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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

VICTOR DUPUIS,

Plaintiff/Appellant

v.

EASTERN IDAHO HEALTH SERVICES, INC., an Idaho Corporation doing business as EASTERN IDAHO REGIONAL MEDICAL CENTER, and JOHN/JANE DOES I-V, whose true identities are presently unknown,

Defendants/Respondents

Supreme Court Docket No: 47917-2020

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 Joel Tingey, Presiding

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I. INTRODUCTION

Respondent Eastern Idaho Regional Medical Center ("EIRMC") filed its Respondent's Brief ("Brief") on September 3, 2020 in response to the Opening Brief filed by Appellant Victor Dupuis ("Victor"), and Victor submits this Reply Brief in response thereto.

As this Court has likely gleaned from the briefing set forth on appeal, the varying arguments before this Court fall within two overarching categories: EIRMC's duty to Victor under a premises liability theory, and, EIRMC's duty to Victor under common law negligence. This Reply Brief addresses EIRMC's arguments regarding these two overarching issues set forth in its Brief.

Before addressing the two overarching categories, Victor will first respond to EIRMC's contention that 1) Victor raised legal issues for the first time on appeal, and 2) Victor's request that this Court adopt a new premises liability standard for hospital visitors is overbroad, arbitrary, and unsupported by the record.

II. ARGUMENT

1. Victor Did Not Raise Legal Issues for the First Time on Appeal.

EIRMC argues in its Brief that Victor raised the following two issues for the first time on appeal: A) a duty should be imposed on EIRMC through the Balancing of Harm Analysis, and, B) the Court should adopt a new premises liability standard for hospital visitors. Neither of these items constitute an issue being raised for the first time on appeal, as argued below.

A. The Balancing of Harm Analysis is Not an Issue Raised for the First Time on Appeal.

EIRMC contends that Victor's citation and reliance on the balancing of harm analysis set forth in *Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1996) constitutes the raising of an issue for the first time on appeal. EIRMC argues because the balancing of harm analysis was not argued before

the District Court, that it cannot now be relied upon in this appeal. Simply put, EIRMC's argument is incorrect.

This Court recently clarified the longstanding rule that an issue cannot be raised for the first time on appeal in *State v. Gonzalez*, 165 Idaho 95, 439 P.3d 1267 (2019). In *Gonzalez*, this Court provides a careful analysis between a case in which a party consistently maintained the same issue or position but "polishes" its argument on appeal with citation to previously uncited authority (*Ada Cnty. Highway Dist. v. Brooke View, Inc.* 162 Idaho 138, 142, 395 P.3d 357, 361 (2017)), and a case in which a party raises a new substantive issue on which the trial court did not have the opportunity to rule (*State v. Garcia-Rodriguez*, 162 Idaho 271, 396 P.3d 700 (2017)). In its comparison of these two cases, with regard to *Brooke View*, this Court stated:

> In *Brooke View*, the district court addressed the legal issue that ACHD appealed and ACHD did not change its legal position toward that distinct issue (that damages caused during construction were not recoverable as part of just compensation), **even though the specific legal arguments it used to support its position had evolved**. This was proper and necessary for ACHD to do—during the time of an appeal, **parties will ruminate on issues and case law will be decided that may need to be applied to the specific facts of the case at hand**. However, these pragmatic evolutions do not leave room for a party to raise new substantive issues on appeal or adopt a new position on an issue that the trial court has not had the opportunity to rule on.

Gonzalez, 165 Idaho 95, 439 P.3d 1267, 1270 (2019)(emphasis added).

As to *Garcia-Rodriguez*, this Court determined that the State did not merely 'polish' its argument, instead, it shifted its prior position (the officers had probable cause to believe the defendant would not appear) to the position that the officers had probable cause to believe the defendant did not have a driver's license. *Gonzalez*, 165 Idaho 95, 439 P.3d 1267, 1271 (2019).

This Court summarized its analysis of these two cases as follows:

> In other words, *Brooke View* portrays a party riding on a horse that has been groomed and reshod for the appellate process, whereas *Garcia-Rodriguez* exemplifies a party entering the appellate process riding a similar-

> looking but entirely new horse. A groomed horse is expected on appeal, but a different horse is forbidden.

Id.

