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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN FREDERICK BALL and JOAN BALL;

Plaintiffs / Appellants,

vs.

CITY OF BLACKFOOT,

Defendant / Respondent,

Supreme Court No. 38530-2011
District Court Case No. CV 2010-328

APPELLANTS' BRIEF

APPEAL 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

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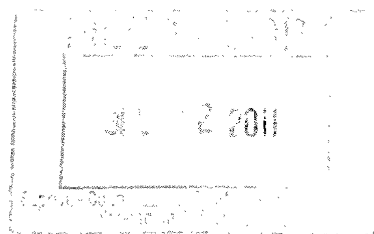


TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS .... *i, ii*

TABLE OF AUTHORITIES .... *iii, iv*

STATEMENT OF THE CASE *2*

A. NATURE OF THE CASE *2*

B. STATEMENT OF FACTS *2*

C. PROCEDURAL HISTORY *6*

ISSUES ON APPEAL *7*

1. Did the district court err when it failed to apply the facts of the Plaintiffs' case to the duty owed to an invitee of a proprietary or private business enterprise owned and operated by a municipality? *7*

2. Did the district court err when it failed to recognize the Defendant assumed a duty to maintain the sidewalks in a non-negligent matter? *7*

3. Did the district court err when it failed to apply the facts of the Plaintiffs' case to the Defendant's general duty to exercise reasonable care to maintain its streets and sidewalks in a reasonably safe condition? *7*

4. Did the district court err when it granted Defendant's Motion for Summary Judgment when material questions of fact remained? *7*

STANDARD AND SCOPE OF REVIEW *7*

ARGUMENT *8*

A. The district court erred when it failed to apply the facts of the Plaintiffs' case to the duty owed to an invitee of a proprietary or private business enterprise owned and operated by a municipality? *8*

B. The district court erred when it failed to recognize the Defendant assumed a duty to maintain the sidewalks in a non-negligent matter. *13*

C. The district court err when it failed to apply the facts of the Plaintiffs' case to the general duty to exercise reasonable care to maintain their streets and sidewalks in a reasonably safe condition? *15*

ATTORNEY FEES ON APPEAL *16*

CONCLUSION *16*

CERTIFICATE OF SERVICE *18*

TABLE OF AUTHORITIES

Page(s)

CASES

City of Nampa v. Kibler, 62 Idaho 511, 113 P.2d 411 .... *8*

Eaton v. City of Weiser, 12 Idaho 544, 86 P. 541 .... *8,9*

Estate of Becker v. Callahan, 140 Idaho 522, 96 P.3d 623 (2004) *8*

Ford v. City of Caldwell, 79 Idaho 499, 321 P.2d 589 .... *8*

Gilbert v. Village of Bancroft, 80 Idaho 186, 327 P.2d 378 .... *8,9*

Hansen v. City of Pocatello, 145 Idaho 700, 703, 184 P.3d 206, 209 (2008) *8*

Harrison v. Taylor, 115 Idaho 588, 768 P.2d 1321 (1989) *9*

Henderson v. Twin Falls County, 56 Idaho 124, 50 P.2d 597 .... *8*

Holzheimer v. Johannesen, 125 Idaho 397, 871 P.2d 814 (1994) *9*

Hooton v. City of Burley, 70 Idaho 369, 219 P.2d 651 .... *8,9*

Johnson v. K-Mart Corp., 126 Idaho 316, 882 P.2d 971 (Idaho App. 1994) *9*

Lively v. City of Blackfoot, 91 Idaho 80, 82, 416 P.2d 27, 29(1966) *8*

Lundahl v. City of Idaho Falls, 78 Idaho 338, 303 P.2d 667 .... *8*

Pearson v. Boise City, 80 Idaho 494, 333 P.2d 998 (Idaho 1959) *11,12,15*

Splinter v. City of Nampa, 70 Idaho 287, 215 P.2d 999 .... *8,9,12*

Strickfaden v. Green Creek Highway Dist., 42 Idaho 738, 248 P. 456 .... *8*

Udy v. Custer County, 136 Idaho 386, 34 P.3d 1069 (2001) *13*

Van v. Portneuf Med.Ctr., 147 Idaho 552, 212 P.3d 982 (2009) *7*

Watson v. Weick, 141 Idaho 500, 112 P.3d 788 (2005) *8*

OTHER

Idaho Rules of Civil Procedure, 56(c) *8*

Idaho Jury Instructions, 3.09 .... *9*

I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a case for damages arising out of a slip and fall accident occurring on the sidewalk in front of the Blackfoot Municipal Pool in Blackfoot, Idaho. The Blackfoot Municipal Pool (hereinafter referred to as "Pool") is owned by the City of Blackfoot. The subject sidewalk is located within the designated parking area for patrons of the Pool. The Plaintiffs assert that the City of Blackfoot was negligent in maintaining the sidewalk by permitting a dangerous accumulation of ice to form and persist creating an unreasonable risk of harm to the patrons of the Pool. Plaintiff JoAn Ball, an elderly patron of the Pool, was severely injured when she slipped and fell on the unattended ice that had accumulated on the sidewalk.

