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Packer v. Riverbend Communications, LLC Appellant's Reply Brief Dckt. 46964

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IN THE SUPREME COURT OF THE STATE OF IDAHO

NICOLE PACKER, Plaintiff, vs. KINGSTON PROPERTIES, L.P.; DK ENTERPRISES, INC., and RIVERBEND COMMUNICATIONS, LLC.,; RIVERBEND COMMUNICATIONS HOLDING, LLC and RIVERBEND COMMUNICATIONS LLC dba RIVERBEND EVENTS Defendants.	Docket Number: 46964-2019 Case No.: CV-17-7024 **APPELLANT'S REPLY BRIEF**

APPEAL FROM THE JUDGMENT OF THE MAGISTRATE COURT OF THE SEVENTH JUDICIAL DISTRICT IN AND FOR BONNEVILLE COUNTY

COMES NOW, Appellant, Nicole Packer, by and through her counsel of record, Allen H. Browning, ISB #3007, and enters this Reply Brief.

ARGUMENT

I. Attorney's fees are not appropriate in this action.

Idaho Code § 12-121 reads: "In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." Idaho Code § 12-121. Idaho Rule of Civil Procedure 54(e)(2) reads: "...attorney fees under Idaho Code section 12-121 may be awarded by the court only when it finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation, which finding must be in writing and include the basis and reasons for the award." I.R.C.P. 54. "An award of attorney's fees on under that statute will be awarded to the prevailing party on appeal **only** when this Court is left with the abiding belief that the entire appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation. *McGrew v. McGrew*, 139 Idaho 551 at 562 (2003); *Benz v. D.L. Evans Bank*, 152 Idaho 215, 231-32 (2012)(emphasis added).

Here, Plaintiff's case has not been brought frivolously or in bad faith, nor has Defendant alleged any facts or grounds upon which a finding of frivolity could be made under I.R.C.P. 54. Therefore, Attorney's fees should be denied.

II. Issues on Appeal

The issues on appeal are (1)whether the court correctly applied the standards for summary judgment, (2) whether Defendant assumed a duty to Plaintiff, (3) whether the Court failed to draw all reasonable inferences in favor of the non-moving party at the summary judgment stage, and (4) whether the court erred in finding that Plaintiff was a licensee and not an

invitee.

Defendant has chosen not to address any of the four Issues on Appeal in their response brief, but has attempted to frame Plaintiff's Appeal in a light more favorable to themselves and has offered their own issues on appeal without properly filing a cross-appeal. Respondent's Brief at 5.

Defendant's response states that it specifically relates to Plaintiff's general negligence claim and Plaintiff's Motion to reconsider and not to Plaintiff's premises liability claim. Respondent's Brief at 5. Therefore, Defendant's attempted arguments concerning Plaintiff's premises liability claim should be disregarded. I.A.R. 17(f); I.A.R. 35(a)(4).

III. Packer was incorrectly found to be a licensee and not an invitee.

Plaintiff, Nicole Packer was incorrectly found to be a licensee by the District Court. "Where a person enters upon the premises of another for a purpose connected with the business there conducted, or the visit may reasonably be said to confer or anticipate a business, commercial, monetary or other tangible benefit to the occupant, the visitor is held to be an invitee." *Wilson v. Bogert*, 81 Idaho 535, 545, 347 P.2d 341, 347 (1959) citing: *Pincock v. McCoy*, 48 Idaho 227, 281 P. 371; *Hall v. Boise Payette Lbr. Co.*, 63 Idaho 686, 125 P.2d 311; *Young v. Bates Valve Bag Corp.*, 52 Cal.App.2d 86, 125 P.2d 840; *Lubenow v. Cook*, 137 Conn. 611, 79 A.2d 826; *Colbert v. Ricker*, 314 Mass. 138, 49 N.E.2d 459, *Printy v. Reimbold*, 200 Iowa 541, 202 N.W. 122; 205 N.W. 211.

As Plaintiff pointed out in previous briefing and the District Court indicated, the distinction between licensee and invitee is a narrow one, and one that has not been discussed at any meaningful

length in Idaho courts. R. at 157 L. 7-8. "...Idaho case law has not expressly determined whether vendors are licensees or invitees...." R. at 157, L. 21-22.

The District Court misapplied the definition of an invitee in its analysis, finding that patrons of the event who conferred no benefit upon Riverbend would have been invitees, while vendors, who conferred tangible, pecuniary benefits upon Riverbend would be licensees. R. 158, L. 2-3.