As applied to the case at bar, Victor has merely 'groomed and reshod his horse for the appellate process'. As with the ACHD in *Brooke View*, Victor has not changed his position that EIRMC assumed a duty of care; this was argued in the Opposition to Motion for Summary Judgment, (R. Vol. I, pp. 197-210), argued during the hearing on EIRMC's Motion for Summary Judgment, ruled upon by the District Court[1], and, listed as the third Issue on Appeal in Victor's Opening Brief (*Issue # 3: Did the District Court Err in Determining EIRMC Did Not Assume a Duty of Care?*).

Victor's citation and reliance on the balancing of harm analysis in *Rife v. Long*, albeit previously uncited authority, constitutes a mere 'polishing' of Victor's consistent position that EIRMC assumed a duty of care. Accordingly, the balance of harm analysis does not constitute an issue raised for the first time on appeal and so it may be considered and relied upon by this Court.

B. <u>Requesting a New Premises Liability Standard is Not an Issue Raised for the First Time on Appeal.</u>

Victor argued in his Opening Brief that because this is an issue of first impression for this Court, this Court should issue a ruling that hospital visitors should be classified as invitees. (*Appellant's Opening Brief, p. 14).* EIRMC, in response, states "In the proceedings below, Dupuis never requested that the district court adopt a new arbitrary rule for hospital visitors based upon public policy considerations." (*Respondent's Brief, p. 11*). EIRMC is correct that Victor never made this request to the District Court; the District Court does not have the authority nor ability to

[1] In its Memorandum Decision and Order, the District Court found "this is not a case where EIRMC assumed a duty. EIRMC had existing duties owed to invitees and licensees and assumed no particular duty to Dupuis." (R. Vol. V, p. 417).

enact such a law, it is one that must be made by this Court or through the legislature. Additionally, the issue before the District Court was not whether or not a new rule should be enacted, it was, and always has been, whether or not Victor was an invitee or licensee, if EIRMC assumed a duty of care to Victor, and if EIRMC was liable under a common law negligence theory.

This is not an issue raised for the first time on appeal. Victor's position has always been, and continues to be, that he was an invitee at EIRMC the evening of January 24, 2017. The District Court ruled that Victor was not an invitee (R. Vol. V, p. 419), and Victor's first Issue on Appeal is "*Did the District Court Err in determining that Victor was a Licensee Rather than an Invitee?*" (*Appellant's Opening Brief, p. 11)*. On appeal, Victor argues the District Court erred in ruling Victor was not an invitee, and in doing so, this Court is asked to issue a ruling that Victor was an invitee while at EIRMC the evening of January 24, 2017. In issuing that ruling, the Court, in essence, would be issuing a ruling that would enact a new precedent related to the legal status of hospital visitors within Idaho's tripartite system.

The District Court stated that this is a case of first impression (R. Vol. V, p. 417) meaning, there is no applicable case law to guide the District Court in its decision. Because the case is now on appeal, this Court has the opportunity to issue a ruling establishing case law rendering a hospital premises liability case no longer a case of first impression. As such, this Court is not excluded from making a determination regarding the legal status of hospital visitors in Idaho.

2. Victor's Request to the Court to Issue a New Premises Liability Standard.

Despite EIRMC's position that Victor's request for the adoption of a new standard related to hospital visitors constitutes an issue raised for the first time on appeal, EIRMC provides briefing in opposition to this Court adopting the new standard. EIRMC argues a new standard wherein

hospital visitors are classified as invitees (hereinafter referred to as the "Hospital Standard") should not be adopted because Victor has not provided sufficient evidence for the adoption of the Hospital Standard, and without such evidence, the Court is asked to make a public policy decision which is better suited for the legislative branch.

A. This Court has the Authority to Enact the Standard Based on The Existence of a Compelling Public Policy.

One of EIRMC's arguments against this Court adopting the Hospital Standard is that "Victor has failed to present this Court with the type of evidence the Court could reasonably rely upon in adopting a new rule with regard to hospitals." (*Respondent's Brief, p. 24*). The type of evidence EIRMC contends Victor is required to present includes:

- Evidence establishing that hospital visitors are frequently injured in Idaho;
- Statistical data regarding prevalence of hospital visitors being injured in Idaho; and
- Evidence supporting what reasonable changes would be necessary to prevent the type of injury in the future.