B. STATEMENT OF FACTS

The Appellants JoAn Ball and Fred Ball (hereinafter respectively referred to as "JoAn" and "Fred") reside in the City of Blackfoot and they have five (5) children, thirty-six (36) grandchildren and eighty-two (82) great-grandchildren. (R. 75). JoAn and Fred paid the Defendant approximately $350.00 for a family pass so they could be regular patrons of the Pool. (R. 138-39). At approximately 6:00 a.m. on the morning of February 25, 2008, JoAn and Fred, drove in their vehicle to the Pool to go swimming. (ADDM R. 92 and 95). When JoAn and Fred arrived, they parked in front of the Pool in the parking area designated for Pool patrons. (R. 6,

55). The designated parking area is identified in front of the Pool by signs stating: "Pool Parking Only" with an arrow. (R. 176). The district court entered a finding of fact that "the Balls parked their vehicle at the designated parking area for the Pool." (R. 181). JoAn and Fred parked next to a pickup truck owned by Beth Golson (hereinafter referred to as "Beth"), a friend and walking partner of JoAn. (ADDM R. 93).

JoAn exited the vehicle and as she was walking around toward the sidewalk she exclaimed "Beth is down". (R. 6, 55; ADDM R. 93). As Fred was walking toward JoAn, Fred observed JoAn slip and fall on the sidewalk in front of the designated parking area for the Pool. (R. 6, 55; ADDM R. 94). When JoAn fell, Fred observed JoAn's feet go up in the air and he heard a crunch or crack as her head hit the sidewalk. (R. 6, 55; ADDM R. 94). Jeanette Merrifield (hereinafter referred to as "Merrifield") was a patron of the Pool on the morning of February 25, 2008, and observed JoAn's slip and fall accident. (R. 59-60). Merrifield observed JoAn walking in a normal and not in a hurried fashion toward Beth and saw JoAn fall with her feet out in front of her two or three feet off the ground. *Id.* It was obvious to Merrifield that JoAn had fallen on an icy surface. *Id.*

Immediately following the accident, Fred knelt down by JoAn on the sidewalk to check on her condition. (R. 55, ADDM R. 94). Fred observed that the section of sidewalk where JoAn and Beth fell had ice accumulation and was very slick. (R. 55, ADDM R. 94-95). Fred saw no sign or evidence that salt or ice melt had been applied on the sidewalk where JoAn slipped and

fell. (R. 55, ADDM R. 94-95). Fred observed that further down the sidewalk, toward the Pool walkway entrance, ice melt of some kind had been applied on a section of the sidewalk, but not on the sidewalk where the accident took place. (R. 55, ADDM R. 95). Merrifield personally observed the sidewalk where JoAn and Beth had fallen and found the sidewalk to be dark and wet looking with no visible evidence of any ice melt having been applied to that area. (R. 60).

Lorna Van Horn (hereinafter "Van Horn"), the Pool manager for the City of Blackfoot, admits that the sidewalks were slippery with ice when she arrived at the Pool at approximately 3:30 a.m. on February 25, 2008. (R. 34). Van Horn is an employee of the City of Blackfoot who is responsible for sprinkling ice melt on the sidewalks outside of the Pool on slippery mornings. *Id.* Van Horn claims that she applied ice melt to the sidewalk three times before patrons of the Pool arrived. *Id.* Van Horn also claims that she applied ice melt "in the area" where JoAn and Beth both fell, but does not state that she specifically applied ice melt where they fell. *Id.*

Following the accident, Fred observed that the Defendant had piled the accumulative snow from the winter season up on the edge of the sidewalk in front of the Pool. (R. 54-55, ADDM R. 95-96). Van Horn also admits that the City of Blackfoot "plowed the road and sidewalk by pushing the snow up onto the grass." (R. 34). Following the accident, Fred observed that the slope of the landscape and sidewalk in front of the Pool, in conjunction with the piling of snow on the edge of the sidewalk, resulted in an increased amount of melted snow running across the sidewalk during the day and the increased accumulation of ice during the night. (R. 50, 55).

