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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Denver, Colorado 80203 Appeal from Adams County District Court District Court Judge: The Honorable John T. Bryan Case Number: 2008 CV 44	
Plaintiff-Appellants: MICHAEL ARELLANO AND SAFEWAY, INC. v. **Defendant-Appellee:** MARTINSON SNOW REMOVAL, INC.	▲ **COURT USE ONLY** ▲
Attorneys for Appellee and Defendant below, Martinson Snow Removal, Inc.: Name: Miles M. Dewhirst, Atty. Reg. #16832 Barbara J. Stauch, Atty. Reg. # 30666 Address: Dewhirst & Dolven, LLC 650 S. Cherry St. Ste. #600 Denver, CO 80246 Phone: 303-757-0003 Fax No.: 303-757-0004 Email: mdewhirst@dewhirstdolven.com bstauch@dewhirstdolven.com	Case No.: 2009CA271 2009CA560 Div.:

ANSWER BRIEF OF APPELLEE MARTINSON SNOW REMOVAL, INC.

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I. ISSUES PRESENTED FOR REVIEW.

Martinson respectfully disagrees with the statement of "Issues Presented" by Plaintiff/Appellant Michael Arellano, based upon the argumentative nature of the language used in framing these issues. Martinson also respectfully disagrees with Plaintiff/Appellant Safeway, Inc.'s "Statement of the Issues" with respect to issue number one, to the extent that it is too broad to properly frame the issues before this Court. Martinson therefore submits that the issues presented for review by this Court, in addition to the remaining issues noted by Safeway, are as follows:

1. WHETHER THE ISSUE OF MARTINSON'S DUTY PURSUANT TO CONTRACT WAS PROPERLY BEFORE THE TRIAL COURT.

2. WHETHER THE TRIAL COURT PROPERLY INTERPRETED THE SNOW REMOVAL SERVICE AGREEMENT IN FINDING THAT MARTINSON HAD NO DUTY TO PROVIDE SERVICES ON THE DATE OF THE INCIDENT BASED UPON THE UNDISPUTED FACT THAT LESS THAN TWO INCHES OF SNOW ACCUMULATED.

II. STATEMENT OF THE CASE.

A. Nature of the Case, Course of Proceedings and Disposition in the Court below.

The parties shall be identified hereinafter as follows: Plaintiff/Appellant Safeway, Inc. as "Safeway"; Plaintiff/Appellant Michael Arellano as "Arellano"; and Defendant/Appellee Martinson Snow Removal, Inc. as "Martinson".

This case involves a slip and fall accident which occurred on January 20, 2006 (the "Incident"). Arellano claims to have fallen on ice or snow that had accumulated in the parking area outside the Safeway store where he worked in Broomfield, Colorado (the "Subject Property"). Martinson had entered into a Snow Removal Service Agreement with Safeway (the "SRSA"), which included a document entitled Snow Removal Maintenance Specifications, outlining the snow removal services to be provided pursuant to the contractual agreement between the parties. It is undisputed that on the date of the Incident prior to Arellano's fall, less than two inches of snow had accumulated in the parking area at the Subject Property.

Because the Incident occurred following his shift, and as he was leaving work, Arellano pursued a worker's compensation claim against his employer, Safeway, which was settled prior to the initiation of this lawsuit. On January 11, 2009, Safeway filed its Complaint against Martinson, seeking reimbursement of damages paid by it to Arellano in the worker's compensation action. Record at ID000001. Arellano filed his complaint initiating suit under Case Number 2008CV85, which asserts a claim under Colorado's Premises Liability Statute, C.R.S. §13-21-115, and a negligence claim. Record at ID000085. On February 25, 2008, the separate actions filed by Arellano and Safeway were consolidated into

one action. Record at ID000008. On December 11, 2008, Safeway's Complaint was amended to include a claim under Colorado's Premises Liability Statute. Record at 000092. This matter was set for a four day jury trial to commence on January 12, 2009. Record at ID000015. On December 26, 2008, the trial court granted Martinson's Motion for Summary Judgment (hereinafter "Martinson's Motion"), while denying Safeway's Motion for Partial Summary Judgment (hereinafter "Safeway's Motion"), which resulted in the dismissal of all claims asserted against Martinson in the case. Record at ID000113. Both Safeway and Arellano filed motions for reconsideration. Record at ID000133 (Safeway) and ID000126 (Arellano). Both motions for reconsideration were denied by the trial court on February 11, 2009. Record at ID000173. Safeway also filed its Rule 59(e) Motion for JNOV or directed verdict on January 12, 2009. Record at ID000138. Safeway's Rule 59(e) Motion was denied by the trial court on January 27, 2009. Record at ID000150. This appeal followed.

