

1995

Lynn F. Atherley v. Albertson's, Inc. : Brief of Appellant

Utah Court of Appeals

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NO 950707-CA

IN THE COURT OF APPEALS
STATE OF UTAH

YNN F. ATHERLEY,	:	
	:	
Plaintiff/Appellant,	:	Case No. 950707-CA
	:	
vs.	:	
	:	
ALBERTSON'S, INC.,	:	Priority 15
	:	
Defendant/Appellee.	:	
	:	

BRIEF OF APPELLANT

APPEAL FROM THE SUMMARY JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
THE HONORABLE DAVID S. YOUNG

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this action by virtue of the provisions of Utah Code Ann. S. 78-2a-3(2)(k) (1953 as amended).

ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether the trial court properly held that Mrs. Atherley had presented no evidence from which a jury could reasonably find that Albertson's had selected a method of displaying strawberries that created a potentially dangerous condition, that Mrs. Atherley had presented no evidence from which a jury could reasonably find that it was foreseeable to Albertson's that the acts of third parties relating to the strawberry display and marketing method could create a hazard, and that, on the basis of those findings, whether the trial court properly granted Albertson's Motion for Summary Judgment by dismissing Mrs. Atherley's negligence claim against Albertson's. On appeal from the granting of summary judgment, the appellate court will not defer to the trial court's determination of whether there are material facts in dispute, will view the facts in a light most favorable to the party against which summary judgment was entered and review the legal conclusions of the trial court for correctness, affording it no deference. Canfield v. Albertsons, Inc., (Utah App. 1992), Cert. denied 853 P.2d 897 (Utah 1993). Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment (R at 71 through 90.) and the argument

of plaintiff's counsel as contained in the transcript of the hearing on defendant's motion show that this issue was preserved in the trial court. (R at 131 through 157.)

DETERMINATIVE PROVISIONS OF LAW

The only determinative provision of law in this appeal is Rule 56 of the Utah Rules of Civil Procedure, a copy of which is set forth verbatim in the addendum to this brief.

STATEMENT OF THE CASE

A. Nature of the Case

This is a tort action for negligence arising out of injuries received by Mrs. Atherley while a customer in one of Albertson's stores. In addition to the cause of action for negligence, Mrs. Atherley's Complaint stated causes of action for the torts of conversion, trespass, and breach of privacy. Mrs. Atherley's conversion, trespass, and breach of privacy claims were dismissed pursuant to the stipulation of the parties.

B. Course of Proceedings

Subsequent to plaintiff's Complaint and defendant's Answer being filed, the parties undertook a period of discovery. Defendant then filed its Motion for Summary Judgment. Plaintiff filed a Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment. A hearing was held before the trial court on defendant's motion on April 7, 1995.

C. Disposition in the Trial Court

The trial court ruled from the bench granting defendant's motion for summary judgment to dismiss plaintiff's negligence claim only. The trial court's order dismissing plaintiff's negligence claim was entered on July 13, 1995. (R at 115 through 118.) Plaintiff/appellant's Notice of Appeal was filed on August 9, 1995. (R at 125 through 126.)

D. Statement of Relevant Facts

On April 8, 1992, Mrs. Atherley was a customer in Albertson's Kearns, Utah store. As she was walking through the store in the area adjacent to Albertson's produce department, Mrs. Atherley accidentally stepped on a strawberry that was on the floor causing her to fall to the floor. Mrs. Atherley was injured in the fall. (R at 1 through 9 and 91 through 92.)

Mrs. Atherley provided evidence in the form of affidavit testimony that strawberry on which she stepped and slipped was approximately six (6) feet away from the table holding Albertson's strawberry display. (R at 92.)

Mrs. Atherley provided evidence in the form of affidavit testimony that there were no barriers around the strawberry display table to prevent strawberries from rolling on to the floor, that there were no floor mats around the strawberry display, and that the strawberries were displayed in open containers. (R at 92 through 93.) The fact that strawberries were displayed in open containers as a marketing approach is uncontested as is the fact that Albertson's had available to it, and actually employed, alternative methods of displaying strawberries in closed containers

greatly reducing the possibility of spillage and the creation of a hazard to shoppers. (R at 90.) Mrs. Atherley also produced a photograph for illustrative purposes showing displays of strawberries in open containers and without barriers or floor mats. (R at 95.)

Albertson's witness, Glenn Wilkes, stated in his affidavit that "the edge of the dry tables on which strawberries and similar produce are displayed have barriers that surround the edges of the tables which are three of (sic) four inches high and they effectively keep the produce on the table." (R at 65.) (emphasis added) This testimony was disputed by Mrs. Atherley's testimony and representative photograph and inconsistent with the photograph provided by Mr. Wilkes and attached to his affidavit. (R at 68.)

The trial court had evidence before it from which the jury could conclude that Albertson's could foresee that its method of displaying strawberries in open containers would commonly result in strawberries ending up on the floor, thereby creating a hazard to Albertson's customers. In his affidavit, Mr. Wilkes testified that "it is not uncommon to see a piece of produce (i.e., grape, strawberry, lettuce leaf, etc.) on the floor...." (R at 66.) The trial court also had evidence that Albertson's had knowledge of a pattern of customer behavior relating to openly-displayed produce that often created the kind of hazard that caused Mrs. Atherley's injuries. (R at 66.)

SUMMARY OF THE ARGUMENT

I. Utah law recognizes two separate and distinct legal theories under which a store owner may be liable for a patron's slip and fall. The trial court failed to view the two theories of liability separately. Instead, the trial court merged the two theories, effectively depriving Mrs. Atherley of her opportunity to present her case against Albertson's under the second theory of liability. By requiring Mrs. Atherley to meet the notice requirement of the first theory, the trial court improperly found cause to dismiss Mrs. Atherley's negligence claim pursuant to Albertson's motion for summary judgment.

II. In challenging Albertson's motion for summary judgment, Mrs. Atherley presented the trial court with evidence supporting her negligence claim under the second theory of liability. She established that Albertson's chose a method of operation whereby strawberries were openly displayed in uncovered cartons. She presented evidence that Albertson's could foresee that the acts of third party customers in relation to the openly-displayed strawberries could result in strawberries falling or being dropped to the floor. Finally, she presented evidence to indicate that Albertson's did not act reasonably to protect its customers from the dangerous condition created by its method of selling strawberries because it failed to put barriers around the strawberry display to stop strawberries from rolling to the floor and failed to place non-skid floor mats around the strawberry display. Despite having these facts and the issues raised by them

at hand, the trial court, contrary to Rule 56 of the Utah Rules of Civil Procedure and the long history of case precedent relating to summary judgment, granted Albertson's motion for summary judgment and dismissed Mrs. Atherley's negligence claim.

III. The trial court improperly ruled as a matter of law that Albertson's method of display was not dangerous. In making its ruling, the trial court improperly took over the role of factfinder from the jury. The trial court erred in making this determination as a matter of law. The question of whether Albertson's chosen method of displaying strawberries was dangerous is fact sensitive and may not be decided as a matter of law.

ARGUMENT

THE TRIAL COURT MISINTERPRETED UTAH LAW CONCERNING STORE OWNER LIABILITY TO PATRONS AND IMPROPERLY DISMISSED PLAINTIFF'S NEGLIGENCE CLAIM ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. The Trial Court Failed To Properly Apply the Tests Defined By the Utah Court of Appeals In Canfield v. Albertson's, Inc.