In the weeks leading up to February 25, 2008, Shauna Justesen (hereinafter referred to as "Justesen"), a Pool patron for approximately nine years, observed that snow had been pushed up in mounds onto the grass up to the edge of the sidewalk in front of the Pool, which snow would melt and run over the sidewalk along the street parallel to the Pool where the designated parking for the Pool was located. (R. 52-53). Justesen observed that there was no evidence of ice melt products being applied to the sidewalks where the runoff was occurring in the weeks leading up to February 25, 2008. *Id.* Prior to February 25, 2008, Justesen had a conversation with Van Horn, the Pool manager, informing her of the slick conditions of the sidewalks outside the Pool. *Id.*

Due to the accident in question, JoAn has absolutely no memory from the evening of February 24, 2008, when she went to bed, until March 5, 2008. (R. 79). JoAn has no recollection of the day of the accident, nor any details or specifics relative to her slip and fall at the Pool on February 25, 2008. (R. 58, 79). JoAn is aware that she was severely injured as a result of the accident as she has suffered, *inter alia*, complete loss of smell, partial loss of taste, impaired vision, partial loss of hearing, impaired gross motor skills, reduced ability to communicate effectively, sudden loss of consciousness, depression, lost enjoyment of life, and emotional pain and suffering. (R. 8, 57-58). The district court made a finding of fact that "when JoAn exited her vehicle and walked on the sidewalk, she slipped on the accumulated ice, fell to the ground, and sustained injuries." (R. 181).

C. PROCEDURAL HISTORY

On February 12, 2010, JoAn and Fred filed the Complaint against the City of Blackfoot. The City of Blackfoot filed an answer to the same on March 10, 2010. Following the depositions of JoAn and Fred, the City of Blackfoot filed a Motion for Summary Judgment on August 27, 2010. On September 22, 2010, Plaintiffs filed a response to Defendant's Motion for Summary Judgment along with the Affidavit of Shauna Justesen, Affidavit of Fred Ball, Affidavit of JoAn Ball, and the Affidavit of Jeanette Merrifield. On October 16, 2010, Defendant filed a motion to strike the affidavits filed by the Plaintiffs. Plaintiffs filed a Response to Defendant's Motion to Strike on October 27, 2010, along with the affidavit of Plaintiffs' attorney David K. Penrod. On November 3, 2010, a hearing on the Defendant's Motion for Summary Judgment and Motion to Strike was heard before Judge Darren B. Simpson. On December 13, 2010, the District Court entered an Order Granting Defendant's Motion for Summary Judgment. On December 29, 2010, the District Court entered a final order dismissing the Plaintiffs' case. Plaintiffs filed a Notice of Appeal on February 8, 2011.

II.

ISSUES ON APPEAL

1. Did the district court err when it failed to apply the facts of the Plaintiffs' case to the duty owed to an invitee of a proprietary or private business enterprise owned and operated by a municipality?
2. Did the district court err when it failed to recognize the Defendant assumed a duty to maintain the sidewalks in a non-negligent matter?
3. Did the district court err when it failed to apply the facts of the Plaintiffs' case to the Defendant's general duty to exercise reasonable care to maintain its streets and sidewalks in a reasonably safe condition?
4. Did the district court err when it granted Defendant's Motion for Summary Judgment when material questions of fact remained?

III.

STANDARD AND SCOPE OF REVIEW

When reviewing the district court's ruling on a summary judgment motion, the Court applies the same standard used by the district court. *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 212 P.3d 982 (2009). Summary Judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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). Disputed facts and reasonable inferences are construed in favor of the non-moving party. *Estate of Becker v. Callahan*, 140 Idaho 522, 96 P.3d 623 (2004). If there is no genuine issue of material fact, only a question of law remains, over which the Court exercises free review. *Watson v. Weick*, 141 Idaho 500, 112 P.3d 788 (2005).

IV.

