8-20-2012

Gagnon v. Western Bldg. Maintenance, Inc. Appellant's Brief Dckt. 39816

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY GAGNON AND JEFFREY GAGNON,	:	
	:	**DOCKET NO. 39816-2012**
Plaintiffs/Appellants	:	
	:	
vs.	:	
	:	
WESTERN BUILDING MAINTENANCE, INC.,	:	
	:	
and	:	
	;	
JOHN AND JANE DOES A-H	:	
	:	
Defendants/Respondents.	:	
	:	

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OPENING BRIEF OF APPELLANTS GAGNON

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Appeal from the District Court of the First Judicial District

****

The Honorable John Patrick Luster Presiding

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Whether the district court erred in granting summary judgment when Western Building Maintenance, Inc., under a comprehensive and exclusive contract with a property owner to maintain its properties, assumed the duty of the property owner to safely maintain its parking lot areas for invitees?

NATURE OF CASE

This is an appeal from the entry of summary judgment in a civil suit brought by Appellants Tracy and Jeffrey Gagnon (hereafter Gagnons) for personal injuries suffered when Tracy Gagnon (hereafter Gagnon) slipped and fell on 'black ice' in the designated parking lot area of her employer, Wells Fargo Bank (hereafter Wells Fargo). Gagnon suffered a significant closed head injury as a result of her slip and fall. At the time of Gagnon's accident the Respondent Western Building Maintenance, Inc., (hereafter Western), under a comprehensive and exclusive maintenance contract, had assumed Wells Fargo's property owner's duty to safely maintain all of its 76 statewide and Spokane, Washington, business properties. The Gagnons filed suit against Western seeking damages for Tracy Gagnon's severe and debilitating injuries and Jeffrey Gagnon's loss of consortium. R. pp. 1-3.

COURSE OF PROCEEDINGS

The Gagnons filed suit in the First Judicial District, Kootenai County, Idaho, on December 4, 2009. R. pp. 1-3. Western filed its answer on July 7, 2011. R. pp. 34-36. Western took the deposition of Gagnon and filed a motion for summary judgment with affidavits from a representative of Western and its attorney. R. pp. 46-47. Gagnon responded to the motion with an affidavit from a representative of Wells Fargo. R. pp. 117-146. The hearing on the motion for summary judgment was held on January 24, 2012. The district court filed its memorandum decision and order, and Judgment, on February 17, 2012. R. pp. 217-222. Gagnon timely filed her appeal to this Court on March 16, 2012. R. pp. 227-228.

STATEMENT OF FACTS

On November 1, 2004, Wells Fargo Bank entered into a comprehensive and exclusive property maintenance agreement with Western, covering all of the banks seventy-six business property locations in Idaho and Spokane, Washington. Western commenced maintenance of Wells Fargo's bank properties on December 1, 2004. R. pp. 119-146. The maintenance agreement was in force in December, 2007. R. pp. 117-118. It was a comprehensive and exclusive property maintenance agreement. R. pp. 117-149. As part of the contract, Western and Wells Fargo agreed that Western would maintain insurance to protect Western from liability to third parties and that this insurance was primary to and noncontributory with any insurance obtained by Wells Fargo. R. p. 121, ¶¶ 7 C and E.

On the morning of December 5, 2007, Tracy Gagnon, a Wells Fargo employee, arrived for work at the bank's property in Hayden, Idaho. It was a bright and sunshiny morning when she arrived at the Wells Fargo offices. All of that changed in a heartbeat. When she parked her car in Wells Fargo's designated parking area it did not appear to be icy. R. p. 69. She was aware that the Western maintained the parking lot in the winter. R. p. 71. When she exited her car she slipped on 'black ice' and struck her head. She suffered life changing and debilitating injuries. R. p. 230. Jeffrey Gagnon suffered the loss of consortium as a result of Tracy's injuries. R. p. 230. When the emergency personnel arrived on the scene they had to put down sand before they could get to her because the parking lot was extremely slippery. R. p. 70, page 19, l. 18-23. She was placed in an ambulance and taken for treatment. R. p. 70, p. 20, l. 9-10. Gagnon filed a worker's compensation claim as a result of her accident and injuries. R. p. 71, at p.23, l. 21-25; p. 72, at p. 51, l. 1-4.

