Cohegrus's injuries.

Rosecrest and FCS cite *Hill v. Superior Prop. Mgmt. Servs., Inc.* for the proposition that they have no duty to maintain the parking strip.<sup>65</sup> *Hill* is distinguishable from Ms. Cohegrus's case. In *Hill*, the defendants had no statutory duty to maintain the land at issue. In this instance, Herriman City imposes an affirmative duty on abutting landowners to maintain the parking strips. Rosecrest owned the abutting land and they hired FCS to maintain it. Both had the duty to maintain the parking strip by statute and by contract. In *Hill*, the homeowner's association ended up settling with the plaintiff since they were not granted summary judgment on the issue of whether they owed a duty to the plaintiff.<sup>66</sup> The duties of the maintenance company, Superior Property Management Services, Inc., did not extend to the tree roots that injured the plaintiff in that case and they did not violate its obligations under their maintenance contract.<sup>67</sup> In this instance, FCS was hired to maintain Rosecrest Village's grounds.<sup>68</sup> They mowed the parking strip. They had the duty to maintain and remove unsafe conditions from the grounds they were maintaining. A person who undertakes

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<sup>65</sup>2013 UT 60, 321 P.3d 1054.

<sup>66</sup>*Id.* at ¶ 7, 1056.

<sup>67</sup>*Id.* at ¶¶ 2, 6-7, 1055-56.

<sup>68</sup>R. 616-617

the task of maintaining another person's property is liable for negligence despite the fact that he or she does not own it.<sup>69</sup>

Herriman City imposed an affirmative duty on Rosecrest and FCS to maintain the parking strip. The deposition of Adam Jones supports the inference that they did maintain that area. Accordingly, Rosecrest and FCS had a duty to maintain the parking strip and protect against unsafe conditions.

### CONCLUSION

The Third District Court's grant of summary judgment should be reversed. Ms. Cohegrus is entitled to reasonable inferences in her favor from the evidence provided. The distinction of permanent and temporary conditions should be overturned and replaced with a creation and notice standard. Additionally, the evidence supports an inference that the Defendants had notice of the rusty rebar and six-inch hole. All the Defendants had a duty to remedy the unsafe condition and are liable for the injuries it caused. Summary judgment should be reversed and this case remanded to the District Court.

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<sup>69</sup>See e.g. *Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener*, 108 Utah 266, 274, 159 P.2d 149, 152 (1945)

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Utah R. App. 24(g)(5)(B).

The brief contains 4,695 words.

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I hereby certify that a true and correct copy of the foregoing were emailed to the following, postage prepaid, on September 21, 2017.

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