Much of the argument contained in this brief was made to the trial court in Mrs. Atherley's behalf in the context of her opposition to Albertson's Motion for Summary Judgment. These arguments failed below because the trial court failed to correctly interpret the law as it has developed relating to premises liability. Utah law recognizes two separate and distinct theories, either of which may be applied to determine if a store owner is liable for its patrons' slip and fall injuries. The two applicable

theories are defined in Canfield v. Albertson's, Inc., 841 P.2d 1224 (Utah App. 1992), Cert. denied 853 P.2d 897 (Utah 1993).

In general, there are two legal theories under which a store owner may be found negligent and held liable for a patron's injuries in a "slip and fall" case in Utah. The first theory involves situations where there is a temporary or transient hazard within the store that was not created by the store owner, its agents, or employees. Under this theory, in order to find a store owner negligent, it must be shown that the store owner "knew or in the exercise of reasonable care should have known of any hazardous condition and had reasonable opportunity to remedy the same." [Citations omitted.]

The second theory, which governs the case before us, involves situations where the store owner, its agents, or employees create or are responsible for the dangerous condition. Under this theory, a plaintiff does not need to establish notice since a store owner is deemed to have notice of the dangerous condition it creates.

Canfield, page 1226.

It should not have been necessary for Mrs. Atherley to persuade the trial court that Albertson's had actual or constructive knowledge that the particular strawberry on which she fell had fallen or been dropped to the floor. The trial court insisted, however, that Mrs. Atherley meet this burden and interpreted Canfield to require the showing of actual or constructive notice as part of the requirement of satisfying the second theory of liability. The trial court commented from the bench that it

[had a hard time seeing why it should hold Albertson's] liable or at least allow it to go to the jury when there is nothing to give me reason to believe that [Albertson's] had **notice** of [the strawberry] and that [Albertson's] had **notice** that [the strawberry] was in a dangerous condition and that it was foreseeable that this person would fall on **that** strawberry or any person would fall on **that** strawberry.

(R at 146 through 147.) (emphasis added).

Albertson's placed substantial emphasis on the fact that neither it nor Mrs. Atherley knew precisely how the strawberry had found its way to the floor. The trial court apparently found this point significant. Mrs. Atherley could not, at the summary judgment phase of her case, and cannot now show that Albertson's had actual or constructive knowledge of the presence of **that** strawberry on the floor where she fell. The law as defined in Canfield relieves Mrs. Atherley of that harsh and inequitable burden of proof.

In this case, Ms. Canfield alleges that she slipped on a lettuce leaf on the floor near a display of farmer's pack lettuce. Viewing the facts in the light most favorable to Ms. Canfield, Albertson's chose a method of displaying and offering lettuce for sale where it was expected that third parties would remove and discard the outer leaves from heads of lettuce they intended to purchase. It was reasonably foreseeable that under this method of operation some leaves would fall or be dropped on the floor by customers thereby creating a dangerous condition. Because Albertson's chose this method of operation, the question of whether Albertson's had notice, either actual or constructive, is not relevant. The relevant question is whether Albertson's took reasonable precautions to protect customers against the dangerous condition it created.

Canfield, page 1227. (Emphasis added.)

The facts in Canfield are strikingly similar to those in Mrs. Atherley's case. In Canfield, Albertson's displayed lettuce in what is commonly called a "farmer's pack" at the end of one of the produce display tables. The individual heads of lettuce were not wrapped and were placed in boxes allowing customers to sort through the heads of lettuce in making their selection. These factors differentiated the "farmer's pack" from lettuce sold individually wrapped in cellophane. Customer's regularly discarded the outer

leaves of the "farmer's pack" lettuce. Albertson's had placed empty boxes around the lettuce display to provide a place where customers could throw the discarded leaves. At least one of the discarded leaves apparently missed the empty box and ended up on the floor where Ms. Canfield stepped on it, slipped, and fell.

In Mrs. Atherley's case, Albertson's displayed strawberries in uncovered boxes and containers which customers could sort through and "pick as many strawberries as they want." (R at 90.) Albertson's, at the same time, also displayed strawberries for sale "in quart containers (i.e., closed plastic containers); and ... in three packs (i.e., a closed container that holds three pints of strawberries);..." (R at 90.) It can be said that the strawberries sold in uncovered boxes were marketed in a "farmer's pack."

Allowing customers to sort through "farmer's pack" strawberries and lettuce may be good marketing and may allow Albertson's to achieve maximum sales by presenting an attractive display to customers but, by allowing customers to pick through the strawberries and package the strawberries themselves, Albertson's created a risk that strawberries would either fall to the floor or be dropped there by customers. It was undisputed below that Albertson's chose this method of marketing strawberries. (R at 90 and 66.) Albertson's argued, however, that because Mrs. Atherley could not show how that strawberry got to the floor she was not entitled to her day in court. Under Canfield, Mrs. Atherley does

not have to show how the strawberry reached the floor in order to prevail in her negligence claim against Albertson's.

The method of operation, displaying strawberries in open containers, was chosen by Albertson's. (R at 90.) Evidence was before the trial court establishing that Albertson's knew that customers would sort through, bump, or knock strawberries out of the display and even drop them from uncovered containers off of a display that did not have a barrier to prevent them from falling to the floor. (R at 66 and 90.) Canfield established that:

[W]here the store owner chooses a method of operation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition, an injured party need not prove either actual or constructive knowledge of the specific condition. [Citation omitted.] In this type of case, notice is satisfied as a matter of law because the store owner is deemed to be informed of the dangerous condition since it adopted the method of operation.

Canfield, page 1226. The Court went on to state that:

To relieve the plaintiff of the requirement of proving actual or constructive notice in such instances is to effect a more equitable balance in regards to the burdens of proof. [Citation omitted].

Canfield, page 1227.

The evidence presented to the trial court by Mrs. Atherley raised sufficient issues of fact to satisfy the second theory of liability set forth in Canfield. Mrs. Atherley showed that Albertson's chose the method of operation, i.e., selling strawberries in open containers. She presented contested evidence that the tables on which the strawberries were openly displayed had no barriers to prevent strawberries from rolling to the floor and that there were not mats around the table to reduce the risk from

strawberries that had fallen. (R at 92 through 93.) She also established that Albertson's knew that customer actions commonly resulted in strawberries, grapes, and peanuts falling to the floor, thereby satisfying the foreseeability requirement. (R at 66.)

The trial court refused to recognize the separate and distinct nature of the second theory of liability defined in Canfield or to relieve Mrs. Atherley of the harsh burden of proof which is effectively eliminated by the second theory. Instead, the trial court merged the two theories and, because Mrs. Atherley could not show actual or constructive notice as required in the first theory of liability, dismissed her negligence claim against Albertson's. The trial court's inability to separate the two theories is clear in its pronouncement from the bench:

The Court also finds that there is no evidence that the store had any opportunity to remedy the single strawberry that was on the floor had they had -- nor that they had any notice that it was there until the accident occurred. Thus there is no potential for the Court to find that there was adequate foreseeability of the store to be held liable, and the defendant's motion for summary judgment is granted. (R at 156.)

The foreseeability required by the second theory of liability is not the same as the notice requirement of the first theory. The clear and obvious purpose of the second theory of liability defined in Canfield is to relieve plaintiffs of the notice requirements of the first theory, yet the trial court required Mrs. Atherley to prove **notice** in order to satisfy the foreseeability requirement. This Court could not have made the distinction any clearer than it did:

In this type of case, notice is satisfied as a matter of law because the storeowner is deemed to be informed of the dangerous condition since it adopted the method of operation.

