No. 23-126732-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BRENDA ZARAGOZA

Plaintiff / Appellant

vs.

BOARD OF COMMISSIONERS OF THE COUNTY OF JOHNSON

Defendant / Appellee

REPLY BRIEF OF APPELLANT BRENDA ZARAGOZA

Appeal from the District Court of Johnson County, Kansas
Honorable Rhonda K. Mason, Judge
District Court Case No. 21CV03636

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ORAL ARGUMENT – 20 MINUTES

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Plaintiff Brenda Zaragoza respectfully requests this Court to reverse the District Court's grant of summary judgment in favor of Defendant Board of Commissioners of the County of Johnson ("Defendant") and to remand the case to the District Court. Further, Plaintiff requests that this Court make a finding that Defendant has failed to provide material evidence that Defendant's Library had a recreational use or purpose at or before the time of Plaintiff's injury. Below, Plaintiff responds to new material raised in Defendant's Brief of Appellee.

I. Defendant Has Failed to Offer Any Material Evidence of a Recreational Use or Purpose of its Library That Occurred At or Before the Time of Plaintiff's Injury.

Defendant makes two primary arguments to establish the applicability of the recreational use immunity found at K.S.A. 75-6104(o).[1] First, Defendant argues that traditional library functions are recreational. (Brief of Appellee, pp. 14-20) Second, Defendant argues that certain other activities would give its Library recreational use immunity. (*Id.* at pp. 21-22) But Defendant lacks evidence that its Library had a recreational use or purpose at or before the time of Plaintiff's injury.

Defendant has the burden of proving its affirmative defenses. *Golden v. Den-Mat Corp.*, 47 Kan.App.2d 450, 497, 276 P.3d 773, 803 (2012). A government entity asserting immunity under one of the KTCA exceptions must prove it is entitled to that protection at trial. *Soto v. City of Bonner Springs*, 291 Kan. 73, 78, 238 P.3d 278 (2010); *Jackson v. U.S.D. 259*, 268 Kan. 319, Syl. ¶ 3, 995 P.2d 844 (2000).

[1] K.S.A. 75-6104(o) is the version of the statute that applies to the time period of Ms. Zaragoza's injury. The statute has since been amended with an effective date of July 1, 2023. That amendment would not apply to this case, so the relevant citation will be used.

In its Order granting summary judgment, the District Court declined to hold that traditional library functions qualify for recreational use immunity. (R. I, 243-244) The District Court stated, "Putting aside whether borrowing books and movies can be considered recreation (the Court can see arguments either way, but will refrain from holding one way or the other), other activities that transpired within the walls of the Library more overtly fit the description of recreation." (R. I, 243) The District Court considered this a fact issue for the jury.

In an effort to distort traditional library functions into something recreational, Defendant argued that educational activities are recreational unless they are compulsory. (Brief of Appellee, p. 17) That is not the law and that is not what is stated in the case Defendant relied upon. Defendant contrived this false distinction by misconstruing the language in the *Jackson ex rel. Essien v. Unified Sch. Dist. No. 259*, 29 Kan.App.2d 826, 832, 31 P.3d 989 (2001).

The *Jackson* case distinguished between mandatory gym classes and other public, recreational uses of a gym. However, the Court was distinguishing between an educational function and a recreational function, not between mandatory and voluntary activities. For example, a college physical education class is voluntary (no one is required to go to college), but it would be educational. The recreational use immunity would not apply to the gym unless it is used for other non-incidental recreational purposes. If the college allows the public to regularly use the gym for pickup basketball games, that would be recreational. Courts look at the purpose of the activity, not whether it is compulsory.

Recreational immunity is not a blanket immunity that extends to every inch of a building. The Kansas Supreme Court recognized the danger of expanding recreational use immunity too broadly. The Court stated,

> The plaintiffs worry that such a determination will broaden a school's immunity to the point that any injury that takes place in a **library**, lecture hall, or cafeteria will not be compensable because school districts will be able to use K.S.A. 75–6104(o) as a complete defense. Each case brought pursuant to the KTCA must be evaluated on a case-by-case basis. Our holding today does not broaden the meaning of "open area," as used in K.S.A. 75–6104(o), beyond that of a school gymnasium.

Jackson ex rel. Essien v. Unified Sch. Dist. 259, Sedgwick Cnty., 268 Kan. 319, 325, 995 P.2d 844, 849 (2000)(emphasis added). The *Jackson* Court suggested but did not hold that a library in and of itself is not recreational.