1. Safeway's Motion for Partial Summary Judgment.

Safeway filed its Motion for Partial Summary Judgment, seeking an Order from the trial court determining that Martinson was required to indemnify Safeway – absent any finding of negligence or wrongful conduct on the part of Martinson – based upon an indemnification provision found in the Independent Contractor

Agreement (the "ICA") which was attached to the SRSA. Record at ID000035. Martinson responded to Safeway's Motion, arguing that the SRSA contained its own indemnification agreement, which by its plain language required a showing of negligence on the part of Martinson in order to establish an obligation to indemnify Safeway, and that the indemnification language found in the ICA was inapplicable to this case because the ICA is a separate agreement. Record at ID000064.

2. Martinson's Motion for Summary Judgment.

After the case had been pending for several months, Martinson filed its Motion for Summary Judgment, seeking dismissal of all claims asserted by both Safeway and Arellano. Record at ID000046. Martinson's Motion set forth the undisputed facts that it had entered into a contractual agreement with Safeway to provide snow removal services at the Subject Property, and that the ICA and SRSA provided that "snow removal services for the parking lot areas were to be provided after two inches of snow had accumulated." Record at ID000046, pp.2-3. Martinson primarily argued that there was insufficient evidence as pled for a reasonable jury to find in favor of Arellano on his premises liability claim because Arellano could not establish what hazardous condition caused his fall, there was no evidence that Martinson knew or should have known of the alleged dangerous condition, and there was a lack of evidence as to how long the alleged hazardous

condition existed prior to Arellano's fall. Record at ID000046. Martinson further asserted that the essential elements necessary to prove a premises liability claim could not be established, based upon *Vigil v. Franklin,* 103 P.3d 322 (Colo. 2004) and *Henderson v. Master Klean,* 70 P.3d 612 (Colo.App. 2003). Record at ID000046, pp. 4-5.

Safeway filed its response to Martinson's Motion on November 3, 2008, contending that whether Martinson's actions on the date of the Incident were reasonable was an issue of material fact to be determined by the jury, and that Martinson had not submitted sufficient evidence in support of its Motion. Record at ID000060-000063. Safeway also stated, in its Response to Martinson's Motion, that "Plaintiff has asserted that the work completed by Defendant was substandard under the contract and negligent and that Defendant unreasonably failed to exercise care in carrying out its duty to remove snow and ice from the parking area." Record at ID000060, p.6.

Arellano sought and received, pursuant to C.R.C.P 56(f), an extension of time to respond to Martinson's Motion so that he could conduct further discovery prior to responding to the Motion. Record at ID000057. Based upon that extension of time, Arellano filed his Response to Martinson's Motion for Summary Judgment on December 8, 2009 ("Arellano's Response"). Record at ID000082 - 000089.

In his response to Martinson's Motion, Arellano argued, among other things, that "[b]y virtue of this Independent Contractor Agreement, Defendant Martinson was responsible for providing a safe environment for the benefit of all entrants to the Safeway store, including Safeway employees such as Plaintiff Arellano." Record at ID000082, p. 9. Arellano argued that Martinson "was legally responsible for the condition of the real property or for the activities or circumstances existing on the real property, including the sidewalk, walkways, and parking area. Record at ID000082, p. 2. Arellano attached the SRSA, in its entirety, as Exhibit A to his Response to Martinson's Motion in support of his arguments made therein. Record at ID000083.

Martinson filed its Reply to its Motion, in which it responded to Arellano's assertions that it responsible for providing a safe environment, explaining that it was undisputed that the snow accumulation was less than two inches on the date of the Incident, and discussing the contractual provisions between Safeway and Martinson. Record at ID000107.