(*Respondent's Brief, p. 24*)

To support its argument that this evidence is required for the Court to adopt the Hospital Standard, EIRMC cites to *Rountree v. Boise Baseball, LLC,* 154 Idaho 167, 296 P.3d 373 (2013), and incorrectly states that this Court declined to adopt the baseball rule "because the plaintiff did not supply the court with evidence supporting the adoption of the special rule." (*Respondent's Brief, p. 24)*. The decision by this Court to not enact the baseball rule was not for lack of evidence presented to the Court; instead, it was because this Court did not find that a compelling public policy for the adoption of the baseball rule existed. *Rountree*, 154 Idaho 167, 173. Accordingly, regardless of the evidence EIRMC claims Victor must present, this Court may enact the Hospital

Standard based upon its finding that a compelling public policy exists to enact such a standard. As set forth below, a compelling public policy exists to enact this standard.

B. A Compelling Public Policy Exists to Enact a New Premises Liability Standard.

In deciding whether a compelling public policy existed to enact the baseball rule, this Court compared the baseball rule with the fireman's rule, previously enacted by this Court. In *Winn v. Frasher*, 116 Idaho 500, 777 P.2d 722 (1989), this Court adopted the fireman's rule, finding, "we concluded that, of the reasons to adopt the fireman's rule, the fact that it was "compelled by public policy" was "the rationale most appropriate for our consideration."" *Rountree*, 154 Idaho 167 at 172-73. This Court then stated that the compelling public policy to enact the fireman's rule was in part, because,

> The very nature of police work and fire fighting is to confront danger. **The purpose of these professions is to protect the public.** It is this relationship between police officers, fire fighters, and society which distinguishes safety officers from other employees. Thus, safety officers are not "second-class citizens," but, rather, are "different" than other employees.

Rountree, 154 Idaho 167, at 172-73 (citing *Winn*, 503, 777 P.2d at 725) (emphasis added).

The purpose of hospitals and medical professionals is similarly, to protect and care for the public. This purpose to protect and care for the public should not just extend to those conferring a monetary benefit upon the hospital. A compelling public policy exists as articulated in Victor's Opening Brief (*Appellant's Opening Brief, p. 15*) and is worth reiterating herein. A hospital should provide the utmost safety to its patients and visitors, as that is the place people go when they are hurt, and those persons expect to not be further hurt while either entering or exiting the hospital. If, for instance, Victor and Carol were walking into the hospital together for Carol's admission when Victor fell, under EIRMC's logic, Victor would not be an invitee. However, if it were Carol who fell, because she was already experiencing chest pain, she would be considered an invitee.

The same quandary would apply if, when Carol was leaving the hospital after being discharged, and she slipped and fell on ice, EIRMC would argue that she is a licensee because she was not bestowing an economic benefit on EIRMC.

It is a disservice to the general public in the state of Idaho to have such a fluid and narrow determination of the duty they are owed based solely upon the economic benefit the hospital is receiving.

Based on the forgoing, a compelling public policy exists that would enable this Court to adopt a standard such as the Hospital Standard.

C. <u>This Court has the Authority to Adopt the Hospital Standard</u>.

EIRMC cites to *Anstine v. Hawkins*, 92 Idaho 561, 563, 447 P.2d 677, 679 (1968) as support that a standard such as the Hospital Standard should be enacted by the legislative branch, not the court, because it relates to the safety and welfare of Idaho citizens. (*Respondent's Brief pp. 24-25*). However, it was this Court, not the legislative branch, that enacted the following premises liability standards and duties:

> **<u>Despite the district court's conclusion that only the Legislature could adopt the Baseball Rule, it is also within this Court's power to do so</u>**. The Court has established duties of care where none previously existed. For example, in *Stephens v. Stearns* we established a new duty of care for landlords – "[A]fter examining both the common-law rule and the modern trend, we today decide to leave the common-law rule and its exceptions behind, and we adopt the rule that a landlord is under a duty to exercise reasonable care in light of all the circumstances." 106 Idaho 249, 258, 678 P.2d 41, 50 (1984). We have expanded duties of care, as in *Sharp v. W. H. Moore, Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990), where we noted that, while a landlord does not necessarily have a duty to keep the building doors locked for the safety of the tenant, where the landlord and its property manager "initiated a locked door policy and had employed a security service with the intent of keeping the doors locked, they undertook such a duty and are subject to liability if they failed to perform that duty with a reasonable standard of care." We have also acted to limit an existing duty, much like Boise Baseball asks us to do in this case. In *Winn v. Frasher*, we adopted the "fireman's rule," limiting the duty owed by landowners to fire fighters and police officers who are injured on their premises, where such

