9-20-2012

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY GAGNON and JEFFREY GAGNON, husband and wife, Plaintiffs/Appellants, v. WESTERN BUILDING MAINTENANCE, INC., and John and Jane Does A-H, Defendants/Respondents.	Docket No. 39816-2012

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RESPONDENT'S BRIEF

****

Appeal from the District Court of the First Judicial District

****

The Honorable John Patrick Luster Presiding

Edward G. Johnson
LAW OFFICES OF RAYMOND SCHUTTS
24001 E. Mission Ave., Suite 101
Liberty Lake, WA 99019-9514

Attorneys for Respondent

Starr Kelso
Attorney at Law
P.O. Box 1312
1621 N. 3rd St., Suite 600
Coeur d' Alene, ID 83816

Attorney for Appellants

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1621 N. 3rd St., Suite 600
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Attorney for Appellants

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I. STATEMENT OF THE CASE

A. Nature of the Case

Western agrees with Appellants' characterization of the case with the following exceptions:

1. The snow removal agreement between the Wells Fargo and Western was by no means "comprehensive and exclusive;"
2. Western did not undertake or assume Wells Fargo's duties with respect to the management of black ice in the Hayden parking lot; and,
3. The nature and extent of plaintiff's injuries – an issue that is not properly before this Court -- is sharply disputed,

B. Course of Proceedings

Appellants' statement of the proceedings is accurate and complete. Although Western advanced alternative legal theories in its summary judgment motion, the only issue before this Court is whether Western owed a duty to Mrs. Gagnon.

C. Statement of Facts

Western had an unwritten agreement with Wells Fargo in December 2007 to remove new snow accumulations from the parking lot and sidewalks of the Hayden bank branch, and to apply ice melt to **only** the sidewalks and the area around the ATM machine. R. p.59 ¶4. That agreement included the same terms as set forth in a 2004

written contract that had expired in 2006. R p.117. Western never contracted or otherwise agreed to assume responsibility for the safety of persons using the Hayden branch parking lot. R. p.61 ¶ 9

The agreement with Wells Fargo for the 2007-08 winter season did not authorize Western to apply any de-icer or traction material to the parking lot of the Hayden branch. During that time, Wells Fargo never requested that Western provide ice melt or sanding services at any Wells Fargo parking lots, including the Hayden branch lot. Nor did Western undertake to provide those services in 2007-2008. R p.59 ¶ 5. Instead, the Wells Fargo Hayden branch maintained a supply of de-icer for its employees to use on the premises. R. p. 61 ¶ 9; R. p. 70.

In conformance with its agreement, Western removed fresh accumulations of snow from the Hayden branch parking lot on December 2 and 3, 2007. R. pp.60 and 63. No new snow fell in the Hayden, Idaho area between December 3 and December 5, 2007. R. pp. 73-82. On December 5, 2007, plaintiff fell on "black ice" in the Hayden branch parking lot as she was exiting her car. R. p. 69. Plaintiff does not claim that there was fresh snow in the parking lot at the time she fell. R. p. 69. Wells Fargo accepted the work without complaint and paid Western in full for its services in December 2007. R. pp. 60-61 ¶ 8.

II. ISSUE PRESENTED ON APPEAL

Did Western owe a duty to plaintiff where Western did not assume responsibility for black ice in the Wells Fargo parking lot and did nothing to create or exacerbate the condition that allegedly caused plaintiff's injury?

III. STANDARD OF REVIEW

Appellants' statement of the standard of review is a correct recitation of the law as far as it goes. Western would supplement appellants' statement with the following points. First, when the party moving for summary judgment will not have the burden of production or proof at trial, the "no genuine issue of material fact" requirement may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder,* 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App.1994).

Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Id.* at n. 1, 882 P.2d at 478 n. 1. Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses, or affidavits, that there is indeed a genuine issue for trial. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (1994).

Moreover, the United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), has stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citations omitted) (emphasis added). The language and reasoning of *Celotex* has been adopted in Idaho. *Dunnick,* 126 Idaho 308, 312, 882 P.2d 475, 479 (1994).

Finally, it is not the intent of F.R.C.P. 56 "to preserve purely speculative issues of fact for trial." *Exxon Corp. v. Federal Trade Comm'n,* 663 F.2d 120, 128 (D.C.Cir.1980). Therefore, a party opposing summary judgment cannot demand a trial simply because of the "speculative possibility that a material issue of fact may appear at that time." 10B Charles A. Wright, Arthur R. Miller, Mary Kay Kane, Wright Miller & Kane, Federal Practice and Procedure §2739 at 388-89 (3d ed.1998). It is well settled that a mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.,* 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986).

