8-24-2011

Ball v. City of Blackfoot Respondent's Brief Dckt. 38530

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

Bingham County Docket No. CV-2010-328

RESPONDENT'S 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.

David K. Penrod
Blake G. Swenson
MAGUIRE & PENROD
1414 E. Center
P.O. Box 4758
Pocatello, ID 83205-4758

Attorneys for Appellants

Blake G. Hall
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630

Attorneys for Respondent City of Blackfoot

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A. NATURE OF THE CASE

This is a case that arises out of a slip and fall on the sidewalk in front of the Blackfoot Municipal Pool in Blackfoot, Idaho in late February. Appellants claim that the City of Blackfoot was negligent (1) by failing to take protective measures to remove accumulated ice on the sidewalk and (2) for a defective design in the sidewalk and surrounding landscape. Despite their contention, Appellants failed to present any evidence of negligence by the City of Blackfoot.

B. STATEMENT OF FACTS

On February 25, 2008, in the early morning hours JoAn Ball slipped and fell outside of the Blackfoot Municipal Pool. Lorna Van Horn, the Blackfoot Municipal Pool manager, testified that during the winters the City of Blackfoot plowed the road and sidewalk in front of the pool by pushing the snow onto the grass. Ms. Van Horn would routinely sprinkle ice melt on the sidewalks outside of the pool on winter mornings. (R. 34, Affidavit Lorna Van Horn, ¶ 6). On February 25, 2008, the morning of Mrs. Ball's fall, Ms. Van Horn arrived at the pool at approximately 3:30 a.m. (R.. 34, Affidavit Lorna Van Horn, ¶ 6). She noticed that the sidewalk was slippery and sprinkled ice melt on the sidewalk at least three (3) times that morning before patrons arrived. (R.. 34, Affidavit Lorna Van Horn, ¶ 7). Ms. Van Horn observed, on that morning, that the sidewalk had been plowed and the snow was pushed up onto the grass. (R.. 34, Affidavit Lorna Van Horn, ¶ 8). While there was some ice, there was no accumulation of snow on the sidewalk. (R.. 34, Affidavit Lorna Van Horn, ¶ 8.) Ms. Van Horn did not see Ms. Ball fall, but saw where she landed and called for emergency services. Ms. Van Horn had sprinkled ice melt that morning in the area where Mrs. Ball fell. (R.. 34, Affidavit Lorna Van Horn, ¶ 9).

Mrs. Ball was a regular at the Blackfoot Municipal Pool, having regularly swam at the pool from 2004 through 2008, in the mornings between 6:00 and 7:00 a.m. (ADDM R. 4, Deposition JoAn Ball, pg. 35, ll. 15-23). Mrs. Ball testified that she went to the pool year round. (ADDM R. 4, Deposition JoAn Ball, pg. 36, ll. 4-6). She was very familiar with the sidewalks at all times of the year. While using the pool during the winter, Mrs. Ball had observed the occasional ice and snow accumulation on the sidewalks. (ADDM R. 6, Deposition JoAn Ball, pg. 37, ll. 18-25; pg. 38 ll. 1-25). Mr. Ball confirmed the frequent presence of snow and ice when he testified as follows:

> Q. So you had experiences negotiating the sidewalks through all the seasons?
> A. Correct.
> Q. And did you ever encounter any problems with the sidewalks during the winter of 2003/2004?
> A. Well, in the wintertime you've always got snow and ice.

(ADDM R. 7, Deposition John Frederick Ball, pg. 38, ll. 20 -25; pg. 39, ll. 1-4).

Mrs. Ball does not recall the morning of the accident, however, Mr. Ball observed his wife get out of the vehicle and say "Beth is down." (ADDM R. 8, Deposition John Frederick Ball, pg. 41, ll. 1-25). Then he came around his side of the vehicle in time to see his wife falling. (ADDM R. 8, Deposition John Frederick Ball, pg. 41, ll. 1-25). Mr. Ball clarified that he did not see what led up to Mrs. Ball falling because he was coming around his vehicle. (ADDM R. 8, Deposition John Frederick Ball, pg. 44, ll. 10-21).

