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Allen H. Browning, ISB#3007
Steve Carpenter, ISB#9132
BROWNING LAW
482 Constitution Way, Suite 111
Idaho Falls, ID 83402
Telephone: (208) 542-2700
Facsimile: (208) 542-2711
E-mail: allen.browning.law@gmail.com

Attorneys for Appellant

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 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 appeals the Decision and Order on Plaintiff's Motion to Reconsider entered in the above titled action on the 28th day of February, 2019, Honorable Judge

Alan C. Stephens presiding, as well as the decision and Order of Dismissal dated December 11, 2018 and Judgment dated December 11, 2018 dismissing Defendant Riverbend Communications Holding, LLC, Riverbend Communications LLC, Kingston Properties, L.P., DK Enterprises, Inc., and Riverbend Events.

STATEMENT OF JURISDICTION

Jurisdiction lies in this Court for appeal from the decision of a district judge pursuant to Idaho Appellate Rule 11.

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SUMMARY OF THE ARGUMENT

The Court erred in applying the incorrect standard on summary judgment.

This portion of Appellant's Brief will discuss how the district court erred in its application of the standards for summary judgment.

Defendant assumed a duty to Plaintiff.

This portion of the Brief will discuss how Defendant assumed a duty to Plaintiff.

The Court erred by construing facts in a light most favorable to the moving party.

This portion of Appellant's Brief discusses the district court's errors in viewing the facts before it in light of the moving party when the moving party presented no facts.

The Court erred in finding the Plaintiff was not an invitee.

This portion of Appellant's Brief discusses the district court's errors in finding that Plaintiff was a licensee and not an invitee.

ISSUES ON APPEAL

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

STATEMENT OF THE CASE

This appeal stems from a Personal Injury Case filed in the Seventh Judicial District of Idaho, County of Bonneville. Plaintiff, Nicole Packer, alleged that she sustained injuries from a fall while following the instruction of Jay Dye, an employee of Defendant, Riverbend. Defendants Riverbend and Kingston filed motions for summary judgement, which were granted. Plaintiff appeals from the District Court's Order granting Riverbend's Motion for Summary Judgment.

STATEMENT OF FACTS

1. On December 4th, 2015, Nicole Packer participated as a vendor in the "All I Want for Christmas" expo sponsored by Riverbend Communications at the Kingston Plaza in Idaho Falls, Idaho. (R., p. 154, L. 5-7).
2. On the morning of December 4th, 2015 Nicole Packer was instructed by Jay Dye, a Riverbend employee, to use the back door of the building. (R., p. 154 L. 7-10).
3. Nicole Packer left the building approximately 8:00 P.M. on December 4th, which was after dark. (R., p. 155 L. 2-3).
4. When Nicole Packer exited the building through the door she was told to use, no light was on outside the door. (R., p. 155 L. 3-4).
5. Nicole Packer proceeded in the direction of the parking lot where she believed her car to be and fell five feet from a loading dock in the dark. (R., p. 155 L. 4-8).
6. After falling, Nicole Packer managed to locate her cell phone and call for help. (R., p. 155, L. 8).

STANDARD OF REVIEW

The Court reviews a grant of summary judgment under the same standard of review the district court originally applied in its ruling. *Conner v. Hodges*, 157 Idaho 19, 23, 333 P.3d 130, 134 (2014) (citing *Arregui v. Gallegos-Main*, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012)); *Infanger v. City of Salmon*, 137 Idaho 45, 46–47, 44 P.3d 1100, 1101–02 (2002). In a motion for summary judgment, the moving party bears the burden of proving the absence of a material fact. *Sadid v. Idaho State University*, 151 Idaho 932, 938, 265 P.3d 1144, 1150 (2011). “When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party.” *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 685, 365 P.3d 1033, 1040 (2016). If the moving party has satisfied its burden, the non-moving party must then come forward with sufficient admissible evidence identifying specific facts that demonstrate the existence of a genuine issue for trial. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). “[a]ll reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party, and disputed facts are liberally construed in the nonmoving party's favor.” *Marek v. Hecla, Ltd.*, 161 Idaho 211, 214, 384 P.3d 975, 978 (2016) (citing *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008)). “All doubts are to be resolved against the moving party.” *Callies v. O’Neal*, 147 Idaho 841, 846, 216 P.3d 130, 135 (2009) (citing *Collord v. Cooley*, 92 Idaho 789, 795, 451 P.2d 535, 541 (1969)). “The burden of proving the absence of material facts is upon the moving party. Once the moving party establishes the absence of a

genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 581, 329 P.3d 356, 363 (2014) (quoting *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003) (internal citations omitted)); *Greenwald v. W. Sur. Co.*, 164 Idaho 929, 942, 436 P.3d 1278, 1291 (2019). Although circumstantial evidence can create a genuine issue for trial, a mere scintilla of evidence is insufficient to demonstrate the existence of a genuine issue of material fact. *Callies v. O'Neal*, 147 Idaho 841, 846, 216 P.3d 130, 165 (2009). Thus, the slightest doubt as to the facts will not forestall summary judgment. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.3d 67, 70 (1996). “If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review.” *Lapham v. Stewart*, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002).

ARGUMENT

I. The Court Erred in its application of the standards for Summary Judgment.

The Court, in deciding a motion for summary judgment, must comport with certain standards, as cited above. Those standards include the burdens incumbent upon each party, and how reasonable inferences are drawn. See generally: *Conner, Liberty Bankers Life Ins. Co., Wattenbarger, Marek, Venable, Greenwald, Callies, Zimmerman, and Lapham, supra.*

In a motion for summary judgment, “The burden of proving the absence of material facts is upon the moving party. Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist.” *Venable* at 581.

Here, the Court chose to use its own standard, stating that Plaintiff was required to prove her prima facie case for negligence on summary judgment and that “it is Ms. Packer’s burden to provide evidence to dispute Riverbend’s motion for summary judgment.” R., p. 159, L. 11-16; R., 160, L. 7-11. The Court stated that “The burden for Ms. Packer to establish her prima facie case for negligence, regardless of whether she was a licensee or invitee, was to provide evidence enough to show that Riverbend knew or should have known about the lights being broken or off.” R., p. 159, L. 11-16. Ms. Packer stated that the lights were off when she exited the building. R., p. 116, L. 10 (Aff. of Nicole Packer, Para. 14); R.137, P. 82, L. 17. Ms. Packer also stated that she was directed by Jay Dye, who was in charge of the event, to use that door to exit the building. R. 115, L.12-19; R. 136, p. 53, L. 15-18.

In *Murphy v. Union Pac. R.R. Co.*, the Court was met with a similar issue. The court below had granted summary judgment against a plaintiff due to the plaintiff contradicting himself in his deposition and affidavit. *Murphy v. Union Pac. R.R. Co.*, 138 Idaho 88, 57 P.3d 799 (2002). The plaintiff in *Murphy* argued that his deposition testimony, in combination with his affidavit, created a genuine issue of material fact regarding causation. *Id.* His deposition testimony indicated that he believed he stepped in or on something, such as uneven ballast or the edge of a tie around which ballast was missing. Murphy's affidavit confirmed that he believed he stepped in one of the uneven areas of the ties and large ballast. Union Pacific contended that Murphy's deposition testimony showed that Murphy did not know what caused him to fall, whether it was his misstep onto an insulator or as a result of negligently maintained ballast and ties. Union Pacific asserted that Murphy's affidavit contradicted his deposition testimony and was, therefore, insufficient to create a genuine issue of material fact for trial on the issue of causation. Murphy alleged in his verified complaint that Union Pacific's failure to provide an adequate walking path caused his fall. His deposition testimony showed that, while not completely certain of what he tripped on, he believed that uneven ballast or ballast missing from between the ties caused his fall. Murphy's affidavit further indicated that he probably tripped on uneven ties and large ballast rather than on a permanent track fixture such as an insulator. Construing these facts most favorably for Murphy, a reasonable person could find that it is more likely than not that Union Pacific's negligence played some part, however slight, in producing Murphy's injury. *Id.* at 92. "On the other hand, a reasonable person could find that Murphy is merely speculating about what caused his fall and that he cannot show that Union Pacific's

negligence played a part in his injury. **When reasonable people could reach different conclusions from the pleadings and evidence in the record, summary judgment must be denied.**” *Murphy v. Union Pac. R.R. Co.*, 138 Idaho 88, 91-92, 57 P.3d 799, 802-03 (2002) citing (*Northwest Bec-Corp.*, 136 Idaho at 839, 41 P.3d at 267; *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992))(Emphasis added).

