

6-14-2011

Ball v. City of Blackfoot Transcript Dckt. 38530

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Ball v. City of Blackfoot Transcript Dckt. 38530" (2011). *Idaho Supreme Court Records & Briefs*. 2911.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2911

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

RECEIVED
IDAHO
2012 JUN 14 A 9:17

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN FREDERICK BALL and JOAN)
BALL, husband and wife,)
)
Plaintiffs-Appellants,)
)
vs.)
)
CITY OF BLACKFOOT,)
)
Defendant-Respondent.)

Docket No. 38530-2011

FILED - ORIGINAL
JUN 14 2011
2011 MAR 15 PM 1:54
CLERK OF DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
BINGHAM, IDAHO

REPORTER'S TRANSCRIPT ON APPEAL

Appealed from the District Court of the Seventh
Judicial District of the State of Idaho, in and for
the County of Bingham, HONORABLE DARREN B. SIMPSON,
District Judge, presiding.

For Appellants: DAVID K. PENROD, Esq.
MAGUIRE & PENROD
Post Office Box 4758
Pocatello, Idaho 83205-4758

For Respondent: BLAKE G. HALL, Esq.
NELSON HALL PARRY TUCKER
Post Office Box 51630
Idaho Falls, Idaho 83405-1630

ORIGINAL

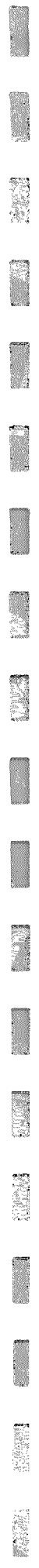
115.10
00107100
STEPH
FOR [unclear]

SANDRA J. BEEBE, C.S.R.
Phone: (208) 782-3141

38530

Post Office Box 658
Blackfoot, Idaho 83221

11



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

JOHN FREDERICK BALL and JOAN) Case No. CV-2010-328
BALL, husband and wife,)
)
) Plaintiff,)
)
vs.)
)
) CITY OF BLACKFOOT,)
)
) Defendant.)
)
_____)

This cause came on regularly for hearing at
Blackfoot, Idaho, on the 3rd day of November, 2010,
at the hour of 9:06 A.M., before the
HONORABLE DARREN B. SIMPSON, District Judge,
presiding.

APPEARANCES:

For Plaintiffs: BLAKE G. SWENSON, Esq.
MAGUIRE & PENROD
Post Office Box 4758
Pocatello, Idaho 83205-4758

For Defendant: BLAKE G. HALL, Esq.
NELSON HALL PARRY TUCKER
Post Office Box 51630
Idaho Falls, Idaho 83405-1630

I N D E X

<u>Wednesday, November 3, 2010</u>	<u>Page</u>	<u>Line</u>
Motion to Strike.....	1	1
Argument by Mr. Hall.....	2	13
Argument by Mr. Swenson.....	4	19
Argument by Mr. Hall.....	10	7
Argument by Mr. Swenson.....	13	23
Argument by Mr. Hall.....	17	7
Argument by Mr. Swenson.....	19	17
Argument by Mr. Hall.....	22	1
Argument by Mr. Swenson.....	24	17
Argument by Mr. Hall.....	25	20
Motion for Summary Judgment.....	26	3
Argument by Mr. Hall.....	26	5
Argument by Mr. Swenson.....	33	17
Argument by Mr. Hall.....	42	24
Reporter's Certificate.....	53	1

1000 9000 8000 7000 6000 5000 4000 3000 2000 1000 0

1 BLACKFOOT, IDAHO, WEDNESDAY, NOVEMBER 3, 2010,
 2 9:06 A.M.
 3
 4
 5 THE COURT: We'll be on the record in Bingham
 6 County Case CV-2010-328, John and JoAn Ball versus
 7 the City of Blackfoot.
 8 Appearing on behalf of the plaintiffs is
 9 Mr. David Penrod, correct?
 10 MR. SWENSON: No, Your Honor. Blake Swenson.
 11 I appeared before you before.
 12 THE COURT: I'm sorry, Mr. Swenson. I don't
 13 see you enough.
 14 MR. SWENSON: That's true.
 15 THE COURT: Have to get you down here more
 16 often.
 17 Mr. Blake Swenson for the plaintiffs. And
 18 Mr. Blake Hall is appearing on behalf of the city,
 19 and he's accompanied by Mayor Mike Virtue.
 20 Good morning to you all.
 21 MR. SWENSON: Good morning, Your Honor.
 22 THE COURT: We have -- we're here for the
 23 defendant's motion for summary judgment. There was
 24 also a motion filed by the defendant to strike the
 25 affidavit of Fred and JoAn Ball, the Merrifield

1

1 testify to scientific and technical information for
 2 which he's not competent to do so.
 3 We ask that you strike Paragraphs 9 and 10 of
 4 his affidavit because they're irrelevant for the
 5 purposes of the motion for summary judgment as to
 6 what the plaintiff, Mrs. Ball, was wearing at the
 7 time of the, of the incident.
 8 Your Honor, we've also requested that you
 9 strike Paragraphs 3 and 4 of JoAn Ball's --
 10 THE COURT: Let me stop you there, and let's
 11 deal with Fred Ball's affidavit. And let me go
 12 specifically to Paragraph 8. So that I'm clear, do
 13 you have any objection to the first sentence of
 14 Paragraph 8 because those appear to be general
 15 observations?
 16 MR. HALL: I'm going to have to pull it out now
 17 and take a second look at it, Your Honor, because I
 18 don't want to --
 19 THE COURT: That's fine.
 20 MR. HALL: No, Your Honor.
 21 THE COURT: Okay. So it's the second portion?
 22 MR. HALL: Yes.
 23 THE COURT: Okay. Now, let's kind of even
 24 narrow the second sentence down then. Is your
 25 objection due to his affidavit in that regard his

3

1 affidavit; and is it Justesen? Yes, the Justesen
 2 affidavit. There was also a motion -- or a response
 3 to that motion.
 4 Court is in receipt of the motion for summary
 5 judgment, the accompanying affidavits. There was a
 6 reply filed by the plaintiffs and a response, and
 7 then there was also an affidavit that was filed on
 8 October on 27th by Mr. Penrod. And then there's a
 9 response to the motion -- or reply motion to strike
 10 affidavits.
 11 So, Mr. Hall, let's go ahead and first deal
 12 with your motion to strike the affidavits.
 13 MR. HALL: Thank you, Your Honor.
 14 If it please the Court and counsel, we, of
 15 course, have fully briefed this matter. We have
 16 requested that the Court strike the affidavit of
 17 Mr. Ball in part. We've requested that Paragraphs 3
 18 and 4 be stricken on the basis that they -- the
 19 information contained therein lacks foundation and
 20 that Mr. Ball's statements as to what, what he now
 21 claims to be aware of belies his personal knowledge
 22 at the time of the accident.
 23 And we've asked also that the Court strike
 24 Paragraph 8 for the same reason of lack of
 25 foundation. And this is an attempt to have Mr. Ball

2

1 conclusion of the slope?
 2 MR. HALL: Your Honor, there's no foundation
 3 established whatsoever with regard to his testimony
 4 relative to the slope. There's nothing that would
 5 indicate that he, in fact, has measured the slope;
 6 that he's acquainted with the slope; that he
 7 understands what the standard in the industry is,
 8 what the zoning requirements are for the slope.
 9 He simply would have this Court believe that
 10 somehow there is something defective in the slope
 11 through the language that is purported here, and he
 12 clearly has no foundation for making such a statement
 13 and is not competent to make such a statement.
 14 THE COURT: Okay. Let's then go and allow
 15 Mr. Swenson to address that one, and then we'll come
 16 back to the next affidavit.
 17 MR. HALL: Very well.
 18 THE COURT: Mr. Swenson.
 19 MR. SWENSON: Thank you, Your Honor.
 20 Your Honor, in response to his motion to strike
 21 that portion of the affidavit, these are clearly his
 22 observations of the landscape and the way the snow
 23 has been piled. You don't need scientific testimony
 24 to come in to know that the laws of gravity still
 25 exist on the planet and that, that snow, when it

