

7-21-2017

# Haight v. Idaho Department of Transp. Respondent's Brief Dckt. 44863

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DEA HAIGHT,	)
	)
Plaintiff,	)
	)
vs.	)
	)
IDAHO DEPARTMENT OF	)
TRANSPORTATION,	)
	)
Defendant.	)
_____	)

**Respondent's Brief**

**Appeal from Kootenai County Case No. CV-15-5927**

**Honorable Cynthia K.C. Meyer, Presiding**

Docket No. 44863-2017

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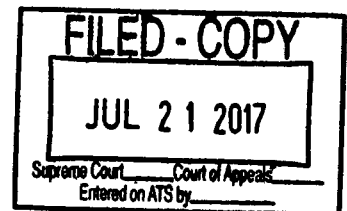


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## STATEMENT OF THE CASE

### I. Summary of Plaintiff's Claims.

This is an appeal from dismissal of plaintiff's claims on summary judgment. Plaintiff's first claim is for property damage to a 5<sup>th</sup> wheel trailer that occurred on July 11, 2014, when the trailer hit an orange traffic barrel in a construction zone on I-90 near Kellogg. R p. 10, par. 7; p. 11, par. 8-11. Plaintiff alleges the barrel was out of line with adjacent barrels, and that the Idaho Department of Transportation ("IDT") was negligent in placing and maintaining the barrel. R p. 10, par. 7; p. 11, par. 8. Plaintiff's second claim is for declaratory and injunctive relief relating to portions of the motorcycle and driver's manuals published by the State, which plaintiff alleges misrepresent the law and/or prescribe standards which present a danger to motorists. R p. 11, par. 17. In its Answer, IDT denied the allegations of negligence and denied the allegations relating to the motorcycle and driver's manuals. R p. 14, par. 2 – 3; p. 15, par. 8.

### II. Procedural History.

The lawsuit was filed on August 20, 2015. R p. 10. The trial court issued its Scheduling Order, Notice of Trial Setting and Initial Pretrial Order on April 20, 2016, setting a trial date of February 21, 2017. R p. 90, L. 9-13. The Scheduling Order provides that motions for summary judgment "shall be timely filed so as to be heard not later than ninety-one (91) days (thirteen weeks) before Trial." R p. 90, L. 9-13. IDT filed separate summary judgment motions on plaintiff's two claims, and the motions were noted for hearing on November 22, 2016 in compliance with the Scheduling Order. R p. 37, L. 1-4 and R p.64, L. 1-4. This was exactly 13

weeks before trial, and the last possible date for hearing summary judgment motions under the Scheduling Order. Tr p. 18, L. 21 – 25; Tr p. 19, L. 1-4.

Plaintiff's response to IDT's motions was due 14 days before the hearing, on November 8, 2016. Instead of timely responding to the motions, plaintiff filed an untimely motion under IRCP 56(d), requesting that the Court defer ruling on the IDT's motions while plaintiff conducted additional discovery. R p. 68-70. Plaintiff's motion was faxed to defense counsel at 9:44 p.m. on November 10, 2016 and it was filed with the court on November 14, 2016. R p. 8, 68, 72. Plaintiff later filed a memorandum on November 17, 2016 opposing IDT's summary judgment motion regarding the declaratory judgment and injunction claims. R p. 82-83. At the summary judgment hearing on November 22, 2016, the trial court heard argument regarding plaintiff's IRCP 56(d) motion, but denied the motion. Tr p. 5, L. 25 – p. 21, L. 4. Both sides then presented argument on the merits of the summary judgment motions, although plaintiff's counsel declined to present argument regarding plaintiff's negligence claim. Tr p. 25, L. 4-5. The court took IDT's motions under advisement, and issued its Memorandum Decision and Order on Defendant's Motions for Summary Judgment on December 20, 2016, granting both motions. R Vol. I, p. 89 – 101.

### III. Facts Pertinent to Plaintiff's Negligence Claim.

At the time of the incident, plaintiff, Dea Haight, and her husband G.W. Haight were towing their 5<sup>th</sup> wheel trailer east on I-90. Mr. Haight was driving. R p. 56, L. 1-22 of deposition page 8. At Kellogg, there were traffic control barrels straddling the line dividing the right and left lanes, and traffic was diverted to the left lane. R p. 56, L. 1-25 of deposition page

9. The Hights claim one of the traffic barrels was “out of place” and they were unable to avoid hitting it with their trailer. R p. 57, L. 7-15 of deposition page 11; L. 7-15 of deposition page 13.