ARGUMENT

A. **The district court erred when it failed to apply the facts of the Plaintiffs' case to the duty owed to an invitee of a proprietary or private business enterprise owned and operated by a municipality?**

It is firmly established law in Idaho that a municipal corporation is liable for its negligence and for the negligence of its employees or servants when the municipality engages in a proprietary or business function. See *Lively v. City of Blackfoot*, 91 Idaho 80, 82, 416 P.2d 27, 29 (1966)(*citing Eaton v. City of Weiser*, 12 Idaho 544, 86 P. 541; *Strickfaden v. Green Creek Highway Dist.*, 42 Idaho 738, 248 P. 456; *Henderson v. Twin Falls County*, 56 Idaho 124, 50 P.2d 597; *City of Nampa v. Kibler*, 62 Idaho 511, 113 P.2d 411; *Splinter v. City of Nampa*, 70 Idaho 287, 215 P.2d 999; *Hooton v. City of Burley*, 70 Idaho 369, 219 P.2d 651; *Lundahl v. City of Idaho Falls*, 78 Idaho 338, 303 P.2d 667; *Ford v. City of Caldwell*, 79 Idaho 499, 321 P.2d 589; and, *Gilbert v. Village of Bancroft*, 80 Idaho 186, 327 P.2d 378). Municipal corporations, out of necessity, are under the same obligations and liabilities and owe the same duty as a private owner when engaged in a proprietary function. *Hansen v. City of Pocatello*, 145 Idaho 700, 703, 184

P.3d 206, 209 (2008); *Splinter,* 70 Idaho at 292; *Hooton,* 70 Idaho at 377; *Eaton,* 12 Idaho at 553; and, *Gilbert,* 80 Idaho at 190. An owner of a business owes a duty of ordinary care under all the circumstances toward invitees who come upon the premises. *IDJI* 3.09; *Harrison v. Taylor,* 115 Idaho 588, 768 P.2d 1321 (1989). This duty extends to all portions of the premises to which an invitee may reasonably be expected to go. *IDJI* 3.09. There is a common law duty placed upon owners to maintain its leased premises in a reasonably safe condition for its invitees, or to warn of hidden or concealed dangers. See *Holzheimer v. Johannesen*, 125 Idaho 397, 871 P.2d 814 (1994); and, *Johnson v. K-Mart Corp.,* 126 Idaho 316, 882 P.2d 971 (Idaho App. 1994). "An invitee is one who enters upon the premises of another for a purpose connected with the business conducted on the land, or where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the landowner." *Holzheimer* at 400.

In the present case, there is no question that the Defendant, a municipal corporation, owns and operates the Blackfoot Municipal Pool. The Pool is a proprietary enterprise and cannot be considered a government function. The Defendant has no governmental, mandatory duty to operate a public pool.

JoAn and Fred paid the Defendant for a yearly pass so that they could regularly use the Pool facilities. As a municipal corporation engaged in a proprietary enterprise, the Defendant owed JoAn and Fred, business invitees, a duty of ordinary care to keep the Pool premises, and specifically the sidewalk running along the <u>entire</u> length of the designated parking area, in a

reasonably safe condition. The Defendant owed JoAn and Fred a duty to warn of hidden or concealed dangers on the premises.

JoAn and Fred have more than adequately alleged that the Defendant breached its duty of care and that they have suffered injuries and damages as a direct result of the breach. The Defendant was aware of the unsafe condition of the subject sidewalks on February 25, 2008. The Defendant's Pool manager, Van Horn, was admittedly aware of the slippery condition of the sidewalks that existed on the morning of February 25, 2008. The unsafe condition of the sidewalks was in part due to the Defendant's piling of shoveled snow up to the edge of the sidewalk permitting it to melt, run across the sidewalk and ultimately freeze, thus, creating an unnatural and unsafe accumulation of ice. Regardless of the actual cause of the ice accumulation on the sidewalk, the Defendant knew the sidewalks were in an unsafe condition and therefore had a duty of ordinary care to the patrons of the Pool as invitees to rectify the dangerous condition. The Defendant failed to exercise ordinary care to protect against an identified and dangerous condition.

Fred and JoAn were going to the Pool, a proprietary enterprise, to exercise. The Defendant had a duty to make sure that the walkways were in reasonably safe condition along the entire sidewalk in the designated parking area. Van Horn claims to have placed ice melt on the sidewalks three times prior to Fred and JoAn's arrival at the Pool on the day in question. Further she claims that she had put ice melt in the "area" where the two elderly women slipped and fell on

ice, both sustaining substantial injuries. Fred has stated that he observed no evidence of ice melt having been applied to the area where JoAn fell. Merrifield, a witness to the accident, personally observed that the area where the accident happened showed no visible evidence of any ice melt having been applied. Merrifield did observe some ice melt along the walkway from the exterior door of the Pool to the street, but none on the sidewalk where JoAn fell. Justesen, a long time Pool patron, was aware of the unsafe condition of the subject sidewalks and she had warned Van Horn of the same prior to the accident.