Defendant argued that other library activities created recreational use immunity even if traditional library functions are not recreational. (Brief of Appellee, pp. 21-22) For factual support, Defendant relied on the affidavit of its employee and corporate representative, Christian Madrigal. (Brief of Appellee, pp. 21-22) (R. III, 47-49) The Madrigal affidavit, however, does not provide material evidence that Defendant's Library had a recreational use or purpose during the relevant time period. Defendant must prove that its library had a recreational use or purpose on or before the date of Plaintiff's injury. A post-injury recreational use or purpose will not create a retroactive immunity.

Defendant claimed without evidence that parts of its Library were constructed for recreational use. Defendant does not identify any material evidence in the record to support this claim. (Brief of Appellee, pp. 21-22). During

his January 6, 2023 testimony as corporate representative, Mr. Madrigal was conspicuously silent about any recreational activities at or near the time of Plaintiff's injury. (R. IV, 84-94) Mr. Madrigal denied that recreational activities occurred outside Defendant's Library on the date of Plaintiff's injury. (R. IV, 93) He was unable to testify that any recreational activities were taking place on the date of Plaintiff's injury. (R. IV, 94).

Seven days after the Madrigal deposition, Defendant filed its motion for summary judgment. Defendant relied on Mr. Madrigal's affidavit as the factual basis for its claim of recreational immunity. But, the affidavit does not identify any recreational activities or purpose that occurred on or before Plaintiff's injury. (R. III, 47-49) The affidavit does not attest that any recreational events or activities occurred before the date of the affidavit (January 12, 2023). The affidavit is silent about the purposes for which the library building was constructed. The Court can presume that if Mr. Madrigal had a factual basis to swear that Defendant's Library had a recreational use or purpose on or before July 18, 2020, he would have said so in his affidavit.

Defendant's discovery responses are contained in Volumes 5, 6, and 7 of the Record on Appeal. Defendant's responses do not provide any evidence of a recreational use or purpose of its Library on or before the date Plaintiff was injured.

Defendant objected to Plaintiff's use of an affidavit that contained excerpts from Defendant's website in which Defendant admits its Library's activities are educational. (Brief of Appellee, p. 15) Defendant's objection is not well placed.

First, the website content attached to the affidavit should have been produced in response to Plaintiff's discovery requesting documents that related to Defendant's affirmative defenses. (R. I, 97; R. VI, 9, 280) Defendant's website contains relevant admissions that the alleged activities at Defendant's Library were educational rather than recreational. The website, like the Madrigal affidavit and testimony, does state that any alleged recreational activities took place on or before Plaintiff's injury. Second, Defendant's expert relied on the same website in rendering her opinions in the case. (R. III, 312) On its website, Defendant admits the described activities at its Library are literacy focused and educational. (R. I, 137) The Court is free to consider Defendant's admissions regarding the educational purpose of its activities. (R. I, 137) Defendant's admissions on its website create a fact issue for the jury.

Defendant asks the Court to extend recreational use immunity to the parking lot where Plaintiff was injured. But, Defendant has not provided the Court with a single case where recreational use immunity was extended to adjacent non-recreational property when there was not a contemporaneous recreational use taking place on the recreational property. Unless recreational use immunity is limited to situations where the non-recreational property is integral to a contemporaneous recreational use, it will be virtually impossible for trial courts and juries to determine the proper scope of the immunity. We see this reasoning in *Poston v. Unified School District No. 387, Altoona-Midway, Wilson County,* 286 Kan. 809, 189, P.3d 517 (Kan. 2008) wherein the Kansas Supreme Court states,

> U.S.D. No. 387 is immune from liability under the recreational use exception of K.S.A.2007 Supp. 75–6104(o) for Poston's injury that occurred in the middle school's commons while recreational activities were in progress in the gymnasium.

Poston, 286 Kan. at 819, 189, P.3d at 524. Every case that has been located where a Kansas court held that non-recreational property was entitled to recreational use immunity, the non-recreational property was found to be integral to a contemporaneous recreational use at the adjacent recreational property.

Whether non-recreational property is integral to a recreational use depends upon the nature of the recreational use. Whether a use was integral is a fact issue for the jury. If there is no contemporaneous recreational activity at the time of an injury, adjacent property cannot be integral to a recreational use.