At the time of the incident, I-90 between Kellogg and Osburn was under construction. The general contractor was Knife River Corporation – Northwest. The traffic control subcontractor was Eclipse Traffic Control & Flagging, Inc. R p. 49. On June 30, 2016, plaintiff filed a separate lawsuit in Kootenai County District Court against Knife River and Eclipse Traffic Control, alleging the exact same property damage claim as is alleged in this action. R p. 49, 61-63. In that suit she claims the contractors were negligent with respect to the out of place barrel. R p. 61-62.

Even assuming the barrel was “out of place” for purposes of summary judgment, Mr. and Mrs. Hight testified in their depositions that they (1) had no knowledge as to how the barrel got out of place; (2) had no knowledge as to how long the barrel was out of place; and (3) had no knowledge that anyone from IDT put the barrel in that position. R p. 60, L. 21-23 of deposition page 27; L. 3-14 of deposition page 28; R p.57, L. 13-23 of deposition page 16.

IV. Facts Pertinent to Plaintiff’s Declaratory/Injunctive Relief Claim.

Plaintiff claims that she is lawfully licensed to operate motor vehicles in the State of Idaho pursuant to a motor vehicle Operator’s license duly issued by IDT. R p. 11, par. 14. Plaintiff states she is and may be subjected to written and other tests by the IDT and its agents with respect to plaintiff’s ability to lawfully operate a motor vehicle. R p. 11, par. 15. Plaintiff claims some portions of manuals and test questions published by IDT misrepresent the law and/or prescribe standards of conduct in operating a motor vehicle which present a real and



present danger of serious physical injury to persons who may adhere to the practices prescribed by IDT. R p. 11, par. 17. Lastly, Plaintiff claims that she and other residents of the State of Idaho are at risk of failing to qualify for licenses to which they are entitled and risk injury and property damage based on improper and misleading information published by IDT with regard to proper operation of motor vehicles. R p. 12, par. 18.

Plaintiff stated in her deposition that her declaratory claim was based only on the motor vehicle manual. R p. 25, L. 1-25, deposition p. 22. She testified specifically that she does not hold a motorcycle license in Idaho, she has only taken a written test to operate a motor vehicle in Idaho once, and she has never been injured while operating a motorcycle. R p. 25, L. 2-25, deposition p. 24. Furthermore, plaintiff testified the only reason she brought forth the declaratory action was because of the fifth wheel incident. R p. 26, L. 1-4, deposition p. 26. The plaintiff has failed to present any evidence or testimony of a personal injury or a causal connection between any injury, the incident that took place on July 11, 2014, and the manuals in order to establish standing. R p. 31, L. 12-14.

## ARGUMENT

### I. Standard of Review.

This Court reviews a summary judgment order under the same standard the district court used in ruling on the motion. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 327, 940 P.2d 1142, 1146 (1997). That is, 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). The moving party has the burden of showing that no genuine issues of material fact exist. *Stoddart v. Pocatello Sch. Dist. No. 25*, 149 Idaho 679, 683, 239 P.3d 784, 788 (2010). This burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under I.R.C.P. 56(d). *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994). Disputed facts and reasonable inferences are construed in favor of the nonmoving party. *Castorena v. Gen. Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010).

The determination of a Rule 56(d) motion is within the trial court’s discretion. A district court does not abuse its discretion in denying such a motion if it recognized it had the discretion to deny the motion, articulated the reasons for doing so, and exercised reason in making the decision. *Fagen, Inc. v. Lava Beds Wind Park, LLC*, 159 Idaho 628, 633, 364 P.3d 1193, 1198 (2016); *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005). The district court need not expressly state that it had discretion to deny the motion if its articulation of the reasons for denying the motion show that the court knew it had discretion to grant or deny the motion. *Fagen*, 159 Idaho at 1198.

## II. The Trial Court Properly Denied Plaintiff’s IRCP 56(d) Motion.

The trial court properly exercised its discretion in denying the Rule 56(d) motion because (1) the motion was not timely filed, (2) plaintiff failed to meet her burden to specify what additional discovery would reveal and how it would preclude summary judgment, and (3) plaintiff failed to diligently pursue discovery.