ISSUE

The district court erred in granting summary judgment when Western Building Maintenance, Inc., under a comprehensive and exclusive contract with a property owner to maintain its properties, assumed the duty of the property owner to safely maintain its parking lot areas for invitees?

STANDARD OF REVIEW

When reviewing an order for summary judgment, the Court applies the same standard of review as was used by the trial court in ruling on the motion for summary judgment. Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits 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. I.R.C.P. 56 (c). If there is no genuine issue of material fact, only a question of law remains, over which the Court exercises free review. It is axiomatic that upon a motion for summary judgment the non-moving party may not rely upon its pleadings, but must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of disputed fact. The Court liberally construes all disputed facts in favor of the nonmoving party, and all reasonable inferences drawn from the record will be drawn in favor of the nonmoving party. If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. *Taylor v. AIA Services Corp.*, 151 Idaho 552, 261 P.3d 829 (2011). In ruling on a motion for summary judgment a trial court is not to weigh evidence or resolve controverted factual issues. *American Land Title Company v. Isaak,* 105 Idaho 600, 601, 671 P.2d 1063 (1983).

ARGUMENT

The elements of a cause of action based upon negligence can be summarized as (1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and actual loss or damage. *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 583, 548 P.2d 80, 83 (1976).

No liability exists under the law of torts unless the person from whom relief is sought owed a duty to the allegedly injured person. *Vickers v. Hanover Constr. Co., Inc.*, 125 Idaho, 835, 875 P.2d 929, 932 (1994). One owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999).

Factors considered in determining whether a duty existed are:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. *Baccus v. AmeriPride Services, Inc.*, 145 Idaho 346, 179 P.3d 309 (2008).

Western's duty was to timely inspect and clear Wells Fargo's parking lot area of ice. Depending upon the weather, the inspection for ice, and clearing, could be required to occur on a 24 hour, 7 day per week basis. R. p. 135, ¶¶ 2 (d) (f) and ¶ 4. The inspection for, and clearing of, ice is clearly a safety-related undertaking. Western assumed the property owner's duty to inspect for, and clear, ice and Gagnon's fall is surely the primary injury that ice melt was intended to prevent. Gagnon's slip, fall, and injury were obviously foreseeable. Any burden

asserted by Western that would arise as a result of this Court holding it had a duty to Gagnon under the circumstances is nonexistent. Commercial contractors are just as capable as property owners of protecting themselves by purchasing insurance, or making other protective financial arrangements, and spreading the cost among all of their customers. See *Gazo v. City of Stamford*, 255 Conn. 245 (2001). The contract provided that Western was required to obtain and maintain insurance coverage for its liability to third parties. R. p. 121, ¶ 7 C. The contract required:

> C. Commercial General Liability Insurance including coverage for Products, Completed Operations and Blanket Contractual Liability, with a minimum Combined Bodily Injury and Property Damage Coverage Limit of $2,000,000 per occurrence, unless higher coverage is agreed to as specified below: R. p. 121, ¶ 7 (C).

Western's obtaining of liability insurance was a bargained for contractual obligation. The insurance coverage is primary to, and noncontributory with, any insurance obtained by Wells Fargo. As a result of her accident and injuries, Gagnon filed a worker's compensation claim for benefits from Wells Fargo. R. p. 121, ¶ 7 (E); R. p. 72, p. 50, l. 21-p. 51, l. 1-4. Because of Western's liability to Gagnon, under Idaho's workers' compensation statutes, Wells Fargo has a subrogation right pursuant to which it is entitled to be reimbursed all the worker's compensation benefits it pays to Gagnon, including benefits paid to her for temporary total disability (lost income), permanent physical impairment (physical injury), and permanent partial or permanent total disability (future lost earning capacity). I.C. § 72-223 (3).

Foreseeability is a flexible and varying concept depending upon the circumstances of each case. Where the degree of harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely where the degree of harm is minor and the burden of preventing such injury is high, a higher degree of foreseeability may be required. Foreseeability is not measured by just what is more probable than not, but also includes whatever

result is likely enough in the setting of modern life that a reasonable prudent person would take such into account in guiding reasonable conduct. *Id.*; *Turpen v. Granieri,* 133 Idaho 244, 985 P.2d 669 (1999). Gagnon's slip, fall, and injuries were obviously foreseeable.