Canfield, page 1226. The trial court's improper merging of the two theories of liability renders the entire purpose of this Court's holding in Canfield meaningless.

II. Mrs. Atherley Presented Sufficient Evidence To Overcome Albertson's Motion for Summary Judgment

Because Mrs. Atherley raised issues of fact sufficient to state a cause of action under the second theory of liability set forth in Canfield, it was improper for the trial court to dismiss her negligence claim pursuant to Albertson's motion. The trial court was determined, however, not to let Mrs. Atherley's claim go to a jury. In Canfield, this Court held that:

In deciding whether the trial court correctly determined that there were no genuine issues of material fact, we do not defer to the trial court's determination of whether there are material facts in dispute, but review the facts and inferences drawn therefrom in the light most favorable to the losing party. [Citation omitted.] Any doubts or uncertainties concerning issues of fact are resolved in favor of the losing party. [Citation omitted]. Ms. Canfield also challenges the trial court's legal conclusions which we review for correctness, giving no deference to the trial court. [Citation omitted].

Canfield, page 1226. The standard of review expressed by this Court in Canfield has been established through a long line of cases in the Utah appellate courts. It recognizes the harsh nature of summary judgment rulings and the fact that summary judgments deprive the losing party of the opportunity to present her claim to the factfinder. In Mrs. Atherley's case, the factfinder, by Albertson's choice, is a jury.

In order to prevail on a motion for summary judgment, Rule 56 of the Utah Rules of Civil Procedure requires that the moving party "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Addendum, page 1.) Albertson's did not meet that burden in relation to Mrs. Atherley's claim and summary judgment was improper.

The critical material facts have been set forth and addressed in the Statement of Facts and section "I" of the argument, above. Mrs. Atherley presented ample evidence from which a jury could find that Albertson's chose a method of operation that resulted in the creation of a hazard, that it was foreseeable to Albertson's that the acts of customers in conjunction with its method of operation could result in the creation of a hazard, and that Albertson's failed to take adequate precautions (no barriers or floor mats) to protect its customers from the risk of injury. Again, turning to Canfield for guidance:

Given Albertson's decision to use farmer's pack displays, the inquiry therefore becomes whether Albertson's did what was "reasonably necessary to protect the customer from the risk of injury that mode of operation is likely to generate." [Citations omitted.] This inquiry necessarily focuses on the store owner's actions prior to, or contemporary with, the creation of the dangerous condition. Each determination of whether the protective measures taken were reasonable is fact sensitive.... In any event the fact finder must determine whether the store owner's vigilance in protecting against a condition or hazard was commensurate with the risk created by the method of operation [Citation omitted.]

Canfield, page 1227.

Instead of recognizing that Mrs. Atherley had presented material issues of fact sufficient to defeat Albertson's motion, the trial court put itself in the role of the jury and weighed the facts in reaching its decision.

I have seen the farmer cases. I just saw it recently in -- on the 17th of March when they had Saint Patrick's Day and they had cases of cabbage right next to the corn (sic) beef, and the cabbage was in farmer-packed cases, and people were picking off leaves and things like that, and there was some risk associated with that, and the cases were out in front of the meat counter. So I can see that....But I have a harder time seeing why, when they have a normal stand of distribution and one strawberry falls, that I should hold them liable or at least allow it to go to the jury when there is nothing to give me reason to believe that they had notice of it....(R at 146.)

The trial court actually argued facts that should have been considered and assessed by a jury. The mere fact that the trial court entered into an analysis comparing cabbage to strawberries establishes that there was a sufficient issue of material fact that deserved to be heard by a jury.

It is for a jury to decide if the facts presented by Mrs. Atherley are sufficient to meet the requirements of the second theory of liability and allow Mrs. Atherley's recovery against Albertson's. The trial court refused to allow the evidence to be examined by the jury and, in so doing, deprived Mrs. Atherley of her day in court. The trial court held Mrs. Atherley to a standard higher than the law allows by requiring her, in effect, to prove that her evidence was sufficient for her to win the case. Rule 56 of the Utah Rules of Civil Procedure and all of the case law interpreting the rule require only that the party present issues of

material fact. Mrs. Atherley met that requirement and the dismissal of her negligence claim was improper.

III. The Trial Court Improperly Ruled As A Matter Of Law That Albertson's Method Of Display Was Not Hazardous Or Risky

The trial court's ruling dismissing Mrs. Atherley's negligence claim as a matter of law was contrary to generations of legal precedent cautioning against summary judgment in cases where facts are in dispute and subject to more than one interpretation. In particular, in relation to negligence claims, the Utah Supreme Court has held that:

As a general proposition, summary judgment is inappropriate to resolve a negligence claim on its merits, and should be employed "only in the most clear-cut case." (Citations omitted.)

Wycalis v. Guardian Title of Utah, 780 P.2d 821, 825 (Utah App. 1989), Cert. denied 789 P.2d 33 (Utah 1990).

In some ways, it appears that the trial court was more concerned with making tort law than applying the law as it has developed and is so clearly defined in Canfield. This is evident from the following statement made by the trial court:

If I follow your argument, I must come to the conclusion that they must take any of these items that are subject to sorting and prepackage them in a closed container, and I don't think that that should be the objective of the Court. They ought to be entitled to package as they wish. Someone purchasing may wish to purchase less than the packaged amount of any kind of prepackaged items. (R at 145.)

It is up to the factfinder to determine if Albertson's should be able to "package as they wish" without incurring any liability for its chosen method of operation. It was improper for the trial

court to make that determination as a matter of law in a summary judgment proceeding.

Finally, the trial court ruled, as a matter of law, that:

The method of the display has not been shown to the Court's satisfaction to be in any way inappropriate or hazardous or risky. (R at 156.)

It was improper for the trial court to rule on the appropriateness of Albertson's method of display as a matter of law. This Court held in Canfield that:

[T]he trial court erred in determining, as a matter of law, that Albertsons acted reasonably in its attempts to protect its customers from the dangerous condition. This determination is fact sensitive and may not be decided as a matter of law.

Canfield, page 1228. (Emphasis added.) The determination of whether a method of operation creates a dangerous condition is equally fact sensitive and not a matter for summary judgment. Mrs. Atherley is entitled to present her case to a jury.

CONCLUSION

The trial court improperly dismissed Mrs. Atherley's negligence claim on Albertson's motion for summary judgment. Mrs. Atherley presented facts to the trial court which were sufficient under the second theory of liability defined in Canfield to avoid summary judgment and to go to a jury. The trial court erred in its interpretation of the holding in Canfield and, as a result, held Mrs. Atherley to a higher standard, based on the merging of the two theories of liability, than she should have been required to meet. The trial court improperly took over the role of factfinder in

analyzing and weighing Mrs. Atherley's evidence and in dismissing her claim on its merits. The trial court's analysis intruded into the role of the factfinder. Albertson's obtained summary judgment too easily in this case because the trial court failed to apply the proper standard in determining the appropriateness of that harsh remedy.

Summary judgment...should be granted **with extreme caution** where the negligence of the property owner is alleged. (Citation omitted.) Issues involved in negligence "become questions of law only when the facts are undisputed and only one conclusion can be drawn from them." (Citation omitted.)

Canfield at 1226.