> injuries are caused by the same conduct that required the officers' official presence on the premises. 116 Idaho at 503, 777 P.2d at 725.

Rountree v. Boise Baseball, LLC, 154 Idaho 167, 172, 296 P.3d 373, 378 (2013) (emphasis added).

In accordance with its authority to establish a duty of care where one previously did not exist, this Court can enact a standard such as the Hospital Standard without the legislative branch.

Based on the forgoing, because it is within this Court's province to enact a standard establishing hospital visitors as invitees, and because such standard constitutes a compelling public policy, Victor is asking this Court issue a decision adopting this standard.

3. EIRMC's Duty to Victor Under Premises Liability Theory.

Turning now to the first of the two overarching categories on appeal, EIRMC owed a duty to Victor as an invitee and as a licensee under premises liability. The District Court erred in its determination that A) Victor was not an invitee, and further erred in its determination that B) EIRMC did not breach its duty to Victor as a licensee.

A. The District Court Erred in Determining Victor to Be a Licensee.

There is disagreement between EIRMC and Victor as to the sufficiency of the District Court's analysis of Victor's invitee status. Victor, in reliance on *Packer v. Riverbend Communs.,* 2020 Ida. LEXIS 167, argued in his Opening Brief that the District Court failed to articulate between the two ways someone can be classified as an invitee (entering upon the premises of another for a purpose connected with the business conducted on the land, or, where the visit may confer a business, commercial, monetary or other tangible benefit to the landowner). EIRMC contends the District Court was fully aware of the two ways someone can be classified as an invitee and points to the Memorandum Decision and Order ("Order") wherein the District Court stated,

> This Court is not persuaded by Dupuis' argument that by visiting his wife, it could reasonably be said he was conferring a business, commercial, monetary, or other tangible benefit to EIRMC or that he personally was there for a purpose connected with EIRMC's business.

Respondent's Brief, p. 20, citing R. Vol. V, p. 418.

The District Court does not address what it deemed the 'purpose of EIRMC's business' to be in determining that Victor was not at EIRMC for a purpose connected with EIRMC's business. EIRMC attempts to shape the District Court's Order into one that addresses the purpose of EIRMC's business by citing to Idaho Code § 39-1301(a)(1) for the definition of a licensed hospital. (*Respondent's Brief, p. 21*). EIRMC argues that the record and the arguments before the court, in consideration with I.C. § 39-1301(a)(1), enabled the District Court to correctly determine that Victor was not on EIRMC's premises for a purpose connected with EIRMC's business. However, the District Court did not cite to I.C. § 39-1301 nor did it proffer any basis for why it determined Victor's visit was not for a purpose connected with EIRMC's business.

Despite EIRMC's attempt to refine the District Court's Order, the fact remains that the District Court did not address nor consider that Victor could be classified as an invitee based upon being at EIRMC for a purpose connected with EIRMC's business.

B. The District Court Erred in Finding EIRMC Did Not Breach Its Duty Owed to Victor as a Licensee.

Even if this Court agrees with the District Court's determination that Victor was a licensee, the issue of EIRMC's breach of its duty to Victor as a licensee remains. The District Court erred in determining EIRMC did not breach its duty because such determination should be made by the jury. The District Court specifically made findings as to i) EIRMC's knowledge of the dangerous parking lot, and ii) the duty of reasonable care owed by EIRMC to Victor, and such findings were made in error.

i. EIRMC's Knowledge of the Dangerous Condition is a Question for the Jury.