Ordinarily there is no affirmative duty to act, assist, or protect someone else. *Coghlan*, 133 Idaho at 399, 987 P.2d at 311. Such an affirmative duty arises only when a special relationship exists between the parties. Whether a special relationship exists is determined by evaluating the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection. *Baccus*, 145 Idaho at 350; W. Prosser, Law of Torts 333 (3d ed. 1964).

While ordinarily the breach of contract is not a tort, a contract may create the circumstances for the commission of a tort. *Just's Inc. v. Arrigton Constr. Co.,* 99 Idaho 462, 468, 583 P.2d 997, 1003 (1978). The negligent breach or non-performance of a contract will not sustain an action sounding in tort, in the absence of a liability imposed by law independent of that arising out of the contract itself. *Steiner Corp. v. American Dist. Telegraph,* 106 Idaho 787, 790, 683 P.2d 435, 438 (1984).

The resolution of this case requires a factual determination by a jury of whether Western was contractually obligated to inspect for, and clear, ice on the Wells Fargo's parking lot area pavement. In other words, did Western breach its duty to Gagnon by failing to perform its duty to inspect for, and clear, ice from the parking lot in a timely manner?

Since this case requires the factual determination of whether Western had an affirmative duty, the issue of whether a special relationship existed between Gagnon and Western arises. *Baccus*, 145 Idaho 346 at 352. This is the first time counsel has been able to locate that this Court has had the opportunity to consider this issue in the context of a comprehensive and

exclusive property maintenance agreement and also to consider the adoption of Restatement (Second) of Torts § 324A. *See Baccus*, supra.

An invitee is a person who enters upon the land for a purpose connected with the business conducted there. *Wilson v. Bogert,* 81 Idaho 535, 347 (1959). Wells Fargo owed a duty of care to Gagnon, an employee coming to work at the bank's office and parking in its designated parking lot area. She was an invitee. The law has adopted a protective view toward invitees. An invitee is entitled to assume that the property has been made safe for him or her to enter. The property owner has not only a duty to disclose dangerous conditions, but also the duty to exercise reasonable care to keep the premises safe for an invitee. See *Feeny v. Hanson*, 84 Idaho 236, 371 P.2d 15 (1962).

One who is required by law to use reasonable care for the safety of an invitee coming onto its property has a duty to inspect the premises for, and remove, ice and snow for their safety. The duty to inspect for and remove ice is a continuing duty. See *Kostidis v. General Cinema Corp. of Indiana,* 754 N.E.2d 563 (2001); *Get-N-Go, Inc. v. Markins,* 544 N.E.2d 484, 487 (Ind. 1989.)

A property maintenance company performing its duties to the property owner under a comprehensive and exclusive maintenance contract that requires comprehensive property maintenance, inspection, and performance duties, assumes the duty of the property owner to invitees. *Palka v. Servicemaster Mgt. Servs. Corp.*, 611 N.Y.S.2d 817, 83 N.Y.2d 579 (1994). A property maintenance company, performing comprehensive and exclusive obligations, contractually assumes the property owner's duty of care to the plaintiff, and stands in the property owners shoes, with respect to liability to the plaintiff. *Gazo v. City of Stamford,* 255

Conn. 245 (2001). Western, pursuant to its contract with Wells Fargo, purchased insurance to protect from third party liability claims. R. p. 121, ¶ 7. C.

Under a comprehensive and exclusive property maintenance contact to maintain a property owner's property, a property maintenance company is subject to a third person for physical harm resulting from its failure to exercise reasonable care in performing it's obligations if (1) it fails to exercise reasonable care increases the risk of such harm, or (2) it has undertaken to perform a duty owed by the property owner to the third person, or (3) the harm is suffered because of the reliance of the property owner or the third person upon the undertaking. See Restatement (Second) of Torts § 324A; *See Baccus v. Ameripride Services, Inc.*, 145 Idaho 346, 179 P.3d 309 (2008); *Palka v. Servicemaster Mgt. Servs. Corp.*, 611 N.Y.S.2d 817, 83 N.Y.2d 579 (1994). Whether a duty was owed is a legal question over which the Court exercises free review. *Id.; See* Restatement (Second) of Torts § 324A.