In *Murphy*, the Idaho Supreme Court has pointed out that these are exactly the issues that a trial is meant to resolve. Where two reasonable people could reach different conclusions from evidence in the record, summary judgment must be denied. Here, the record shows that Mr. Dye directed Ms. Packer to use a particular exit and by doing so assumed a duty of care regarding her egress through that exit. His duty of care required him to warn her of known dangers and to inspect the path which he was sending her out, ensuring that the path was free from danger. Upon assuming responsibility for Ms. Packer’s choice of exit, Mr. Dye assumed a duty to at least inspect, or have previously inspected, the path of egress he instructed Ms. Packer to use. The knowledge of whether or not the light is on, off, broken, or otherwise functioning or non-functioning is imputed to him when he directs another person, under his supervision, to use that method of egress. Whether or not Mr. Dye knew of the light’s condition before instructing Ms. Packer to use the exit and whether or not the light was on, off, or non-functioning are material questions of fact for a jury to decide. Just as in *Murphy*, two reasonable people could reach differing conclusions about the same material facts and summary judgment should have been denied by the district court.

By misapplying the standard for summary judgment, the lower Court engaged in a reversible error and this case must be remanded to correct the error.

II. Defendant assumed a duty of care to Plaintiff by directing her to use a particular exit.

“A possessor of land is (a) a person who occupies the land and controls it; (b) a person entitled to immediate occupation and control of the land, if no other person is a possessor of the land under Subsection (a); or; (c) a person who had occupied the land and controlled it, if no other person subsequently became a possessor under Subsection (a) or (b).” Restatement 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 49. There is no dispute that Jay Dye directed Ms. Packer to exit through the back door. R. 211. L. 4-5. Jay Dye was supervising vendors for the event and was the possessor of the premises for the evening due to his position. “A person is in control of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land, which is the reason for imposing the duties contained in this Chapter on land possessors.” Restatement 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 49(c). Because of his position, he was able to direct and control the ingress and egress from the building by both vendors and attendees. When Jay Dye directed Ms. Packer to use the back door, and no other door, he took the choice to use another door from her and assumed control of her choice of exits and thereby assumed a duty to Ms. Packer for her safety when exiting the premises. “If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner.” *Featherston v. Allstate Ins. Co.*, 125 Idaho 840, 843, 875 P.2d 937, 940 (1994) (citing *Bowling v. Jack B. Parson Cos.*, 117 Idaho 1030, 1032, 793 P.2d 703, 705 (1990)). *Stoddart v. Pocatello Sch. Dist.*

25, 149 Idaho 679, 687, 239 P.3d 784, 792 (2010). By directing Ms. Packer to use the back door, Mr. Dye assumed a duty of ordinary care over her safety exiting the premises through the manner in which he prescribed she exit the building. The Court states that “Mr. Dye did not attempt to assume a duty when he instructed Ms. Packer to use the rear entrance [sic].” R. 221, L. 9-10. There is no element of intent when the assumption of a duty is concerned, only that “Liability for an assumed duty . . . can only come into being to the extent that there is in fact an undertaking.” *State v. Kraly*, 164 Idaho 67, 73, 423 P.3d 1019, 1025 (2018). The undertaking in question is the direction of Mr. Dye, acting as the possessor of the premises, to Ms. Packer. Mr. Dye undertook a duty of care for the safety of Ms. Packer’s egress from the premises when he instructed her to use a particular exit.

III. The Court Erred by construing facts in the light most favorable to the moving party.

The Idaho Supreme Court stated, concerning summary judgment motions, in *Friel v. Boise City Housing Authority* that “[t]he Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994).

The Court stated that “Because Ms. Packer did not establish or even present any evidence on the cause of the lighting being off or broken, she therefore could not establish that Mr. Dye knew or should have known about the lighting condition.” R. 160, L. 3-5. There is no correlation between a cause of the lighting being off or non-functioning and Mr. Dye’s duty to inspect the path of egress he directed Ms. Packer to use. The fact at issue is whether or not the light was on

and, under *Friel*, the Court would be required to infer that the light was either off or non-functioning for purposes of summary judgment. Instead, the Court reversed the burden and has required Plaintiff to prove that the light was off or broken and the Mr. Dye knew about the light's condition. The Defendant offered no proof that the light was, in fact, "on" when Mr. Dye directed Ms. Packer to use that exit. The only evidence of the condition of the outside light in the record is that it was off. The Defense has asked the Court to speculate that the light might have been on at some part of the day, which the Court may not do.

