9-13-2018

Lamont Bair Enterprises, Inc. v. City of Idaho Falls Appellant's Reply Brief Dckt. 45819

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 45819

LAMONT BAIR ENTERPRISES, INC.;
Plaintiff/Appellant

v.

CITY OF IDAHO FALLS;
Defendant/Respondent

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville.
Honorable Dane H. Watkins, Jr., District Judge, presiding.

Jared W. Allen
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404

Attorney for Appellant, Lamont Bair Enterprises, Inc.

Blake G. Hall
Hall Angell & Associates, LLP
1075 S. Utah, Suite 150
Idaho Falls, Idaho 83402

Attorney for Respondent, City of Idaho Falls

Table of Contents

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

INTRODUCTION

Ten times, at least, the City of Idaho Falls (the City) falsely states in Respondent's Brief that the water line at issue in this case was within its useful life. And yet, the City's own expert states, "[d]escriptions of the types of breaks and repairs performed on the 1950s-era cast iron pipe include . . . clamp-type repairs of rusting and cracked pipelines. . . . indicat[ing] that the material is past its design life and is (sic) need of replacement."[1] The City similarly repeatedly and incorrectly asserts that it was not on notice of any defect in its water pipes. And yet, the City's own expert reached his conclusion about the design life by relying upon roughly 30 years of data regarding the location, date, and description of water main breaks in its system revealing that 70% of the breaks occur in cast iron pipe installed between 1920 and 1959.[2] Again, the City repeatedly asserts that it was not on notice of any waterline breaks on the west side of Idaho Falls near 547 South Skyline Drive. And yet, per the City's own engineer, one year prior and less than a mile away from the break at issue, there was a break in the main of the same material installed at the same time just around the corner on Stimson Avenue.[3] The City's position is built upon a fiction, a denial by the City of critical facts, all established from the City's own evidence and experts.

The City's position is also built upon a similar denial about the law, a refusal to acknowledge the well settled public policy of this state that an operator of a public water system has a duty to maintain that system in a reasonably safe condition. And yet, the law is clear. Every

---

[1] R, p. 245.

[2] *Id.*

[3] R, p. 127.

public utility is required to maintain its instrumentalities, equipment, and facilities in a safe condition. *See* IDAHO CODE ANN. § 61-302; *Hansen v. City of Pocatello*, 145 Idaho 700, 184 P.3d 206 (2008).

This Court should reject the City's denial about the state of the law and state of the facts. The evidence presented to the district court by Lamont Bair Enterprises, Inc. (LBE) revealed a failure on the part of the City to exercise due care in the performance of a public policy established obligation to maintain its public works in a reasonably safe condition. As a consequence, summary judgment was granted in error and this Court should remand this matter back to the district court for further proceedings.

ARGUMENT

When a government agency negligently fails to carry out an operational responsibility, it is liable for that negligence and the immunity provisions of the Idaho Tort Claims Act (ITCA) afford it no protection. IDAHO CODE ANN. § 6-904(1). Neither discretionary function nor design immunity applies to a negligent failure to maintain public works facilities in a safe condition. Because the City failed its operational duty to maintain its water system in a safe condition, the district court erred in finding discretionary function immunity. Because LBE's claim arises from that negligent failure to maintain the system, not from any allegation of negligent design of that system, design immunity would have been, and is, an equally inappropriate basis for summary judgment.

I. Maintenance of public works in a reasonably safe condition is not discretionary and the City failed to exercise ordinary care in the performance of a statutory or regulatory function.

This district court erred in granting the City immunity with respect to the maintenance of its public water system because the City acted negligently in the implementation of existing policy. The City's continued reliance upon the two-step approach for determining if a government act is discretionary or operational is misplaced. The existence of a clearly articulated policy obviates the application of that two-step approach because the question is not whether there is room for policy judgment and decision, but whether the City failed to exercise due care in the implementation of statutory or regulatory policy. This case does not deal with operational decision making, but implementation of policy, and "[t]he discretionary function exception does not immunize the negligent implementation of policy[.]" *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 331, 775 P.2d 640, 645 (1989). When there is an existing policy already in place, the execution of that policy is not discretionary, but operational, and the operational prong demands that the policy be carried out with ordinary care. *Id.* at 330, 644.