Mrs. Ball does not have any knowledge of whether or not the sidewalk in question was defective. (ADDM R. 5, Deposition JoAn Ball, pg. 34, ll. 15 - 18). Mr. Ball testified that he believed the sidewalk had a defective design because "there's not too much slope there. . . There wasn't enough slope on the sidewalk to drain the water." (ADDM R. 5, Deposition John Frederick

Ball, pg. 49, ll. 1-10. However, Mr. Ball conceded that to his knowledge the sidewalk was not in violation of any building code. (ADDM R. 5, Deposition John Frederick Ball, pg. 49, ll. 11-23.

On the morning of the fall, Ms. Van Horn had not observed any defect in the sidewalk where Mrs. Ball fell prior to her accident. (R.34, Affidavit Lorna Van Horn, ¶ 10). Further confirming the lack of any defect in the sidewalk, Rex Orgill, the Blackfoot City Building Official, testified that he was alerted of the fact that Ms. JoAn Ball had slipped and fallen on the sidewalk outside of the Blackfoot Municipal Pool on February 25, 2008, and instructed where Ms. Ball had fallen. (ADDM R. 11, Affidavit of Rex Orgill, ¶ 4). On March 9, 2010, Mr. Orgill conducted an inspection of the sidewalk in front of the City of Blackfoot Municipal pool. (ADDM R. 11, Affidavit of Rex Orgill, ¶ 5). He inspected the area where Ms. Ball slipped and fell on February 25, 2008. (ADDM R. 11, Affidavit of Rex Orgill, ¶ 5). The sidewalk was constructed with standard width and slope. The walking surface did not show any signs of spaulding or weathering. (ADDM R. 11, Affidavit of Rex Orgill, ¶ 5). The surface was slightly worn, yet still had adequate abrasiveness to provide for non-slip walking surface during wet weather. (ADDM R. 11, Affidavit of Rex Orgill, ¶ 5). He also did not find any trip hazards that exceeded ADA standards. (ADDM R. 11, Affidavit of Rex Orgill, ¶ 5). Mr. Orgill testified that in his opinion, the sidewalk where Ms. Ball fell was properly constructed with the correct grade and was in compliance with the applicable building codes. (ADDM R. 11, Affidavit of Rex Orgill, ¶ 6).

IV. ARGUMENT

A. THE DISTRICT COURT APPLIED THE CORRECT STANDARD OF CARE APPLICABLE TO A MUNICIPALITY AS ARTICULATED IN *PEARSON v. BOISE CITY.*

"Municipalities are not insurers of the safety of those who use the sidewalks." *See, Pearson*

v. *Boise City*, 80 Idaho 494, 497, 333 P.2d 998, 1000 (1959), *citing Wilson v. City of Idaho Falls*, 17 Idaho 425, 105 P.1057 (1909)("mere slipperiness of a sidewalk, occasioned by smooth or level ice or snow, is insufficient to charge the municipality with liability for injury resulting therefrom where the snow or ice does not constitute an obstruction."). The standard which governs the care of sidewalks by a municipality was clearly defined to be a duty of "keeping streets in reasonably safe condition for public travel and are liable for damages for injuries sustained only in consequence of their negligent discharge of such duty." *Pearson*, 80 Idaho at 496. The rationale for imposing such a duty is sound:

> In certain seasons and localities, as is well known, it would be burdensome, if not impracticable, to impose the duty on the municipality to keep its sidewalks clear of snow and ice at all times. Pedestrians must assume the risks attending a general slippery condition of sidewalks produced by natural causes and which remain despite the efforts of reasonable care and diligence.