The Restatement (Second) of Torts § 324A provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) His failure to exercise reasonable care increases the risk of such harm, or
> (b) He has undertaken to perform a duty owed by the other to the third person, or
> (c) The harm is suffered because of reliance of the other or the third person upon the undertaking. *See Baccus v. Ameripride Services, Inc.,* 145 Idaho 346, 179 P.3d 309 (2008).

Case law, exemplified by a line of cases in the state of New York, sets forth the situations in which a contractor is to be found to owe a duty to a third party in tort as detailed in *Espinal v. Melville Snow Contractors, Inc.,* 98 N.Y.2d 136 (2002).

In *Espinal*, the plaintiff sued Melville Snow Contractors asserting that her fall was due to an icy condition left by it while performing its obligation, under a limited property maintenance

contract, to plow snow from her employer's parking lot area. The contract only required Melville Snow Contractors to plow snow when accumulations exceeded three (3) inches. Melville had no affirmative duty to identify or address icy conditions. The contract duty of Melville was very limited. It also specifically required that the identification of icy conditions was the responsibility of the property owner, or property manager. When the property owner/property manager inspected the property and identified icy conditions, it was the duty of the owner/property manager to decide whether the identified icy condition warranted the application of salt and sand. It contractually retained these responsibilities. Melville Snow Contractors was only, after being told to do so, to spread a mixture of salt and sand on the property. Melville's duty to clear ice did not arise until after it was directed to do so at the property owner's directive.

The court in *Espinal* undertook a review of the cases pertaining to tort liability based upon contractual obligations. It determined that the cases of *H.R. Moch Co. v. Rensselaer Water Co.,* 247 N.Y. 160 (1928), *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.,* 76 N.Y.2d 220 (1990), and *Palka v. Servicemaster Mgt. Servs. Corp.,* 83 N.Y.2d 579 (1994) "help light the way" in identifying contractual situations where tort liability to third persons was the issue. The *Espinal* court set forth the situations in which a contractor may be liable in tort. The situations are:

1. Where the contracting party fails to exercise reasonable care in the performance of his or her duties and thereby launches a force or instrument of harm;
2. Where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and
3. Where the contracting party has entirely displaced the other party's duty to maintain the premises safely. *Espinal v. Melville Snow Contractors, Inc.,* 98 N.Y.2d 136 (2002).

The *Espinal* court held that, while a contractual obligation will generally not give rise to tort liability in favor of a third party properly, these three exceptions to that general rule

were firmly rooted in case law. It also stated that these exceptions are consistent with principals of tort liability that are generally recognized by other authorities such as the Restatement (Second) of Torts § 324A. *Espinal* at page 140.

The district court in granting Western's motion for summary judgment, cited the New York case, *Anderson v. Jefferson-Utica Group, Inc.,* supra., as authority. However the court's decision only referenced *Anderson* as standing for the first exception; "where a third party contractor creates or exacerbates a dangerous condition." R. p. 220.

In *Anderson* the New York court undertook a further analysis of liability in tort of a snow plowing contractor. The decision was based upon its consideration of the following cases and their cited authorities.

Torella v. Benderson Development Co., Inc., 307 A.D.2d 727 (2003).

The property owner entered into a contract with a contractor, Mooney, to provide services. It held that Mooney did not launch a force or instrument of harm, and plaintiff did not detrimentally rely on did not rely on contractor Mooney. In discussing the third exception, comprehensive and exclusive maintenance agreement, the court held that since the property owner monitored the performance of the snow plowing contract and retained the right to request additional services, that the contract was not a comprehensive and exclusive contract of the nature required and cited *Espinal* as authority.

Engel v. Eichler, 290 A.D.2d 477 (2002).

The plaintiff was entering a parked vehicle when another vehicle driven by Eichler hit a patch of ice in a parking lot owned by the defendant hospital. Eichler lost control of his vehicle and it struck another parked vehicle, and that vehicle in turn struck the vehicle the plaintiff was entering. The defendant contractor Vita Construction Company contracted with the hospital to

plow snow and to salt and sand its parking lots. The court determined, without describing the specificities of Vita's contract with the hospital, that the contract did not constitute a comprehensive and exclusive property maintenance obligation. Accordingly it dismissed the plaintiff's claim against Vita, but the hospital's claim against Vita based upon inadequate performance of its contractual obligations was not dismissed.

Kozak v. Broadway Joe's, 296 A.D.2d 683 (2002).