The District Court found that Victor could only recover in this action "if the dangerous condition in the parking lot was unknown to Dupuis, and EIRMC had a greater or superior knowledge of the dangerous condition." (R. Vol. V, p. 420). The District Court made a finding that Victor knew of the dangerous condition and that EIRMC did not have greater or superior knowledge of the dangerous condition. A dispute as to knowledge of the dangerous condition is a question of fact that may preclude summary judgment. *Shea v. Kevic Corp.,* 156 Idaho 540, 549, 328 P.3d 520, 529 (2014). In Victor's case, the District Court erred in ruling on summary judgment because EIRMC's knowledge of the dangerous condition of the parking lot was in dispute.

In its Brief, EIRMC argues:

> [i]n this case, the District Court had no evidence before it upon which it could reasonably find that EIRMC had a knowledge of the condition of its parking lot on the evening of January 24, 2017, that was superior to Dupuis' actual knowledge as supported by the record.

(Respondent's Brief, p. 31).

However, there was ample evidence before the District Court to establish a dispute in knowledge. Victor relied on prior slip and fall cases on ice at EIRMC premises for the contention that EIRMC had knowledge of the dangerous condition. EIRMC has argued that such reliance by Victor is misguided because the slip and fall incidents did not occur in EIRMC's parking lot and it cannot be inferred that those incidents gave EIRMC any knowledge of the condition of the parking lots. (*Respondent's Brief, p. 30*). If EIRMC's argument that prior incidents do not establish evidence of EIRMC's knowledge is taken to be the appropriate standard, then Victor's slip and fall would be considered an isolated incident, and a landowner's requisite knowledge of an isolated incident is set forth by this Court in its recent decision issued October 5, 2020:

> Depending upon the circumstances of the condition causing the injury, plaintiffs have a few methods by which they may satisfy their prima facie burden. If the dangerous condition is an "isolated occurrence," e.g., temporary or transient, a plaintiff must prove that the land possessor knew, or should have known, of the specific dangerous condition that caused the injury. Citing *Tommerup*, 101 Idaho at 3, 607 P,2d at 1057; *Johnson*, 164 Idaho at 57, 423 P.3d at 1009. **Of note, constructive notice – knowledge of a condition that the exercise of reasonable care would have revealed-is sufficient. *All v. Smith's Mgmt. Corp.*, 109 Idaho 479, 481, 708 P.2d 884, 886 (1985).**

Oswald v. Costco Wholesale Corporation, ___ Idaho ___, ___, ___ P.3d ___, ___ (ISC Docket No. 47261; emphasis added).

EIRMC did not exercise reasonable care in inspecting its parking lot the evening of January 24, 2017; a responsibility of the Plant Operations Department was to check the conditions of the parking lot after B&K left the EIRMC premises, (R. Vol. I, p. 200), and no one from this department checked the conditions of the parking lot that evening. (R. Vol. I, p. 200). Had EIRMC inspected the parking lot, it may have found that the parking lot contained black ice, and it could have called B&K to come back and treat the ice.

If Victor's slip and fall is not deemed to be an isolated incident, then EIRMC's knowledge of the dangerous parking lot conditions may be shown through EIRMC's operating methods. This Court recently provided the following synopsis of Idaho cases regarding a landowners' knowledge,

> However, if circumstances allow, a plaintiff may seek to prove the land possessor's knowledge of the dangerous condition by showing that the land possessor's "operating methods" (i.e., how they run their business on a daily basis) were "such that dangerous conditions are continuous or easily foreseeable."

Oswald v. Costco Wholesale Corporation, ___ Idaho ___, ___, ___ P.3d ___, ___ (ISC Docket No. 47261)(citing *All v. Smith's Mgmt. Corp.*, 109 Idaho 479, 481, 708 P.2d 884, 886 (1985)).

The nature of EIRMC's operating methods were that it chose to reduce the amount of ice melt applied to its parking lots and it instructed B&K to not provide pre-treatment services to the

parking lots. A jury could find that EIRMC's operating methods created an easily foreseeable dangerous condition. Victor's use of the prior slip and fall cases on the EIRMC premises show that Victor's slip and fall was not an isolated occurrence, and those incidents should be presented to a jury to weigh all inferences regarding EIRMC's knowledge of the dangerous condition. Evidence of the prior slip and fall cases creates an inference best determined by the jury. Again, as recently cited by this Court,

> However, we find it difficult to adopt a rule of law that would allow a business to escape liability for a plaintiff's injuries sustained from an errant vehicle based on lack of foreseeability when the business had had three similar incidents on prior occasions. *See Howe*, 570 A.2d at 1203....The fact is that the jury is the appropriate arbiter for resolving such issues rather than having the trial court rule such incidents unforeseeable as a matter of law.