Id. (citing McQuillin, Municipal Corporations, 3rd Ed., Vol. 19 § 54.84, p. 316) (emphasis added). Snow and ice is synonymous with Eastern Idaho winters and this Court has clearly established that a "municipality is bound to exercise only ordinary and reasonable care to maintain its streets and sidewalks in a reasonably safe condition." *Id.* (citing *Miller v. Village of Mullan*, 17 Idaho 28, 104 P. 660 (1909)) (emphasis added). This is the clearly articulated standard that applies to the City's maintenance of its sidewalks.

It is, indeed, uncommon to locate a decided case from the same jurisdiction that is so factually analogous to the case currently being appealed. However, *Pearson v. Boise City, supra*, is so closely aligned with the present case factually that the district court had little option but to follow the clear precedent previously established by this Court.

In *Pearson*, an elderly woman received personal injuries when she slipped and fell on the

city's sidewalk. The sidewalk had sunk approximately one-half inch leaving a depression, which filled with water from melted snow and froze; and that falling snow covered the ice frozen in the depression. This condition had existed for more than three years and was known, or should have been known, to the city.[1] *Pearson*, 80 Idaho at 496. Further, the elderly woman did not allege that the ice obstructed the sidewalk but rather that it made the sidewalk slippery and was, therefore, a dangerous condition which should have been remedied by the city. The district court was unpersuaded by the woman's claims and dismissed her complaint, and this Court affirmed. In coming to its conclusion, this Court declared, following an in-depth discussion of case law from various jurisdictions regarding defects in a sidewalk:

> The authorities are overwhelming in their holdings that a defect in a sidewalk of a minor or trivial nature, as shown by respondent's pleadings, is not sufficient to hold a municipality liable in damages for failure to repair the same. The defect in itself not being of sufficient serious import as to render the municipality liable for actionable negligence, **the fact that the depression becomes filled with water and freezes with a surface of hard, smooth glazed ice, because of natural weather conditions, likewise does not constitute any defect for which the municipality may be held liable**, since in such a case the ice and not any existent defect constitutes the proximate cause of any injury received because of slipping on the ice.

Id. at 503, 333 P.2d at 1003 (emphasis added). Though the allegations in *Pearson* included a claim that there was a minor defect in the street, this Court held that hard, smooth glazed ice resulting from natural weather conditions does not constitute any defect for which the city may be held liable.

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[1]Appellants unsuccessfully attempt to distinguish *Pearson* on the grounds that the City allegedly knew that the ice was on the sidewalk. However, this Court clearly noted that the condition had persisted for at least three years and that the City knew or should have know of the purported defect. As such, any argument that *Pearson* is inapplicable because the City knew of the ice is consistent with the level of knowledge that the city had in *Pearson*.

This Court also stated that "Pedestrians must assume the risks attending a general slippery condition of sidewalks produced by natural causes and which remain despite the efforts of reasonable care and diligence." *Id.* (citing McQuillin, Municipal Corporations, 3rd Ed., Vol. 19 § 54.84, p. 316). This Court further clarified that "[m]ere slipperiness of a sidewalk, occasioned by smooth or level ice or snow, is insufficient to charge the municipality with liability for injury resulting therefrom where the snow and ice does not constitute an obstruction." *Id.* at 497, 333 P.2d at 999-1000. As such, the requirement of a municipality, in ensuring a reasonably safe condition is to clear the sidewalks of any obstructions only.

It is undisputed that the City of Blackfoot plowed the road and sidewalk in front of the pool by pushing the snow onto the grass. It is uncontroverted that the City removed any snow obstructions, as such, the City has complied with the clear mandate from *Pearson*, namely that snow obstructions be removed. The City then went above the duty imposed by *Pearson* and routinely sprinkled ice melt on the sidewalks outside of the pool on winter mornings. (R.34, Affidavit Lorna Van Horn, ¶ 6). On the morning of the accident, Ms. Van Horn arrived at the pool at approximately 3:30 a.m. and confirmed that the sidewalk had been plowed and the snow was pushed up onto the grass that morning. (R.34, Affidavit Lorna Van Horn, ¶ 8). While there may have been some ice, there was no accumulation of snow on the sidewalk. (R.34, Affidavit Lorna Van Horn, ¶ 8). Ms. Van Horn noticed that the sidewalk was slippery. She sprinkled ice melt on the sidewalk at least three (3) times that morning before patrons arrived, and specifically in the area where Mrs. Ball fell. (R.34, Affidavit Lorna Van Horn, ¶ 7, 9). Based on the foregoing, it is unquestionable that the City made every effort to keep the sidewalks in a reasonably safe condition.