II. The District Court Erred by Finding That There was No Evidence of Gross and Wanton Negligence by Defendant.

The District Court disregarded evidence that Defendant was grossly and wantonly negligent. Defendant inaccurately claimed that its architect and corporate representative, Georgia Sizemore, did not actually admit she was personally and professionally aware of the danger that injured Plaintiff before the time Plaintiff was injured. (Brief of Appellee, pp. 38, 39).

But, Ms. Sizemore, admitted that Defendant received complaints about the lack of color differentiation in the curbs caused by the newness of the concrete. The individuals who complained noted that they were walking off the curb without realizing there was a step there. (R. IV, 17) Ms. Sizemore admitted she had the same problem as she was getting older. *Id.* She testified that the color of the curb and the concrete were the same and not conspicuous. *Id.* Defendant applied

yellow paint to the curbs near the building to prevent injuries, but Ms. Sizemore did not know why Defendant did not apply paint to the curbs in the parking lot a few feet away. (R. IV, 19) She testified that the slope where someone would step into the parking lot as Plaintiff did might not be conspicuous. *Id.* She admitted that the yellow paint Defendant used on the curbs to fix the issue near the building would signal to a pedestrian that there was a height change. (R. IV, 18) cf. (R.I, She admitted that she would expect somebody leaving the library to cross the first parking spot in the place where Plaintiff crossed. (R. IV, 18) She also admitted that in certain circumstances, a patron would not have a clear view of the slope in the first parking space where Plaintiff fell. (R. IV, 18-19). This is evidence that Defendant had actual knowledge of the danger.

Defendant also claims in its brief that there is no record of anyone else falling where Plaintiff was injured. (Brief of Appellee, p. 4) This claim is misleading at best because Defendant admits that it did not keep records of falls unless an injury was reported. (R. V, 4)

Gross and wanton negligence does not require a willful act on the part of the tortfeasor, just a realization of danger and a reckless disregard and indifference for the consequences. In *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 392, 836 P.2d 1222, 1225 (1992), this Court explained,

> A wanton act is something more than ordinary negligence but less than a willful act. It indicates a realization of the imminence of danger and a reckless disregard and indifference for the consequences. Acts of omission can be wanton since reckless disregard and indifference are characterized by failure to act when action is necessary to prevent injury.

Gruhin, 17 Kan.App.2d at 392, 836 P.2d at 1225. In this case, the evidence of gross and wanton negligence is stronger than the evidence that led this Court to remand *Gruhin* to the trial court. The *Gruhin* defendant actually made an effort to mark the area of danger that led to the plaintiff's injury. The Court ruled it was a jury issue whether the *Gruhin* defendant was grossly and wantonly negligent. In this case, Defendant did not make any effort to mark the area of danger even though Defendant was aware of the danger. This is a fact issue for the jury.

III. The District Court Erred by Refusing to Consider Plaintiff's Evidence of Defendant's Gross and Wanton Negligence.

The District Court also erred when it held that Plaintiff's Petition was not sufficiently broad to encompass a claim of gross and wanton negligence and when it denied Plaintiff's Motion For Leave to File First Amended Petition. Defendant argues that Plaintiff's motion to amend is an admission that the original Petition was insufficient to plead gross and wanton negligence. (Brief of Appellee, p. 35) Plaintiff's motion to amend demonstrates the falsity of Defendant's claim:

> The facts as alleged [in the Petition] already included the essential elements of wantonness when Plaintiff alleged that Defendant had knowledge that there were dangerous conditions involving the non-distinct curbs in the parking lot, the Board refused to fix them all or attempt to barricade them where possible, and Plaintiff fell as a result. ¶¶ 18-20. We now know that the Board fixed the issue in one or more locations, but ignored its parking lot used by its patrons.

(R. III, 179)(bracketed material added for context).

Defendant argues that Plaintiff's motion to amend was untimely. However, the timing of Plaintiff's motion to amend was a direct result of Defendant's failure to plead recreational use immunity and to respond fully to discovery about its

defenses. Below is a chronological outline of what Defendant pled, the discovery responses it provided, and the relevant District Court deadlines.

September 2, 2021 – Defendant filed its answer including the following affirmative defense: "3. Plaintiffs' claims are barred by the provisions of the Kansas Tort Claims Act, including K.S.A. 75-6104 and limited by the provisions of K.S.A. 75-6105." (R. I, 12) This is the only affirmative defense Defendant pled that was based on the Kansas Tort Claims Act. At the time of Defendant's answer, K.S.A. 75-6104 contained 24 unique situations in which a government entity's liability would be limited. Only one of those related to recreational use. Defendant never stated its Library was subject to recreational use immunity. Defendant's answer did not provide notice of its defense.