On December 26, 2008, the trial court granted Martinson's Motion, and simultaneously denied Safeway's Motion, finding that there was no evidence that Martinson had breached its agreement with Safeway on the date of the Incident. Record at ID000013, p. 4. The trial court denied Safeway's Motion on the basis

that the ICA was a stand-alone agreement, entered into in conjunction with the SRSA, but was not incorporated into that agreement; thus, the indemnification provision found in the ICA was not applicable to the Arellano claims. Record at ID000013, pp. 3-4.

Arellano filed a Motion for Reconsideration on January 9, 2009, pursuant to Rule 60, asserting that an error of law had occurred. Record at ID000126-131. Arellano argued that Martinson raised the issue regarding its contractual obligations for the first time in its Reply to the Motion for Summary Judgment, and that there was evidence that the contractual agreement had been modified, or certain provisions waived, by Martinson's over-performance of its obligations. Record at ID000126. Prior to the Court's ruling on its pending Motion for Reconsideration, Arellano filed this appeal. Record at ID000162.

On January 12, 2009, Safeway filed a Motion for Reconsideration, based upon its argument that there were material issues of fact precluding entry of summary judgment in Martinson's favor, and that the trial court's decision was incorrect as a matter of law based upon Safeway's assertion that Martinson assumed a duty to remove ice and snow based upon its conduct, and that Martinson waived the two inch accumulation provision in the SRSA by its conduct. Record at ID000133-137. Safeway also filed a Rule 59(e) Motion for JNOV, contending

that the trial court's denial of Safeway's Motion for Summary Judgment based upon its position that the court erred in determining that the ICA was a separate stand-alone agreement and the ICA's indemnification provision did not apply under the circumstances of the case. Record at ID000138-140.

On January 27, 2009, the trial court denied Safeway's Rule 59(e) Motion for JNOV. Record at ID000150. The motions for reconsideration filed by Arellano and Safeway were denied by the trial court on February 11, 2009. Record at ID000173.

Martinson sought its litigation costs in the amount of $8,196.91, as the prevailing party, upon motion providing the legal basis for all costs sought. Record at ID000175-188. The trial court awarded Martinson all of its litigation costs on March 11, 2009. Record at ID000193.

B. Factual Background.

On January 20, 2006, Arellano slipped and fell in the parking area outside of the Safeway store located at 6775 West 120th Avenue in Broomfield, Colorado (the "Incident"). At the time of the Incident, Arellano was employed by Safeway, and had just completed his shift. Arellano testified that he recalled punching out following his shift, and leaving the store to walk to his car, but did not recall anything further about the Incident. Record at ID000107, pp. 3-4; ID000108, p. 11;

and ID000109, pp. 3-4. Arellano contends that he slipped on ice in the parking lot, which caused him to fall and sustain serious injuries. Record at ID000107, pp. 3-4, ID000109, pp. 3-4. Arellano pursued a worker's compensation claim against his employer based upon the Incident, which was resolved prior to suit being commenced against Martinson by either Arellano or Safeway. Record at ID000041.

On or about October 1, 2005, Martinson entered into a Snow Removal Service Agreement ("SRSA") and Independent Contractor Agreement ("ICA") with Safeway to provide snow removal services at the Subject Property. Record at ID000083. With respect to the parking lot where Arellano fell, the SRSA required snow removal services were to be provided "after two (2) inches accumulation." Record at ID000083, p. 5. Neither Safeway nor Arellano has disputed that on the date of the Incident, less than two inches of snow had accumulated. Record at ID000060-63, and ID000082-89. The SRSA contained the following provisions which were reviewed by the trial court in reaching its decision to dismiss Safeway and Arellano's claims:

> Each Safeway premise shall be served for snow removal, when the snow depth is 2" or more and still snowing... Contractor's representatives shall make additional visits and perform additional services as necessary and/or upon request by a designated Safeway representative.