The plaintiff while walking through a parking lot slipped, fell, and hit her head on the pavement. The court dismissed the claim against the snow removal contractor because it did not have a comprehensive and exclusive property maintenance obligation. It cited *Espinal* and *Palka v. Servicemaster Mgt. Servs. Corp.* 611 N.Y.S.2d 817, 83 N.Y.2 579 (1994), as authority.

Palka v. Servicemaster Mgt. Servs. Corp., 611 N.Y.S. 2d 817, 83 N.Y.2d 579 (1994).

In *Palka*, a nurse employed by a hospital was injured when a fan fell from a wall. Servicemaster was under contract with the hospital to maintain the hospital premises. The Court held that Servicemaster was liable to Palka for personal injuries suffered when Servicemaster neglected, or failed, to perform its contractual maintenance obligations with the hospital. Sevicemaster's liability for failing to perform its contractual obligations to the hospital were held to extend to, and assume, the hospital's duties to invitees. Servicemaster also contracted to indemnify and hold the hospital harmless as to any liability arising from its acts or omissions. The Court held that persons utilizing the hospital's premises, like Gagnon in this case, had a reasonable expectation, and are entitled to rely, that someone is in charge of and responsible for basic safety maintenance. Servicemaster's contract placed the total responsibility of safely maintaining the premises for invitees on Servicemaster. The Court held that Servicemaster undertook a duty, and breached that duty, to maintain the premises safely. Palka's injuries were

the result of the negligent performance, or nonperformance, of Servicemaster's duty under its comprehensive and exclusive maintenance contract. Because of the comprehensive and exclusive nature of Servicemaster's contract to maintain the property owner's property, Servicemaster was liable in tort for the injuries suffered by the hospital's Palka as a result of Servicemaster's negligent performance, or nonperformance of its contractual duties.

Borden v. Wilmorite, Inc., 706 N.Y.S.2d 230, 271 A.D.2d 864 (2000).

Plaintiff slipped on 'black ice' in a parking lot. The court confirmed that a snow removal contractor only owes a duty of reasonable care to users of the surface if it has an exclusive property management obligation. The snow plow contractor, Santoro, was hired by a property management company, Genesee. Under the contract (1) Genesee made the decision as to when each plowing would commence and employees of Genesee also engaged in snow removal activities, and (2) Genesee had the sole responsibility for sanding the premises as needed. The court held that Santoro did not have an exclusive maintenance obligation. It cited *Palka* as authority.

The *Anderson* court's decision held that a limited snow plowing duty was not the type of "comprehensive and exclusive" property maintenance obligation contemplated in *Palka* and thus the contractor did not assume the property owner's duty to invitees. The court held that because the property owner retained the duty to identify icy conditions requiring sand and salt and that it was its responsibility to direct Melville to apply salt and sand that it retained its landowner's duty to inspect and safely maintain the premises.

The Western-Wells Fargo property maintenance contract falls squarely within the third exception to the general rule; a comprehensive and exclusive maintenance contract. The contract obligated Western to maintain Wells Fargo's buildings and parking lots at seventy (70) locations

throughout Idaho and at six (6) locations in the Spokane, Washington area. R. p. 138-141. The scope of Western's property maintenance contract, which even required Western to purchase and maintain liability insurance for claims made by third parties and to fully and completely protect Wells Fargo and required coverage for Wells Fargo under any insurance coverage that Western obtained, placed Western in the third category above (displacing the property owner's duty to maintain premises safely) and within the scope of Restatement (Second) of Torts § 324A, which this Court should adopt. Western undertook to fulfill all aspects of Wells Fargo's duty to maintain its premises in Idaho and Spokane, Washington, and to purchase and maintain, at its own cost, comprehensive liability coverage protecting Wells Fargo from all claims arising out of Western's negligent performance, including claims to third parties.

When a property maintenance contractor undertakes the obligation to perform the duty of the property owner to maintain the property owner's property safely for third person invitees, under a contract displacing the property owner's duty to invitees through a comprehensive and exclusive maintenance obligation, the property management contractor stands in the property owner's shoes. The duty owed to third party invitees by the property owner becomes the contractor's duty. Whether the property maintenance contractor breached its assumed duty to a third party invitee is a question of fact-- did the property maintenance contractor adequately perform its contractual obligations and meet its duty to the third party? The existence of a question of fact precludes the entry of summary judgment. I.R.C.P. 56 (c); *Taylor v. AIA Services Corp.,* 151 Idaho 552, 261 P.3d 829 (2011); *American Land Title Company v. Isaak,* 105 Idaho 600, 601, 671 P.2d 1063 (1983). *See also Engel v. Eichler,* 290 A.D. 477 (New York 2002).