The Court went on to say that "There are simply not enough facts for this Court to make any reasonable inference as to the actual or constructive notice necessary to establish that Riverbend had a duty to Ms. Packer." R. 160, L. 4-5. The facts in the record which show that Riverbend owed a duty to Ms. Packer are apparent in her affidavit and her deposition. R. 115, L.12-19; R. 136, p. 53, L. 15-18; R., p. 116, L. 10 (Aff. of Nicole Packer, Para. 14); R.137, P. 82, L. 17. Even though there are enough facts that no inference is required here, the Court is still required, under *Friel*, to find any reasonable inferences in favor of the moving party and was required to infer that the duty was owed based on the facts alleged.

These mistakes amount to reversible error by the lower Court and the matter must be reversed and remanded to correct these errors. Because Mr. Dye undertook the duty, it does not matter whether Ms. Packer was an invitee or a licensee.

IV. The Court erred in finding that Plaintiff was not an invitee.

The Court admits that “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. The Court then stated that “...Idaho case law has not expressly determined whether vendors are licensees or invitees....” R. at 157, L. 21-22.

The Court, in its analysis, chose to ignore the relationship between vendors and an event center and framed its opinion in terms of guests on the premises. While this analysis would apply to the guests of the convention, it does not apply to vendors. The Court is correct in its statements that a visitor or guest supplying a minor or incidental benefit to their host would be a licensee. R. 158, L. 2-3. The Court is incorrect in applying that analysis to the facts of the instance case.

“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. Reibold*, 200 Iowa 541, 202 N.W. 122; 205 N.W. 211.

The business purpose of an events center is to host events and it holds that, without events, the events center will not generate revenue. The events themselves are dependent upon vendors selling their wares. The primary revenue source for the events centers is vendors purchasing space

for their booths to sell their wares. This is a well-known business model and practice. The commodity that Riverbend was selling was space to vendors. Ms. Packer did not confer a mere tangential benefit on Riverbend, as the patrons of the expo were, but was conferring a primary benefit upon Riverbend, making her an invitee. The Court applied its analysis opposite of *Wilson* by saying that the patrons of the event were invitees and that vendors were licensees when, under the Court's analysis and the analysis in *Wilson*, the patrons who are conferring minor tangential benefits on Riverbend were the licensees and the vendors, who are conferring the primary benefit of paying for booth space and generating revenue for Riverbend, are the invitees.

For these reasons the Court must reverse and remand the lower Court's grant of summary judgment for Defendant Riverbend.

V. Conclusion

In conclusion, the District Court has made clear errors resulting in the erroneous dismissal of Plaintiff's case by summary judgment. The Court's first error was that the Court applied the incorrect standard on summary judgment and instead of holding the Defendant, the moving party, to show that no issue of material fact existed, the Court instead placed the burden on Plaintiff to provide proof of each claim.

The Court's second error the Court made was not recognizing that, by directing Plaintiff to use a specific mode of egress, he had assumed a duty to Plaintiff.

The third error that the District Court made was in construing the facts in the light most favorable to the moving party and drawing all reasonable inferences in favor of the non-moving

party. As a matter of law, the Court must construe the facts in a light most favorable to the non-moving party and draw all reasonable inference in favor of the non-moving party.

The fourth error made by the District Court was in finding that Plaintiff was a licensee when she was clearly an invitee.

Because of these errors by the District Court, this case must be reversed and remanded to the District Court for trial.

DATED this 25th day of October, 2019.

BROWNING LAW



Allen H. Browning

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2019, a true and correct copy of the foregoing document was delivered to the following attorney of record by email, efile, or facsimile.

John A. Bailey, Jr.
Hawley Troxell Ennis & Hawley LLP
412 West Center Street, Suite 2000
P.O. Box 100
Email: jbailey@hawleytroxell.com

Donald F. Carey
Lindsey R. Romankiw
Carey Romankiw, PLLC
477 Shoup Ave, Suite 203
Idaho Falls, Idaho 83402

DATED this 25th day of October 2019.



Legal Assistant