Like all other exceptions to liability under the ITCA, the discretionary function immunity exception must be closely construed to favor liability and to limit the exceptions. *Grabicki v. City of Lewiston*, 154 Idaho 686, 690, 302 P.3d 26, 30 (2013). Section 6-904(1) provides:

> A governmental entity . . . shall not be liable for any claim which:
>
> Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

IDAHO CODE ANN. § 6-904 (1).

The City not only glosses over, but completely disregards the first half of the statute, electing instead to jump to an analysis of whether the City performed a discretionary function. But the execution or performance of a statutory or regulatory function is never discretionary. The correct first question, therefore, is whether the City was negligent in the performance of a statutory or regulatory function. Because the answer is yes, the City is not entitled to discretionary function immunity. It is the settled policy of this state that an operator of water supply public works has a duty to maintain those public works in a safe condition. *Hansen v. City of Pocatello*, 145 Idaho 700, 703, 184 P.3d 206, 209 (2008); IDAHO CODE ANN. § 61-302.

The City is critical of LBE's reliance upon *Skaggs Drug Centers, Inc. v. City of Idaho Falls*, 90 Idaho 1, 407 P.2d 695 (1965) and *C.C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, 372 P.2d 752 (1962), suggesting that the adoption the ITCA in 1971 somehow altered the public policy of this state as it relates to the maintenance of public works water systems. Specifically, the City argues:

> LBE asserts that because this Court did not apply the immunity to the municipal entities in *Skaggs* and *C. C. Anderson*, there must be a public policy prohibiting its application. When viewed in this context, this assertion is absurd. *Skaggs* and *C. C. Anderson* were both decided of this Court prior to the state legislature's enactment of the Idaho Tort Claims Act in 1971. Consequently, the laws and immunities available to municipal entities were vastly different at that time. In light of the Idaho Tort Claims, those cases represent outdated, inapposite law, not "well-established public policy."[4]

[4] Respondent's Brief, p. 11.

There are a number of flaws with this argument. First, the only truly absurd assertion is that the adoption of the ITCA somehow altered public policy as it relates to public works water systems. Nothing about the ITCA alters long-standing public policy regarding a public utility's obligation to maintain its facilities and equipment in a safe condition.

More importantly, LBE does not rely on *Skaggs* and *C. C. Anderson* to suggest there is a public policy prohibiting the application of the discretionary immunity doctrine. Indeed, that is not LBE's argument at all. LBE does not contend that public policy prohibits application of the immunity doctrine, but rather because public policy requires it, a public utility's duty to maintain its water system in a safe condition is not discretionary. And because it is not discretionary, discretionary immunity does not apply. As noted above, "[t]he discretionary function exception does not immunize the negligent implementation of policy[.]" *Czaplicki*, 116 Idaho at 331, 775 P.2d at 645.

Contrary to the City's contention, LBE does not rely on *Skaggs* and *C. C. Anderson* to establish the underlying public policy, but its existence is nonetheless certain. The policy was determined by the legislature in 1913 when it adopted Section 61-302 and its ongoing existence was affirmed by this Court in *Hansen* thirty-seven years after the adoption of the ITCA. The City's protestations aside, the law and public policy of this state demands that the operator of a water utility maintain its equipment and facilities in a safe condition. IDAHO CODE ANN. § 61-302; *Hansen, supra*. And because public policy requires that maintenance, the City's duty to maintain its system in a safe condition is not discretionary. The City negligently ignored literally

decades of warnings about the condition of its system, and discretionary function does not immunize its negligent implementation of settled policy.