Justice demands that the trial court's summary judgment order be reversed and that this matter be remanded so that Mrs. Atherley can present her case to the jury, the only proper factfinder in this case.

RESPECTFULLY SUBMITTED this 23rd day of February, 1996.



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MAILING CERTIFICATE

I hereby certify that on the 23rd day of February, 1996, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLANT LYNN F. ATHERLEY to the following:

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ADDENDUM

fault judgment where notice is required only by custom, 28 A L R 3d 1383

Failure of party or his attorney to appear at pretrial conference, 55 A L R 3d 303

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A L R Fed 190

Key Numbers. — Judgment ⇐ 92 to 134

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall

forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
 —Contents.
 —Corporation.
 —Experts.
 —Inconsistency with deposition.
 —Necessity of opposing affidavits.
 —Resting on pleadings.
 —Objection.
 —Sufficiency.
 —Hearsay and opinion testimony.
 —Superseding pleadings.
 —Unpleaded defenses.
 —Verified pleading.
 —Waiver of right to contest.
 —When unavailable.
 —Exclusive control of facts.
 —Who may make.
 Affirmative defense.
 Answers to interrogatories.
 Appeal.
 —Adversely affected party.
 —Standard of review.
 Attorney's fees.
 Availability of motion.
 Compliance with rule.
 Cross-motions.
 Damages.
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 Evidence.
 —Facts considered.
 —Improper evidence.
 —Proof.
 —Weight of testimony.
 Implicit rulings.
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 Issue of fact.
 —Contract interpretation.
 —Corporate existence.
 —Deeds.
 —Lease as security.
 —Notice.
 Judicial attitude.
 Motion for new trial.
 Motion to dismiss.
 Motion to reconsider.
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 —Provision not jurisdictional.
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 Procedural due process.
 Purpose.
 Scope.
 Summary judgment improper.
 —Damage to insured vehicle.
 —Dispersal of interest.
 —Findings by court.
 —Foreclosure of trust deeds.
 —Fraud or duress.
 —Guardianship.

—Mortgage note.
 —Negligence.
 —Nonspecific denial of requests for admission.
 —Note.
 —Recovery for goods and services.
 —Stock ownership.
 —Wrongful possession.
 Summary judgment proper.
 —Contract action.
 —Contract terms.
 —Deceit.
 —Jurisdiction.
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 —Res ipsa loquitur.
 Time for motion.
 Written statement of grounds.
 Cited.

Affidavit.

—Contents.

Specific facts are required to show whether there is genuine issue for trial. *Reagan Outdoor Adv., Inc. v. Lundgren*, 692 P.2d 776 (Utah 1984).

When a motion for summary judgment is made under this rule, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. *Treloggan v. Treloggan*, 699 P.2d 747 (Utah 1985).

Affidavits submitted by plaintiff that contained opinion, legal conclusions, and facts not supported by adequate foundation but portions of which complied with Subdivision (e), because the objectionable statements did nothing more than supplement the arguments made in plaintiff's memorandum, did not prejudice defendants. *Broadwater v. Old Republic Sur.*, 854 P.2d 527 (Utah 1993).

—Corporation.

Where an affidavit is made by an officer of a corporation, it is generally considered to be the affidavit of the corporation itself. However, the personal knowledge of an agent of the corporation who is not a corporate officer regarding the facts to which he has sworn will generally not be presumed, and therefore, the specific "means and sources" of his information should be shown. *Utah Farm Prod. Credit Ass'n v. Watts*, 737 P.2d 154 (Utah 1987).

—Experts.

Utah Rule of Evidence 704 allows the expert to state his opinion concerning the ultimate issue in the case, and an expert affidavit must also contain a sufficient factual basis for the opinion proffered. Thus, the affidavit is sufficient if it articulates the facts upon which the opinion was based and if the facts were of the "type usually relied upon by experts in the field." *Gaw v. State*, 798 P.2d 1130 (Utah Ct. App. 1990).

FILED DISTRICT COURT
Third Judicial District

JUL 13 1995

SALT LAKE COUNTY

RANDALL D. LUND (A5617)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor By _____
Post Office Box 45000 Deputy Clerk
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

Attorneys for Defendant Albertson's Inc.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

LYNN F. ATHERLEY,
Plaintiff,

ORDER

vs.

Civil No. 940904525PI

ALBERTSON'S, INC.
Defendant.

Judge David S. Young

Defendant Albertson's ("Albertson's") Motion for Summary Judgment came on for hearing on the 7th day of April, 1995, before the above-entitled Court, the Honorable Davis S. Young presiding. Plaintiff was represented by her attorney, Don R. Schow, and Albertson's was represented by its attorney, Randall D. Lund. The Court having heard oral argument by counsel for both parties and having previously reviewed the memoranda, affidavits and other documents submitted by counsel for the parties in connection with Albertson's Motion for Summary Judgment, and otherwise being fully advised in the circumstances, finds that there is no genuine issue of material fact and that Albertson's is entitled to judgment as a matter of law on Count I

of Plaintiff's Complaint for Negligence because despite the express requirements of Rule 56 of the Utah Rules of Civil Procedure:

1. Plaintiff has failed to introduce any evidence indicating that Albertson's employees created a condition or defect which proximately caused, created or otherwise contributed to the creation of the alleged temporary hazard;

2. Plaintiff has failed to introduce any evidence indicating that Albertson's method of operation made it reasonably foreseeable that the expectable acts of third parties would result in the creation of the alleged temporary hazard;

3. Plaintiff has failed to introduce any evidence that Albertson's had notice of the temporary hazard or that, through the exercise of reasonable care, Albertson's should have known of the temporary hazard before the alleged accident occurred; and

4. Even if it is assumed, arguendo, that Albertson's had notice of the hazard, Plaintiff failed to introduce any evidence that Albertson's had a reasonable opportunity to remedy the temporary hazard.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment be and the same is hereby granted and summary judgment is hereby entered in favor of

Defendant Albertson's, Inc., on Count I of Plaintiff's Complaint
for Negligence, with both parties to bear their own costs.

DATED this 13th day of July, 1995.

BY THE COURT:

15/
David S. Young
District Court Judge

APPROVED AS TO FORM:

MARK R. MCDUGAL & ASSOC.

By Don R. Schow
Don R. Schow
Attorneys for Plaintiff

SH\RD\15631.032\ATHERLEY.ORD

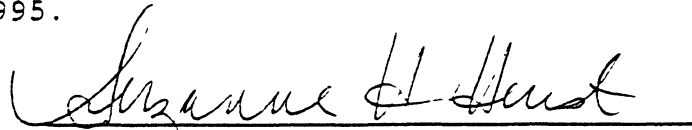
AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

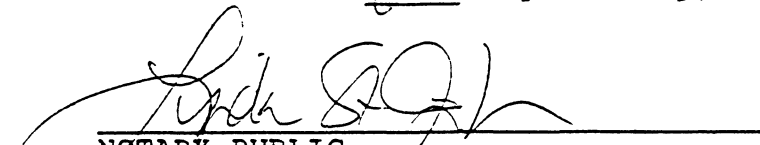
Suzanne H. Hurst, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Defendant Albertsons, Inc. herein; that she served the attached ORDER (Case Number 940904525PI, Third Judicial District Court of Salt Lake County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Don R. Schow
MARK R. MCDOUGAL & ASSOCIATES
Attorneys for Plaintiff
4360 South Redwood Road, Suite 1
Salt Lake City, Utah 84123

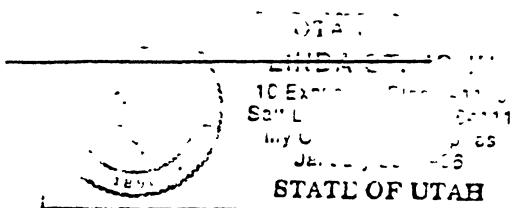
and causing the same to be mailed first class, postage prepaid, on the 6th day of July, 1995.