Van Horn admits in her affidavit that snow from the streets and sidewalks were piled up on the grass. Fred and Justesen both observed that the city piled mounds of snow just off the sidewalk on the grass or landscaping, allowing the same to melt during the day and run across the sidewalk and ultimately freeze again at night. Thus, the accumulation of ice on the sidewalk where JoAn fell was partially due to Defendant's negligent snow removal and/or maintenance of the sidewalk. Justesen also observed that the city would pile snow up against the curb along the sidewalk. (R. 53). That act alone may have created a situation where the melted snow could not properly drain off of the sidewalk. Even if the ice accumulation was the product of natural causes, however, the Defendant was aware of the unsafe conditions and did not take adequate measures to ensure the safety of the patrons coming to the Pool.

The district court erroneously concluded that the facts of the present case are "almost identical" to the facts in *Pearson v. Boise City*, 80 Idaho 494, 333 P.2d 998 (Idaho 1959), which

case the Idaho Supreme Court dismissed. The sidewalk in *Pearson* was situated at the corner of an intersection within the corporate limits of Boise. Unlike in the present case, the sidewalk in *Pearson* was not being used in conjunction with a proprietary business owned and operated by a municipality. The street corner was one of countless many street corners and/or streets located in the large city of Boise. It is not too burdensome for a city to monitor and maintain the limited number of sidewalks used by invitees of a proprietary enterprise owned by the city. Unlike the present case, there are no facts in *Pearson* that suggest the city was admittedly aware of the dangerous condition of the sidewalk prior to the slip and fall. Unlike the present case, there are no facts in *Pearson* that the city recognized and/or assumed a duty and then acted in a negligent manner in performance of that duty. Upon proper examination, the facts of the present case are readily distinguishable and significantly different from the facts set forth in *Pearson*.

The district court erroneously concluded that the *Splinter* case was of no legal import in the present matter. *Splinter* specifically states that a city is under the same obligations and liabilities and owes the same duty to everyone as does a private owner when exercising proprietary as distinguished from governmental powers. *See Splinter,* 70 Idaho at 292. The Defendant owns and operates the Pool, without question a proprietary business. The legal duty set forth in *Splinter* cannot be dismissed simply because the case involves storage tanks rather than icy sidewalks. The legal duty discussed in *Splinter*, as well as the numerous other cited cases herein, are applicable to any proprietary business enterprise owned by a city. No matter

what private enterprise the city is engaged in, the city will owe the same duty of care to invitees as any other private business of that type.

Based on the case law set forth herein, the district court erred in dismissing the Plaintiff's case. The Defendant owed Fred and JoAn a duty of care as invitees and that duty was breached. They were patrons who had paid the city for a yearly pass to the Pool. The Defendant knew that Fred and JoAn would be using the exterior sidewalks during inclement weather. The Defendant was admittedly aware of a dangerous condition on the sidewalk. The Defendant failed to remedy the hazardous condition and/or warn the Plaintiffs of the same. JoAn was severely injured as a result of the Defendant's negligence and she will never be the same again.

B. The district court erred when it failed to recognize the Defendant assumed a duty to maintain the sidewalks in a non-negligent matter.

Idaho law recognizes that one who voluntarily undertakes to perform an act, a duty arises to perform the act in a non-negligent manner. See *Udy v. Custer County*, 136 Idaho 386, 34 P.3d 1069 (2001).

On February 25, 2008, the Defendant breached an assumed duty to patrons by negligently applying ice melt to only a portion of the icy sidewalk located within the designated parking area on the premises. Van Horn, the Pool manager, admits that the sidewalks were slippery with ice when she arrived at the Pool on February 25, 2008. (R. 34). Van Horn admits that she is an employee of the Defendant who is responsible for sprinkling ice melt on the sidewalks outside the

Pool on slippery mornings. *Id.* Van Horn claims that she applied ice melt to the slippery sidewalk three times before patrons arrived at the Pool. *Id.* Fred and Merrifield both personally observed that no ice melt had been applied to the sidewalk where JoAn and Beth slipped and fell. If Van Horn had applied three applications of ice melt in a two and a half hour period of time, as she claims, there would have been visual evidence of the same. The failure to apply a proper application of ice melt on the entire length of the admittedly unsafe sidewalk was a breach of the Defendant's duty to keep the walkways in a reasonably safe condition. At the very least, it was a breach of an assumed duty to apply ice melt in a non-negligent manner.