Western is not a small, narrowly focused, business like Mr. Kujawa had in *Anderson.* Western's contractual obligations are akin to those of Jefferson-Utica Group, Inc. The Wells Fargo-Western contract reflects the fact that Western is a large and professional full-service property maintenance company in the business of taking over, and being responsible for, the property owner's maintenance obligations. When it entered into the contract with Wells Fargo, Western had been performing property maintenance for property owners for 23 years. R. p. 143, ¶ 17. In addition to the 76 locations that Western agreed to comprehensively maintain for Wells Fargo, it also maintained twenty-three (23) other bank's facilities in north Idaho and an additional one hundred twenty-one (121) non-bank commercial/industrial sites in southwest, south central, and north Idaho. R. p. 143, ¶¶ 18 and 19. Also, in addition to utilizing subcontractors such as Idaho Cleaning Maintenance, Service Master, and Fireball Cleaning, Western employed 4 executives, 6 administrators, 9 supervisors, 25 technicians, and 120 janitors. R. p. 143.

Wells Fargo is in the business of operating a bank and not the business of property maintenance. Western is in the business of property maintenance and not in the business of operating a bank. The property maintenance contract required that the "standards of maintenance be the highest at all times." R. p. 126, ¶ 1. The comprehensive nature of the duty assumed by Western is reflected by the fact that the contract is expressly stated to be "a guide for, rather than a limitation to, the services required to effectively maintain the Premises." R. p. 126. The minimum performance specifications set forth in the contract, which were a guide to, rather than a limitation to, extends over eleven pages in the contract. R. p. 126-136. Western was obviously placed in the shoes of Wells Fargo regarding the duty to maintain the bank's properties in a safe manner.

Under its contract with Wells Fargo, Western assumed all of Wells Fargo's property maintenance responsibilities. It is clear from the comprehensive scope of Western's duties to Wells Fargo, that if the bank did not utilize the professional services of Western that it would utilize the services of a different property maintenance company to fully and completely maintain its property locations throughout Idaho in a safe condition. Western was required to use its own employees, agents, and subcontractors, under its "exclusive and complete supervision and control," to perform maintenance at all of Wells Fargo's properties. R. p. 121. Western was also obligated to maintain insurance coverage, without limitation, for liability claims made by third parties arising out of its performance of its contractual obligations. R. p. 121, ¶ 7 (C). Western's insurance was primary to and noncontributory with, any insurance obtained by Wells Fargo. It is also required that Wells Fargo be a named insured on all policies of insurance, including umbrella or excess policies, with respect to all work performed for by Western at Wells Fargo properties. R. p. 121 ¶ 7 (E).

Since the duty to third person invitees on Wells Fargo's property was contractually assumed by Western, a question of fact exists as to whether Western adequately performed its assumed obligations and met the duty of Wells Fargo to invitees. The existence of a question of fact precludes the entry of summary judgment.

The district court erroneously failed to determine whether Western contracted to, and did, assume Wells Fargo's duties to invitees. It interpreted the contract, a question of fact for the jury, and that Western's obligation to distribute ice melt only arose when two (2) inches of snow had accumulated. R. p. 220. Even a 'minimum' interpretation of the contract's comprehensive and exclusive duties of Western do not support such a limitation.

The 'Service Agreement' sets forth the obligations of Western to bid certain work out as well as separate 'minimum' obligations of Western to perform work. The 'minimum' nature of the contract that is a guide to, and not a limitation of, the scope of Western's duty is revealed in the obligation of Western to bid out certain work. The 'bid-out' provisions are vague and appear inconsistent. R. p. 135. Western was required to bid out to subcontractors.

> 2. CONTRACTOR will bid Snow Removal Services to vendors pre-approved by BANK using the specifications below:
>
> c. CONTRACTOR will clear all parking areas and/or sidewalks when two (2) inches of snow has accumulated...
>
> d. Ice melt is to be used when necessary. In most cases, ice melt will be furnished by BANK. If not furnished, ice melt is to be billed as an extra item...
>
> e. Areas surrounding the BANK ATM's should be kept reasonably clear of snow and ice 7 days per week, 24 hours a day.