Suzanne H. Hurst

SUBSCRIBED AND SWORN to before me this 6th day of July, 1995.


NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:



COPY

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LYNN F. ATHERLEY,)	
)	
Plaintiff,)	
)	
vs.)	No. 940904525 PI
)	
ALBERTSON'S, INC.,)	
)	
<u>Defendant.</u>)	

BEFORE THE HONORABLE DAVID S. YOUNG

April 7, 1995

Defendant's Motion for Summary Judgment

Reported by
Lori Lawrence, CSR, RPR, CP
File No.
040795LL

ALPHA
Court Reporting Service
P.O. Box 510047
SLC, Utah 84151-0047
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1 Salt Lake City, Utah: April 7, 1995: 10:10 a.m.

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THE COURT: All right. The next matter to be considered is the matter of Lynn Atherley versus Albertson's, Inc., Case No. 940902 -- or 4525. Counsel, state your appearances, please.

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8

MR. SCHOW: Don R. Schow for the plaintiff, Lynn Atherley.

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MR. LUND: Randall D. Lund for Albertson's, Incorporated, defendant.

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THE COURT: All right. Mr. Lund, it's your motion for summary judgment.

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MR. LUND: Thank you, your Honor. If it please the Court and counsel: It's interesting how you can come to work one day and receive a case that will in some way change your life or stay with you for a long time, and that happened to me several years ago when I came to work. It was my first Albertson's case. Received information on a claim by one Mary Canfield, and since that time, I don't think I've ever had a professional day that's gone by that I haven't heard something about the case of Canfield versus Albertson's.

23

24

25

And in approaching the Court today, I feel that it's my responsibility really to distinguish between the case of Canfield versus Albertson's and this case and in

1 that respect show why summary judgment is merited in this
2 case.

3 Now, the facts of this case are very
4 straightforward. We have a plaintiff who was walking in an
5 Albertson's store. She slipped and fell on a strawberry.
6 It's a given fact that she did not see the strawberry
7 before she stepped on it.

8 Now, this photograph is the best that we have,
9 and we apologize for the quality of it, but this is a
10 photograph of the produce area. At this end, we have where
11 the strawberries were displayed, and in this area right
12 here is where the slip and fall occurred. The purpose of
13 this line, of course, is a measurement from the end of this
14 display table to the corner, which we submit is about
15 twenty-five feet. Now, that is a disputed fact by the
16 plaintiff, but we submit that it's really not relevant in
17 light of the law that we're going to discuss today.

18 Your Honor, there are some similarities between
19 the case of Canfield versus Albertson's and Lynn Atherley
20 v. Albertson's. We have a slip and fall. We have the same
21 defendant. We have the same defense attorney. We have no
22 opportunity for notice. There's not much dispute about
23 notice, but there are significant distinctions, and that's
24 what I'd really like to talk about for a moment.

25 The first distinction that I think is important:

1 In the case of Canfield versus Albertson's, the accident in
2 question took place right in front of the farmers' pack
3 lettuce display. Now, little is talked about in the
4 opinion of Canfield versus Albertson's about what a
5 farmers' pack lettuce display is, but in reality it is a
6 box of lettuce heads that have been shipped straight to the
7 store by the farmer. Albertson's rips open the top of the
8 box, they stick it out there, and people are allowed to
9 come in. It's a very efficient way to sell lettuce.

10 Now, the problem with that is you need to remove
11 the outer leaves. They're not desirable. People don't
12 want them. We know it, and the customer knows it, and we
13 try to protect ourselves by putting garbage cans on the
14 floor because we know those customers are going to walk in
15 and take those lettuce leaves off, and they're going to
16 discard them, and they're on the floor.

17 And in the case of Canfield versus Albertson's,
18 there was testimony by a number of Albertson's employees
19 who testified that this was a known problem, that those
20 lettuce leaves were there, they were discarded, and despite
21 the boxes, they ended up on the floor. There is no similar
22 factor in this case.

23 The slip-and-fall incident, well, in our -- to
24 our respect, we submit occurred twenty-five to thirty feet
25 away from the strawberry display. Plaintiff admits,

1 nevertheless, that it was six to ten feet away, so the
2 proximity is different.

3 The knowledge of the store is different. We
4 knew, with respect to the lettuce heads, that lettuce was
5 being discarded on the floor. There is no evidence in this
6 case of any similar problem with respect to strawberries.

7 I think, your Honor, that it's important to
8 distinguish between a case like Canfield, where you have a
9 constant, recognizable problem, and the general
10 consequences of running a store. We put things on shelves.
11 People come into stores. They buy things off shelves.
12 They bring their kids. They bring their families, and the
13 policy of the court has never been to force these
14 supermarkets to become insurers. It's always been to ask
15 them to apply reasonable standards.

16 Now, because these things are in the produce area
17 because they're displayed for sale, people can look at
18 them. They can put them in their grocery cart, and for any
19 number of reasons, they can end up in any number of places
20 in many different areas in the store.

21 And so you have to distinguish between the
22 situation where the store does something in Canfield that
23 it knows causes a problem and the facts of this case where
24 we have a strawberry. We have no idea how it got there, we
25 have no idea where it came from, and the plaintiff herself

1 admitted that she doesn't know how long it had been there.
2 So for those reasons, we submit that the notice law applies
3 in this case.

4 Now, we submit that plaintiff has raised the
5 issue of Canfield for this reason. They want to circumvent
6 the notice argument. In Canfield, the Court held if, in
7 fact, you can show that the store has done something to
8 create the hazard, we are going to waive the notice
9 provision of the law.

10 Now, as the Court knows, it's usually a
11 two-point -- or a two-prong test. Did the store have
12 notice of the hazard? And, No. 2, did the store have an
13 opportunity to remedy the hazard? If the plaintiff can
14 respond to both of those positively, they can go to trial.
15 If they don't have evidence on those two points, they
16 can't, and in this case, there is no evidence on either
17 point.

18 Another distinguishing factor, your Honor, is
19 just the absence of evidence in this case. One of the
20 troubling aspects of Canfield is that, yes, there is
21 language in the case that talks about what happens when the
22 store adopts a method of display that may create or
23 contribute to the hazard, but in Canfield, we are inundated
24 with the expert affidavits of the plaintiff talking about
25 what were recognized standards for grocery stores, what

1 stores were doing to prevent slip-and-fall accidents, what
2 they could do, what they should do, what stores throughout
3 the country were doing.

4 There is no similar evidence in this case. The
5 plaintiff has pointed to Canfield. They have said, "We've
6 made this allegation. We've said that the strawberries
7 were negligently displayed."

8 Well, that argument fails, we submit, for two
9 reasons. No. 1, there is no testimony from a person
10 qualified to give an opinion as to what a reasonable method
11 of display is with respect to strawberries. It's just not
12 there. We have an allegation under Rule 56(e). It's not
13 enough. No. 2, even if we were to assume that there is
14 something wrong with the display, we've got the distance,
15 at least six to ten feet, and Mrs. Atherley admits she
16 doesn't know how it got there.