Even if Van Horn had applied ice melt along the entire sidewalk, and the Plaintiffs contend that she did not, there would still be a jury question as to whether she had applied an adequate portion ice melt. Nowhere in the record does it state exactly where and how much ice melt Van Horn applied to the slippery sidewalks. If Van Horn applied an inadequate portion of ice melt given the conditions of the sidewalk, or if she failed to spread ice melt along the entire sidewalk, there would still be a jury question as to whether the Defendant was negligent.

The district court erred in failing to address the Plaintiffs' argument that the Defendant had assumed a duty to remedy a dangerous condition in a non-negligent manner. There is a factual dispute as to whether the Defendant applied an appropriate amount of ice melt, if any, along the entire sidewalk falling within the designated parking area for Pool patrons. The

Plaintiffs should be permitted their day in court to present factual evidence to a jury regarding the negligence of the Defendant.

C. The district court erred when it failed to apply the facts of the Plaintiffs' case to the Defendant's general duty to exercise reasonable care to maintain its streets and sidewalks in a reasonably safe condition, as set forth in *Pearson*.

If a municipality is not engaged in a proprietary enterprise, the municipalities still have a general duty to exercise ordinary or reasonable care to maintain their streets and sidewalks in a reasonably safe condition for public travel as set forth in *Pearson*.

The district court erred in summarily dismissing the Plaintiffs' case by way of a simplistic and narrow comparison of factual similarities between the case at bar and the facts set forth in *Pearson*. It is true that both cases involve elderly women who were injured slipping on icy sidewalks within the corporate limits of a city. As set forth above, however, there are significant factual differences between the present case and the facts set forth in *Pearson*. In the present case, the Defendant was aware of the dangerous condition of the sidewalk prior to the accident and the Defendant acted negligently in attempting to rectify the hazardous condition. In the present case, the accident occurred on the sidewalk running along the designated parking area for patrons of the Pool, a proprietary enterprise owned and operated by the Defendant. In the present case, another Pool patron had warned the Defendant that the condition of the sidewalk was unsafe. In the present case, the Defendant was aware that Pool patrons, including the elderly, would be traveling on the sidewalk daily in inclement weather to exercise at the Pool.

The district court failed to apply the facts of this case to the legal standard set forth in *Pearson*. The duty the Defendant owed to Fred and JoAn was to exercise ordinary or reasonable care to maintain its streets and sidewalks in a reasonably safe condition. The sidewalks were not in a reasonably safe condition on February 25, 2008, and the Defendant knew it. The Defendant was negligent in failing to apply ice melt along the entire sidewalk located within the designated parking area in front of the Pool. The district court erred in granting Defendant's Motion for Summary Judgment in view of the significant questions of fact that remain in dispute.

V.

ATTORNEY FEES ON APPEAL

Pursuant to Idaho Appellate Rule 41, Appellants claim attorney fees in accordance with Idaho Code §12-121.

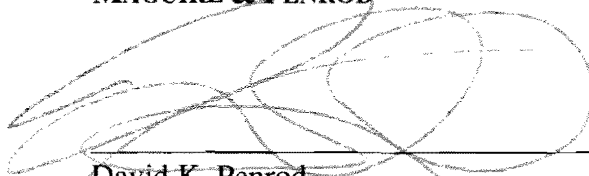
VI.

CONCLUSION

In the present case, the pleadings, depositions, and admissions on file, together with the affidavits, show that there is a genuine issue of material fact that require the reversal of the district court's Order Granting Defendant's Motion for Summary Judgment. Based on the foregoing, the Plaintiffs want their day in court to present their case to a jury for a factual determination.

Respectfully submitted this 20 day of July, 2011.

MAGUIRE & PENROD



David K. Penrod
Attorney for Plaintiff

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing was:

☑ mailed, postage prepaid
☐ hand delivered
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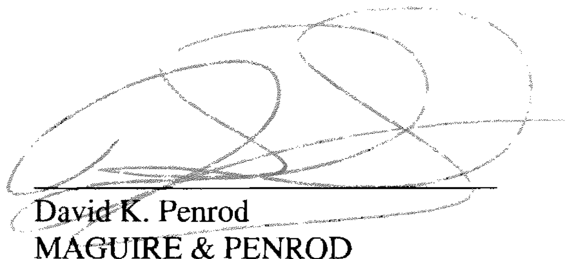

David K. Penrod
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