IV. ARGUMENT

A. Summary judgment was appropriate where it is undisputed that Western did not assume a duty to manage black ice in the Wells Fargo parking lot, and that Western diligently fulfilled its limited contractual obligation to remove new accumulations of snow from the parking lot.

A limited contractual undertaking to provide snow removal services does not render the contractor liable in tort for personal injuries sustained by third party invitees using the property. *See Wheaton v. East End Commons Associates, LLC*, 854 N.Y.S.2d 528 (2008). A snow removal contractor becomes liable only where the contractor negligently creates or exacerbates a dangerous condition, where the invitee relies on the contractor's continued performance, or where the snowplowing contract is so comprehensive and exclusive that it entirely displaces the property owner's duty to maintain the premises safely. *Anderson v. Jefferson-Utica Group, Inc.*, 809 N.Y.S.2d 693 (2006).

Although no reported Idaho decisions address a snow removal contractor's liability to a third party, the aforementioned rule has been recognized and followed in several other snow belt jurisdictions. For example, in *Eichler v. Plitt Theatres, Inc.*, 167 Ill. App. 3d 685, 521 N.E.2d 1196 (1988), where an invitee slipped and fell in a movie theater's icy parking lot, the court held that a snow plowing company, which contracted with the owner of the parking lot to perform snow plowing and snow removal but did not have a contractual duty to remove ice, could not be held liable to the invitee. According

to the court, even if the removal of snow led to the later accumulation of ice on the surface, that scenario would not itself constitute negligence.

In *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012, 525 N.E.2d 1127 (1988), in which a plaintiff who slipped and fell on a patch of ice in the parking lot of a store brought a suit against the contractor who had been hired to remove snow from the parking lot, the court affirmed the entry of summary judgment in favor of the contractor, ruling that the plaintiff could not rely on the snow removal contract between the store and the contractor to impose liability on the contractor. The court further held that absent evidence of negligent snow plowing operations by the contractor, there was no showing of a duty owed to plaintiff.

Similarly, in *Hellmann v. Droege's Super Market, Inc.*, 943 S.W.2d 655 (Mo. Ct. App. 1997), in which a grocery store customer was injured when she slipped and fell on ice in a store's parking lot and brought a negligence action against the store and a snow removal service that the store had contracted, the court held that the trial judge did not err in directing a verdict in favor of the contractor. After noting that the contractor had not contracted to insure the safety of the parking lot, the court further held that 1) the service's agreement with the store was to plow the parking lot after each winter storm, 2) the service did plow on the day of the last snow storm, and 3) the service had neither a contractual duty nor a legal right to plow the lot on the day plaintiff fell.

The result was the same in *Autrino v. Hausrath's Landscape Maintenance, Inc.*, 231 A.D.2d 943, 647 N.Y.S.2d 638 (1996), in which an employee who slipped and fell on ice in his employer's parking lot sued the contractor that provided snow removal services for the employer. The court held that the trial judge properly granted the

contractor's motion for summary judgment, since the contractor did not contractually assume the employer's duty for ice removal.

In *La Due v. G & A Group Inc.*, 241 A.D.2d 791, 660 N.Y.S.2d 215 (1997), where a shopping center customer fell on an accumulation of ice and snow in a parking lot, the court affirmed the grant of summary judgment to a company that contracted with the operator of the shopping center to provide snow removal services. Holding that the company did not assume a duty to the plaintiff by virtue of its contract with the operator, the court noted that the company's snow removal obligation was not an exclusive property maintenance obligation, as was demonstrated by the shopping center operator's retained control over when the contractor sanded and salted the parking lot.

Significantly, plaintiffs have cited several other cases in their opening appellate brief that also lend support to Western's position. For example, in *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 773 N.E.2d 485 (2002), which is discussed at length by the Gangons, the court dismissed the plaintiff's case on summary judgment, holding that the defendant snow removal contractor did not enter into a "comprehensive and exclusive" agreement that entirely displaced the property owner's duty to safely maintain the premises. The court pointed to terms in the contract that limited the snowplowing activity and authorized ice melt only if requested by the property owner. The *Espinal* court also found no evidence to support plaintiff's argument that the contractor had exacerbated the ice hazard by plowing the snow. Other New York snow removal cases cited by the plaintiffs are also in accord with the *Espinal* holding. *See Anderson v Jefferson-Utica Group Inc., 226 A.D.3d 760, 809 N.Y.S.2d 693 (2006); Torella v. Benderson Dvlpt. Co., 307 A.D.2d 727, 763 N.Y.S.2d 876 (2003)*; *Kozak v.*