Record at ID000083, p. 3. The "General Requirements" provisions of the Snow Removal Maintenance Specifications provided, "... [t]asks outlined in this Agreement shall be performed at least as frequently and in the times and accumulations indicated by text integrated into Agreement." Record at ID000083, p. 5. In the "Services to be Performed" section of the Snow Removal Maintenance Specifications, the Agreement provided as follows:

> A. Snow Removal – General:
>
> 1. Removal for morning clean up will begin no later than 5:00 a.m. and be completed by 7:00 a.m. if conditions permit.
>
> ...
>
> 4. Should weather conditions warrant snow removal during normal business hours, Contractor will commence snow removal as soon as practicable but, in no event, later than two (2) inches accumulation.
>
> B. Snow Removal – Walks:
>
> 1. Cleared upon an accumulation of snow on sidewalk...
>
> C. Snow Removal – Lots:
>
> 1. Contractor will begin snow removal after two (2) inches accumulation...
>
> ...
>
> 3. Sand and/or Ice Melt as needed.

Record at ID000083, p. 5.

Arellano testified that there were "very light flurries" when he drove his car to work late in the evening on January 19, 2006, that the roads were not slippery, and that he was able to drive at his normal speed. Record at ID000107, p. 4, and

ID000109, p.5. Arellano does not recall there being any snow accumulated on the sides of the road. Record at ID000107, p.4 and ID000109, p.7. Arellano testified that it was dark in the parking lot when he left work, and that the only light in the lot was coming from the store. Record at ID000107, p. 4 and ID000109, p. 5-6.

III. SUMMARY OF ARGUMENT.

The trial court did not err in granting Martinson' Motion for Summary Judgment. The trial court correctly determined, based upon the undisputed evidence before it, that Martinson was not contractually obligated to provide services on the date of the Incident. The language in the SRSA, which the trial court interpreted as a matter of law based upon undisputed facts, supports the trial court's ruling, and therefore it should be sustained. It is undisputed that less than two inches of snow had accumulated on the date of the Incident prior to Arellano's fall. Because the contract between Martinson and Safeway is not ambiguous, the Court should not consider the arguments of Safeway and Arellano concerning assumption of duty and waiver.

As Martinson had no duty to provide services on the date of the Incident, it is not a landowner under the Colorado Premises Liability Act, C.R.S. § 13-21-115. At the time of the Incident, Martinson was not in possession of the premises, and

did not owe a duty under the SRSA to provide snow removal services, and thus could not be deemed a "landowner" under the premises liability statute.

The trial court did not abuse its discretion in denying Safeway's Motion for Partial Summary Judgment, as the indemnification provision relied upon Safeway related to the ICA only and was not applicable to Arellano's fall, and the indemnification provision in the SRSA required a showing of negligence by Martinson, which had not been established by Safeway in its Motion.

The trial court properly awarded all costs of litigation to Martinson, as the prevailing party, and did not abuse its discretion in so doing.

IV. ARGUMENT.

A. Standard of Review on Appeal.

Summary judgment is appropriate when the pleadings and supporting documents demonstrate that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Ryder v. Mitchell,* 54 P.3d 885, 889 (Colo. 2002), citing *Martini v. Smith,* 42 P.3d 629, 632 (Colo. 2002) citing *Vail/Arrowhead, Inc. v. Dist. Ct.,* 954 P.2d 608, 611 (Colo. 1998). The appellate court's review of a summary judgment is *de novo. Ryder v. Mitchell,* 54 P.3d at 889, citing *Vail/Arrowhead, Inc.* 954 P.2d at 611. Whether a contract is ambiguous is a question of law that the Court of Appeals review *de*

novo. Union Insurance Company v. Hottenstein, 83 P.3d 1196, 1199 (Colo.App. 2003).

On appeal, the appellate court must view the evidence presented to the trial court in the light most favorable to the prevailing party. *Raydon Exploration, Inc. v. Ladd,* 902 F.2d 1496, 1499 (10th Cir. 1990).

"The findings of the trier of fact must be accepted on review, unless they are so clearly erroneous as not to find support in the record." *M.D.C./Wood, Inc. v. Mortimer,* 866 P.2d 1380, 1384 (Colo. 1994). *See also, City of Aurora v. Colorado State Engineer,* 105 P.3d 595, 619 (Colo. 2005) (trial court's factual findings binding unless not supported by record).