17 So, your Honor, Albertson's argument, very
18 briefly, is this. No. 1, we're entitled to summary
19 judgment because we had no notice of the hazard. There is
20 no evidence that anybody knew about this strawberry until
21 after the accident. Certainly we had no opportunity to
22 remedy the hazard until after the accident.

23 And finally, even if we do apply Canfield, even
24 if we assume that for some reason Albertson's should have
25 known, that we're going to waive the notice requirement,

1 there's no evidence with respect to her negligence
2 allegations. Be just her allegations. Unless the Court
3 has any questions --

4 THE COURT: Thank you, Mr. Lund.

5 MR. LUND: Thank you.

6 THE COURT: Mr. Schow?

7 MR. SCHOW: Thank you, your Honor. Defendant
8 depends to a large extent in its motion on alleging that
9 the plaintiff is relying on mere allegations of her
10 complaint to defeat the motion for summary judgment in that
11 she's presented no fact presenting a genuine issue of --
12 genuine issue for trial, and that's simply inaccurate.

13 If her affidavit merely stated Albertson's was
14 negligent, then certainly that's a conclusory statement and
15 not sufficient to defeat summary judgment, but the mere
16 fact that the statements made in plaintiff's affidavit
17 support the factual allegations of her complaint doesn't
18 render those statements inappropriate, and it doesn't
19 render them unable to -- to present facts to defeat summary
20 judgment.

21 There are specific factual allegations made in
22 the complaint. Those are supported by statements in her
23 affidavit. The simple fact that they're in both places
24 doesn't render them inappropriate in her affidavit.

25 THE COURT: You concur that the law is that

1 Albertson's must have notice of the problem and, in
2 addition, an opportunity to remedy that problem?

3 MR. SCHOW: No, your Honor, not under Canfield.

4 THE COURT: What do you think the Canfield law
5 requires of Albertson's?

6 MR. SCHOW: Your Honor, Canfield requires
7 primarily that plaintiff be able to present facts from
8 which the trier of fact can infer or believe that
9 Albertson's first engaged or set up a dangerous method of
10 operation. What that does is it establishes Albertson's
11 not necessarily liability at that point, but it establishes
12 Albertson's involvement in establishing that dangerous
13 condition.

14 Then the Canfield court does speak somewhat of
15 foreseeability, but that's not the same thing as notice,
16 your Honor. The notice that defense counsel has gone over
17 again and again in his memoranda and before the Court this
18 morning is notice under the other standard where plaintiff
19 would have to show that Albertson's actually knew that
20 strawberry was on the floor and failed to do something
21 about it.

22 Canfield doesn't require that. In fact, Canfield
23 states that that is an unreasonable burden of proof to put
24 on a plaintiff because a plaintiff isn't privy to the same
25 information as the defendant is in these cases.

1 THE COURT: I don't have any problem with that
2 philosophy myself, that the plaintiff shouldn't have to
3 show sort of the old one-bite rule that somebody has
4 done -- notice that they have an animal of a mean and
5 mischievous disposition before they can get recovery. The
6 problem that I have with this case is that whatever the
7 distance, six to twenty-five feet, you have a single
8 strawberry on the floor. At least that's the best evidence
9 I've heard.

10 MR. SCHOW: And that's the best evidence we have
11 to date on that particular strawberry.

12 THE COURT: Okay, and that strawberry could get
13 there multiple ways. It could get there, one, by
14 negligence of an employee, and that would have greater
15 liability for Albertson's. It could get there by somebody
16 putting strawberries in their basket and driving beyond the
17 strawberries between six and twenty feet and having one
18 spill out that they don't observe and it's simply on the
19 floor, and I can see that Albertson's might be charged with
20 a duty to know that people can spill goods as they travel
21 around the store and that they should pick those up
22 immediately, and there's no reason to believe that they
23 would not had they had the opportunity to see this
24 strawberry, and there's no reason to believe that they saw
25 it and didn't pick it up. We don't have any evidence such

1 as that.

2 But if the trier of fact has to have facts given
3 to it that would cause one to conclude that there was some
4 dangerous method of operation, what facts would you propose
5 to establish that?

6 MR. SCHOW: Those facts would be this, your
7 Honor, and I don't think they're facts that we need to
8 bring an expert in to determine. I think in this case,
9 possibly Forrest Gump would be the best one to determine by
10 looking at the way strawberries are displayed, that they're
11 open.

12 There are alternative methods, closed containers.
13 Albertson's markets them both ways, either in closed
14 containers or openly. The open containers, a juror could
15 say, create a bigger hazard because customers are, in
16 effect, invited to handle individual strawberries, to pack
17 them and overpack them and to abuse the system basically.

18 But Canfield addresses that, your Honor. The
19 Court in Canfield states, "There is no logical distinction
20 between a situation in which the store owner directly
21 creates the condition or defect and where the store owner's
22 method of operation creates a situation where it is
23 reasonably foreseeable that the expectable acts of third
24 parties will create a dangerous condition or defect."

25 Now, we have evidence of that foreseeability,

1 your Honor, not presented by plaintiff but presented by
2 defendant. In Paragraph 16 of his affidavit, Mr. Wilkes
3 states, "On occasion, as customers taste the produce or
4 give samples to their kids, they will drop the occasional
5 grape, strawberry, or peanut on the floor wherever they
6 happen to be in the store. Because customers occasionally
7 drop produce from their carts as they shop, it is not
8 uncommon to see a piece of produce -- example, grape,
9 strawberry, lettuce leaf, et cetera -- on the floor on the
10 other side of the store."

11 It is not uncommon to see this. This man with
12 all of these years of experience is testifying to that
13 fact, and that's why whether plaintiff can prevail or not
14 on how far the strawberry was from the display is really
15 not relevant because we have Albertson's own expert stating
16 that is not uncommon to see these strawberries on the other
17 side of the store.

18 Now, here's what the -- the jury can infer from
19 the facts that are already presented. First of all, from
20 Mr. Wilkes' statement, look at the types of things he said
21 it's not unusual to see. Strawberries, grapes, peanuts,
22 and lettuce leaves. These are all things that Albertson's,
23 by choice, displays openly and without protection.

24 Now, it's a disputed fact whether there are
25 barriers or mats around. These are things that could maybe

1 mitigate against Albertson's negligence, but those are
2 disputed facts.

3 But these are all items that have alternate
4 methods of display. Grapes can be put in bags and sold.
5 Strawberries are put in plastic cartons that are closed
6 that customers merely pick up and put in the cart,
7 virtually eliminating any chance of spillage. Peanuts are
8 marketed in an open display or also in bags, as are -- as
9 is lettuce. The farmer pack display is very different from
10 the standard display where each head of lettuce is wrapped
11 in cellophane.

12 These are facts that are now available for the
13 jury, and the jury can look at that, combined with
14 Albertson's own statement that this is a foreseeable
15 problem, and it's foreseeable, because of the way they
16 choose to operate in the display and marketing of
17 strawberries and other loose produce, that the jury could
18 infer negligence on the part of Albertson's under the
19 Canfield analysis.

20 Under Canfield, plaintiff doesn't have to show
21 that Albertson's failed to adequately monitor either. She
22 simply has to show facts from which the jury could infer
23 that a method of operation -- in this case, the method of
24 displaying strawberries open and loose for customers to go
25 through -- is a dangerous method and some degree of

1 foreseeability at least, which Albertson's has established,
2 as I said.

