IN THE UTAH COURT OF APPEALS

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Jule Kreyling, Plaintiff and Appellant, v. St. George City; Washington County dba St. George Senior Citizen Center; Richard Watts Construction, Inc. dba Watts Construction Co., Inc.; and John Does I-X, Defendants and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070882-CA F I L E D (October 17, 2008) 2008 UT App 363

Fifth District, St. George Department, 050501129
The Honorable James L. Shumate

Attorneys: Brian L. Olson, St. George, for Appellant
Linette B. Hutton, Salt Lake City, for Appellee

Before Judges Bench, Davis, and Orme.

DAVIS, Judge:

Jule Kreyling appeals the District Court's Order granting St. George City's (the City) Motion for Summary Judgment. We affirm.

Some time in September or October 2003, Kreyling and his wife visited the St. George Senior Center for lunch. At the time, a new senior center was being built on the neighboring lots, and the area was an ongoing construction site. Rather than parking in the old center's parking lot, Kreyling parked on the street near the construction of the new center--in roughly the same spot he regularly parked when he visited the center--because it was "easier to get in and out." As Kreyling walked around his vehicle to open the door for his wife, he stepped onto the City's parking strip and into what Kreyling described as a hole covered by "leaves and stuff," including cobwebs. He had not noticed any hole on his previous visits to the senior center. Washington County, the land owner of both the old and new senior centers,

employed various contractors to construct the new center.[1] These contractors never requested or obtained a permit to dig on the City's park strip.

When filling out an incident report form on October 9, 2003, Kreyling indicated that he stepped into the hole on September 24 or 25, 2003. Then on October 13, 2003, he filled out another form, this time indicating that the date of the accident was October 10, 2003. Approximately two weeks later, after the area had been fully excavated, Kreyling and his son took pictures of the area in question.

Besides his testimony and photographs, Kreyling presented no evidence to support his claim. After a hearing on the matter, the trial court issued an order granting the City's Motion for Summary Judgment, ruling that "there is no probative evidence that [the City] created the defect or condition in the park strip, or knew or should have known of any defect or condition."

Kreyling contends that the trial court erroneously granted summary judgment. "Inasmuch as a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues, [an appellate court] reviews those conclusions for correctness, without according deference to the trial court's legal conclusions." Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989).[2] "[B]are contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact [that] will

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[1] Kreyling entered into a settlement agreement with Washington County and Watts Construction Co., Inc., which are not parties to this appeal.

[2] Kreyling contends that summary judgment was also improper because there was a factual dispute as to the existence and nature of the hole into which he purportedly fell. However, we conclude that this argument is not applicable given that the granting of summary judgment in favor of the City was premised on the insufficiency of evidence of constructive notice and time to remedy presented by Kreyling. Similarly, arguments by both parties with regard to governmental immunity, the special use doctrine, and the availability of alternative places for Kreyling to park his car are not applicable. We therefore do not analyze these issues. See State v. Allen, 839 P.2d 291, 303 (Utah 1992) ("All of these issues have been duly considered and determined to be without merit. In accord with the established principles of review applicable to all cases, civil and criminal, we decline to analyze and address in writing every issue or claim raised." (citing State v. Carter, 776 P.2d 886, 888-89 (Utah 1989))).

preclude the entry of summary judgment." Massey v. Utah Power & Light, 609 P.2d 937, 938 (Utah 1980).

"If a plaintiff alleges that a defendant negligently failed to remedy a dangerous condition that the defendant did not create," as Kreyling alleged in this case, "then evidence of notice and a reasonable time to remedy are required to survive a motion for summary judgment." Goebel v. Salt Lake City S. R.R. Co., 2004 UT 80, ¶ 22, 104 P.3d 1185 (discussing Schnuphase v. Storehouse Mkts., 918 P.2d 476 (Utah 1996)). If, however, a plaintiff claims "that the defendant actually created the dangerous condition," such evidence of notice and the lapse of a reasonable time for remedying are not required. Id. "The rationale behind these distinct rules is that it is reasonable to presume that a party has notice of conditions that the party itself creates, but it is not reasonable to presume notice of conditions that someone else creates[.]" Id. It is undisputed that the City had not created the dangerous condition, and the first rule therefore applies.

The parties similarly do not dispute that the City did not have actual notice of the dangerous condition. Instead, Kreyling argues that the City had constructive notice. A party is found to have constructive notice of a fact when that party "could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." Matheson v. Marbec Invs., LLC, 2007 UT App 363, ¶ 7, 173 P.3d 199 (internal quotation marks omitted); see also Meyer v. General Am. Corp., 569 P.2d 1094, 1097 (Utah 1977) ("Constructive notice can occur when circumstances arise that should put a reasonable person on guard so as to require further inquiry on his part."). In Goebel v. Salt Lake City Southern Railroad Co., 2004 UT 80, 104 P.3d 1185 "[the plaintiffs] tried to establish constructive notice by arguing that [the defendant] only lacked actual notice of the [dangerous condition] because [the defendant] failed to perform reasonable inspections of the [railroad] crossing." Id. ¶ 23. The plaintiffs "failed as a matter of law to establish constructive notice because reasonable minds could not differ regarding whether [the defendant] should have noticed the [dangerous condition]." Id.; see also Maloney v. Salt Lake City, 1 Utah 2d 72, 262 P.2d 281, 282 (1953) (affirming a directed verdict in favor of the defendant where the plaintiff "could not state that the sidewalk was in a defective condition before the accident, although he had previously used the sidewalk in question many times").

Kreyling claims that the City had "constructive, if not actual, notice that the hole was created" via ongoing construction outside the senior center. However, the evidence Kreyling relies upon is a two- to three-week-old photograph of

the construction site, which may or may not represent the condition of the park strip at the time Kreyling fell into the hole--whether on September 24 or 25, 2003, or on October 10, 2003. Kreyling also argues that the fact that he noticed cobwebs and leaves covering the hole before he stepped into it means that the hole must have "existed long enough for the gathering of debris and cobwebs" and that the City therefore had constructive notice. In short, Kreyling is essentially arguing that the City should have known about the hole because the hole was camouflaged by debris, leaves, and cobwebs that allegedly caused Kreyling to step into the hole in the first place. Such evidence is inadequate to show constructive notice.

Even assuming, arguendo, that Kreyling had presented sufficient evidence of constructive notice for the purposes of surviving summary judgment, Kreyling provided no evidence that the City had had a reasonable time to remedy the dangerous condition. A plaintiff must provide specific evidence of when the defendant had actual or constructive notice of the defect. See Fishbaugh v. Utah Power & Light, 969 P.2d 403, 408 (Utah 1998). "Without such evidence, it is impossible to determine whether the [defendant] failed to repair the [dangerous condition] within a reasonable time after receiving notice." Id. Thus, given that Kreyling cannot state with certainty when he fell into the hole, cf. id. at 408 n.5, let alone when the hole was made or how the hole appeared when the day the accident occurred (such that it should have been noticeable to a reasonable person), the trial court properly granted summary judgment in favor of the City.

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James Z. Davis, Judge

I CONCUR:

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Russell W. Bench, Judge

I CONCUR IN THE RESULT:

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Gregory K. Orme, Judge