An Order denying a motion for reconsideration is reviewed for an abuse of discretion by the trial court. *City of Aurora v. ACJ Partnership,* 209 P.3d 1076, 1082 (Colo. 2009), citing C.R.C.P. 60(b) and *In re Marriage of Smith,* 928 P.2d 828, 830 (Colo.App.1996). Similarly, a trial court's decision on a Rule 59 motion is reviewed for an abuse of discretion. *School Dist. No. 12 v. Security Life of Denver Ins. Co.,* 185 P.3d 781, 786-787 (Colo.2008).

A review of an award of costs to the prevailing party is similarly reviewed for an abuse of discretion by the trial court. *Gf Gaming Corp. v. Taylor,* 205 P.3d 523, 526 (Colo.App. 2009), citations omitted. To establish an abuse of discretion

by the trial court, it must appear that the court's choice of a particular course of action was manifestly arbitrary, unreasonable or unfair. *School Dist. No. 12,* 185 P.3d at 787, citing *Colo. Nat'l Bank of Denver v. Friedman,* 846 P.2d 159, 166-167 (Colo.1993); see also *Higley v. Kidder, Peabody & Co., Inc., 920 P.*2d 884, 891 (Colo.App. 1996).

B. The trial court's Order granting Martinson's Motion for Summary Judgment was based upon its interpretation of a contractual agreement that was properly before the court.

Arellano contends that Martinson did not argue, until its Reply brief, that it had no duty under its contract to remove snow on the date of the Incident. Arellano's argument on appeal is based upon his contention that this issue was not properly raised in Martinson's Motion for Summary Judgment, and thus should not have been considered by the trial court. Arellano contends that Martinson's Reply to the Motion for Summary Judgment was the first argument asserted concerning the contractual duties under the SRSA and ICA; however, Arellano raised the contractual duty issue in his Response to Martinson's Motion, thus allowing Martinson the opportunity to respond to this argument in its Reply. Record at ID000082, pp. 1, 2 and 9. In fact, Arellano submitted the SRSA, in its entirety, to the trial court as Exhibit A to its Response to Martinson's Motion. Record at ID000083. Arellano argued, in his Response to Martinson's Motion, that based

upon the SRSA, Martinson was responsible for "providing a safe environment for the benefit of all entrants to the Safeway store..." Record at ID000082, p. 9.

The SRSA between Martinson and Safeway provides, in pertinent part, that services shall be performed "when the snow depth is 2" or more and still snowing." Record at ID000083, p. 3. It has never been disputed by the parties that on the date of the Incident, the snow depth did not reach two inches. In fact, the only precipitation in the late hours of January 19, 2006 and the early hours of January 20, 2006, were light flurries that did not accumulate on pavement. Record at ID000112. Arellano, on one occasion, denied that there was snow on the ground at the time of the Incident. Record at ID000108, p. 14, Response to Request for Admission 3. As stated above, he later testified that he could not remember whether there was snow on the ground or not at the time he fell. Neither Arellano nor Safeway has ever disputed the fact that less than two inches of snow had accumulated in the parking area at the Safeway store prior to Arellano's fall on the date of the Incident.

The SRSA also provides that Martinson shall make additional visits and perform additional services "as necessary and/or upon request" by Safeway. Record at ID000083, p.3. Although Safeway cites deposition testimony by Martinson employee Chad Lunde concerning his dealings with Safeway, Safeway

never presented any evidence from any of its own employees that it contacted Martinson on January 20, 2006 prior to the Incident to request services due to icy conditions or for any other reason, or that any other person or entity notified Martinson of the alleged hazardous conditions at the Subject Property.

Arellano contends that Martinson's ice melt services were required to be performed no later than 7:00 a.m.; however, this also is not what the SRSA specified. Record at ID000083. With respect to the parking lots at the Safeway property, the Contract provided as follows: "Contractor will begin snow removal after two (2) inches accumulation...Sand and/or Ice Melt as needed." Record at ID000083, p. 5, ¶ II.C. The 7:00 a.m. completion time applied to snow removal services, which on January 20, 2006, were not necessary in the parking lot. The SRSA does not provide a specific start time and completion time with respect to the parking lots at the Safeway property. Record at ID000083, p. 5. Based upon the contractual agreement between Martinson and Safeway, neither Arellano nor Safeway can establish that Martinson had a duty to provide ice abatement services in the parking area on the date of the Incident, particularly as there was no specific requirement that Martinson inspect the lots for ice at a specific time.