3 And there's really -- there's really not much
4 difference between strawberries and lettuce, your Honor,
5 unless we're talking about what you're going to put on your
6 breakfast cereal. The same situation arises. Customers
7 are free -- in fact, they're invited to do their own
8 selecting, to do their own culling where strawberries are
9 concerned. In other words, they see one that doesn't look
10 very appealing. They're going to set that aside or do who
11 knows what with it.

12 But Albertson's has established it knows what the
13 third-party customers are doing, and that's specifically
14 what Canfield addresses.

15 THE COURT: If I follow your argument, I must
16 come to the conclusion that they must take any of these
17 items that are subject to sorting and prepackage them in a
18 closed container, and I don't think that that should be the
19 objective of the Court. They ought to be entitled to
20 package as they wish. Someone purchasing may wish to
21 purchase less than the packaged amount of any kind of
22 prepackaged items.

23 For instance, mushrooms, they prepackage those,
24 and we've all seen them with the cellophane over them.
25 They also have a case of them that you can pick. If you

1 want ten mushrooms or one mushroom or whatever, you can
2 pick from that. Strawberries seem to lend themselves to
3 the similar kind of distribution, and I don't quite see why
4 somebody should be required as a store owner to so package
5 them and sell them with cellophane wrapping just to avoid
6 this kind of potential.

7 MR. SCHOW: But, your Honor, when they choose
8 that method of operation, then the foreseeability factor of
9 third-party intervention kicks in. This is no different
10 from Canfield. You can say the same thing about lettuce.

11 THE COURT: Well, I frankly can see some
12 difference in that. I have seen the farmer cases. I just
13 saw it recently in -- on the 17th of March when they had
14 Saint Patrick's Day and they had cases of cabbage right
15 next to the corn beef, and the cabbage was in farmer-packed
16 cases, and people were picking off leaves and things like
17 that, and there was some risk associated with that, and the
18 cases were out in front of the meat counter. So I can see
19 that.

20 But I have a harder time seeing why, when they
21 have a normal stand of distribution and one strawberry
22 falls, that I should hold them liable or at least allow it
23 to go to the jury when there is nothing to give me reason
24 to believe that they had notice of it and that they had
25 notice that it was in a dangerous condition and that it was

1 foreseeable that this person would fall on that strawberry
2 or any person would fall on that strawberry.

3 MR. SCHOW: Well, your Honor, again, plaintiff
4 doesn't need to show notice. Plaintiff needs to show
5 basically foreseeability, and that foreseeability has been
6 established.

7 Now, we're not saying Albertson's should be held
8 liable for any injury that arises out of a product carried
9 in its store. Defendant points to the case where I guess a
10 packaged piece of pumpkin pie ends up on the floor. Well,
11 that's certainly less foreseeable than the strawberry
12 situation.

13 What we're talking about here with strawberries
14 and grapes and things are round, squishy fruit that present
15 a special hazard. It's the banana-peel syndrome. I mean
16 if Albertson's invited people to peel bananas and eat them
17 on the spot and someone dropped a peel, there might be a
18 problem.

19 This isn't a problem with all produce or all the
20 products marketed by Albertson's. If a customer drops a
21 package of diapers on the floor, there's much less chance
22 that a customer's going to fall over that and get injured,
23 but a strawberry's a small item and is particularly squishy
24 and slippery, and the way they market them, it's
25 foreseeable to them by their own statement that customers

1 are going to feed their kids with it or they're going to
2 overpackage them or they're just not going to take care of
3 them, and by putting them in containers, that's safer.

4 THE COURT: If I follow your argument, everybody
5 that slips on a strawberry, grape, or almost any item of
6 produce is entitled to go to the jury 'cause it's
7 foreseeable that those could fall off the counters. If
8 they slip on a package of diapers, they may not, or a can
9 of beans if it is on the floor, they may not, but produce,
10 because of the way it is marketed and packaged and sold,
11 it's foreseeable that it can fall on the floor.

12 MR. SCHOW: Well, I think the important point
13 made in Canfield, your Honor, is that this is a method of
14 operation chosen by Albertson's, and why is it chosen by
15 Albertson's? Because it increases profit. They display
16 these strawberries in the way they do because it's a very
17 attractive way to display them. I appreciate buying
18 strawberries that way, and I don't have to worry about a
19 green one or a rotten one hiding in the middle of the box.
20 That increases profitability, but they're paying a price
21 for that, and a jury can certainly look at the facts of
22 this case and determine whether that is reasonable or not.

23 Going back to Canfield, the Court states,
24 "Summary judgment should be granted with extreme caution
25 where the negligence of the property owner is alleged.

1 Issues involved in negligence become questions of law only
2 when the facts are undisputed and only one conclusion can
3 be drawn from them."

4 More than one conclusion can be drawn here, your
5 Honor. A jury could easily look at the facts of this case
6 and say, "It's probably not a good idea to display
7 strawberries like that. It's probably a dangerous
8 condition."

9 It's probably even more important to find for the
10 plaintiff in this case because Albertson's knew -- Mr.
11 Wilkes doesn't say that people are always dropping coconuts
12 or cucumbers or watermelons. He specifically states
13 strawberries, grapes, and peanuts, these types of things.
14 Albertson's knows that. It's known it for years.

15 And just the mere fact that by some -- some great
16 fortune no one has been hurt falling on a strawberry in the
17 past few years shouldn't preclude the plaintiff from
18 presenting those facts to the jury and saying, "You
19 determine this. You determine, based on Albertson's own
20 testimony and based on the way this display looks" --
21 contrary to Mr. Wilkes, no barriers. The Court's seen the
22 pictures, and that's an outright misrepresentation to the
23 Court, and if the defendant didn't think it was important
24 to have barriers around strawberries, he wouldn't have made
25 that misrepresentation in his affidavit. Even Albertson's

1 thinks those barriers are important. Even Albertson's
2 thinks the floor mats are important when it comes to
3 squishy fruit.

4 Plaintiff's testimony is there were no barriers.
5 The pictures support that. There were no floor mats. The
6 pictures support that. There are very simple precautions
7 that Albertson's can make to render this potentially
8 dangerous method of display much less so by placing
9 barriers around and by putting floor mats down, nonskid
10 floor mats. They didn't do that. These are other facts
11 the jury should look at to determine whether that method of
12 display is dangerous or not.

13 And unless the Court has further questions, I
14 just emphasize that the facts and inferences to be drawn
15 therefrom have to be viewed in a light most favorable to
16 the plaintiff. Summary judgment simply is not appropriate
17 in this case. The facts are sufficient for a jury to look
18 at and determine if that is a dangerous method of operation
19 and, based on Albertson's foreseeability, whether they
20 should have some liability or all liability for the
21 injuries suffered by the plaintiff in this case.

22 THE COURT: Thank you, Mr. Schow.

23 MR. SCHOW: Thank you.

24 MR. LUND: Can I just have a moment, your Honor?

25 THE COURT: Certainly you may. Yes, Mr. Lund.

1 MR. LUND: Your Honor, I think perhaps the most
2 common misapprehension there with respect to Canfield is
3 this perception that it's overturned all these years of
4 notice law that we have. It doesn't.

5 The Court recognizes in Canfield and says in
6 general that there are two theories which may be applied,
7 and it goes on to talk about them. The first theory, of
8 course, is a notice argument, which we've talked about.
9 The second theory occurs and is triggered when -- and this
10 is what the Court said, that the second theory usually
11 requires that the store owner, its agents, or employees
12 actually create the condition of the defect that causes an
13 injury.