4

1 melts, it goes downhill.
 2 If you look at his affidavit, his affidavit on
 3 Page 49 --
 4 THE COURT: Whose affidavit?
 5 MR. SWENSON: Mr., Mr. Ball's affidavit.
 6 THE COURT: On page what? You said 49?
 7 MR. SWENSON: Yeah, but I'm looking at it right
 8 here.
 9 THE COURT: 'Cause I don't think his affidavit
 10 is 49 pages long.
 11 MR. SWENSON: Oh, his deposition. I'm sorry.
 12 THE COURT: Okay.
 13 MR. SWENSON: In his deposition -- I had it
 14 marked here. Yeah, it's on Page 49, Sheet 13, of his
 15 deposition testimony. He's talked about the sidewalk
 16 and how there's not very much slope on the sidewalk,
 17 and he said that there's a -- and he's -- and the
 18 bank -- reading from Line 2 forward, he says, there's
 19 not too much slope there; and the bank where the lawn
 20 is, there's a big pine tree. There's kind of slope
 21 there, kind of slopes down a little bit; and they
 22 were piling all that snow up there, and it would warm
 23 up in the day and would run down to the sidewalk.
 24 Then it couldn't drain water.
 25 So he's --

5

1 So he has provided sufficient foundation to
 2 make his observations as a layperson as to condition
 3 of the sidewalk.
 4 THE COURT: Paragraphs 3 and 4?
 5 MR. SWENSON: I'm sorry, Your Honor?
 6 THE COURT: Let's deal now with Paragraphs 3
 7 and 4 of his affidavit, which he indicates he's now
 8 aware of certain factors. But I think Mr. Hall's
 9 objection is is what's the foundation because it's
 10 obviously -- it's obvious that he's relying upon some
 11 other type of information to establish his
 12 conclusions in those two paragraphs.
 13 MR. SWENSON: Well, if you wanted to strike the
 14 "I am now aware" portion, I don't think I have an
 15 objection to that. But he continually talks about in
 16 his deposition the conditions of the street that day.
 17 He says when he arrived at the pool, the streets were
 18 dry. He said but the conditions of the day prior was
 19 that, that it had snowed, but it was warm, and the
 20 snow had melted off the streets.
 21 And he says that -- he, he details the fact
 22 that he worked for the street department, that he was
 23 in charge of sanding. He worked for the fire
 24 department. They used a lot of, he says, stuff
 25 there. These were answers to direct questions --

7

1 THE COURT: Hang on 'cause I'm not finding it.
 2 MR. SWENSON: I'm sorry, Your Honor.
 3 THE COURT: I'm trying to find his deposition
 4 here.
 5 Okay. Okay. Go ahead.
 6 MR. SWENSON: So if coupled with -- and, of
 7 course, he doesn't need to state -- these, these
 8 statements made in his deposition are under oath, and
 9 his testimony there supplements his specific
 10 affidavit as to foundation and any other things
 11 Mr. Hall has an objection to.
 12 So in reading Mr. Ball's deposition, he clearly
 13 goes through details throughout that deposition,
 14 foundation for his understanding. He worked for the
 15 city. He worked for the street department for a
 16 number of years. He worked for the fire department
 17 for a number of years. He's been a handyman, ran RV
 18 parks. I mean he goes through and details his life
 19 and, and what he's done in his life.
 20 And then he makes specific observations here
 21 about this big pine tree and the slope of the
 22 landscape that runs down onto the sidewalk and saying
 23 that there isn't very much slope on the sidewalk; and
 24 when the water runs down on there, it has nowhere to
 25 drain to.

6

1 direct response to Mr. Hall's questioning in his
 2 deposition, and they went unchallenged by Mr. Hall at
 3 that point.
 4 He talks about -- on Page 43 of his deposition,
 5 he says, and I quote, reading from Line 1, "You know,
 6 when I was on the fire department, we worked with a
 7 lot of stuff. Then when I worked on the street
 8 department, we done a lot of sanding and stuff. So I
 9 knew there was ice there. There was no doubt in my
 10 mind because the day, you know, the day was warm, and
 11 it would thaw. And the snow -- it would thaw the
 12 snow, and then it would freeze at night. It happens
 13 all the time."
 14 He clear -- and he goes on to talk about how
 15 he's lived in Idaho, and this is what happens in
 16 Idaho. Anybody that lives in Idaho knows that if it
 17 warms up during the day sometimes, the snow melts,
 18 and at night it freezes.
 19 And this accident happened, and I don't think
 20 they're, they're disputing the fact it happened at
 21 6:00 in the morning when it's the coldest time.
 22 THE COURT: All right. Paragraphs 9 and 10 of
 23 the affidavit.
 24 MR. SWENSON: What is the specific objections
 25 to 9 and 10? I don't think he got to that point.

8

1 THE COURT: He did. Relevance I think was the
 2 question at least as to 9.
 3 Am I correct, Mr. Blake -- or Mr. Hall?
 4 MR. HALL: Yes, Your Honor. The testimony with
 5 regard to 8 and -- or 9 and 10 are that it's not
 6 relevant.
 7 MR. SWENSON: Well, it is relevant, Judge, and
 8 relevance is one of the weakest arguments to make
 9 when you're speaking to evidentiary issues 'cause
 10 most things are relevant. It happens to go to
 11 whether it's probative on any issue or tends to make
 12 any issue more probable than not to prove an element
 13 of, of what's going on.
 14 Here, it's to show -- it goes to shows that she
 15 has taken precautions, that she was wearing boots.
 16 Had she been wearing flip-flops or ice skates, I can
 17 guarantee Mr. Hall would be saying that, in the case,
 18 that she didn't exercise reasonable care by wearing
 19 flip-flops or ice skates knowing in the wintertime.
 20 And so when it comes to this issue, the fact
 21 that she's wearing snow boots in the winter during
 22 ice aids in allowing any jury or this Court to
 23 determine that she had taken personal reasonable
 24 care.
 25 Specifically when Mr. Hall argues in, in his

1 the factors are with regard to accumulation of snow,
 2 melting of snow, accumulation of ice, and slopes, and
 3 drainage of city streets and/or sidewalks. And he's
 4 made no measurements at all, but he wants to come
 5 across to tell the Court I'm, I'm now an expert at
 6 this.
 7 And that far exceeds the -- what is allowed
 8 by -- with, with regard to a lay witness in an
 9 attempt to provide general observations as compared
 10 to now trying to establish from some expertise a
 11 causal relationship between some alleged defect for
 12 which he can't even establish that in fact there is
 13 any such alleged defect; and, therefore, Your Honor,
 14 that paragraph should be stricken because it exceeds
 15 mere observation.
 16 Finally, with regard to Paragraphs 9 and 10, as
 17 we've indicated, the plaintiff in this case, what
 18 shoes they were wearing or what they were not wearing
 19 or -- is not more probative as to whether or not she
 20 was being careful or not. Additionally, Your Honor,
 21 when she says, well, generally when I walk outside,
 22 I'm careful; and that's what he's trying to testify
 23 to is that it's been his observation that when his
 24 wife walks outside, she's careful.
 25 That wasn't the circumstances on the day in

1 brief that citizens -- he, he cites to the Pearson
 2 case and others, and he says citizens need to take
 3 reasonable care when walking on the city streets and
 4 others. It goes to show that that's what she was
 5 doing.
 6 THE COURT: All right. Mr. Hall, any response?
 7 MR. HALL: Yes, Your Honor.
 8 As indicated, with regard to Paragraphs 3 and
 9 4, there's no foundation to establish that Mr. Ball
 10 is testifying in his affidavit from anything other
 11 than what his general experience in Idaho was with
 12 regard to the fact that on occasion we have cold
 13 weather, and sometimes we have warm weather with some
 14 melting, and other times with cold weather and
 15 freezing. Those are his general observations.
 16 He has no direct testimony with regard to and
 17 no foundation with regard to what he's now attempting
 18 to testify to with regard to these -- the, the
 19 specific day in question. And, therefore, it clearly
 20 lacks foundation and is, as such, inadmissible.
 21 With regard to Paragraph 8, in this case, Your
 22 Honor, Mr. Ball's testimony attempts to exceed mere
 23 observation, but would attempt to suggest to the
 24 Court that he somehow is an expert and can testify
 25 and the Court can rely upon his expertise as to what