Oswald v. Costco Wholesale Corporation, ___ Idaho ___, ___, ___ P.3d ___, ___ (ISC Docket No. 47261).

Based on Idaho's clear case law regarding the jury as a fact finder for disputed issues such as EIRMC's knowledge and foreseeability, the District Court erred in making a finding as to EIRMC's knowledge of the dangerous condition of the parking lot.

ii. <u>The Duty of Reasonable Care is a Question for the Jury</u>.

Victor's Complaint and Demand for Jury Trial against EIRMC implicates EIRMC's duty to exercise reasonable care. This Court provided a thorough analysis of the duty of reasonable care in its recent decision in *Oswald v. Costco* wherein existing Idaho law on the duty of reasonable care was reiterated as follows:

> This Court's case law is clear that when an ordinary duty of reasonable care is the standard, the foreseeability of the harm is a question of fact for the jury. *See Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 301, 796 P.2d 506, 510 (1990). **<u>Even in the dangerous-condition context, the reasonable foreseeability of the harm is used as a surrogate for proving knowledge which, if disputed, is question for the jury</u>**. *See Shea*, 156 Idaho at 549, 328 P.3d at 529 (holding that the issue of knowledge is a question of fact that can preclude summary judgment).

Oswald v. Costco Wholesale Corporation, ___ Idaho ___, ___, ___ P.3d ___, ___ (ISC Docket No. 47261) (emphasis added).

> When the facts of a particular case are so out of the ordinary, the question is not whether the facts obviated the duty owed, **but whether the circumstances were so unforeseeable that the Court can take the question away from the jury because no reasonable juror could determine that the defendant breached its duty by failing to take adequate care given how unforeseeable the harm was**. I.R.C.P. 56. This standard ensures that the jury addresses the core questions of whether the defendant's actions were reasonable in cases where reasonable minds could differ. In such cases, the reasonableness of the conduct is assessed by the collective barometer of the common sense and combined human experience of multiple jurors, rather than one judge.

Oswald v. Costco Wholesale Corporation, ___ Idaho ___, ___, ___ P.3d ___, ___ (ISC Docket No. 47261)(emphasis added).

EIRMC's breach of its duty of reasonable care is one which should be resolved by the jury in this matter, as such, the District Court erred in granting EIRMC's motion for summary judgment, finding that EIRMC did not breach its duty owed to Victor.

4. EIRMC'S Duty to Victor Under Common Law Negligence

The second of the two overarching categories on appeal is the duty EIRMC owed to Victor under common law negligence. The District Court erred in finding that common law negligence does not apply to this case. In its Brief, EIRMC contends that, A) EIRMC did not assume a duty of care because it already owed a duty to Victor as a licensee, and B) EIRMC did not assume a duty of care based upon an undertaking. Each is addressed in turn, below.

A. Assumption of a Duty is Not Mutually Exclusive from a Duty Owed under Premises Liability.

EIRMC claims "Victor failed to recognize there is already an existing duty imposed on EIRMC, as the owner of its hospital premises, to inspect its premises for the benefit of its

licensees." (*Respondent's Brief, p. 12*). Without providing legal authority, EIRMC's position is that because it already owed a duty under premises liability law that it cannot assume a separate duty of care. However, these duties are not mutually exclusive, and, in cases where a duty does not yet exist, this Court may establish a duty of care.

In *Boots v. Winters*, because a duty of care did not already exist, the Idaho Court of Appeals determined whether a duty existed based upon the facts presented to the Court. *Boots v. Winters*, 145 Idaho 389, 394, 179 P.3d 352, 357 (Ct. App. 2008). The Court ruled that:

> **Premises liability is not the exclusive source of duties where a landowner is involved. Instead, circumstances may give rise to a general duty of care owed to third parties**. As a general principle, every person, in the conduct of his or her business, has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others.

Boots v. Winters, 145 Idaho 389, 391, 179 P.3d 352, 354 (Ct. App. 2008) (emphasis added).