Broadway Joe's, 296 A.D.2d 683, 745 N.Y.S.2d 139 (2002); Engel v. Eichler, 290 *A.D.2d* 477, 736 N.Y.S.2d 676 (2002); *Borden v. Wilmorite, Inc., 271 A.D.2d 864, 706 N.Y.S.2d 230 (2000).*

Idaho case law is consistent with the above-cited decisions in holding that a person has no affirmative duty to protect others from a hazard unless that person created the hazard or voluntarily assumed a duty to act. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999). Where a person assumes such a duty, "the duty that arises is limited to the duty actually assumed." *Martin v. Twin Falls School Dist. No. 411*, 138 Idaho 146, 150, 59 P.3d 317, 321 (2002).

In the instant case, Western's only obligation to maintain the parking lot in December 2007 arose from its agreement with Wells Fargo. That agreement clearly did not create a "comprehensive and exclusive" property maintenance obligation at the time of plaintiff's accident, as evidenced by the fact that during the 2007-2008 snow season, Wells Fargo only authorized Western to remove new snow accumulations from the parking lot and never requested an application of de-icer or traction material in the lot. Wells Fargo also affirmatively retained control over winter maintenance of the premises by making ice melt available for its employees to use. Contrary to plaintiff's assertions, neither the number of employee and subcontractors utilized by Western, nor the number of customers it provided services to, alters the scope of its contractual undertaking at the Hayden bank branch.

In his memorandum decision, the trial judge made the following finding with regard to the scope of Western's responsibility for the Hayden branch parking lot:

> The plain language of the 2004 Agreement shows that the Defendant did not undertake an absolute duty to remove snow and distribute ice melt in the Wells Fargo Bank parking lot on days where less than two (2) inches to snow falls. ... As a result, there is no genuine issue of material fact that the Defendant did not owe the Plaintiff a duty, and the Defendant is entitled to judgment as a matter of law

R. p. 220.

Furthermore, the evidence is uncontroverted that 1) Western had fulfilled its limited obligation to remove snow from the parking lot on December 2 and 3, 2007, 2) no additional snow fell in the interim, and 3) the accident was the result of "black ice" rather than an accumulation of snow. There is no evidence that Western caused or contributed to the black ice condition. Because Western did not contractually assume an obligation to deal with ice in the parking lot or otherwise insure the safety of persons using the parking lot, no duty was owed to plaintiff under the uncontroverted facts of this case.

B. Appellants have failed to create a factual issue regarding the scope of Western's contractual obligations

In response to Western's summary judgment motion, plaintiffs submitted a bare bones affidavit from Heather Gable that failed to address, let alone dispute, any of the factual assertions set forth by Jan Vaterlaus in his August 15, 2011 affidavit. Significantly, nowhere in her affidavit does Gable state that Western was authorized to apply ice melt or abrasive material to the parking lot of the Hayden branch during the 2007-2008 snow season. In fact, Gable was not even the person who supervised Western's services at the Hayden branch in 2006-2007. R. pp. 187-188 ¶ 2.

Nor does the expired agreement attached to the Gable affidavit offer any support for plaintiffs' position that Western assumed a contractual obligation to apply ice melt to the parking lot. Paragraph 2 of Appendix B spells out the following relevant performance specifications for Western's work:

> b. CONTRACTOR will furnish all necessary labor, equipment, materials and supplies (with the exception of ice melt) needed to perform the conditions and specifications of Snow Removal.
> c. CONTRACTOR will clear all parking areas and/or sidewalks when two (2) inches of snow has accumulated. The initial clearing will occur prior to 8:00am of each snow day.
> 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. Calcium chloride ice melt only is to be used – no salt is to be used.
> . . . .
> f. Access surrounding the BANK ATMs should be kept reasonably clear of snow and ice 7 days per week, 24 hours a day.

R. p.135.

These specifications do not call for ice melt to be applied to the parking areas. Only the ATM is specifically identified as an area to be kept clear of ice. Nothing in the specifications is inconsistent with the procedures in place 2007-2008 between the Bank and Western as described in the first Vaterlaus affidavit. R. p.188 ¶ 3. In their opening brief, plaintiffs cite the following language in paragraph 4 of Appendix B:

> 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.

R. p.135.

This contract provision, which deals with timely and effective communication between Western and its subcontractors, is not germane because it does not specify **which** areas are to be cleared of ice.