1 question because this wasn't -- she was just walking
 2 outside. She saw someone who had fallen, and she was
 3 hurrying over to try to provide assistance. And so
 4 him attempting to testify as to what her general
 5 habits are don't even come into play when we aren't
 6 dealing with what his observations were under what
 7 her normal general habits were. These are special
 8 circumstances in this case, Your Honor.
 9 And, as such, Your Honor, again, we believe
 10 that Paragraphs 9 and 10, that the information is
 11 irrelevant and, as such, should be stricken.
 12 THE COURT: JoAn Ball affidavit, Mr. Hall.
 13 MR. HALL: Yes, Your Honor.
 14 JoAn Ball's affidavit, we've requested that the
 15 Court strike Paragraph 3 and 4, Your Honor; and 3 and
 16 4 deal with the same issue that we just barely
 17 finished speaking about. And so I can repeat that
 18 argument, but I think I've covered it. I don't want
 19 to take more of the Court's time than is necessary,
 20 but we would suggest to the Court that the same
 21 argument with regard to relevance would apply there.
 22 With regard to Paragraph 5, Your Honor, in this
 23 case, the plaintiff testifies that due to the
 24 seriousness of her injuries, she has no recollection
 25 and then attempts to provide medical testimony by the

1 statement "because of the seriousness of my
 2 injuries". And we would suggest, Your Honor, that
 3 Ms. Ball's not qualified to give such opinion; and,
 4 therefore, that paragraph should be stricken;
 5 although it's probably not relevant to the motion
 6 that's before the Court in any fashion.
 7 And with regard to Paragraph 6, Your Honor, the
 8 paragraph -- we believe the testimony is speculative
 9 and that she doesn't recall the accident. She starts
 10 out in the previous paragraph by saying, "I don't
 11 recall the accident." And then in the next
 12 paragraph, Paragraph 6, attempts to testify as to
 13 what level of caution she took on the day of the
 14 accident.
 15 And, Your Honor, for her to attempt to tell the
 16 Court on one hand I don't remember everything, but
 17 I'm sure I was careful is nothing more than
 18 speculation on her part and, as such, is not
 19 admissible.
 20 THE COURT: Mr. Swenson, as to Paragraphs 3 and
 21 4, as Mr. Hall has indicated, those have been argued.
 22 Any additional argument on those two paragraphs?
 23 MR. SWENSON: Yes, Your Honor.
 24 I refer back to his previous statements when he
 25 was talking about Mr. Ball's affidavit. He said,

1 and the fact that she has traction soles on her
 2 shoes, these are all clearly relevant to the fact
 3 that she took -- and they contradict what Mr.,
 4 Mr. Hall says. He says that she was hurrying, and he
 5 tells you that to try to make you believe that she
 6 wasn't taking due caution.
 7 The fact is is that this testimony does show
 8 that she was taking due caution and that she was --
 9 she'd taken special classes to teach seniors to how
 10 to be careful, and she taught for a number of years.
 11 This is detailed in her deposition as well.
 12 As to Paragraph 5, her deposition also goes
 13 through extreme detail about the fact that she's --
 14 she has lost her hearing. She lost her, her sense of
 15 smell; her, her taste. She had back problems right
 16 after this accident; that she was relatively free of,
 17 of injury up to this accident; that she had a brain
 18 injury, bleeding on the brain. Her deposition goes
 19 through all of these medical issues that happened
 20 since her fall.
 21 When she says "due to the seriousness of my
 22 injury", she's not making a medical determination
 23 there. She's saying there's ten days out of my life,
 24 nine or ten days out of my life I don't even
 25 remember; and I get -- and she goes through her

1 when she got out, she hurried over there. There's no
 2 evidence anywhere that she hurried anywhere. In
 3 fact, the, the evidence is contrary to Mr. Hall's
 4 assertion that she, she was in a hurry.
 5 She got out of the truck. The testimony and
 6 through the deposition, you pull up to the curb of
 7 the sidewalk; and she was -- when she had got out of
 8 the car, she was right there. She didn't have to
 9 hurry anywhere. She was mere feet from her.
 10 And in fact there's other eyewitnesses that,
 11 that said that she wasn't hurrying anywhere and she
 12 wasn't in a hurrying manner. So his statement that
 13 she was hurrying are actually contrary to the
 14 evidence. Nothing in the record supports that
 15 statement.
 16 Her deposition is, is detailed with her -- the
 17 fact that she teaches a fit and, fit and fall class I
 18 believe it's referred to. And she took a class at
 19 the university to be able to teach seniors to watch
 20 their surroundings, to be careful when they exercise
 21 or when they're doing anything else. She teaches
 22 these classes to seniors, and so -- and she's taken
 23 specialized -- and been certified to be able to teach
 24 this class.
 25 And so when, when she talks about this issue

1 deposition, talks about how -- her dizzy spells and
 2 how she has to be on this medication now since the
 3 fall.
 4 I think that's a pretty reasonable inference to
 5 make after you fall. If all these medical issues
 6 fall and you suffer from since the fall, I can say
 7 the fall is pretty serious; and I don't think that's
 8 any stretch. Any layperson can say, based upon this
 9 accident, the seriousness of it, this is what's
 10 happened to me; and if you read her deposition, she's
 11 laid sufficient foundation to make that kind of a lay
 12 opinion or lay observation as to her own body.
 13 As to No. 6, No. 6, all she is doing is
 14 indicating -- again, in corroboration of Paragraphs 3
 15 and 4, she details what she's been doing, how she's
 16 been teaching people. She's, she's showing that she
 17 is probably more aware than your average senior
 18 citizen because she's taken the special classes to be
 19 able to teach these people, and she teaches these
 20 people on a regular basis how to be safe.
 21 And in her deposition, it says that she didn't
 22 teach this class just once in a while. It's ongoing,
 23 that she, she teaches the class, and they come back,
 24 and it's a continual thing.
 25 And so I forget what his argument was as to why

1 that should be stricken, whether it was relevance or,
 2 or what; but it's clearly relevant, Your Honor, to
 3 show that she had a heightened awareness of how to
 4 be, how to be safe. And she was actually teaching
 5 people how to do that, more so than any other senior.
 6 THE COURT: Mr. Hall.
 7 MR. HALL: Your Honor, counsel attempts to
 8 represent to the Court that somehow Mr. Ball claims
 9 that he actually saw his wife fall. If you read
 10 Page 44 of his deposition, he admits that he didn't
 11 see her fall; that he was getting out of the vehicle,
 12 coming around; and as he was coming around, his wife
 13 had fallen. So he, he didn't observe or see her
 14 proceeding to the location of the incident.
 15 And, and so in this case you have her
 16 attempting to testify as to what happened after she
 17 tells you, first of all, she doesn't remember what
 18 happened; and that's the reason that it should be
 19 stricken is because she now is attempting in, in that
 20 paragraph to suggest to the Court in Paragraph 6 this
 21 is what happened, this is the care that I took when
 22 in fact she has no memory as to what happened.
 23 And to the extent she would be attempting to
 24 testify, it would be on what somebody else may have
 25 told her; and counsel's relying upon what Mr. Ball