October 4, 2021 – Defendant served responses to Plaintiff's opening discovery. Relevant questions and responses included:

> 20. Identify all persons who have knowledge of the facts supporting each defense or affirmative defense in your pleadings.
>
> **ANSWER:**
> 1. **Plaintiff Brenda Zaragoza**
> 2. **Bet Mercer,**
> 3. **Cherri Germany,**
> 4. **Christian Madrigal**
> 5. **Clark Enersen**
> 6. **Georgia Sizemore**
> 7. **Juan Lopez-Tamez**
>
> **Defendant reserves the right to supplement this response as discovery unfolds.**

(R. IV, 280)

The only witness who provided any information about the recreational use immunity was Christian Madrigal. Defense counsel did not permit Ms. Sizemore

to testify about the Kansas Tort Claims Act defenses other than in relation to the missing plant that would have prevented Plaintiff's injury. (R. IV, 21-22)

> 21. Identify all documents and other tangible things that support each defense or affirmative defense made in your Answer to Plaintiff's Petition and identify the person who has each document.
>
> **ANSWER: Pursuant to K.S.A. 60-233(d), see the documents produced in response to RFPs 5, 6, 8, 10, 11, 14, 15, 16, 17, and 26. Defendant reserves the right to supplement this response as discovery unfolds.**

(R. VI, 8)

In Defendant's responses to Requests for Production of Documents number 5, 6, 8, 10, 11, 14, 15, 16, 17, and 26, Defendant identified the documents found at (R. VI, 12-273). Defendant supplemented this response on July 14, 2023 (R. VI, 285-349) and again on December 16, 2022 (R. VII, 353-490). None of the documents produced relate to a claim of a recreational use of Defendant's Library or provide evidence of such a recreational use.

May 10, 2022: The District Court entered a Case Management Order. May 20, 2022 was the deadline for amending pleadings. Discovery was set to close on December 16, 2022.

July 14, 2022: Defendant provided supplemental responses to Request for Production of Documents 27 and 28 on July 14, 2022 (R. VI, 285-349), but no evidence of recreational use.

November 16, 2022: Plaintiff sent additional discovery to Defendant including Requests for Admissions. (*See*, R. V, 3-9)

December 14 and 16, 2022: The parties agreed to these dates for depositions of corporate representatives and other defense witnesses. These dates were postponed to January 5 and 6, 2023 by agreement of the parties due to the illness of one of Defendant's witnesses. (R. II, 47)

December 16, 2022: Defendant filed its responses to Plaintiff's discovery including requests for admission. Discovery closed. (R.V, 3; R.VI, 350; R.VII, 1 & 4)

> 16. Admit that on July 18, 2020, the Premises had yellow paint on the curbs in the locations represented in **Exhibit 1**.
>
> **ANSWER: Admitted, although the yellow paint depicted in Exhibit 1 denotes a no-parking zone, not that a warning as to the existence of a curb or as to the slope of the walking space.**

(R. V, 5)

Defendant also admitted that it expected patrons of its Library to park next to the sewer where Plaintiff fell, that it could have put a warning at that location, but that no warning was in place on the date of Plaintiff's fall. *See*, Requests for Admissions 13, 14, 15, 17, and 18. (R. V, 3-7)

Defendant produced additional documents located at R. VII, 4-238. None of these documents relate to a recreational use of the property.

January 5, 2023: Defendant's architect and corporate representative, Georgia Sizemore, testified. Defense counsel objected to questioning Sizemore about the Kansas Tort Claims Act defense except as related to "planter design" and deferred other questions to Christian Madrigal. (R. IV, 21-22) Ms. Sizemore admitted that

the curbs next to Defendant's Library building were painted because patrons complained that they had difficulty with the step down from the curb to the street because the color of the concrete was too uniform. (R. IV, 17) Ms. Sizemore admitted she understood the concern and had the same difficulty. *Id.* She admitted she did not know why the curb in the parking lot was not painted similarly or why the bush called for by the plans was not put in place. (R. IV, 19 and 23)

January 6, 2023: Defendant's corporate representative Christian Madrigal testified. When asked about the Kansas Tort Claims Act defense, he described what he claimed were recreational uses of the property for the first time. (R. IV, 93) On further questioning, he could not testify that Ms. Zaragoza was engaged in a recreational use at the time of her injury or that there was a recreational use of the parking lot. (R. IV, 93-94) He did not testify to any recreational activities occurring on the date of Plaintiff's fall. *Id.* at 94. He could not testify whether there was any recreational activity at Defendant's Library at the time of Plaintiff's injury. *Id.* He never identified any recreational activities that had occurred at Defendant's Library on or before the date of Plaintiff's fall.