In addition to disregarding, and even denying, the existence of this well settled policy, the City misreads *Jones v. City of St. Maries*, 111 Idaho 733, 727 P.2d 1161 (1986), to reach the erroneous conclusion that "the Court has already determined that the immunity is available when dealing with water systems."[5] On the contrary, the *Jones* court specifically declined to apply discretionary immunity in *Jones* and reversed the district court's grant of summary judgment and remanded the case "for further proceedings consistent with the views expressed herein." *Jones v. City of St. Maries*, 111 Idaho at 737, 727 P.2d at 1165. Among the views expressed, the *Jones* court held that if a city assumes the responsibility for maintaining water mains, "then it would be obligated to perform those activities with due care and would be correspondingly liable for any failure to do so." *Id.* When the City of Idaho Falls decided to become a public utility, it subjected itself to the requirements of the Public Utilities Law and assumed the responsibility for maintaining its water mains, including the obligation to maintain its facilities in a safe condition. Having assumed that responsibility, it is liable for its failure to maintain its facilities with due care. Discretionary immunity under Section 6-904(1) does not apply. As such, the District Court erred in granting summary judgment.

A. The City's own records establish the City's negligence.

In addition to denying the existence of its obligation to maintain its water system in a safe condition, the City contends there is no evidence to support a finding of negligence with respect

[5] Respondent's Brief, p. 11.

to that obligation. Specifically, the City maintains that it lacked any actual or constructive notice of any defects or breaks in its waterline. The City's position is not supported by the evidence.

The City maintains that the pipe in question was "within its *expected* useful life of 75 years."[6] While it is accurate to suggest the pipe was within its *expected* useful life, that does not end the inquiry. First, "the city is bound to take notice that its pipes are liable to deteriorate from time and use[.]" *Yearsley v. City of Pocatello*, 71 Idaho 347, 353, 231 P.2d 743, 747 (1951). And more importantly, the city had actual notice that the pipe in question had already deteriorated past its design life, irrespective of what its expected life may have been. It cannot be disputed the City had this notice as its Water Facility Plan states:

> The City has recorded the location, date, and description of water main breaks and repairs since the mide-1980s. This information is invaluable for determining generally what type and age of pipe is breaking and should be scheduled for replacement. . . . The break counts indicate that cast iron pipeline installed between 1920 and 1959 accounts for approximately 70% of the City's breaks or repairs. Descriptions of the types of breaks and repairs performed on the 1950s-era cast iron pipe include many joint leak repairs and clamp-type repairs of rusting and cracked pipelines. These failures indicate that the material is past its design life and is (sic) of replacement.[7]

The record further reveals that nearly half of the breaks were to cast iron pipe installed between 1940 and 1959, the very type of pipe at issue in this case.[8] The City, in what was hopefully an oversight and not an outright misrepresentation, attempts to downplay this evidence by suggesting "the waterline at issue here was not in need of 'clamp-type repairs of rusting and cracked pipelines,' but rather experienced a shear break of the piping caused by shifting soils due

---

[6] Respondent's Brief, p. 22 (emphasis added).

[7] R, p. 245.

[8] *Id.*

to deep frost penetration."[9] This Court must reject this contention as the record clearly establishes that the break was, in fact, a cracked pipe repaired with a clamp-type repair. Of the break at issue, David Richards (Richards) testified:

> Q. Do you know what kind of break it was?
>
> A. It's basically that if pressure gets applied to a pipe, that the pipe itself *cracks* completely around the full circumference of the pipe and it separates, it's called a sheer break.
>
> . . .
>
> Q. Okay. So can you tell, based on this document, how the repair was performed?
>
> A. Yes. They dug down to the broken main. It was approximately four feet deep. They used a 16-inch diameter by 12-inches long full circle *clamp* for a cast iron pipe. It's just a sleeve that goes over the pipe with a rubber gasket on the inside to seal it up.[10]

In other words, the break and repair to the pipe at issue in this case was a crack repaired with a clamp-type repair, precisely the type of break that lead the City's own expert to conclude the cast iron pipes installed from 1920-1959 were past their design life. The City had actual notice that the pipe in question was past its design life.

The City attempts to distinguish the present case from *Skaggs, supra*, where this Court reasoned:

> The City's policy with respect to the maintenance, repair and replacement of the pipelines was to wait until a break or leak was reported and then dispatch a crew to make the necessary repairs. The City took no steps whatsoever to *prevent* leaks caused by rusting, nor did it institute any procedures or practices to inspect or check the lines prior to an actual break.

