9-21-2011

Ball v. City of Blackfoot Appellant's Reply 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 District Court Case No. CV 2010-328

APPELLANTS' REPLY 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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I.

ARGUMENT

A. The municipality of the City of Blackfoot operating the Blackfoot Municipal Swimming Pool, breached their duties to the Appellants' as invitees.

It is uncontroverted that in the early morning hours of February 25, 2008, Appellants' were the business invitees of Blackfoot Municipal Swimming Pool ("Pool"), where as purchasers of a "family pass," they parked in the demarcated area for pool patrons and unsuccessfully attempted safe passage via the ingress and egress (sidewalk) to the Blackfoot Municipal Swimming Pool building. That during Appellant JoAn Ball's attempt at safe passage to the Pool, she fell on the ice-covered sidewalk and was seriously injured.

Respondent's repeated attempts to align this case as "so factually analogous" and "so closely aligned" with *Pearson v. Boise City*, 80 Idaho 494, 333 P.2d 998 (1959) are misguided by their unwillingness to squarely address the facts. *Pearson* is not a business invitee case! *Pearson* dealt with passing "pedestrians" and an unidentified section of sidewalk somewhere within the boundaries of the city of Boise. There is no indication that the city of Boise in fact knew that there was a current and potentially dangerous condition that needed an immediate remedy and/or an immediate need to warn of the danger. The case of *Pearson* does not have the additional negligent conduct by the city of Boise, contra position to the case at bar. Furthermore, there are no factual similarities in *Pearson* that show that the city of Boise may have attempted to address a dangerous condition and failed, or that they assumed a duty.

On the other hand, the dangerous conditions persisting in this case were in front of the Pool, where Appellants', as patrons and business invitees and not merely passing "pedestrians," parked their vehicle and attempted to enter the Pool precisely where, pursuant to the signage demarcation, they were directed. (R. 176). Not only was Blackfoot Municipal Swimming Pool put on notice of the persisting dangerous conditions, by their own admission they identified the dangerous conditions, but then failed to take affirmative steps to fully remedy said dangerous conditions or warn invitees thereof. (R. 34, 52-53). Furthermore, the City of Blackfoot was additionally negligent by piling snow on the inclined landscape immediately adjacent to the ingress and egress of the Pool, which under "natural weather conditions" (thawing, freezing and gravity) caused the snow to melt, run down slope and freeze across the sidewalk, thereby creating unreasonably dangerous conditions.

The facts of the case at bar and *Pearson* are factually very different and are distinguishable on that basis alone, as set forth above. However, *Pearson* does not apply in this case as Appellants' enjoy the status of business invitees of Blackfoot Municipal Swimming Pool, to which Respondent owes heightened duties. Respondent claims to have "sprinkled" ice melt in the "area" in question on the morning of February 25, 2008, however, multiple witnesses indicate that, although there were signs that ice melt may have been applied on the section of sidewalk near the Pool's entrance door, there were no signs that any reasonable care had been employed to remedy the dangerous conditions, where not only Appellant, JoAn Ball, fell, but also an additional Pool patron. In addition, negligent conduct by Respondent in piling snow on the

inclined landscape side of the sidewalk aided in creating unsafe and dangerous conditions of melting snow and subsequent ice covered sidewalks, which they then failed to diligently and affirmatively make safe, and/or warn invitees about. Furthermore, Respondent's negligent conduct in the placement of the snow and their failure to remedy and/or warn of the known dangerous conditions, constituted an obstruction on the sidewalk that left the mere act of walking unattainable. Whether or not Respondent fulfilled the duties owed to Appellants', as they assert they did and Appellants' vigorously deny, is a question of fact for determination by a jury.

In addressing *Splinter v. City of Nampa*, 70 Idaho 287, 215 P.2d 999, Respondent attempts to dismiss its applicability by simply stating the facts are different. However, the case, in part stands for the liability of a Municipality when they are engaged in a proprietary enterprise and cannot be shielded as engaging in a governmental function (as do the other cited cases in Appellants' Brief, but are not addressed by Respondent). The court in *Splinter* also correctly recognized that a municipality owes heightened duties, as any private landowner or company does, to patrons and/or invitees when engaged in a proprietary enterprise—as the City of Blackfoot irrefutably did and does in the operation of Blackfoot Municipal Swimming Pool.

Respondent posits that because Appellants' injuries emanate from a fall on a sidewalk that is "incidental" to using the pool inside the building, Respondent should be shielded from their breach of the duties owed to Appellants. This argument begs the question: how is a business invitee to enter into the building and use the pool, if not via the parking and sidewalk that is

designated for pool patrons? Such an argument is inapposite to Idaho law in the context of business invitees. In the recent case of *McDevitt v. Sportsman's Warehouse, Inc., et al*, ___ Idaho ___, Docket No. 37244 (2011), this Court found for Sportsman's Warehouse, Inc., in part based upon the finding that the sidewalk was not part of Sportsman's Warehouse's leased premises and did not have control of it. In analyzing the issues, this Court cited to *Johnson v. K-Mart Corp.*, 126 Idaho 316, 882 P.2d 971 (Ct. App. 1994), wherein the Court of Appeals found that K-Mart Corp. did have a duty towards its invitees in maintaining its adjacent parking lots. If Respondent's argument in this regard were given applicability, no business or proprietary enterprise would be liable for the maintenance or safety of anything outside its building or directly associated with its business purpose. Thus K-Mart Corp. would be off the hook, so to speak, because their parking lot is merely "incidental" to the sale of goods inside of the store. Thankfully, that is not the law in Idaho. Here, Respondent is the owner and has exclusive control over that portion of sidewalk in question. Again, whether or not Respondent was diligent in its affirmative duties to keep the premises safe and/or warn its invitees of the dangerous conditions is a question of fact for determination by a jury.