Although plaintiffs have attempted to provide their own interpretation of the contract, the agreement when read in its entirety is unambiguous with respect to what services Western was authorized to provide in the parking lot. Even if an ambiguity was found to exist, the result would be the same. The primary consideration in interpreting an ambiguous term of a contract is the intentions of the parties, which intentions are to be gleaned from the evidence. *Werry v. Phillips Petroleum Co.*, 97 Idaho 130, 540 P.2d 792 (1975); *Big Butte Ranch, Inc. v. Grasmick*, 91 Idaho 6, 415 P.2d 48 (1966).

In the instant case, the only evidence available to interpret an ambiguity comes from Jan Vaterlaus, since the Heather Gable affidavit is devoid of any elucidation as to where ice melt was to be used. According to Mr. Vaterlaus, the written agreement did not authorize Western to apply ice melt to the parking lot. Therefore, the Gable declaration cannot create a factual dispute to avoid summary judgment by merely stating that the parties continued to operate on the terms previously agreed to in the expired written agreement, without first explaining how the written agreement was interpreted by the parties.

C. Plaintiff's reliance on the *Baccus* and *Palka* decision is misplaced.

Although the factual scenarios in *Baccus*, decided by this Court, and *Palka,* a New York appellate court decision, are analogous the case at bar, the results in those two cases are readily distinguishable from the instant case. In *Palka,* the defendant

assumed overall management responsibilities for a hospital's maintenance department, including training of hospital employees. A nurse in the hospital was injured when a fan fell from its stand. The threshold question, which the appellate court decided in favor of the plaintiff, was whether the defendant had contractually agreed to supervise a preventative maintenance program that included fan inspections. Only after finding that the defendant had assumed this contractual obligation did the court go on to determine whether defendant's failure to perform its contractual duty would permit a third party to sue in tort for injuries resulting from the breach.

Unlike *Palka*, the snow removal agreement did not entirely displace Wells Fargo's duties as a landowner to provide reasonably safe conditions for its invitees. This is borne out by the fact that Wells Fargo maintained a supply of ice melt on the premises for its own use. Moreover, the bank placed express limits on the services that Western could provide, such as requiring a 2" snow accumulation before services were commenced, specifying the type of ice melt to be used, and limiting its application to sidewalks and the ATM. Under these circumstances, there is no basis for finding that Western assumed the land owner's duty to its invitees with respect to ice in the parking lot.

In *Baccus,* this Court held that a building maintenance contractor could face premises liability exposure to an injured invitee under two circumscribed situations: a special relationship between plaintiff and defendant, or a voluntary undertaking in which the contractor assumes the duty owed by the property owner to the plaintiff. Under the latter scenario, which presents the only potential basis for Western to have liability in the instant case, the Court held that the following facts must be established:

> A duty arises in the negligence context when one previously has undertaken to perform a primarily safety-related service; others are relying on the continued performance of the service; and it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking.

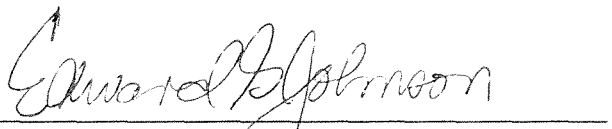
145 Idaho at 351; 179 P.3d at 314. The *Baccus* court found that the contractor had assumed the duty to replace a mat at a building entrance on a weekly basis. Because there was evidence suggesting that the contractor failed to replace the mat on one occasion and thereby created a hazardous condition, the court held that summary judgment was inappropriate. In the instant case, however, there is not a scintilla of evidence to support a finding that Western undertook an obligation to prevent ice from forming in the Wells Fargo parking lot. Since Western had not previously applied ice-melt to the parking lot, plaintiff cannot claim to have relied on continued performance, as was the situation in *Baccus*.

V. CONCLUSION

Plaintiffs have failed to meet their burden to create a triable issue of fact after Western established an absence of evidence that it had assumed responsibility for managing black ice conditions in the parking lot. The repeated use of the phrase "comprehensive and exclusive" in appellants' brief does not change the fact that Western's contractual obligation was limited to removal of new accumulations of snow in the lot. As a result, the trial court correctly dismissed plaintiffs' action based on an absence of a legal duty, and Western requests that this Court affirm that ruling.

Respectfully submitted this 18th day of September, 2012.

Law Offices of Raymond W. Schutts



Edward G. Johnson
Attorney for Respondent Western Building Maintenance, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of September, 2012, I sent for delivery two true and correct copies of the foregoing **RESPONDENT'S BRIEF** by the method indicated below, and addressed to the following:

Starr Kelso
Attorney at Law
P.O. Box 1312
1621 N. 3rd St., Suite 600
Coeur d' Alene, ID 83816

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Edward G. Johnson