Victor's recovery against EIRMC is not limited solely to premises liability theories, instead, common law negligence also applies as EIRMC, in the conduct of it business, has a duty to exercise ordinary care to prevent unreasonable foreseeable risks to others, such as Victor.

B. EIRMC Assumed a Duty of Care Based on an Undertaking.

Both Victor and EIRMC cited in their respective appellate briefs, "Idaho law recognizes two circumstances in which a person has an affirmative duty of care to another; a special relationship or an assumed duty based on an undertaking." *Beers v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 686, 316 P.3d 92, 98, (2013). There is no dispute that a special relationship does not exist between Victor and EIRMC, there is however, a dispute that EIRMC assumed a duty based upon an undertaking. As cited in Victor's Opening Brief (p. 21), the current law as to an assumption of duty based upon an undertaking is:

> "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." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 982 P.2d 300, 312 (1999). That duty, however, "is limited to the duty actually assumed." *Beers v. Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 688, 316 P.3d 92, 100 (2013) (citation omitted). "[M]erely because a party acts once does not mean that party is forever duty-bound to act in a similar fashion." *Id.* This duty arises "when [i] one previously has undertaken to perform a primarily safety-related service; [ii] others are relying on the continued performance of the service; and [iii] it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking."

Forbush v. Sagecrest Multi Family Prop. Owners' Ass'n, 162 Idaho 317, 326, 396 P.3d 1199, 1208 (2017).

Notably, EIRMC did not claim that the *Forbush* three factor analysis is an issue raised for the first time on appeal even though Victor did not rely upon it nor argue it to the District Court. Nor did EIRMC address or even respond to Victor's reliance and use of the *Forbush* three factor analysis. Instead, EIRMC attempts to insert another factor into the three-factor analysis by arguing that Victor has to "point to evidence demonstrating that ERIMC's [sic] performance of the alleged undertaking induced Dupuis to rely [sic] EIRMC to continue to perform the action." (*Respondent's Brief, p. 12*). The current law on assumption of duty based upon an undertaking does not require evidence or proof of inducement. Instead, as cited above, an assumption of duty arises "when [i] one previously has undertaken to perform a primarily safety-related service; [ii] others are relying on the continued performance of the service; and [iii] it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking." *Forbush,* 162 Idaho 317, 326.

EIRMC assumed a duty of care based upon its undertaking of the following two safety related services, i) entering into an Agreement with B&K Professional Services for snow and ice removal services, and ii) assigning employees to walk EIRMC premises to check for ice or snow

that needed to be removed after B&K had left the premises, and notifying B&K if additional ice removal was needed after B&K left for the evening.

i.) Assumption of Duty Based Upon B&K Agreement.

EIRMC assumed a duty of care to all visitors on EIRMC's premises, regardless of the legal status of such visitors, by entering into a snow removal agreement with B&K Professional Services.

EIRMC cites to *Rountree* for its proposition that this Court cannot enact a new premises liability standard as it relates to hospital visitors, however, as this Court cited to in *Rountree*, this Court expanded upon a premises liability duty of care in *Sharp v. W. H. Moore, Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990). In *Sharp*, this Court noted that, "while a landlord does not necessarily have a duty to keep the building doors locked for the safety of the tenant, where the landlord and its property manager initiated a locked door policy and had employed a security service with the intent of keeping the doors locked, they undertook such a duty and are subject to liability if they failed to perform that duty with a reasonable standard of care." *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 172, 296 P.3d 373, 378 (2013)(citing *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990)).

EIRMC's Agreement with B&K created a duty similar to the duty of care expanded upon in *Sharp*. EIRMC may not have necessarily had the duty to keep its premises safe for every visitor, but once it employed B&K to provide ice and snow removal services, with the intent of keeping its premises safe, it undertook that duty and is subject to liability for failing to perform such duty with reasonable standard of care. By changing the terms of the Agreement to reduce the amount of ice melt and eliminate use of parking lot pretreatment for cost savings (R. Vol. I, p. 200),

EIRMC did not perform its duty with a reasonable standard of care. Roland "Bud" York's expert report (R. Vol. II, pp. 250-264) and (R. Vol. IV, pp. 405-413) provided his expert opinion directly addressing the reasonableness of EIRMC reducing snow and ice removal services. As argued below, the District Court improperly issued a ruling on summary judgment without first ruling on EIRMC's Motion to Strike.