Western was not only required to bid out snow plowing when two (2) inches of snow had accumulated but it was also required to bid out, at paragraph (d), the placement of ice melt when necessary. The snow plowing requirement is clear, but it was also Western's duty to inspect and determine when the timely use of ice melt was necessary. Ice melt was obviously necessary on the morning that Gagnon was injured. The emergency crew had to spread sand in order to reach the location in the parking lot area where she lay. R. p. 70, at page 19, ll. 18-23. As discussed by the Indiana court in *Kostidis*, supra., the duty to inspect for ice on the parking lot area is a continuing duty of a property owner and, in this case, it was Western's continuing duty because it assumed the bank's duty in this regard and it stands in its shoes.

Western, through the affidavit of Vaterlaus, asserted that it plowed snow and cleared ice at Wells Fargo's property in Hayden, on December 2nd and 3rd, 2007. R. p. 60, ¶¶ 7 and 8. The weather record reports submitted do not support that there was a two (2) inch snow fall on either day. They record '0.00' snowfall. R. p. 75. The Vaterlaus affidavit also asserts that Western plowed snow and applied ice melt on December 8th. R. p. 60, ¶ 8. The weather record reports

'0.00' snowfall on December 8, 2097. R. p. 76. The records do reflect 'precipitation' during that time period. R. pp. 75-76. On the morning of Gagnon's accident, December 7th, the weather records reflect that the temperature was either 25 degrees or 28 degrees Fahrenheit. R. pp. 76 and 84. Despite the variance between Western's asserted snow plowing and ice melt application and the weather records, it is known that (1) Gagnon slipped on 'black ice', fell, and was seriously injured, and (2) the footing at the parking lot where Gagnon fell was so slick and treacherous that the emergency personnel coming to assist Gagnon had to put down sand on it before they could even reach her location in the parking lot. What is, at least implied, when the assertions of Western regarding its snow plowing and application of ice melt activities are compared to the weather records, is that Western did not keep and maintain accurate records of its maintenance work for Wells Fargo.

The property owner, Wells Fargo, certainly would not be permitted to claim that it did not have a duty to inspect its parking lot for ice or that it could ignore the presence of ice on its parking lot. Western, after comprehensively and exclusively assuming Wells Fargo's property maintenance duties, stood in Wells Fargo's place and it is also not permitted to claim that it did not have a duty not inspect the parking lot for the presence of ice or that it could ignore ice on the parking lot. It was Western's duty to maintain the parking lot in a safe manner for the bank's invitees.

Separate and apart from what Western was required to 'bid out', and consistent with the continuing duty to inspect for and clear ice, the contract sets forth 'minimum' comprehensive maintenance services that Western contracted to provide Wells Fargo.

> 3. CONTRACTOR shall employ competent supervisory personnel and assign a qualified foreman to supervise all work for the purpose of providing quality control over work.

4. CONTRACTOR shall communicate effectively with subcontractors and other employees to ensure that all parking lots, sidewalks and other areas designated by this contract are cleared of snow and ice in a timely manner...

7. The CONTRACTOR shall make available and provide emergency service 24 hours per day, seven days per week..." R. p. 135, ¶¶ 3, 4, and 7.

These performance standards required Western, irrespective of snow fall, to supervise all maintenance aspects for quality control and to "ensure" that all parking lots are cleared of ice in a timely manner. At a minimum the contract raises a question of fact to be determined by a jury whether Western, despite being specifically required to ensure that the parking lots are cleared of ice in a timely manner, was only required to ensure that the parking lots are timely cleared of ice after two (2) inches of snow accumulated. The district court erred by interpreting the Service Agreement contract and finding that Western was only required it to apply ice melt to the parking lot areas if there was an accumulation of two (2) inches of snow.

Invitees on Wells Fargo property are entitled to reasonably expect that someone is in charge of and responsible for basic safety and maintenance of the premises. Western contracted to assume the duty of Wells Fargo to maintain its property in a manner that is reasonably safe for invitees.