Appellants argue that the appropriate standard applicable to the City is that of a proprietary

enterprise, and more specifically, that the City maintain the premises in a reasonably safe condition for its invitees, or to warn of hidden or concealed dangers. (Appellants' Brief, p. 9). Appellants argument fails for two reasons, first, the applicable standard of care is articulated in *Pearson*, which is to "exercise only ordinary and reasonable care to maintain its streets and sidewalks in a reasonably safe condition." Second, the standard articulated in *Pearson* is indistinguishable from the standard of care of a proprietary enterprise.

Appellants cite *Splinter v. City of Nampa*, 70 Idaho 287, 215 P.2d 999 (195), a case decided prior to *Pearson*, as creating the applicable standard of care relative to the City's obligations in maintaining the sidewalks. Curiously, Appellants never suggest what is the applicable standard created by *Splinter*. Nonetheless, Appellants reliance on *Splinter* is misplaced as the case is so easily distinguishable when compared to the instant matter. The holding in *Splinter* was a hotly contested 3-2 decision, where this Court struggled over whether or not the City of Nampa was engaged in a proprietary or governmental function when it allowed an adjacent private landowner to install a butane tank in a city alley for use by the landowner. The adjacent landowner was injured as a result of the proprietary activity, namely an explosion of the butane tank. The court concluded that the granting of a permit by the City for the placement of a tank in a City alley was a proprietary function and overruled the demurrer. In so concluding, this Court recognized an "illogical" and "unjustified anomaly" if it were to allow the City to be free from all liability based on where an injured party was located. The resultant conclusion was that the "degree of care to be exercised must be commensurate with the danger or hazard connected with the activity." This Court recognized that the duty of care was altered by the danger or hazard connected with the activity. With an increase in the danger or hazard of an activity, the degree of care also increase commensurate to the danger. *Id.* at 294, 215

P.2d at 1002 ("The highest degree of care must be exercised in connection with storing, handling, etc., of highly inflammable [sic] and explosive substances."). Thus, the only duty that can be derived from *Splinter* is that a municipality owes the highest duty when dealing with highly flammable substances. The *Splinter* court did not purport to define the duty of a City to maintain its sidewalks during winter, and no such duty can be created from the case's holding.

Most glaring, however, just as this Court balked at limiting liability based on the location of an individual in *Splinter*, here it would likewise be "illogical" and an "unjustified anomaly" if a different standard for city sidewalks were applied based upon where an individual fell. In other words, it is illogical to suggest that the standard of care for an individual who is walking on the sidewalk to use the pool and falls enjoys a different standard of care than an individual who is walking along the same stretch of sidewalk without intending to use the pool and falls. Such a distinction is both illogical and impractical. It is also illogical to suggest that an individual using a sidewalk, which would be incidental to a proprietary function, would enjoy the same standard of care for an individual actually engaged in the proprietary function. Here, Mrs. Ball was injured not while using the pool, a proprietary function, but rather using a sidewalk leading to the pool. The sidewalk is incidental to the public use of the pool. Unlike *Splinter*, here the injury was not the result of any proprietary activity but rather was incidental to such an activity. Mrs. Balls fall was not associated with the alleged proprietary function of the pool. As such, Appellants' reliance on *Splinter* is misplaced.