---

[9] Respondent's Brief, p. 24.

[10] R, p. 128-129.

Skaggs, 90 Idaho at 1, 6–7, 407 P.2d at 697 (emphasis in original). The City contends that the present case is distinguishable because it "has a plan to replace its waterlines before they exceed their life expectancy and does not wait until leaks occur before making repairs."[11] Once again, the record does not support the City's conclusion. First, we know the City's plan is not to replace waterlines before they exceed life expectancy, but rather to replace, over the course of the next 15 years, many miles of cast-iron pipe that is already "past its design life." Moreover, waiting until a leak occurred before making repairs is precisely what the City did in this case. The City knew as of the adoption of the Water Facility Plan, and had reason to know before it was written, that the pipe at issue was past its design life, but waited until a leak occurred to do anything about it. And finally, just as the Court noted in *Skaggs*, per Richards, the City has no procedures or practices to inspect or check lines for leaks prior to an actual break.[12]

While the City contends LBE produced no evidence of negligence, the contention simply is not accurate. Although it all came from the City's own records, LBE produced ample evidence from which a jury could conclude the City negligently failed to perform its statutory and public policy obligation to maintain its water facilities in safe condition. Specifically, the City ignored years of warning signs[13] and neglected to prepare or plan for known potential problems until the City's cast-iron pipe installed between 1940 and 1959 was beyond its design life. As a matter of law, the City was on notice that pipes will deteriorate. *Yearsley, supra.* A jury could readily conclude that the City's disregard for decades of warning signs regarding the actual deterioration

[11] Respondent's Brief, p. 24.

[12] R, p. 126.

[13] R, p. 245.

of its cast-iron pipes was a breach of its duty to maintain the water facilities in a safe condition. Accordingly, the district court erred in granting summary judgment.

B. *Res ipsa loquitur* precludes summary judgment on LBE's negligence claim.

Even in the absence of the foregoing direct evidence of the City's negligence, the doctrine of *res ipsa loquitur* is applicable to this case and supports a finding of negligence. As previously briefed, the doctrine allows a jury to draw an inference of negligence when: (1) the agency or instrumentality causing injury is under the exclusive control of the defendant; and (2) the circumstances are such that common knowledge and experience justify an inference that the injury would not happen in the absence of negligence. *Wing v. Clark's Air Serv., Inc.*, 106 Idaho 806, 807, 683 P.2d 842, 843 (1984).

While acknowledging the pipe in question was in its exclusive control, the City maintains that the doctrine does not apply because the pipe conformed with engineering standards. But whether the pipe conformed with engineering standards is a disputed question of fact and cannot support the district court's summary judgment. It is disputed because: (1) the only evidence of that conclusion is Richards' unfounded testimony; and (2) that testimony is contradicted by the City's own expert in the Water Facility Report conclusions.

The evidence in question is the very same testimony at issue on appeal of the district court's denial of LBE's motion to strike, Richards' conclusory and unfounded testimony that the pipe in question conformed with engineering standards on December 28, 2015. Fatal to that conclusory testimony is that Richards has never seen the pipe in question.[14] "Expert opinion

[14] R, pp. 125-126.

must be based upon a proper factual foundation." *State v. Hall*, 163 Idaho 744, 419 P.3d 1042, 1077 (2018) (quoting *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999)). Without physically observing the pipe in question, Richards cannot possibly rebut the Water Facility Report conclusion that the City's cast-iron pipes installed between 1940 and 1959 were beyond their design life.

Furthermore, uncontested evidence from Richards' testimony suggests that the pipe in question was compromised. Richards testified, "The subsoil west of the Snake River is soft and sandy creating an environment that is easy on water lines."[15] This important fact supports a conclusion that the pipe in question was, as the Water Facility Report states, beyond its design life, else why would the pipe have sustained a circumferential shear crack? That the City suffered two failures in approximately one-year in this area where the soils are soft, and sandy, and easy on water lines, serves to confirm, or at least corroborate, the Water Facility Report conclusion that the pipe was beyond its design life.