1 With regard to Paragraph 5, the witness lacks
 2 foundation to testify about the, quote, "visible
 3 evidence of Ice Melt". This is, of course, lay
 4 opinion, and there's no indication in the affidavit
 5 the witness is qualified and experienced to know
 6 whether or not Ice Melt had been applied; although
 7 the evidence is clear in this case it had been
 8 applied three, three previous occasions during that
 9 morning.
 10 And so in this case, the witness contradicts
 11 her own testimony when she says that the Ice Melt has
 12 not been applied; and then at the same time says, but
 13 it looks like it's wet, like Ice Melt has been
 14 applied. And, as such, Your Honor, we believe that
 15 Paragraph 5 should be stricken.
 16 THE COURT: Mr. Swenson.
 17 MR. SWENSON: Thank you, Your Honor.
 18 I want to go back just to his last statement
 19 regarding JoAn Ball's affidavit for a brief moment,
 20 Judge. If you look, he says that I had stated that
 21 Mr. Ball had not seen her fall. I didn't state that
 22 at all.
 23 However, on Page 41 of Mr. Ball's testimony,
 24 Lines -- starting with Line 9, he says, "And I
 25 looked -- I locked the truck up; and, you know, as

1 may have told her. And Mr. Ball testifies that he
 2 didn't see her go down, didn't see his own wife go
 3 down on this -- in this incidence. As such, Your
 4 Honor, clearly it is -- Paragraph 6 is speculative.
 5 And with regard to Paragraph 5, I don't think
 6 it's relevant to the issue the Court has before you.
 7 You know, if you, if you have a treble case on
 8 liability, I guess you try to argue, well, the
 9 seriousness of the damages are such, Your Honor, we
 10 ought to keep the case in even though there's no
 11 liability. And that's what that is. It's nothing
 12 more than that attempt to do so.
 13 And we've already indicated with regards to
 14 Paragraphs 3 and 4 the previous argument.
 15 THE COURT: The Merrifield affidavit, Mr. Hall.
 16 MR. HALL: Thank you, Your Honor.
 17 With regard to the Merrifield affidavit, we've
 18 requested the Court strike portions of Paragraph 3.
 19 In this case the witness lacks foundation to testify
 20 as to the causation of Mrs. Ball's fall, and yet she
 21 attempts to do so when she says "It was obvious to
 22 me". The witness does not state that she observed
 23 ice specifically where Mrs. Ball fell; and, as such,
 24 the fifth sentence of that Paragraph 3 should be
 25 stricken.

1 she got out, I heard her say, 'Beth is down.' And I
 2 kind of come around and, and seen her feet go up like
 3 that." He clearly saw her go down. There's no
 4 question about that. That's in his deposition.
 5 As to "Mr." Merrifield's affidavit, the first
 6 paragraph states at the end, the facts that are set
 7 forth are based on my personal knowledge. She said,
 8 "I observed JoAn Ball walking towards the woman who
 9 had fallen, and I saw JoAn Ball fall to the ground in
 10 very close proximity to the first woman. JoAn's feet
 11 came up very quickly in front of her two or three
 12 feet off the ground. It was obviously to me she had
 13 slipped on an icy surface."
 14 She's making merely an observation based upon
 15 common sense. As anybody who's ever slipped on ice,
 16 you don't go forward. You go backward if you slip.
 17 This is a common sense observation made by her.
 18 Paragraph 4. "I proceeded toward the two women
 19 and found JoAn unconscious with her husband and the
 20 other fallen victim showing great concern for her."
 21 No. 5. "I personally observed the conditions
 22 of the walkway from the exterior entry door of the
 23 pool out to the street and saw evidence of Ice Melt
 24 applied."
 25 What she's saying is is -- what she's

1 describing is the walkway from the door out to the
 2 sidewalk that, that comes across. She says there, I
 3 saw that the Ice Melt had been applied; but when I
 4 got down to where the two victims had fallen, there
 5 was no evidence of Ice Melt. So she's making an
 6 observation.
 7 And one -- on one hand, they want you to strike
 8 her testimony where she says I saw where Ice Melt had
 9 been applied, and I viewed where Ice Melt had not
 10 been applied. But they don't contest the fact that
 11 Ice Melt had been applied down the one. So they want
 12 it both ways.
 13 Her testimony should not be stricken. This is
 14 based upon her personal knowledge and her personal
 15 observations; and anyone living in Idaho, it's a
 16 reasonable inference if you grow up here, if you live
 17 here during the winter.
 18 She states that she's, she's attending the
 19 Blackfoot Municipal Pool. She, she attends there,
 20 and it's during the winter. Everybody knows what Ice
 21 Melt is. Everybody knows what salt is, and they know
 22 the effects of it. If you live in the winter, you
 23 knows those things. Those are observations. It's a
 24 reasonable inference.
 25 THE COURT: Mr. Hall.

21

1 take anything out of context.
 2 Your Honor, with regard to the Merrifield
 3 affidavit, as we've indicated, Paragraph 3,
 4 Ms. Merrifield is attempting to testify as to the
 5 causal -- the cause of this fall; and we do not
 6 believe that, that she's capable of doing that.
 7 Specifically, we've suggested to the Court that the
 8 witness does not observe -- does not say where she
 9 observed Mrs. Ball fall. And the fifth sentence of
 10 the paragraph should, therefore, be stricken.
 11 We've also indicated what we believe is
 12 inappropriate lay testimony with regard to
 13 Paragraph 5.
 14 THE COURT: All right. Mr. Hall, the Justesen
 15 affidavit.
 16 MR. HALL: Yes, Your Honor.
 17 With regard to Paragraph 2 of the Justesen
 18 affidavit, the plaintiff or -- excuse me -- the
 19 affiant attempts to represent to the Court what their
 20 observations were in the weeks leading up to
 21 February 25th, 2008. It doesn't talk about what the
 22 conditions were actually on February 25th, 2008; and,
 23 as such, Your Honor, that testimony is not relevant
 24 to the facts of this case or the issues that are
 25 before this Court.

23

1 MR. HALL: Thank you, Your Honor.
 2 I hate to go back to the earlier argument; but
 3 when counsel takes a part of the deposition out of
 4 context and tries to lead the Court into believing
 5 something different than what Mr. Ball actually
 6 testified to, I think it's incumbent that I do that.
 7 And Mr. Ball testified that he didn't see what
 8 his wife was doing immediately before her fall.
 9 That's on Page 44 of the deposition, Line 10. The
 10 question: "So you didn't see exactly what your wife
 11 was doing immediately before she fell?"
 12 "Answer: She just went around the front of the
 13 pickup to see what had -- to help Beth.
 14 "Question: But you didn't see --
 15 "Answer: But she didn't make it.
 16 "You don't know whether she was reaching down
 17 to help Beth or not?
 18 "No, no. I didn't get to see that because I
 19 was coming around."
 20 So he's admits in his deposition, Your Honor,
 21 that he didn't see what his wife was doing
 22 immediately before she fell; and I just think that
 23 it's incumbent that we fairly and appropriately
 24 represent the facts as they've been disclosed in the
 25 deposition to the Court rather than attempting to

22

1 Additionally, Your Honor, with regard to
 2 Paragraph 3, Your Honor, it is clear to us at least,
 3 Your Honor, that the witness lacks foundation to
 4 testify about visible evidence of Ice Melt. In this
 5 case that's an attempt by lay testimony to provide
 6 some expert testimony to the Court.
 7 And the paragraph covers a time period in the
 8 weeks leading up to February 25th. It does not deal
 9 with the date of the accident and, therefore, again,
 10 is irrelevant.
 11 And, finally, with regard to Paragraph 4, Your
 12 Honor, it deals with hearsay and is vague and lacks
 13 foundation. There's no date or time of the alleged
 14 conversations; and, as such, the matter becomes
 15 irrelevant and should be stricken.
 16 THE COURT: Mr. Swenson.
 17 MR. SWENSON: Yes, Your Honor.
 18 With regard to Mr. Hall's testimony again back
 19 on Frederick Ball, I'm not going to go over it too
 20 much; but he talks about taking it out of context. I
 21 would just refer the Court to Page 44, Line 19. He
 22 stopped halfway at Line 19, but he did not finish
 23 Line 19 or Line 20. And we would refer the Court to
 24 those lines.
 25 As to the affidavit of Shauna Justesen, she

24

1 again begins her affidavit in Paragraph 1 by saying
2 this is based on personal knowledge. This is
3 relevant, Your Honor. It goes -- it -- it's
4 corroboration testimony that shows that -- what the
5 conditions were leading up to the 25th.