Notwithstanding *Splinter*, even if this Court were to decide that a proprietary standard of an invitee were applicable, the appropriate standard of care for a business invitee is indistinguishable from the standard of care articulated in *Pearson*. A land owner "has not only a duty to disclose

dangerous conditions, but also the duty to exercise reasonable affirmative care to keep the premises safe for an invitee." *Keller v. Holiday Inns, Inc.*, 105 Idaho 649, 653, 671 P.2d 1112, 1116 (1983). Under this standard, the City owed a duty to "exercise reasonable affirmative care to keep the premises safe." The standard does not require that a landowner prevent any accident from occurring, rather that reasonable efforts be taken to keep the premises safe. In *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 251 P.3d 602 (2011), a woman tripped on a mat in an aisle of a store and was injured. The store filed a summary judgment motion, which was granted by the district court, supported by the affidavit testimony of the store manager that he had inspected the aisle twenty-five minutes prior to the fall and that the mat had been lying flat. *Id.* at 606. The store had inspected the area near the fall and there were no noticeable dangers. This Court concluded that the store acted reasonably in ensuring that the aisles were reasonably safe for its patrons and affirmed the lower court. It is undisputed that the City had inspected the area and sprinkled ice melt on the sidewalks to aid in providing a safe ingress and egress into the pool facility. There are no facts in the record to conclude that the City provided anything but reasonably safe sidewalks for Mrs. Ball. As such, the district court's ruling was correct under either standard.

Because the City exercised ordinary and reasonably care in maintaining the sidewalks outside the Bingham County Pool in a reasonably safe condition, and Appellants failed to present any evidence to suggest otherwise, the district court's grant of summary judgment was proper.

B. THERE IS NO EVIDENCE THAT THE CITY OF BLACKFOOT NEGLIGENTLY MAINTAINED ITS SIDEWALKS.

From the outset, as this Court has previously held, hard, smooth glazed ice resulting from natural weather conditions does not constitute any defect for which the city may be held liable.

Pearson, 80 Idaho at 503, 333 P.2d at 1003. Furthermore, one of the inherent risks to each individual residing in Eastern Idaho is the certainty of snow and ice on sidewalks. Here, Mrs. Ball was on notice of ice on the sidewalk. Mrs. Ball testified that she had observed ice and snow accumulation on the sidewalks at the Blackfoot Pool. (ADDM R. 37, Deposition JoAn Ball, pg. 37, ll. 18-25; pg. 38 ll. 1-25). Mr. Ball likewise supported this observation when he testified about sidewalk conditions in the winter, "in the wintertime you've always got snow and ice." (ADDM R. 7, Deposition John Frederick Ball, pg. 38, ll. 20 -25; pg. 39, ll. 1-4). It is undisputed that Appellants had notice of the icy conditions on the morning Mrs. Ball fell because she witnessed a friend slip on the ice moments before her fall. (ADDM R. 8, Deposition John Frederick Ball, pg. 41, ll. 1-25).

Appellants attempt to create a genuine issue of material facts by suggesting the City was negligent in maintaining the sidewalks through the use of speculative and unfounded statements. Specifically, Appellants torture Ms. Van Horns affidavit to support a conclusion that ice melt was not applied or was improperly applied because there was no visual evidence of the ice melt. Appellants further ignore the unambiguous statements that Ms. Van Horn applied ice melt to the sidewalk and area where Mrs. Ball fell. Appellants contention that Ms. Van Horn was required to apply ice melt in a non-negligent manner fails because it creates a new standard of care and ignores undisputed evidence that Ms. Van Horn applied ice melt on the sidewalks.