Clearly, an event goer who paid no entry fee or attendance fee does not confer a tangible or pecuniary benefit upon Riverbend, while a vendor, who purchased a booth from Riverbend, clearly confers a direct, tangible, and pecuniary benefit upon Riverbend. It is undisputed that Plaintiff had a booth, which was rented from Riverbend and that Jay Dye instructed Plaintiff to use a particular exit. R. at 104, 211.

Because the Idaho Courts have not considered this issue in depths, the analysis must be found elsewhere. In *Cotten v. St. Bernard Preparatory Sch.*, a case from the Alabama Court of Appeals, nearly identical facts were presents. Cotton, the Plaintiff, argued that St. Bernard was not entitled to a summary judgment on the ground that she was a mere licensee while she was on its campus because, she said, there was substantial evidence indicating that she was an invitee rather than a mere licensee; specifically, she asserted that a person whose presence on a premises owner's premises confers a benefit on the premises owner is an invitee rather than a licensee under Alabama law and that her payment of the vendor fee charged by St. Bernard conferred an economic benefit upon St. Bernard. *Cotten v. St. Bernard Preparatory Sch.*, 20 So. 3d 157, 159 (Ala. Civ. App. 2009).

At the very least, the evidence indicating that Cotten paid a fee for the privilege of selling her crafts at the festival and that the fee she paid was used to purchase advertising in order to generate revenue for St. Bernard creates a genuine issue of material fact regarding whether Cotten was an invitee. Accordingly, the trial court erred in holding that, as a matter of law, Cotten was a mere licensee. Because a genuine issue of material fact existed regarding whether Cotten was an invitee, a genuine issue of material fact necessarily existed regarding whether the duty owed by St. Bernard to Cotten was the duty a premises owner owes to an invitee or the one a premises owner owes to a licensee. *Cotten v. St. Bernard Preparatory Sch.*, 20 So. 3d 157, 162 (Ala. Civ. App. 2009).

Here, Plaintiff paid her vendor fee, making her an invitee. R. at 104, 114, 115. As in *Cotton*, the same question of material fact exists in the instant case, which should be decided by a jury. The District Court improperly granted summary judgment to the Defendant and it must be reversed.

IV. Plaintiff has not raised any new issues on appeal.

At multiple points in their brief, Defendant has asserted that Plaintiff has "raised new issues" on appeal. Respondent's Brief at 7, 8, 10, 11. Plaintiff has not raised new issues on appeal, but has renewed issues raised below and has properly preserved her arguments for appeal.

"The disagreement regarding preservation requirements lies in how broadly or narrowly a party wishes to define the term 'issue'" *State v. Islas*, 443 P.3d 274, 280 (Idaho Ct. App. 2019). Recent opinions of the Idaho Supreme Court clarify the preservation requirement. "[I]ssues not raised below will not be considered by this court on appeal, and the parties will be held to the

theory upon which the case was presented to the lower court." *State v. Garcia-Rodriguez*, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (quoting *Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands*, 99 Idaho 793, 799-800, 589 P.2d 540, 546-47 (1979)). *State v. Islas*, 443 P.3d 274, 282 (Idaho Ct. App. 2019). Defendant has cited to *Campbell v. Parkway Surgery Center, LLC.*, 158 Idaho 957, concerning raising the issue of standing on appeal, which does not apply in this case; *Selkirk-Priest Basin Ass'n v. State*, 127 Idaho 239, which discusses standing, but does not address preservation of issues on appeal; *In re Conservatorship of Estate of Reinwald*, 122 Idaho 401, addressing whether the issue of the creation of a testamentary trust was created could be addressed on appeal without any facts in the record, is also inapplicable in the instant case where the Record clearly includes facts on the issues; *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, stating that "issues not raised below and presented for the first time on appeal will not be considered or reviewed," which is also inapplicable to the instant case because Plaintiff clearly raised each issue in the District Court; and *Rosales v. Balbas*, 125 Idaho 848, which uses the same language as *Sun Valley Shopping Center*, but concerns a motion for relief under I.R.C.P. 60(b)(1). Defendant has failed to cite to any relevant authority, which would serve to keep Plaintiff from renewing her arguments from the District Court on appeal, and Defendant's assertions that Plaintiff did not preserve her arguments for appeal are unfounded and should be disregarded.

Plaintiff, in her complaint, plead a theory of general negligence consistent with Idaho's notice pleading requirements, and one of premises liability. R. at 12-14. Plaintiff argued at summary judgment that Defendant assumed a duty to Plaintiff by negligently instructing her to use a certain door without warning her of the unsafe condition outside the door. R. at 107, 109, 115,

116, Plaintiff also argued below that her status was that of an invitee not a licensee. R. at 12, 13, 104, 114. These arguments, supported by facts in the Record, were clearly raised in the District Court and, because this is not a new issue raised on appeal, but one raised at the summary judgment stage which Plaintiff continues to address, must be considered.