EIRMC assumed a safety related duty to all visitors by entering into the Agreement with B&K and thereby it undertook the responsibility of ensuring its parking lots and sidewalks are safe to traverse.

ii.) <u>Assumption of Duty Through Employee's Actions.</u>

As with EIRMC contracting with B&K for snow removal services, the duty of care expanded upon in *Sharp* also applies to EIRMC's responsibilities under the Agreement. EIRMC established the practice of 1) directing employees from Plant Operations at EIRMC to check the status of EIRMC's parking lot and sidewalks after B&K had left the premises, and, 2) if a slick spot is found or additional snow removal services are needed after B&K has left the premises, EIRMC was responsible to contact B&K to return to the premises (R. Vol. I, p. 22). EIRMC did not necessarily have a duty to do either of these two items, however, once it instructed Plant Operations to check the conditions parking lot and sidewalks after B&K left EIRMC premises, and, once it began contacting B&K to return to the premises if additional slick spots were found, it undertook such a duty. By undertaking these duties of care, EIRMC is subject to liability for failing to perform such duty with reasonable standard of care. There is no dispute that with regard to the evening of January 24, 2017 (the date Victor fell), Plant Operations did not check the conditions of the parking lot (R. Vol. I, p. 200), and, EIRMC did not contact B&K to return to

EIRMC for any slick spots it found. (R. Vol. I, p. 200). These inactions by EIRMC do not comply with the requisite reasonable standard of care duty.

Lastly, and in summation of the forgoing section, EIRMC assumed a duty of care through an undertaking for safety related services. EIRMC assumed these duties of care to **all** visitors to the EIRMC premises, regardless of their status as an invitee or licensee. Thus, EIRMC's failure to carry out these duties with a reasonable standard of care is felt by **all** visitors to the EIRMC premises, not just those with an invitee status. EIRMC assumed a duty of care based upon an undertaking, and such duty of care exists despite EIRMC's duty owed to invitees and licensees under premises liability.

5. The District Court Erred in Failing to Consider the Expert Report of Bud York.

EIRMC does not argue nor respond to Victor's contention that the District Court must resolve credibility issues before ruling on a summary judgment motion. Instead, EIRMC only recited the court's finding that the opinions of Roland "Bud" York were moot because of the summary judgment decision. (*Respondent's Brief, p. 32*). This is the incorrect standard, EIRMC does not argue otherwise.

When considering evidence submitted in connection with a motion for summary judgment, a court can only consider material which would be admissible at trial. *Gem State Ins. Co. v. Hutchison,* 145 Idaho 10, 175 P.3d 172 (2007). As a result, the court must determine objections to the admissibility of evidence as a "threshold question" before addressing the merits of motions for summary judgment. *Montgomery v. Montgomery,* 147 Idaho 1, 6, 205 P.3d 650, 655 (2009). If the admissibility of evidence is raised by objection by one of the parties, the court must first make a threshold determination as to the admissibility of the evidence before reaching the merits of the

summary judgment motion. *Gem State Ins. Co.,* 145 Idaho at 14, 175 P.3d at 176 (citing *Bromley v. Garey,* 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999).

The District Court erred by not resolving credibility issues or determining the admissibility of Mr. York's expert report before determining its decision on EIRMC's motion for summary judgment. Mr. York's expert report created genuine issues of material fact which would have precluded the granting of EIRMC's motion for summary judgment. As described above in Section 4(B)(i), Mr. York specifically addresses the unreasonableness in EIRMC's reduction of ice melt and elimination of parking lot pretreatment application. Such opinion has bearing on the outcome of a motion for summary judgment, and thus, it was error for the District Court to determine the Motion to Strike as 'moot' because it had already granted EIRMC's motion for summary judgment.

III. CONCLUSION

Based on the forgoing briefing as well as Appellant's Opening Brief, Victor respectfully requests this Court to reverse the District Court's Memorandum Decision and Order and to reverse the District Court's Judgment.

DATED: October 8, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 8, 2020, I caused a true and correct copy of the foregoing to be served to the person(s) indicated below via the method indicated below:

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