6 And there already is testimony on the, on the
7 25th and after the 25th by Mr. Ball of the conditions
8 of the snow being piled up on the grass, which was
9 running over the sidewalk. This is merely
10 corroboration testimony to show that this has been an
11 ongoing problem.

12 The -- she also indicates in Paragraph 3 that,
13 by her observation, there was also no Ice Melt being
14 put on the, on the ice that was on the sidewalks,
15 also corroboration testimony.

16 Paragraph 4, this shows that the city or the
17 municipality or the pool had been put on notice of
18 the dangerous conditions outside and is relevant.

19 THE COURT: Mr. Hall.

20 MR. HALL: Well, again, Your Honor, I will be
21 very brief.

22 Paragraphs 2 through 4 relate to what she
23 believes conditions were in the weeks leading up to
24 the accident; and, as such, Your Honor, it has no
25 basis as to what the conditions were on the date of

1 Melt. That, of course, is corroborative of the
2 affidavit that the, the Court has before it from
3 Lorna VanHorn who indicated that she arrived to work
4 on February 25th at 3:30 a.m. I must admit I admire
5 people who are capable of arriving at work at
6 3:30 a.m.

7 But, in any event, at that time, as she was
8 aware of these -- the fact that in Idaho there had
9 been snow and ice. You know, it's just one of those
10 things here in Idaho. We get snow, and we get ice.
11 And that happens to every street, happens to every
12 sidewalk.

13 And as a result of that, she took reasonable
14 precautions; and the reasonable precautions that she
15 took was -- and she testifies to this in her
16 affidavit -- that she went out on three different
17 occasions between 3:30 and 6 a.m. and applied Ice
18 Melt on the sidewalk in order to try to make this
19 area as safe as possible. But, again, Your Honor --
20 well, I'll get to that in the argument.

21 I, I next want to go to the affidavit of
22 Mr. Orgill who testified, Your Honor, that he
23 conducted an inspection of the sidewalk in front of
24 the City of Blackfoot Municipal Pool. When he
25 inspected the area where Ms. Ball purported to have

1 the accident. And, as such, Your Honor, is not
2 relevant or admissible.

3 THE COURT: Mr. Hall, let's now move to your
4 motion for summary judgment.

5 MR. HALL: Thank you, Your Honor.

6 As a result of the argument that's already
7 occurred, I will try to be fairly brief with regard
8 to the facts because I'm sure the Court has a good
9 command of the facts.

10 But, in any event, Your Honor, this case
11 involves a claim by Mr. and Mrs. Ball as a result of
12 a slip and fall that JoAn Ball claims to have had on
13 February 25th, 2008, on a sidewalk near the parking
14 area of a street in the City of Blackfoot by the
15 Blackfoot City Pool.

16 And Mr. Ball testified that the City of
17 Blackfoot had placed Ice Melt on the sidewalk on the
18 day of the accident because, as he said, quote, "You
19 could see where the salt had been melting the ice.
20 You know, salt melts -- makes little holes, and then
21 it would melt the ice. You could see that. When I'm
22 kneeling down there, I could see where they had
23 salted ways up there."

24 So he is testifying as to what his observation
25 was, that the city had been applying salt and Ice

1 slipped and fall, he was able to determine that the
2 sidewalk was constructed with a standard width,
3 standard slope; that the walking surface, while it
4 showed some signs of spalling or weathering or --
5 excuse me -- did not show any signs of spalling or
6 weathering.

7 And while it was slightly worn, it had more
8 than adequate abrasiveness on its nonslip -- as a
9 nonslip walking surface to meet all the requirements
10 of the ADA and that there were no tripping hazards
11 consistent with anything that would be in violation
12 of the ADA.

13 He also testifies that the sidewalk where
14 Mrs. Ball purports to have slipped and fallen was
15 properly constructed with the correct grade, was in
16 compliance with the applicable building codes.

17 And so, Your Honor, at this point we get to the
18 issue of what is the legal liability of the city
19 'cause that's really the issue that this Court has to
20 determine in deciding whether or not to grant summary
21 judgment to the city.

22 And, Your Honor, what the Court will see is
23 that the plaintiffs want to argue a standard that
24 doesn't apply, and the Court is required to apply the
25 standard the Supreme Court has put forth for cities

1 and municipalities with regard to their streets and
2 sidewalks. The Supreme Court has recognized that
3 because we live in Idaho, to suggest that you're able
4 to keep all snow and all ice from ever accumulating
5 on your roads or sidewalks is an unreasonable burden.

6 In Pearson, the Idaho Supreme Court stated, in
7 certain seasons and localities, it is well-known -- I
8 would suggest that's probably Blackfoot, Idaho -- it
9 would be burdensome, if not impracticable, to impose
10 the duty on the municipality to keep its sidewalks
11 clear of snow and ice at all times. Pedestrians --
12 Mrs. Ball -- must assume the risk attending a general
13 slippery condition of sidewalks produced by natural
14 causes and which remain despite the efforts of
15 reasonable care and diligence.

16 So the Supreme Court has clearly established
17 that a municipality is only required to exercise
18 ordinary or reasonable care to maintain its streets
19 and sidewalks in a reasonably safe condition.

20 And that's exactly what the testimony and the
21 evidence in this case is. What did the City of
22 Blackfoot do? They removed all the snow from the
23 sidewalks. And when and if ice accumulated, they
24 went out; and they spread Ice Melt.

25 What is interesting to me, Your Honor, is that
29

1 in Pearson, the Court was asked to look at a
2 circumstance which, quite frankly, was much more
3 severe than anything that the plaintiffs can claim in
4 this case; and that was that there was an actual
5 defect in the sidewalk in Pearson. And the Supreme
6 Court held in that case that the defect in itself not
7 being of sufficient serious import as to render the
8 municipality liable for actionable negligence.

9 There the Court says, well, there's a defect.
10 Here there is no defect. There there was a defect;
11 and they said the fact that this defect, the fact
12 that the depression becomes filled with water and
13 freezes with a, with a surface of hard, smooth glazed
14 ice because of natural weather conditions likewise
15 does not constitute any defect for which the
16 municipality may be held liable.

17 So in this -- in that case, Your Honor, the
18 plaintiffs were able to point to a specific defect, a
19 depression in the sidewalk, which caused the water to
20 accumulate and create a hard, smooth glazed ice
21 surface.

22 There's no evidence that there was ever any
23 effort taken by the city to apply Ice Melt. There
24 was no evidence that the city made any effort to try
25 to address the defect that was clearly established by
30

1 the plaintiffs in that case, and the Supreme Court
2 held that this did not constitute any defect for
3 which the municipality may be liable since in such a
4 case the ice and not any existent defect constitutes
5 the proximate cause of an injury received because of
6 slipping on the ice.

7 Now, if that is not all fours, I don't know
8 what case you could find that would be on all fours.
9 And, of course, plaintiffs simply ignore that case in
10 their response.

11 But, Your Honor, the Court held that hard,
12 smooth glazed ice resulting from natural weather
13 conditions does not constitute a defect for which a
14 city can be held liable. And why? Because to do so
15 in Idaho would create a burden. It would be so great
16 that no municipality could ever meet it.

17 In this case, Your Honor, the plaintiff --
18 there's no question but the plaintiff have not come
19 forward with any expert witness to suggest there's a
20 defect. It's interesting because in their complaint
21 what they allege -- and I think it's important to at
22 least acknowledge what they've alleged -- is that
23 they allege on one count that the city negligently
24 failed to take protective measures to remove
25 accumulated ice on the sidewalk. So it's a standard
31

1 negligence claim.

2 Supreme Court has addressed that by saying,
3 now, for municipalities we're not going to hold them
4 to that standard to keep all ice off of the sidewalks
5 in Idaho because of natural weather conditions.

6 Their second cause of action is that they claim
7 it's for a defective design in the sidewalk in
8 question and the surrounding landscape. What is the
9 evidence to the Court? What is the competent
10 evidence that the Court has before it of a defect of
11 the sidewalk or the surrounding landscape?