IV. District Court incorrectly found that Packer failed to raise an issue of material fact.

Defendant has predicated their argument on the assumption that Plaintiff was a licensee and not an invitee. As discussed above, whether Plaintiff was an invitee or a licensee is clearly an issue of material fact for a jury to decide. *Cotten v. St. Bernard Preparatory Sch.*, 20 So. 3d 157, 159 (Ala. Civ. App. 2009). Defendant continues to assert that Plaintiff was required to show that Jay Dye knew or should have known that the light on the loading dock was out, off, or broken; however, Plaintiff is not required to show this as she was an invitee, not a licensee. The District Court incorrectly determined Plaintiff to be a licensee instead of leaving that determination for a jury, as it is a material question of fact for a jury to decide.

Defendant argues that the District Court determined that premises liability did not attach to Riverbend; however, the District Court never made that determination. Respondent's Brief at 10. Defendant then argues that the standards of proof for a licensee plaintiff should pertain to an invitee plaintiff, which is incorrect and should also be disregarded.

Defendant asserts that it is "important" to note that Jay Dye told Plaintiff, in the morning, to use the back door when she exited the expo that evening. Respondent's Brief at 9. Defendant's argument assumes that no reasonable person would understand that it gets dark in

the evening, when the expo ended, and seeks to excuse Riverbend from having knowledge of their own premises. Defendant's argument here should be disregarded as irrelevant.

Defendant then claims to have denied that Jay Dye told Plaintiff to use the back door of the building, despite facts in the Record indicating the contrary. Respondent's Brief at 9; R. at 104, 211.

V. Packer correctly plead a negligence claim.

Generally, a claim for relief need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." I.R.C.P. 8(a)(1). Under notice pleading, "a party is no longer slavishly bound to stating particular theories in its pleadings." *Cook v. Skyline Corp.*, 135 Idaho 26, 33, 13 P.3d 857, 864 (2000) (citation omitted). A complaint need only state claims upon which relief may be granted. Id at 34, 13 P.3d at 865. A party's pleadings should be liberally construed to secure a just, speedy and inexpensive resolution of the case. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 427, 95 P.3d 34, 45 (2004) (citations omitted). The emphasis is to insure that a just result is accomplished, rather than requiring strict adherence to rigid forms of pleading. *Id.* "The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it." *Id*; *Seiniger Law Office, P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 246-47, 178 P.3d 606, 611-12 (2008).

Here the District Court incorrectly found that Plaintiff did not plead a negligence claim. Under notice pleading, Plaintiff need not spell out in painstaking detail exactly each and every claim; however, Plaintiff's Complaint states the following:

8. On or about December 4, 2015, Plaintiff, NICOLE PACKER, was leaving

a Christmas expo sponsored by Riverbend Communications and Riverbend Events at Kingston Plaza in Idaho Falls, Bonneville County, Idaho. Ms. Packer, began to leave the Christmas expo and was directed to use a door located in the back of the building by an employee supervising the expo on behalf of Riverbend Communications and Riverbend Events. Nicole had not used this exit before, but was told by this agent of Riverbend Communications and Riverbend Events that the other doors were out of commission and could not be used. Nicole Packer used this back door as directed by the Riverbend Communications employee who was working at the Christmas expo. At this time, there was a light outside the door, but that light was not working. As the Plaintiff exited the building as directed, the door closed and locked behind her and she could not re-enter the building. It was dark out at that time, and she could not see anything except distant lights toward the parking lot area. She took a couple of steps towards the parking area lights and fell several feet straight down, off an unlit loading dock, because she could not see the loading dock when she fell.

9. The actions of having no lighting outside on the loading dock and having an exit door that automatically locked upon exiting were two dangerous conditions that were the fault of the owners of the premises, Defendant KINGSTON PROPERTIES, L.P., and DK ENTERPRISES, INC, and were a proximate cause of the Plaintiff's injuries and damages.