Even if this Court were to deny LBE's appeal of the motion to strike, Richards' testimony regarding the pipe in question is disputed by the City's own Water Facility Plan. As a consequence, a jury could reject Richards' conclusory statement and find that the break in question would not have happened in the absence of negligence, specifically the City's failure to monitor its pipes of deterioration beyond their design life. Accordingly, summary judgment was not proper and the district court's decision should be reversed.

---

[15] R, p. 25.

II. There are no alternative grounds on which summary judgment should be affirmed.

The City continues to advance its argument for design immunity pursuant to Idaho Code § 6-904(7). Fatal to this argument are two inescapable realities. First, LBE's claim does not arise out of the Water Facility Plan; and second, the pipe in question was not installed pursuant to that plan.

> Where a plaintiff's claim arises out of an alleged negligent plan or design on the part of a governmental entity, the entity is entitled to immunity under I.C. § 6–904(7), if the entity can "establish (1) the existence of a plan or design that was (2) *either* prepared in substantial conformance with existing engineering or design standards *or* approved in advance of construction by the legislative or administrative authority."

Woodworth v. State ex rel. Idaho Transp. Bd., 154 Idaho 362, 364, 298 P.3d 1066, 1068 (2013) (quoting *Lawton v. City of Pocatello*, 126 Idaho 454, 459, 886 P.2d 330, 335 (1994)).

The City maintains that it can meet the second and third elements of this test, but it fails to address and cannot meet the important, but un-enumerated, first element. Immunity under Section 6-904(7) only applies, "[w]here a plaintiff's claim arises out of an alleged negligent plan or design on the part of a governmental entity." *Woodworth, supra.* LBE's claim does not arise out of any alleged negligence with respect to any plan or design set forth in the Water Facility Plan. Indeed, it is and has always been LBE's position that the City's negligence occurred well in advance of the adoption of the plan. The plan merely serves to confirm the existence of that negligence by establishing that the City had allowed its water facilities to fall into a state of profound disrepair. The negligence had already occurred and the City cannot escape the consequences of its negligence by the adoption of a plan after the fact. Because LBE's

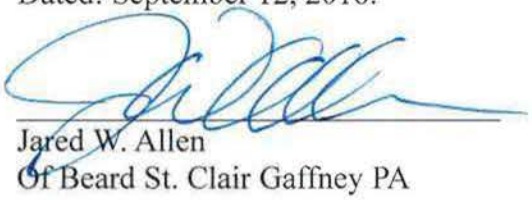
negligence claim does not arise out of the Water Facility Plan, that plan cannot be relied upon to establish immunity under Section 6-904(7).

As the district court correctly concluded, "LBE's claim is not based on any claim that the Brentwood pipe's design was flawed."[16] Similarly, the claim is not based on any claim that the plan or design for the installation of that pipe was flawed. Section 6-904(7) does not provide the City immunity from LBE's claim of negligent maintenance, the district court correctly denied summary judgment on this point, and the City's request that summary judgment be affirmed on this alternative ground should be rejected.

CONCLUSION

For the foregoing reasons, LBE respectfully reiterates its request for a reversal of the decisions of the District Court.

Dated: September 12, 2018.



Jared W. Allen
Of Beard St. Clair Gaffney PA
Attorneys for Appellant

[16] R, p. 406.

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in Idaho and on September 12, 2018, I served true and correct copies of *Appellant's Reply Brief* on the following by the method of delivery designated below:

Blake G. Hall
Sam L. Angell
Hall Angell & Associates, LLP
1075 S. Utah, Suite 150
Idaho Falls, ID 83402
Fax: (208) 621-3008

☑ E-filing ☐ Hand-delivered ☐ Facsimile

Idaho Supreme Court
451 West State Street
Boise, ID 83720

☑ E-filing ☐ Hand-delivered ☐ Facsimile

Jared W. Allen
Of Beard St. Clair Gaffney PA
Attorneys for Appellant