The City had a duty to keep the sidewalks outside the Blackfoot Municipal Pool in a reasonably safe condition. The City acted reasonably by ensuring that snow was removed from the parking lot and sidewalks. The City then exceeded its duty by then applying ice melt to the sidewalks on three occassions. Appellants do not challenge that these actions occurred. The law is clear that "[m]ere slipperiness of a sidewalk, occasioned by smooth or level ice or snow, is

insufficient to charge the municipality with liability for injury resulting therefrom where the snow or ice does not constitute an obstruction. Simply put, ice and snow that is level does not constitute an obstruction and the City cannot be liable for injuries that occur when an individual slips on smooth ice or snow. Maintaining a sidewalk free of all snow and ice at all times during the harsh Eastern Idaho winters is virtually impossible, as this Court recognized; "it would be burdensome, if not impracticable, to impose the duty on the municipality to keep its sidewalks clear of snow and ice at all times." *Pearson*, 80 Idaho at 496.

Moreover, Appellants must establish through appropriate affidavit testimony that the City did not exercise reasonable care to maintain its streets and sidewalks in a reasonably safe condition. The only facts in the record on sidewalk maintenance, which were undisputed by appropriate affidavit testimony, is that the City plowed the snow from its streets and sidewalks and that the City spread ice melt on the subject sidewalk on three occasions the morning of the accident. (R. 34). It is important to remember that the standard is whether the City took reasonable actions in maintaining the sidewalks. Appellants failed to present any evidence suggesting that the City acted unreasonably. Rather, Appellants contend that because Mrs. Ball fell, that the City must have acted negligently. Appellants have an obligation in opposing a summary judgment motion to come forward with more than just "mere allegations" that the City breached the established duty of care. *See* Idaho R. Civ. P. 56(e). No supporting evidence can be found in the record.

Appellants do not dispute that the City removed the snow from the streets and sidewalks. Appellants further do not dispute that ice melt was applied on three occasions prior to the accident. Appellants only evidence supporting their claim is the affidavits of Fred Ball, Joan Ball, Jeanette Merrifield and Shauna Justeson, all of which contain inadmissible testimony that was the subject of

a separate motion to strike before the district court. The Court declined to rule on that motion because the affidavit testimony was immaterial to the resolution of the case. (R. 184). As such, it would be improper for this Court to consider the statements which were subject to an undecided motion to strike.

Nonetheless, even the Appellants' proposed affidavit testimony falls short of creating a genuine issue of material fact sufficient to avoid summary judgment. One fact repeated throughout the affidavits is that there was "no visible evidence" that ice melt had been applied to the sidewalk where Mrs. Ball fell. This testimony is speculative, lay opinion testimony which is insufficient support for summary judgment. Even if it is not excluded, it does not represent the correct standard that a City must meet. The City does not have to demonstrate "visible evidence" of ice melt having been applied to all city sidewalks at all times. The City only has to demonstrate that it took measures to keep the sidewalks in a reasonably safe condition. The mere fact that there was not "visible evidence" of ice melt in the place where Joan Ball fell is not a sufficient fact to create a genuine issue of fact for trial on the duty question.

In considering the affidavit of Jeanette Merrifield, her statements corroborate Ms. Van Horn's claims that ice melt was actually applied. Merrifield testified that the sidewalk was "wet looking" at the place where Ms. Ball fell. (R. 60). If that is the case, then the implication is that ice melt must have been applied or the sidewalk would have appeared to be *ice covered* instead of "wet looking."

Perhaps the most glaring deficiency in Appellants opposition is that there has been no testimony, expert or otherwise, presented that more extensive measures needed to have been taken by the City to keep its sidewalks in a reasonably safe condition. In fact, there is no evidence in the record that the actions taken by the City did not rise to the level of reasonable. Under Idaho Rule

of Civil Procedure 56(e), "an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." As the record stands, Appellants failed to provide sufficient facts by affidavit in opposition to the City's summary judgment motion to create a genuine issue of fact with regard to the City's duty. If anything, Appellants merely relied on the allegations in their complaint. The only testimony provided by the affidavits is improper lay opinion testimony regarding whether ice melt was visible at the site of the accident. Based upon the lack of proper evidence in opposition to the City's motion for summary judgment, dismissal of Appellants' negligence claims were appropriate.