14 We don't know what brought this strawberry to be
15 here. The plaintiff admitted in her deposition testimony,
16 "I don't know how it got there." For all we know, a small
17 child could have brought it in with him from outside. We
18 don't know how it got there. Truly, it is in the proximity
19 of the strawberry display such as we have it.

20 The plaintiff, who's introduced pictures which
21 have no relevance to this case because this entire store
22 has been gutted -- this is the only picture we have of the
23 way the area looked on the day in question, and despite the
24 poor quality, it's what we have, and you can see there's
25 mats, there's tables with edges around them, the things

1 that the plaintiff is talking about.

2 But I submit that these things are really
3 irrelevant because the undisputed facts in this case are:
4 She doesn't know how it got there; she has no proof that
5 Albertson's had any opportunity to do anything about it.

6 And finally, I just ask the Court to imagine what
7 a produce area would look like if all of the sudden the
8 duty was to take everything and package it. Customers go
9 in a produce area, and, as the Court pointed out, they sort
10 through things. These are things the customers do, they
11 have done forever, and they do it in every grocery store in
12 the state. This method of operation isn't something that
13 Albertson's has just chosen. It's something that every
14 grocery store in the state uses. It's something that every
15 grocery store in the country uses, and there is no evidence
16 that that is negligent or unreasonable in this case.

17 THE COURT: If I'm -- we're dealing with a
18 motion, though, for summary judgment. Where do I draw the
19 line? Do I say, "Well, they had ten strawberries on the
20 floor. Therefore, they should have known they had a
21 dangerous condition"? Do I say, as Mr. Schow would have me
22 say, that since the strawberries weren't wrapped, they
23 could or should have known that the strawberries could fall
24 to the floor and thus they should run the risk either of,
25 one, wrapping all the strawberries or defending lawsuits?

1 And I have a hard time understanding if I should
2 put on the plaintiff the burden to show more notice, more
3 opportunity to cure, or just simply let it go to the jury
4 and let the jury decide, "Well, gosh. We all go in stores
5 and see things on the floor, and if we don't watch them and
6 we fall, we may have to bear the burden ourself," or the
7 jury may say, "Under the circumstances here, rather than
8 having her bear the burden, Albertson's should have been
9 more careful."

10 I don't know. These cases, every case pushes the
11 line at a different spot.

12 MR. LUND: I agree, your Honor. **It is a**
13 difficult call to make, but I think that we can clearly
14 separate this case from Canfield. The case in Canfield
15 involved a situation where there was an abundance of
16 testimony that Albertson's knew that lettuce leaves were
17 piling up around the display because every customer who
18 went to that display was dumping lettuce there, and that's
19 what the case talks about. The store employees knew this,
20 and what did they do? They put boxes there in hopes of
21 collecting this lettuce, in hopes of stopping the problem,
22 and the only thing that Canfield went to trial on was
23 whether or not that procedure, using the boxes, was
24 reasonable.

25 We don't have that situation here. We don't have

1 strawberries mounting up. We don't have evidence of any of
2 the produce piling up and becoming a problem that's so
3 problematic that the store is having to take remedial
4 measures by putting boxes wherever they can for people to
5 throw them into.

6 You see, the foreseeability that needs to be
7 focused on here is not the foreseeability that things are
8 going to end up in the store, because that's just
9 foreseeable to everybody. The foreseeability that they
10 focused on in Canfield is that the customers were
11 intentionally discarding this specific product and doing it
12 around the lettuce display.

13 There is no evidence in this case that anybody
14 did anything with intention with respect to this
15 strawberry. We just don't know, and under Rule 56(e), you
16 can't go to trial based on just your allegations. You've
17 got to come with some evidence.

18 Now, she's come in, and she has alleged there was
19 a strawberry on the floor, and we said, "That's right.
20 There was a strawberry on the floor. We didn't know
21 anything about it until we heard about the incident." We
22 do the best that we can do with the procedures we talked
23 about with the employee sweeping procedures. We do what we
24 can to keep the floor clean. We instruct our employees to
25 pick up things when they see them. We do what we can, and

1 there is a clear line of cases for the last forty years
2 insofar as I can tell where the courts have upheld the
3 notice theory.

4 I think Canfield, your Honor, is a very, very
5 narrow case, and I think it applies to a situation where
6 the plaintiff can come into court and can show that there
7 is something wrong with the display, that there is
8 something about that display which in and of itself can
9 cause that hazard.

10 In Canfield, for example, the Court made
11 reference to the situation where the shelves were slanted
12 and it was potentially hazardous because the produce could
13 fall off the rack by itself.

14 There's no evidence like that here. The evidence
15 in this case is simply that there's a strawberry on the
16 floor and nobody knows how it got there, and when those are
17 the facts -- and there is a long list of cases. Long v.
18 Smith's, the pumpkin pie; Howard v. Aurbach's, the oil;
19 Allen v. Federated Dairy Farms and Albertson's where we
20 have cottage cheese on the floor. We have Martin versus
21 Safeway where there was ice. All of these cases point out
22 that if we don't know how it got there, you have to show --
23 and the plaintiff bears that burden of showing -- how the
24 hazard had gotten there, how long it had been there,
25 whether the store had an opportunity to remedy it.

1 THE COURT: All right.

2 MR. LUND: Thank you, your Honor.

3 THE COURT: Thank you, Mr. Lund. Court finds
4 that the defendant's motion for summary judgment should be
5 and the same is herein granted. The Court finds that there
6 is no adequate basis for the Court to conclude that
7 Albertson's had notice of the defect. The method of the
8 display has not been shown to the Court's satisfaction to
9 be in any way inappropriate or hazardous or risky. The
10 Court also finds that there is no evidence that the store
11 had any opportunity to remedy the single strawberry that
12 was on the floor had they had -- nor that they had any
13 notice that it was there until the accident occurred. Thus
14 there is no potential for the Court to find that there was
15 adequate foreseeability of the store to be held liable, and
16 the defendant's motion for summary judgment is granted.

17 If you'll prepare an order consistent, Mr. Lund.

18 MR. LUND: Thank you.

19 THE COURT: Court's in recess.

20 (The matter concluded at 10:45 a.m.)

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1 STATE OF UTAH)
2)
3 COUNTY OF SALT LAKE)

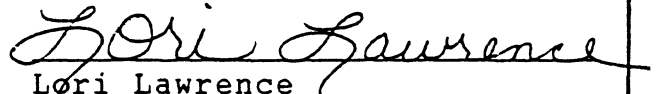
4 I, Lori Lawrence, C.S.R., R.P.R., C.P., and
5 Notary Public for the State of Utah, residing in Salt Lake
6 County, certify:

7 That the foregoing proceedings were taken before
8 me at the time and place herein set forth;

9 That all proceedings had of record at the time
10 were recorded stenographically by me and were thereafter
11 transcribed into printing under my direction and the
12 transcript is a full, true, and correct record of my
13 stenographic notes so taken;

14 That I am neither counsel for nor related to any
15 party to said action nor in anywise interested in the
16 outcome thereof.

17 IN WITNESS WHEREOF, I have subscribed my name
18 this 25th day of August, 1995.

19 
20 Lori Lawrence
21 C.S.R., R.P.R., C.P.
22 Notary Public
23
24
25