A. The Motion was Not Timely Filed. IRCP 56(b)(2) provides that any opposing documents must be served at least 14 days before the hearing. Likewise, IRCP 7(b)(3)(A) provides that motions must be filed and served at least 14 days prior to the hearing. Here, plaintiff's motion under Rule 56(d) was due on November 8, but was not served until November 10 (albeit by fax at 9:44 p.m.), and was not filed until November 14. The motion was not timely and the district court would have been justified in denying the motion on that ground alone.

B. Plaintiff Failed to Meet Her Burden Under Rule 56(d). IRCP 56(d), formerly numbered 56(f) but substantively identical, provides as follows:

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

A party seeking a continuance under Rule 56(d) "has the burden of setting out 'what further discovery would reveal that is essential to justify their opposition,' making clear 'what information is sought and how it would preclude summary judgment.'" *Jenkins* at 386 (2005). The trial court may consider the moving party's lack of diligence in pursuing discovery in ruling

on a Rule 56(d) motion. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 105, 294 P.3d 1111 (2013).

In *Jenkins*, the plaintiff requested additional time to respond to a motion for summary judgment because the case was “complex” and there were outstanding requests for written discovery and depositions. *Jenkins* at 385. In the supporting affidavit, the plaintiff’s attorney stated that “he believed the discovery would produce additional documents and testimony supporting the Jenkins’ theories, and that he required the opportunity to use the responses and testimony in additional discovery in order to thoroughly respond to summary judgment.” *Id.* The Supreme Court held the district court did not abuse its discretion in denying the motion because “the affidavit ... did not specify what discovery was needed” to properly respond to the summary judgment motion, “and did not set forth how the evidence he expected to gather through further discovery would be relevant to preclude summary judgment.” *Id.* at 386.

Similarly, in *Taylor v. AIA Services Corporation*, the district court denied a plaintiff’s Rule 56(f) motion for additional time to conduct discovery. *Taylor*, 151 Idaho 552, 572, 261 P.3d 829, 849 (2011). The court noted that the plaintiff had more than a year to conduct discovery and the motion did not set forth what relevant information the plaintiff needed or provide a “reasonable basis to believe additional discovery will produce new or relevant information not previously disclosed....” *Id.* The Supreme Court affirmed, noting the plaintiff had failed to rebut “the district court’s finding that he failed to point to any information or document that may be relevant to” his opposition to the motion for summary judgment. *Id.*

In the present case, plaintiff's counsel stated in the Rule 56(d) motion that he sought through written discovery the identity of "persons authorized by Defendant to work on Interstate 90 at the time and place of the accident." R p. 68. He goes on to state that he will need to depose such persons "with regard to their knowledge of facts relevant to these proceedings" once they have been identified. R. p. 68. Counsel failed, however, to specify what these depositions would reveal and how it would preclude summary judgment. Therefore, as in the *Jenkins* and *Taylor* cases above, plaintiff failed to meet her burden under Rule 56(d), and the district court properly denied the motion.

C. Plaintiff Failed to Diligently Pursue Discovery. Plaintiff conducted no discovery in this case for approximately 14 months. It was only after IDT completed written discovery and deposed plaintiff and her husband on October 12, 2016 that plaintiff served defense counsel with written discovery requests. R p. 78. These requests were timely answered by IDT on November 10, 2016, although plaintiff's counsel conceded he had not read the responses yet by the time of summary judgment hearing on November 22, 2016. R p. 80-81; Tr, p.15, L.8-10. IDT timely filed its summary judgment motions so they would be heard in compliance with the deadlines in the district court's Scheduling Order. The district court properly considered plaintiff's lack of diligence in denying the Rule 56(d) motion.

D. The District Court Did Not Abuse Its Discretion in Denying the 56(d) Motion. In ruling on the Rule 56(d) motion at the summary judgment hearing, the district court stated that the motion itself "was inadequate to indicate what specific information would be needed from discovery...." Tr p. 8, L.21-23 of p. 19. The court also noted that the motion was not filed

timely, but more important to the court was plaintiff's failure to engage in discovery for over a year after the case was filed. Tr p. 8, L.24 -25 of p. 19 and L.1-4 of p. 20. The court stated:

And while the Court is sympathetic to how life can really get in our way – and you've had a lot of issues lately<sup>1</sup>, and the Court is sympathetic to those issues – nevertheless, discovery was not engaged in when it could have been, and so to indicate that additional time is needed when this summary judgment motion is scheduled for the last possible date that the scheduling order would allow is simply too late, and I'm going to deny the 56(d) motion, and we are going to continue with argument on the summary judgment motion itself today.