January 13, 2023: Defendant filed its Motion for Summary Judgment which included an affidavit of Christian Madrigal dated January 12, 2023. (R. III, 6 and 47-49) This was the first time Defendant explicitly stated it was alleging a recreational use immunity. The Madrigal affidavit was dated nearly 1 month after the close of discovery. Like the Madrigal deposition, the Madrigal affidavit does not identify any recreational use of Defendant's Library taking place on or before

the date of Plaintiff's injury, or on any other date prior to the date of the affidavit. (R. III, 47-49)

February 3, 2023: Plaintiff filed its Motion For Leave to File First Amended Petition. Contrary to the claims of Defendant in Appellee's Brief, Plaintiff was seeking leave to amend the Petition to state facts discovered on January 5, 2023. Those facts supported Plaintiff's original allegations that Defendant was aware of a dangerous condition and failed and refused to correct it. As Plaintiff explained in her Motion, Plaintiff was not changing her tactics or theories and there was no prejudice to Defendant. Defendant had concealed the true nature of its affirmative defense and was not forthcoming when responding to discovery. The new evidence obtained by Plaintiff had always been in Defendant's possession. Defendant simply withheld the evidence until after the close of discovery and then complained that Plaintiff wanted to use that evidence to rebut an affirmative defense that it had not explicitly pled. (R. III, 172)

Volumes 5, 6 and 7 of the record contains Defendant's discovery responses. Again, none of the responses reference recreational use immunity or provide evidence of a recreational use or purpose at or before the time of Plaintiff's injury.

Defendant denied and concealed its prior knowledge of the dangerous condition that harmed Plaintiff until after the close of discovery. Ms. Sizemore testified that she knew the curbs at and around Defendant's Library were dangerous, but only the curbs near the building were painted. Defendant's corporate representative could not give a reason why the curb where Plaintiff fell had not been painted. (R. IV, 19) Defendant claimed in its affirmative defenses that

the condition that caused Plaintiff to fall was open and obvious. Defendant considered the condition dangerous enough that it corrected a similar condition a few yards away from the site of Plaintiff's injury. (*See,* Brief of Appellee, p. 38 (photograph)) At the same time, Defendant argues it did not have knowledge of a dangerous condition. Defendant's arguments are internally inconsistent.

Defendant argued in its brief its failure to paint the parking lot curbs did not harm Plaintiff because she knew she was stepping down. Defendant failed to tell the Court that Plaintiff testified that she could not discern the slope that caused her to fall. (R. III, 237), or that its own corporate representative acknowledged that the slope could be inconspicuous. (R. IV, 17). Plaintiff's expert also opined that painting the curb yellow would have drawn Plaintiff's attention so she could take appropriate actions. (R. I, 91-92).

Defendant argues that it did not need to paint the parking lot curbs because there were fewer individuals walking on the main sidewalk to the parking lot than there were using the front curb of the building. (Brief of Appellee, pp. 10, 45) Of course, Defendant produced no evidence of the comparative pedestrian traffic at the two locations. To the contrary, Defendant admitted it did not know the number of people who "walked the same path from the library building to the location where Ms. Zaragoza fell in the 2 years before the incident at the premises." (R. V, 4) The District Court, without the benefit of evidence, assumed that the area where Plaintiff fell was a lower traffic area than where the curbs had been painted. (R. I, 246) It is unclear how the District Court could reach this conclusion when

Defendant admitted it did not have any information about pedestrian traffic at the location.

The District Court's ruling rewards the Defendant for not clearly pleading its recreational use affirmative defense, and for not fully responding to discovery that sought factual information about its affirmative defenses. The District Court's ruling sends the message that a defendant can avoid liability by not clearly pleading its defenses and by withholding discovery.

CONCLUSION

For the above reasons, Plaintiff requests the Court reverse the District Courts grant of summary judgment and remand the case for additional discovery and a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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