12 Well, the only evidence the Court has before it
13 of any competency is that of Mr. Orgill, who provides
14 the Court with an affidavit which makes it very clear
15 that the -- this sidewalk is built with the proper
16 grade, the proper surface -- by that I mean the
17 proper abrasiveness on, on the surface that is
18 required under the building code -- and that the
19 surrounding landscape was designed in accordance with
20 industry standards and was not defective in any way.
21 That's the only competent evidence the Court has
22 before it.

23 Now, plaintiffs can't -- don't address these
24 issues and can't because that's what the true
25 standard is in Idaho with regard to liability for
32

1 municipalities. And so, instead, they try to get
 2 this Court and would have this Court adopt a
 3 different standard altogether, which deals with a
 4 highly hazardous activity of a propane tank. Doesn't
 5 apply in this case, Your Honor. What applies in this
 6 case is what the Supreme Court has held specifically
 7 with regard to snow and ice.

8 And we would suggest, Your Honor, that it is
 9 not for this Court to create a new standard for
 10 municipalities or counties, but rather to follow the
 11 standards that the Supreme Court has set forth
 12 because to do otherwise would be, as the Court has
 13 held, burdensome, impracticable, and impose a duty
 14 that municipalities simply could never meet.

15 Thank the Court.

16 THE COURT: Mr. Swenson.

17 MR. SWENSON: Your Honor.

18 Your Honor, it's interesting to turn to look at
 19 plaintiffs' -- or defendant's opening brief in
 20 support of motion for summary judgment. In their
 21 first --

22 THE COURT: Mr. Swenson, you need to pull that
 23 mike a little bit closer.

24 MR. SWENSON: I'm sorry, Your Honor.

25 In their first paragraph, they state that they

1 pointed out, the Splinter case, which deals with the
 2 duty in relation to a tank that exploded in that
 3 case: The Pearson case appears to be right on point
 4 because it's dealing specifically with slip-and-fall
 5 cases on sidewalks in Idaho. So isn't that the
 6 standard that I'm supposed to follow? I mean when I
 7 looked at the case and did the search on it, it still
 8 appears to be good law.

9 MR. SWENSON: Your Honor, admittedly, I have
 10 not read the case cited by Mr. Penrod in his brief
 11 with regard to -- I don't even know what the case
 12 name is.

13 THE COURT: Well, let me -- I've got it right
 14 here. So let me just quote you a couple things.
 15 "Mere slipperiness of a sidewalk occasioned by smooth
 16 or level ice or snow is insufficient to charge the
 17 municipality with liability for injury resulting
 18 therefrom where the snow or ice does not constitute
 19 an obstruction."

20 MR. SWENSON: I, I read the Pearson case. I'm
 21 speaking of the other case that, that --

22 THE COURT: The Splinter case?

23 MR. SWENSON: Yeah.

24 Judge, you cannot take -- first of all, it is
 25 important to recognize that this, this is a, this is

1 want to make a bunch of hay about whether or not
 2 there was ice on the sidewalk and this and that and
 3 the other; but in their, in their own statement of
 4 facts, the very first paragraph, they say that JoAn
 5 slipped and fell on ice.

6 There's no question that there was ice present
 7 and that she slipped and fell. Their own, their own
 8 statement of facts sets forth the fact that all their
 9 murmurings about whether this should come in, that
 10 should come in are of no moment. They admit that the
 11 statement of facts that this Court should rely on are
 12 that Mrs. Ball slipped and fell on ice.

13 Paragraph 7, they want you, they want you to
 14 accept the statement of facts that when Mrs. VanHorn
 15 arrived at the pool at 3:30 a.m., she noticed that
 16 the sidewalk was slippery and sprinkled Ice Melt on
 17 the sidewalk.

18 There's no question that there was ice on this
 19 sidewalk. The question is is did they take
 20 reasonable and ordinary care, whatever the standard.
 21 Even if you were to take this lower standard that
 22 Mr. Hall suggests to this Court should apply, they
 23 did not exercise reasonable and ordinary care.

24 THE COURT: Well, let me, let me stop you there
 25 and ask you this, because you argued, as Mr. Hall's

1 a business for the city. They charge people to come
 2 in and do it.

3 The Balls in their deposition stated they pay
 4 350 bucks a year for a family pass to do this. This
 5 is a, this is a venture. This is a business venture
 6 for them. They make money here. They charge people
 7 money to come and do this.

8 And so -- and, and I'm sure the Court's aware
 9 where this is at, right next to the school; and it's
 10 got one continuous sidewalk.

11 They recognized -- it's, it's more egregious
 12 for the fact that they recognized the slippery
 13 conditions and took a halfhearted effort to try to
 14 address it. They put Ice Melt down the center
 15 sidewalk and then little places on the side, but they
 16 didn't go down the entire sidewalk of where all the
 17 patrons park down that, that area.

18 You can't, you can't say I can see there's a
 19 dangerous situation here, I'm going to address part
 20 of it, and I'm going to ignore the rest of it.
 21 That's not what Pearson case stands for.

22 We're not saying, if they take some measures to
 23 -- for safety, then that -- whether they take the
 24 measures for safety or not is irrelevant. They don't
 25 have to take any measures at all. They have a

1 standard of care, and it's reasonable.
 2 The fact is, as she testifies, Ms. "Horn"
 3 testified, when she got there, she recognized the
 4 slippery conditions on that sidewalk that day; and
 5 she took a halfhearted measure to do it, to, to
 6 remedy it. And they were warned on a prior occasion
 7 by other patrons of the slippery conditions.
 8 In addition, Ms. "Horn" argues -- sets forth in
 9 her affidavit that she recognized the snow had been
 10 piled up onto the landscape by the sidewalk, which
 11 was causing water to run over the sidewalk. They're
 12 recognizing that --
 13 THE COURT: Well, let me ask you this: When we
 14 talk about reasonable care, being familiar with Idaho
 15 winters, if you shovel your sidewalk, are you saying
 16 that reasonable care for the city then is not to pile
 17 it up on the side, on the grass, but to haul it off?
 18 MR. SWENSON: If you have a situation -- I'm
 19 tell -- yeah, I'm saying that if you have a situation
 20 where you're piling snow up on landscaping and you
 21 know that it's running off during the day and it's
 22 putting a sheet of ice over the sidewalk, I'm saying,
 23 yeah, that's an, that's an unreasonable course.
 24 That's negligence. That's negligent conduct knowing
 25 that, knowing that your conduct is creating a worse

1 Supreme Court in that case cites to Wilson versus
 2 City of Idaho. It's always fun to pull out the old
 3 books. This is a 1909 case. The standard that's
 4 discussed in Pearson and in Wilson, I quoted a
 5 portion of that language. It's the liability for
 6 injury resulting therefrom where the snow or ice does
 7 not constitute an obstruction.
 8 In Wilson, on Page 429, they quote from a
 9 Washington case that they rely upon. The city is not
 10 liable for accidents occasioned by mere slipperiness
 11 caused by ice upon the walk. If the ice is not so
 12 rough and uneven or so rounded up or at such an
 13 incline as to make it an obstruction and to cause it
 14 to be unsafe for travel with the exercise of due
 15 care, there's no liability.
 16 So the portion I'm kind of struggling with a
 17 little bit on this is that, given time, with now
 18 we've got Ice Melt, if they've shoveled the snow and
 19 there's no evidence that the -- if there's -- let's
 20 assume there's ice there, that the ice is smooth,
 21 it's not accumulated over time where it's uneven and
 22 causes a tripping hazard or that type of thing,
 23 then -- and even if we admit the evidence in the
 24 affidavits that she used her boots to walk on the
 25 ice, she's taken reasonable care, doesn't the