10. The actions of the employee/agent of RIVERBEND COMMUNICATIONS, LLC, and RIVERBEND EVENTS were the actions of the Defendant RIVERBEND COMMUNICATIONS, LLC, by virtue of agency law and respondent superior. **The employee's act of directing the Plaintiff towards an unmarked and dangerous exit was negligent and was a proximate cause of the Plaintiff's injuries**. (emphasis added)

R. at 12-13.

The Defendant has cited to cases in which the Complaint sought to plead a cause of action in the prayer for relief section without putting the opposing party on notice of the cause of action otherwise in the complaint. Respondent's Brief at 11. Plaintiff clearly plead duty, a breach of that duty, harm, and causation of the harm in her Complaint and specifically accused the defendant of acting negligently. R. at 12-13. Because of this, the District Court's determination that Plaintiff did not plead a negligence claim, must be reversed.

VI. Plaintiff did not need to "plead" the Restatement of Torts.

Defendant has misstated that the Restatement of Torts § 311 posited a new avenue of recovery and thus a new cause of action or new issue not raised below. The Restatement of Torts is a treatise and as such, does not establish causes of action and is not law, but serves to provide explanations of the law. It cannot be "pled"[sic]. Respondent's Brief at 13. Plaintiff's argument concerns the fact that Jay Dye directed her out the back door, and by doing so, implied that the exit was safe for her to use because he did not warn her of an unsafe condition and has nothing to do with a new theory of "misrepresentation".

Defendant cites to the *Manahan* case for the proposition that "one may not blindly act upon a statement in disregard of an opportunity to learn the truth when exercise of ordinary attention would have learned of it." Respondent's Brief at 14. Further, Defendant has failed to apply the logic in Manahan to the facts in this case, primarily because they are so dissimilar that it is not possible to do so.

In *Manahan*, the Plaintiff was offered an alternate route between a hotel and a restaurant and was assaulted while using the suggested route. Defendant fails to realize the distinction between a concierge suggesting a route and the expo manager, Jay Dye, directing plaintiff to only use one specific exit and no other exit. R. 115, L.12-19; R. 136, p. 53, L. 15-18. Plaintiff never had "an opportunity to learn the truth" with the "exercise of ordinary attention" in this matter because she was told to use the exit. It was the responsibility of Jay Dye to ensure that the exit was safe before telling an invitee to use the exit. Defendants have mischaracterized the evidence by stating that Plaintiff "*opted*" to use the exit. Respondent's Brief at 15, emphasis

theirs. Defendants then further attempted to attribute blame to Plaintiff by stating it was her "decision to proceed in the dark towards he vehicle," "exit through a different route," or "use her cell phone for light or to call someone." Respondent's Brief at 15. As the facts in the case show, Plaintiff did not make a decision to use that exit, she was told to use it. R. 115, L.12-19; R. 136, p. 53, L. 15-18. Plaintiff thought she could not get back into the building through the door she exited from and was not able to get back in through the door after seeing the light was out. R. at 116. Plaintiff had no alternative route. R. at 115-116. Plaintiff has no affirmative duty to carry a flashlight everywhere she goes. Plaintiff's hands were full and she could not get her phone out of her purse to use as a makeshift flashlight to compensate for Riverbend's unsafe condition. R. at 116-117.

VII. Riverbend's Independent Duty to Plaintiff

Defendant asserts that Plaintiff failed to plead a separate cause of assumed liability beyond her general negligence claim. Plaintiff's Complaint alleges that she was "directed to use a door located at the back of the building by an employee supervising the expo on behalf of Riverbend Communications and Riverbend Events," and that as a direct and proximate cause of those actions, she suffered her injuries. R. at 12-13. The facts of the case show that Jay Dye was in charge or the safety of patrons and vendors at the event and that Plaintiff was directed by Jay Dye to use the exit to the loading dock. R. 114-117, L.12-19; R. 136, p. 53, L. 15-18. The District Court improperly disregarded the evidence that Jay Dye was supervising the expo, making him in charge of the safety of the patrons and vendors, giving him the legal authority to direct them, and that his instructions as to which door to use were related to safety. By making

the instruction to Plaintiff to use the exit, he assumed the duty to ensure her safety upon exiting the building through the prescribed method of egress. Plaintiff clearly plead this issue in her Complaint and it is not a new issue being brought up on appeal.

VIII. Conclusion.

Based upon the foregoing and the Record before the Court, Appellant requests that this Court remand this case to the District Court for trial and deny Riverbend's request for Attorney's fees.

DATED this 3 day of January, 2020.

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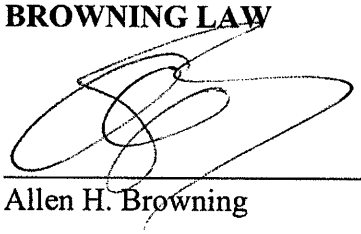

Allen H. Browning

CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of January, 2020, a true and correct copy of the foregoing document was delivered to the following attorney of record by email, efile, or facsimile.

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