B. Respondent assumed a particular duty in making the ice covered sidewalks safe for passage to the Pool's invitees by their failed attempt to do so.

Even if this Court were to find that Respondent did not have a duty to make the ice-covered sidewalks safe for passage, Respondent clearly assumed the duty to make the whole sidewalk designated for pool invitees safe for passage by "sprinkling" ice melt on a portion of the

sidewalk. As stated in Appellants' opening brief, 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). At a minimum, the facts are in dispute whether Respondent performed their assumed duty of making the sidewalks safe for passage to the Pool. Respondent's employee, Lorna Van Horn, states in her Affidavit that she sprinkled ice melt in the "area" where Appellant sustained her injuries when she fell on the ice-covered sidewalk. (R. 34).

Although, Respondent fails to address and ignores the assumed duty by the City of Blackfoot and its employee, they seem to set forth their own affirmative defense in that Appellant assumed the risk in using the sidewalk to attend the pool. (Respondent's Brief, p. 10). However, Respondent offers no applicable case law in support thereof. They do, however, contort the deposition testimony of JoAn Ball, wherein she stated: "in wintertime you've always got snow and ice," as support for the notice allegation. *Id.* Following this assertion, they state: "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." *Id.* However, this is a misstatement of fact and the record. In referring to the citations listed by Respondent for this allegation, no such statements can be found. In fact the only statement that can be attributed to what JoAn knew is that "Beth [was] down."

Exactly what does "in the area" mean? The Affidavit of Ms. Van Horn is undeniably vague as to what she means by "area." (R. 34). Ms. Van Horn's Affidavit clearly does not state she applied ice melt in the very spot that two pool patrons irrefutably fell due to the dangerous accumulation of ice on the sidewalk, nor does it state she correctly applied the ice melt and that it was sufficient to remedy the known dangerous conditions.

Because the facts with regard to the extent Respondent remedied a dangerous condition created in part by their own negligent conduct in the piling of snow, coupled with the fact that first hand testimonial evidence disputes Respondent's claim that ice melt was sprinkled in the location of the falls on the ice, the District Court's dismissal should be reversed. These are clearly disputed issues of fact for jury determination.

C. At a minimum, the Blackfoot Municipal Swimming Pool's landscaping is defective in that it significantly contributes in the creation of unnatural and unsafe conditions on the sidewalk.

Although Respondent claims that their Affiant, Rex Orgill, stated that the landscaping in question was not defective, no such statements were actually made by said Affiant. (Respondent's Brief, p. 13-14, ADDM, p. 11). Mr. Orgill's Affidavit speaks only to his opinion regarding the sidewalk. (ADDM, P. 10-11). In the Affidavit of Fred Ball, he indicates that he observed how the snow had been piled up on the edge of the sidewalk, where as the snow would melt, it would run down the slope and freeze across the sidewalk. (R.55).

Whether the City of Blackfoot was negligent in their snow removal and created an unnatural and dangerous condition thereby is a question of fact for a jury's determination.

II.

ATTORNEY FEES ON APPEAL

Pursuant to Idaho Appellate Rule 41, Appellants' have claimed attorney fees in accordance with Idaho Code §12-121. Furthermore, Respondent's claim for attorney's fees and costs are inappropriate, in that there are genuine issues of fact for a jury's determination requiring a reversal of the District Courts *Order Granting Defendant's Motion for Summary Judgment.* Further, given the arguments and case law argued herein and in Appellants' Brief, this appeal has not been brought frivolously, in bad faith, and with foundation, as said allegations of the Respondent regarding such are wholly unsupported and should be rejected.

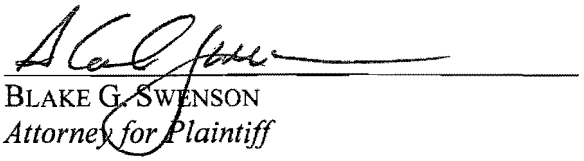
III.

CONCLUSION

In the present case, the pleadings, depositions, and admissions on file, together with the affidavits, show that there is are genuine issues 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 Appellants want their day in court to present their case to a jury for a factual determination.

Respectfully submitted this _____ day of September, 2011.

MAGUIRE & PENROD



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CERTIFICATE OF SERVICE

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

☒ mailed, postage prepaid
☐ hand delivered
☐ faxed
☐ e-mailed

to the following, this 14 day of September, 2011, and addressed as follows:

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