1 hazard.
 2 But even, but even setting that aside, Your
 3 Honor, the fact that -- she admits that she put Ice
 4 Melt on part of it. And then you have all the other
 5 witnesses say there was Ice Melt over here, but there
 6 was no Ice Melt over here. What she had done, she
 7 just put Ice Melt -- there's no testimony of how much
 8 Ice Melt she put on, the exact locations that she,
 9 she put the Ice Melt on.
 10 There's no, there's no indication in her
 11 affidavit that she followed the instructions on the
 12 amount of proper Ice Melt to put down. But she
 13 admits that she took certain steps, but her steps
 14 were wholly inadequate. And I find that it's, it's
 15 more negligent --
 16 THE COURT: Let me, let me ask you this 'cause
 17 this is --
 18 MR. SWENSON: -- if she does part, but not the
 19 whole.
 20 THE COURT: We're all focused on Ice Melt. So
 21 let me ask you this: The Pearson case was from 1959.
 22 I wasn't around then. So I don't know if they had
 23 Ice Melt or not. Nothing in the record tells me
 24 whether they do or not.
 25 Interestingly enough, though, when the -- the

1 standard in Pearson and Wilson still say that the
 2 city's not liable?
 3 MR. SWENSON: No.
 4 THE COURT: Why not?
 5 MR. SWENSON: Because it states that they're in
 6 charge to taking reasonable care for the -- to ensure
 7 the safety of their patrons.
 8 THE COURT: Right. That's my question. Is
 9 shoveling enough?
 10 MR. SWENSON: No.
 11 THE COURT: Okay. Why not?
 12 MR. SWENSON: 'Cause when you have -- I would
 13 say that to leave the snow on -- if, if you're going
 14 to walk -- and this Court knows, having lived here,
 15 if I've got snow or solid ice to walk on, I'm going
 16 to walk on the snow 'cause I'm not going to fall on,
 17 on, on snow as -- I'm not as likely to fall on that
 18 as I am on, on ice.
 19 And so by removing the snow -- and they, they
 20 recognize -- that's the key here, Judge, is they
 21 recognize the danger. And she says I recognized the
 22 slipperiness and the ice on the sidewalk. So I went
 23 and got the Ice Melt; and, and she said she applied
 24 it in the area. She doesn't say she applied it
 25 where, how much, or, or what precautions she took,

1 and exactly where she applied it.
 2 But it's clear that three people testified in
 3 their affidavits that she had put Ice Melt here, but
 4 she didn't put it down here. (Indicating.) I don't
 5 think you get it both ways. I don't think you get
 6 to, to recognize a problem, address part of it, and
 7 not the other part; and, in fact, the evidence is is
 8 two people fell in the same place indicating the
 9 dangerous conditions there.
 10 THE COURT: Go ahead. Anything further?
 11 MR. SWENSON: Well, I got --
 12 THE COURT: I didn't mean to get you off track.
 13 MR. SWENSON: I would, I would like to comment
 14 on the affidavit of Rex Orgill. In his affidavit he
 15 talks about the sidewalk; but nowhere in his
 16 affidavit does he talk about the landscape
 17 surrounding the sidewalk, what conditions the
 18 landscaping and the slope of the landscape, what have
 19 caused due to the sidewalk. He merely focuses on the
 20 sidewalk itself. He doesn't focus on anything else.
 21 These, these issues, Your Honor, are questions
 22 for a jury. The reasonableness, whether or not the
 23 municipality was reasonable in their efforts is, is a
 24 question of fact for this jury or for a jury to
 25 decide.

1 defect, I would just be very brief. I don't think
 2 the Court's heard any evidence where the burden has
 3 been carried by the plaintiff to demonstrate that
 4 there's any defect in this sidewalk in any fashion
 5 whatsoever or in this area of the city property, any
 6 fashion whatsoever. And, as such, Your Honor, that
 7 matter seems to me to be very clear and easy for the
 8 Court to dismiss that claim.
 9 It's interesting, Your Honor, with regard to
 10 the claim of negligence, while the plaintiffs have
 11 relied heavily on Splinter versus the City of Nampa
 12 for their efforts to urge this Court to adopt a
 13 different standard of care, plaintiffs' counsel
 14 apparently hasn't read the case and I don't believe
 15 has legitimately attempted to argue the case to this
 16 Court because if he had read the case, the Court --
 17 he would recognize that that case dealt with a very
 18 hazardous circumstance, in which case the Court said
 19 that because of the highly flammable and explosive
 20 nature of the circumstances, we're going to hold them
 21 to a higher standard.
 22 Weather in Idaho doesn't rise to that higher
 23 standard. It simply doesn't arise to that higher
 24 standard.
 25 So, therefore, Your Honor, we must deal with

1 And to, to find summary judgment on these
 2 issues, my, my opinion, Your Honor, is reversible
 3 error. These issues are clearly for a jury. These
 4 are questions of fact -- whether or not they took
 5 reasonable steps; whether or not they were on notice;
 6 and after they were on notice, did they take
 7 reasonable efforts.
 8 And whether they were put on notice doesn't
 9 matter because their own, their own witness,
 10 Ms. VanHorn, I believe her name is, Lorna VanHorn,
 11 admits that she was on notice herself. She, she
 12 recognized that there was an issue. But she only,
 13 she only, she only took efforts to, to remedy part of
 14 it; and she ignored the rest of it.
 15 There's three people that testified that she
 16 took steps to remedy part of it, but didn't remedy
 17 the other part of it; and that's where two people
 18 fell at the same time or nearly the same time in the
 19 same, in the same vicinity on that ice.
 20 They did not take reasonable steps; and they
 21 had, they had a duty to, to do so. And they failed
 22 to do that, Judge.
 23 THE COURT: Okay. Mr. Hall.
 24 MR. HALL: Thank you, Your Honor.
 25 I guess with regard to their second claim of a

1 what the actual law is in the State of Idaho; and I,
 2 I sense that plaintiff says, well, they've admitted
 3 that there's ice. Well, for purposes of summary
 4 judgment, Your Honor, we have to allow this Court to
 5 assume the facts most favorable to the plaintiff; and
 6 so we recognize that the Court will assume the facts
 7 most favorable to the plaintiff. And then if, in
 8 spite of all that, we're still entitled to summary
 9 judgment, the Court will grant that summary judgment.
 10 So now what plaintiff is arguing is though --
 11 even though they have no case law cited in this
 12 jurisdiction or any other jurisdiction, they're now
 13 telling this Court that you have to adopt a standard
 14 of care that's never been adopted in any jurisdiction
 15 that they've been able to reveal to the Court. And
 16 they have said, well, it's because they recognize
 17 that this property -- that the sidewalk is slippery,
 18 and, quote, "They made a halfhearted effort to remedy
 19 it."
 20 Now, it's interesting that that language would
 21 be used because there's nothing in the record that
 22 would suggest that by going out on three separate
 23 occasions -- at least three separate occasions is
 24 what the affidavit of Ms. Lorna Horn -- VanHorn
 25 stated -- that by going out on at least three

1 previous occasions to this fall and applying Ice
 2 Melt, that somehow is a halfhearted effort.
 3 But in some respects, Your Honor, it's a, it's
 4 a red herring; and the reason it's a red herring is
 5 because that is -- that's going above the standard of
 6 care that's required in Idaho to apply any Ice Melt.
 7 So it's a red herring.
 8 Now, if they had said, well, they applied Ice
 9 Melt; that made the, that made the ice melting; and I
 10 slipped in an area where the Ice Melt had made the
 11 ice -- put some water on top of the ice -- well,
 12 then, then maybe it would be relevant.
 13 But that's a red herring because what is the
 14 standard that's required in Idaho? The Supreme
 15 Court's not unequivocal about this, and I'm glad
 16 they're not because, as a property owner, you know, I
 17 hate to think that -- well, first of all, I'm told
 18 that I'm required or supposed to shovel my sidewalks.
 19 I'm told that I can't pile the snow into the, into
 20 the street. I have to pile it on my own property,
 21 and I'm told that I'm supposed to do those things.
 22 And I -- you know, if I don't, my neighbors kind of
 23 get a little upset on my house being the only house
 24 that has snow.
 25 And then to somehow claim, well, it's safer to

45

1 municipality with liability for injury." Boy, that's
 2 exactly what the plaintiffs claim happened here, and
 3 yet Supreme Court says there's no liability.
 4 They say the only time there's liability is
 5 where the snow or the ice constitutes an obstruction.
 6 There's nothing in any affidavit. There's not been
 7 anything in any deposition. There's not even been
 8 any attempt to argue to this Court today by
 9 plaintiffs, counsel that there is a hint that this
 10 ice or snow by the city pool on October 25th of 2008
 11 constituted an obstruction.
 12 Now, I recognize they've said, well, you ought
 13 to take and apply this other standard because it's a
 14 proprietary activity because the City of Poc -- or
 15 City of Blackfoot makes money on their pool. Well, I
 16 suppose the Court's capable of taking judicial notice
 17 that the city would love to make money on their pool
 18 and would love to not have to subsidize it.
 19 But to argue that it's anything other than a
 20 service that they provide for its citizens that's
 21 subsidized is exactly the same thing as claiming
 22 that, well, by buying driver's licenses and buy --
 23 and paying for gas and having gas taxes, that we
 24 somehow are making money on our roads. That's not
 25 the reality.

