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Donna Jex v. JRA, Inc., dba Hickory Kist Deli, James Fillmore, and Angela Fillmore : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DONNA JEX, Plaintiff and Appellant, vs. **JRA, INC., dba HICKORY KIST DELI, JAMES FILLMORE and ANGELA FILLMORE** Defendants and Appellees.	**REPLY BRIEF** Case No. 20060571

This is an appeal from a summary judgment order from the Fourth Judicial Court, American Fork Department, June 6, 2006.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. The Water that Miss Jex Slipped on Does Not Have to be Considered a Temporary Condition.

While Appellees argue that the puddle Miss Jex slipped on can only be considered a temporary condition, they point to no case in which a court has held that the two types of conditions (temporary and permanent) are mutually exclusive. In as much as Miss Jex slipped as a result of the defendant's failure to employ adequate safety measures in their daily activities, the injury was the result of a permanent condition or mode of operation created by the defendants. This is illustrated by *DeWesse v. J.C. Penny* where the plaintiff slipped on water (a condition defendant's argue is temporary), yet the court found the condition to be permanent because it involved an unsafe mode of operation—the failure of J.C. Penny to put out non skid mats in light of snowy weather conditions. *See* 297 P.2d 898, 901 (Utah 1956). While Miss Jex slipped on water, the presence of the water was attributable to Appellees' unsafe mode of operation and thus, can be a permanent condition. The unsafe method of operation is outlined in expert Charles Haines affidavit and includes a

II. There is Extensive Evidence, Which Appellees Failed to Acknowledge, Showing that Constructive Knowledge Should be Imputed.

Appellees argue that the present case is more like *Lindsay* than *Ohlson* and *Silcox*. However, this argument is not well founded. First, in *Lindsay*, there was absolutely no

circumstantial evidence presented by the plaintiff showing how long the water had existed before she slipped on it. Lindsay v. Eccles Hotel Co., 284 P.2d 477, 478 (Utah 1955). In the present case there are numerous pieces of evidence showing that the water on Defendant's floor existed for long enough that defendant should have discovered it. First, the shoes of Mr. Fillmore and Sharlene had deep tread (See R. at 289). Snow would have easily become lodged in the deep grooves of their shoes and would have been tracked onto the wood floor when they entered the store. Second, Mr. Fillmore had been outside shoveling the snow before he entered the front of the store (R. at 290). Shoveling would have required Mr. Fillmore to step in large amounts of snow numerous times whereas Miss Jex walked into the store after snow removal had occurred (R. at 290). Third, the amount of time needed for snow to melt into water would not have occurred in the one second it took Miss Jex to step from the mat onto the wood floor. Fourth, with the small tread on Miss Jex's shoes, any traces of water and snow would almost certainly been removed from her shoes by the time she reached the wood floor because she walked on approximately twenty five feet of mats before she arrived at the counter (See R. at 289). On the other hand, the mats were not out when Mr. Fillmore and Sharlene walked through the front of the store (See R. at 290). When taken in a light most favorable to the plaintiff, the facts show that either Sharlene or Mr. Fillmore tracked in the snow that caused the water on the floor. Thus, the water was very likely on the floor for 1-2 hours before Miss Jex slipped on it. These pieces of evidence are no different than the evidence relied on in *Ohlson* where the court determined that the condition had existed for a long

enough time that Appellees should have discovered it. See Ohlson v. Safeway Stores, Inc., 568 P.2d 753, 755 (Utah 1977).

III. Appellees, Like the Defendant's in De Weese, Created a Hazardous Condition by Choosing to Employ a Wood Floor in their Store.

Appellees argue that the present case is distinguishable from *De Weese*, but fail to articulate just how the two cases are different. Just as the defendants in *De Weese*, Appellees in the present case failed to employ the corrective safety measure they usually used. Mr. Fillmore admitted that he had previously placed mats in the area where Miss Jex fell. However, on the occasion in question there were no mats to guard against the slippery nature of the wood flooring (See R. at 288). Because Appellees chose to use wood flooring in their store (an inherently dangerous condition) and because it was foreseeable that water would be tracked onto the floor on a snowy day, Appellees are liable to Miss Jex under the permanent condition theory of storeowner liability.

Appellees also argue that this case is like *Schnuphase* where the plaintiff made allegations of poor safety precautions, but failed to show that there was an inherently dangerous condition. This analysis is not well placed. Miss Jex is not arguing that the failure of Appellees to take certain precautionary measures (as outlined in the affidavit of expert witness Charles Haines) was an inherently dangerous condition. Rather, Miss Jex is arguing that the Appellees' *wood floor* was an inherently dangerous condition and that by failing to take certain precautionary measures appellees failed to adequately guard against the inherently dangerous condition they chose to employ, just as the defendant in *Canfield* did not adequately guard against the inherently dangerous method of displaying

lettuce that that it chose to employ. See Canfield v. Albertsons, Inc., 841 P.2d 1224, 1227 (Utah Ct. App.), cert. denied, 853 P.2d 897 (Utah 1993).

IV. All Other Arguments Made by Appellees are Addressed in Appellant's Brief.

This reply brief does not address every argument made by Appellees because most of Appellee's arguments are addressed in Appellant's brief. For the sake of brevity, this reply brief addresses only those arguments raised by Appellees that were not adequately addressed in the Appellant Brief.

CONCLUSION

Due to the trial court's errors in applying Utah law and awarding summary judgment to the defendants when there were issues of material fact, this Court should remand the case to the trial court. Miss Jex has provided sufficient evidence of constructive knowledge, inherent danger, and foreseeability to overcome a summary judgment ruling.

DATED this 30 day of January, 2007

Denton M. Hatch

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **Reply Brief** this 30th day of January 2007, to:

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