Tr p.20, L.19-25 of p. 20 and L.1-4 of p. 21.

It is apparent that the court recognized it had the discretion to grant or deny the 56(d) motion, articulated the reasons for denying the motion, and exercised reason in making the decision. The court did not abuse its discretion.

III. Plaintiff's Negligence Claim was Properly Dismissed Because There was No Evidence of Actual or Constructive Notice by IDT.

The elements of a negligence claim are: “(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage.” *Cumis Ins. Soc'y, Inc., v. Massey*, 155 Idaho 942, 947–48, 318 P.3d 932, 937–38 (2014) (quoting *Nation v. State of Idaho, Dep't of Corr.*, 144 Idaho 177, 189, 158 P.3d 953, 965 (2007)).

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<sup>1</sup> In response to IDT's argument that plaintiff had not been diligent in conducting discovery, plaintiff's counsel had earlier told the court about having computer problems beginning in August 2016, car problems in September, roofing problems in October, some medical and dental appointments in September and October, and some other miscellaneous items in that general time frame. Tr. p.6, L.14 – p.11, L.3.

With respect to dangerous conditions on highways, the State has a duty in certain situations to either make the condition safe or warn motorists of the condition. The State is subject to liability when it creates or maintains a dangerous condition on the highway if it:

- (1) **knows of or by the exercise of reasonable care would discover such condition, and**
- (2) should realize that the condition, involves an unreasonable risk of harm to those using the highways, and
- (3) should expect that persons using the highway will not discover or realize the danger, and
- (4) fails to exercise reasonable care to make the condition safe or to adequately warn of the condition and the risk involved, and,
- (5) the persons using the highway do not know or have reason to know of the condition and attendant risks. (emphasis added).

*Smith v. State*, 93 Idaho 795, 804, 473 P.2d 937, 946 (1970)(superseded by statute on other grounds as stated in *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 725 (1986)). *See also, Liefeld v. Johnson*, 104 Idaho 357, 362, 659 P.2d 111 (1983)(State has duty to warn motorists of a known dangerous condition on a public highway).

In the present case, plaintiff cannot establish the first element above from the *Smith* case, *i.e.* that IDT had actual or constructive notice of the out of place barrel. This is an essential element of her claim on which she has the burden of proof. Both plaintiff and her husband testified they had no knowledge as to how the barrel got out of place, how long it had been out of place, or that anyone from IDT put the barrel in that position. R p. 60, L. 21-23 of deposition page 26; L. 3-14 of deposition page 27; R p.58, L. 13-23 of deposition page 16. IDT challenged an essential element of plaintiff's negligence claim, and the burden shifted to plaintiff to demonstrate there is a genuine issue of material fact as to actual or constructive notice by IDT.

Plaintiff failed to meet her burden, and her negligence claim was properly dismissed by the district court.

IV. The Trial Court Properly Dismissed Plaintiff's Declaratory/Injunctive Relief Claim for Lack of Standing.

“It is a fundamental tenant of American jurisprudence that a person wishing to invoke a court’s jurisdiction must have standing.” *Young v. City of Ketchum*, 137 Idaho 102,104, 44 P 3d 1157, 1159 (2002) *citing Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129,1132 (2000). “Standing is a preliminary question to be determined by this Court before reaching the merits of the case on appeal.” *Id. citing Miles v. Idaho Power Co.*, 116 Idaho 635, 637 778 P.2d 757, 759 (1989). The Idaho Supreme Court has previously noted the doctrine is imprecise and difficult to apply. *Id. citing Miles* at 641, 778 P.2d at 763 (*citing Valley Forge College v. Americans United*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). “Standing focuses on the party seeking relief and not on the issue the party wishes to have adjudicated.” *Id. citing Van Valkenburgh* at 124, 15 P.3d at 1132; *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (*quoting Miles* at 639, 778 P.2d at 761). “To satisfy the case or controversy requirement of standing, a litigant must **‘allege or demonstrate an injury in fact and a substantial likelihood the judicial relief requested will prevent or redress the claimed injury.’**” *Id. (emphasis added)*. “This requires a showing of **‘distinct palpable injury’** and **‘fairly traceable causal connection between the claimed injury and the challenged conduct.’**” *Id. citing Miles* at 639, 778 P.2d at 761 (**emphasis added**).