47

1 walk on snow than it is to walk on a cleared
 2 sidewalk, boy, that's just not been my experience.
 3 And there's certainly nothing in the record that
 4 would suggest that in Idaho, by having numerous
 5 people tromp down snow and it melts and freezes and
 6 melts and freezes and you've got all sorts of
 7 footprints and jagged edges and unevenness and so
 8 forth, that that's somehow going to be safer than a
 9 smooth surface.
 10 But, again, it's irrelevant. It's a red
 11 herring. That isn't the standard of care that's
 12 required in Idaho. The Supreme Court has been clear
 13 as to what is the standard of care.
 14 They go all the way back to -- and the Court
 15 cited the case from our brief; but it, it, it goes
 16 all the way back to Wilson versus the City of Idaho
 17 Falls. It's not like this is a new problem. It's
 18 not like this is a new issue that we've just finally
 19 realized that we have snow and ice on sidewalks in
 20 Idaho.
 21 So it goes all the way back to 1904 in the
 22 Wilson versus City of Idaho Falls where the Supreme
 23 Court clearly set forth the standard. And they say,
 24 "Mere slipperiness of a sidewalk occasioned by smooth
 25 or level ice or snow is insufficient to charge the

46

1 So what is the standard? No obstruction.
 2 So then you go to the more recent case, the
 3 '54, the 1954 case in Pearson versus the City of
 4 Boise. They don't mention in that case that, well,
 5 the city should have put Ice Melt on the property.
 6 No.
 7 In fact, it's very interest what they say.
 8 They say it would be too burdensome, if not
 9 impracticable, to impose the duty upon a municipality
 10 to keep its sidewalks clear of snow and ice at all
 11 times, not going to require that. Now, the
 12 plaintiffs want you to require that. Supreme Court
 13 says we're not going to require that.
 14 And then what seems very interesting to me is
 15 the Supreme Court has told all of us as citizens of
 16 the State of Idaho the following: Me, you, as
 17 pedestrians, we must assume the risk attendant in --
 18 to a general slippery condition of sidewalks produced
 19 by natural causes and which remain despite the
 20 reasonable efforts of municipality.
 21 And guess what. We, as Idahoans, already do
 22 that. We know that. In fact, even the plaintiff in
 23 this case claims that she was attempting to be
 24 careful because she knew of the slippery conditions
 25 and went ahead and confronted them. That doesn't

48

1 create liability. That simply doesn't create
 2 liability.
 3 There's been nothing to suggest that this
 4 condition was anything other than what would occur
 5 under the natural conditions of snow and weather in
 6 Idaho.
 7 And interestingly enough, Your Honor -- and I
 8 think this is really the capstone. Even in Pearson
 9 when they found a defect in the sidewalk because of a
 10 depression, the Supreme Court held that the fact that
 11 the depression becomes filled with water and freezes
 12 with a surface of hard, smooth glazed ice because of
 13 natural weather conditions -- that's all the argument
 14 here is, not the defect, but everything else -- this
 15 does not constitute any defect for which the
 16 municipality may be held liable since in such a case
 17 the ice and not any existent defect constitutes the
 18 proximate cause of the injury received result because
 19 of the slipping on the ice. No liability.
 20 That is the standard that applies, Your Honor;
 21 and, as such, we believe that this case is
 22 appropriate for this Court to grant summary judgment.
 23 THE COURT: All right. Gentlemen, I need to
 24 ask a question in relation to, Mr. Hall, your motion
 25 for summary judgment regarding Mr. Ball's claims.

1 Assuming that -- assume for purposes of this
 2 argument or this question that you don't prevail on
 3 summary judgment, is it your -- are you -- have you
 4 asserted enough to go forward on a summary judgment
 5 claim against Mr. Ball at this point under that
 6 situation; or is it merely that if you are granted
 7 summary judgment, that then Mr. Ball's claims are
 8 lost?
 9 MR. HALL: Appreciate the question, Your Honor;
 10 and I apologize that I did not address that issue in
 11 my initial argument.
 12 Your Honor, because we believe that we're
 13 entitled to summary judgment in this case, we have
 14 simply suggested to the Court that because all of
 15 Mr. Ball's claims are parasitic to Mrs. Ball's claim,
 16 that if there is no liability relative to Ms., Ms. --
 17 Mrs. Ball, there clearly is no liability as to
 18 Mr. Ball.
 19 We may, if we were not granted summary
 20 judgment, we may come back at a later date with
 21 regard to a motion for summary judgment as to
 22 Mr. Ball's claims that would be independent of
 23 Mrs. -- which would be under independent arguments
 24 with regard to proximate cause, et cetera, and so
 25 forth, because they made all sorts of claims that are

1 clearly, we believe, not associated with this
 2 accident.
 3 But because they're all parasitic at this
 4 point, Your Honor, we believe, if we receive summary
 5 judgment on Mrs. Ball, we're clearly entitled to
 6 summary judgment on Mr. Ball. If we don't, we would
 7 anticipate the Court wouldn't grant summary judgment
 8 on Mr. Ball at this point. We would have to come
 9 back and argue independently under different
 10 arguments at that time.
 11 THE COURT: All right. So if I understand
 12 correctly, if you lose the summary judgment hearing,
 13 Mr. Ball's claims survive pending subsequent motion?
 14 MR. HALL: Correct, Your Honor.
 15 THE COURT: All right. Mr. Swenson, in
 16 relation to that, if plaintiffs are granted summary
 17 judgment, is it -- are you asserting that Mr. Ball's
 18 claims would survive beyond that?
 19 MR. SWENSON: Well, I'd have to say, yes, Your
 20 Honor, because they've not addressed it. They've not
 21 moved for summary judgment. They've made a simple
 22 allegation it's parasitic, offered nothing in support
 23 of that; and so they would -- it would necessarily
 24 survive.
 25 THE COURT: Okay. All right. Gentlemen, I'll

1 take your motions under advisement. You'll have a
 2 decision shortly. Appreciate you both.
 3 MR. HALL: Thank you, Your Honor.
 4 MR. SWENSON: Thank you.
 5 THE COURT: Court will be in recess.
 6 (Proceedings recessed at 10:23 a.m.)
 7
 8
 9
 10 -oOo-
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

1 REPORTER'S CERTIFICATE

2
3 I, SANDRA J. BEEBE, Certified Shorthand
4 Reporter, Registered Professional Reporter, and
5 Official Court Reporter, Seventh Judicial District,
6 State of Idaho, do hereby certify that the foregoing
7 transcript, consisting of Pages 1 to 52, inclusive,
8 is a true and accurate record of the proceedings had
9 on the date and at the time indicated therein as
10 stenographically reported by me to the best of my
11 ability, and contains all of the material designated
12 in the Notice of Appeal.

13 IN WITNESS WHEREOF, I have hereunto set my hand
14 this 15th day of March, 2011.

15
16
17 

18 SANDRA J. BEEBE, C.S.R.
19 C.S.R. No. 42