Summary judgment standards require the district court to liberally construe the facts in favor of the nonmoving party, and to draw all reasonable inferences from the record in favor of the nonmoving party. The plaintiff need not prove that an issue will be decided in its favor at trial. *Country Cove Development, Inc. v. May*, 143 Idaho 595, 150 P.3d 288 (2006). All doubts are to be resolved against the moving party and the motion must be denied "if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable [people] might reach different conclusion." *Taylor v. AIA Services Corp.*, supra., *Doe v. Durtschi,* 110 Idaho 466, 716 P.2d (1986); *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The terms of the comprehensive property maintenance contract, a 'minimum' description of Western's duty, raises a material question of fact as to whether Western to assumed the duty to ensure, regardless of an accumulation of snow, that the bank's parking lot areas were timely cleared of ice, for the safety of the bank's invitees. There is certainly no evidence in the record that Wells Fargo, at any time undertook any inspection for ice on the parking lot or that it ever placed ice melt on the parking lot. This question of fact should have been submitted to the jury for determination. The district court erred in interpreting the Service Agreement contract to find that Western did not assume Wells Fargo's obligation to ensure that the bank's parking lot areas were, at all times, timely cleared of ice and were safe for the bank's invitees.

CONCLUSION

The district court erred in not analyzing Western's contractual duty under the New York line of cases, exemplified by *Palka*, or under Restatement (Second) of Torts § 324A in light of the Wells Fargo-Western comprehensive and exclusive' property maintenance agreement under which Western assumed full responsibility for the duty of Wells Fargo to maintain its property in a reasonably safe condition for its invitees. Wells Fargo contracted with Western to stand in its shoes to fulfill its duty to maintaining the property and to protect it from tort liability to third parties. Western's contractual duty was to inspect Wells Fargo's parking lot areas for the presence of ice and to apply ice melt on the ice when it was located. It is submitted, although it ultimately needs to be determined by a jury, that there is no question but that had Western inspected the parking lot on the morning of December 7, 2007, it would have located the ice. When the emergency personnel arrived shortly after Gagnon was injured the parking lot was too treacherous to be walked on, even in an emergency, without first laying down sand for traction. Western did not perform its contractual duty to timely clear the parking lot areas of ice.

Western's duty to clear the parking lot areas of ice was not directed at faceless or an unlimited universe of persons. Western's duty was to Wells Fargo's invitees such as Gagnon. It owed a duty to Gagnon who parked her car in the parking lot area and slipped on the black ice on her way to work.

The connection between Western's omission to clear the ice and Gagnon's fall and injuries was not remote or attenuated. Gagnon's accident was foreseeable and the proximate cause of the failure of Western to investigate for, and to clear, the black ice on the parking lot area. *See Wheeler v. Smith,* 96 Idaho 421, 529 .2d 1293 (1974); *Palsgraf v. Long Island R.Co.,* 248 N.Y. 339, 162 N.E. 99 (1928); Prosser, Law of Torts, 4th Ed.,ch. 7, pp. 236-289, § 41-44 (1971).

The Gagnons should not be left without a remedy that will fully compensate them for Tracy Gagnon's severe and debilitating injuries and Jeffrey Gagnon's loss of consortium caused by the tortious negligence of Western. Wells Fargo and Western bargained that Western was required to maintain insurance coverage for potential tort liability to third parties. The insurance Western was required to maintain was required to be primary to "any insurance" obtained by the bank. Wells Fargo should not be left without the ability to be reimbursed for the worker's compensation benefits paid to Tracy Gagnon as a result of her accident and injury. Western was under a legal duty to prevent foreseeable harm such as occurred to Gagnons once it agreed to comprehensively and exclusively maintain Wells Fargo's extensive properties by, among the many other duties, inspecting for and clearing ice from the bank's parking lot in a timely manner. Western should not be permitted to avoid liability to Gagnon, and it should not be permitted to avoid its contractual liability to reimburse Wells Fargo, from the very insurance policies that it

bargained with Wells Fargo, to provide for coverage in such instances where third parties are injured due to its failure to perform its contractual duties.

The judgment should be reversed and remanded to the trial court for trial.

Respectfully submitted this 17th day of August, 2012.

Starr Kelso

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CERTIFICATE OF SERVICE: I hereby certify that two true and correct copies of the foregoing Opening Brief of Appellants was mailed by regular U.S. Mail, with postage prepaid thereon, to Edward G. Johnson, attorney for Respondent Western Building Maintenance, Inc., on the 17th day of August, 2012 at:

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