C. THERE IS NO EVIDENCE THAT THERE WAS A DEFECT IN THE SIDEWALK WHERE MRS. BALL FELL.

Although thinly veiled, Appellants suggest that the sidewalk and landscaping were defective and the cause of the slippery condition. *(See* Appellants Brief, p. 10). In support of this conclusion, Appellants relied exclusively on the lay testimony of Mr. Ball. Mr. Ball attempted to testify that the slope of the sidewalk coupled with the manner in which the snow was shoveled resulted in an increased risk of ice accumulation, however, there is no foundation for this testimony, and pursuant to the City's motion to strike should have been stricken from the record. The lay testimony provided does not create an issue of fact that the City's snow removal was negligent. The Appellants failed to present any expert testimony that the sidewalk was defective in any fashion. When compared with the testimony of Rex Orgill, the Blackfoot City Building Official, there is no question that the sidewalk and landscape in question was designed according to industry standard, and was not defective in any way. Mr. Orgill specifically testified that he inspected the sidewalk in front of the

pool and that the sidewalk complied with construction standards. (ADDM 11, Affidavit of Rex Orgill, ¶ 5). He further testified that the sidewalk was in satisfactory condition and did not show signs of spaulding or weathering and that the walkway still had adequate abrasiveness to provide for non-slip walking surface during wet weather. (ADDM 11, Affidavit of Rex Orgill, ¶ 5). He also was unable to find any tripping hazards that exceeded ADA requirements. (ADDM 11, Affidavit of Rex Orgill, ¶ 5). In sum, it is undisputed that the sidewalks and surrounding landscaping is not defective. Further, the City is constrained as to where it can place snow. Snow cannot be left in the street, it must be removed from the streets and sidewalks to ensure that there are no obstructions.

In this case, the supporting affidavits established that the snow had been pushed off the road and across the sidewalk to the grass. There is no evidence that this was negligent. Any argument that the City's sidewalks and landscaping was defective and contributed to the slippery condition was unsupported and dismissal was appropriate.

V. ATTORNEY FEES ON APPEAL

Pursuant to Idaho Appellate Rule 41, the City seeks an award of attorney fees in accordance with Idaho Code Section 12-117. Section 12-117 provides for a city to recover attorney fees when "the party against whom the judgment is rendered acted without a reasonable basis in fact or law." Under the statutes, the City is entitled to an award of attorney fees on appeal inasmuch the appeal has been brought frivolously, in bad faith, and without foundation.

Case law has held that an appeal is deemed frivolous when a party fails to make a legitimate showing that the trial court misapplied the law. *Bowles v. Pro Indiviso, Inc.* 132 Idaho 371, 973 P.2d 142 (1999). In this case, there is no legitimate argument that the trial court misapplied the law. The Appellants do not allege anything factually different than the claims alleged in *Pearson*. Conversely,

the *Splinter* case, upon which Appellants rely, is inapplicable to the case at bar and cannot be reasonably deemed to overcome the clear import of *Pearson* and its effect on this case. The City therefore requests an award of attorney fees on appeal.

VI. CONCLUSION

Pearson v. Boise City rendered the Appellants' complaint ripe for summary judgment. There is undisputed evidence that the City removed the snow from the parking lot and sidewalks at the Blackfoot Municipal Pool and that ice melt was applied on at least three occasions prior to Mrs. Ball's fall. The City exercised ordinary and reasonably care in maintaining the sidewalks outside the Bingham County Pool in a reasonably safe condition, and Appellants failed to present any evidence to suggest otherwise. The City therefore requests that the district court's decision granting summary judgment and dismissing the complaint be affirmed.

DATED this 22 day of August, 2011.

BLAKE G. HALL

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 22 day of August, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

David K Penrod
MAGUIRE & PENROD
1414 E. Center
P.O. Box 4758
Pocatello, ID 83205-4758
Fax: (208) 232-5181

[X] Mailing
[ ] Hand Delivery
[ ] Fax
[ ] Overnight Mail

BLAKE G. HALL

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