Just as she did in the district court, plaintiff directs this Court's attention to Idaho Code §67-5278 and *Rawson v. Idaho State Board of Cosmetology*, as evidence that she clearly has standing. *Rawson*, 107 Idaho 1037, 695 P.2d 422 (Ct. App. 1985). Section 67-5278 only provides a mechanism or claim for a person injured or threatened to be injured by a rule to bring a claim. The statute alone does not automatically provide standing or a justiciable interest. I.C. §67-5278. Section 67-5278 allows for a declaratory action "...if it is alleged the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner." The requirements to obtain a declaratory action similar to Idaho Code §67-5278 are also found in Idaho Code §10-120 as follows:

*Any person...whose rights, status or other legal relations are affected by a statute...may have determined any question of construction or validity...and obtain a declaration of rights, status or other legal relations thereunder.*

Idaho Code §10-1202. (*emphasis added*). The *Rawson* case recognized a right that was interfered with, or impaired by the rule in question and was sufficient to confer standing under I.C. §67-5207. *Rawson at 426*.

IDT's argument is NOT that plaintiff cannot bring a case under the U.S. Constitutional right to petition for personal grievance or plaintiff's right to due process. U.S. Const. amend. I, V and XIV § 1 and Idaho Const. art 1, §18. IDT's argument is that plaintiff has not established standing to bring this claim. The U.S. Supreme Court has made it clear that the burden of establishing standing rests on the plaintiff. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332,340-341 (2006). The Idaho Supreme Court has stated that standing is a preliminary question to be

determined by this Court before reaching the merits of the case. *Young at 1159*. The Idaho Supreme Court did not take away a person's right to bring forth a case in the courts of Idaho, but made a requirement that the person must have standing, a controversy or injury, before the plaintiff can bring forth evidence to establish the merits of their case.

Plaintiff has failed to provide testimony or evidence of the first requirement of standing; injury in fact due to the Defendant's driving manual and, therefore, has failed to demonstrate standing to bring forth a claim and her declaratory/injunctive claim was properly dismissed by the district court.

#### CONCLUSION

The district court did not abuse its discretion in denying plaintiff's motion under Rule 56(d). The motion was not timely filed, plaintiff failed to meet her burden under Rule 56(d) of specifying what additional discovery is needed and how it will preclude summary judgment, and plaintiff failed to diligently pursue discovery for over a year before IDT's motions were filed.

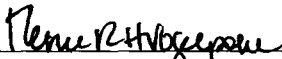
IDT challenged an essential element of plaintiff's negligence claim, *i.e.* that IDT had actual or constructive knowledge of the out of place traffic barrel. The burden shifted to plaintiff to demonstrate there is a genuine issue of material fact as to actual or constructive notice by IDT. Plaintiff failed to meet her burden, and her negligence claim was properly dismissed by the district court.

IDT also challenged an essential element of plaintiff's declaratory action, *i.e.* that Plaintiff has standing to sustain a declaratory action. The burden then shifted to the Plaintiff to

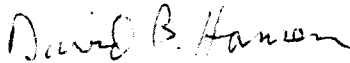
demonstrate standing by providing evidence or proof of an injury. Plaintiff failed to meet her burden, and her declaratory and injunction actions were properly dismissed by the district court.

Dated this 21<sup>st</sup> of July, 2017.

STATE OF IDAHO  
IDAHO TRANSPORTATION DEPARTMENT

  
\_\_\_\_\_  
Renee R. Holländer-Vogelpohl  
Deputy Attorney General

LAW OFFICES OF DAY & HANSEN

  
\_\_\_\_\_  
David B. Hansen  
SDAG for Idaho Department of Transportation

CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of July, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

G.W. Haight  
Attorney at law  
1137 E Skyline Drive  
Coeur d'Alene, ID 83814

- U.S. Mail (Certified )
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)
- Email



---

KAREN WOODHEAD  
Legal Section  
Idaho Transportation Department