In its original Motion for Summary Judgment, Martinson twice argued that the SRSA between Safeway and Martinson only required Martinson to perform

services after two inches of snow accumulated. Martinson stated "[t]he Independent Contractor Agreement and Service Agreement provided that snow removal services for the parking lot areas were to be provided after two inches of snow had accumulated," as an "undisputed fact" and "[t]here is no evidence, for example, that Martinson failed to remove snow in the parking area after two inches had accumulated, as required by the contract." Record at ID000046, p. 3 (Undisputed Material Fact No. 2) and pp. 8-9, respectively. These assertions by Martinson put both Arellano and Safeway on notice of Martinson's argument that it was not required to provide services in the parking area of the Safeway store on the date of the Incident because less than the requisite two inches of snow had fallen that day.

Arellano cites several cases in support of his proposition that an argument not raised until a reply brief is not properly before the Court; however, none of these cases are applicable to the case at bar because the issue was raised – specifically by Arellano in his Response – prior to the reply brief. The SRSA and Martinson's contention regarding the two inch accumulation requirement were discussed, albeit briefly, in Martinson's Motion. Arellano attached the SRSA as Exhibit A in support of his Response to Martinson's Motion, arguing that Martinson "was responsible for providing a safe environment" (Record at

ID000082, p. 9), and "was late in arriving to the premises, in violation the Defendant Martinson's snow removal contract with Safeway." Record at ID000082, p. 12. Arellano not only had notice of Martinson's position regarding the SRSA, he argued that Martinson had violated it in his Response. The SRSA and Martinson's duties under it were squarely before the trial court prior to Martinson's Reply.

Arellano requested, and was provided, an opportunity to conduct any discovery he felt was necessary prior to providing his Response. Record at ID000049 and ID000059, respectively. There was no limitation placed on the type or amount of discovery that could be conducted by Arellano. *Id.* Arellano does not contend Martinson did not timely and properly disclose the SRSA, or that witnesses were not available for deposition prior to the deadline for his Response. Arellano now argues that had he been on notice of Martinson's position regarding the two inch accumulation requirement, he would have conducted different additional discovery. Arellano Opening Brief, p. 22.

It is unlikely that the proposed the additional discovery requested by Arellano would have produced admissible evidence. Under the parol evidence rule, the Court can only look within the four corners of the SRSA to interpret unambiguous terms. *See Ad Two, Inc. v. City and County of Denver ex rel.*

Manager of Aviation, 9 P.3d 373, 376-77 (Colo. 2000). The trial court found the two-inch snow accumulation requirement unambiguous. Record at ID000113, p. 4. Therefore, the Court could not consider any extrinsic evidence regarding Martinson's contractual duty.

Although Martinson provided the Court with a basis for its ruling and gave Arellano an opportunity to respond to its assertion that it had no contractual duty to provide services, even a *sua sponte* summary judgment is proper unless the losing party can "show that different notice or a different opportunity to respond would have allowed presentation of some evidence or argument on which the complaint could have survived summary judgment." *ISG, LLC v. Ark. Valley Ditch Ass'n*, 120 P.3d 724, 730-31 (Colo. 2005) (citing *In re Rockefeller Ctr. Props., Inc.*, 183 F.3d 280, 287-89 (3d Cir. 1999)). See also, *Moody v. Town of Weymouth,* 805 F.2d 30, 31-32 (1st Cir. 1986) (where Plaintiff does not show he would have done something different, and this would have defeated the motion, Plaintiff has not demonstrated prejudice).

In this case, Arellano has presented nothing to substantiate that additional discovery, had he chosen to conduct it, would have affected or changed the facts upon which the Court's Order was based. Arellano contends that he would have argued that Martinson assumed a duty not set forth in the SRSA, or alternatively

that Martinson waived the two inch accumulation requirement by its actions. Both Safeway and Arellano presented factual information in support of these arguments in their respective Motions for Reconsideration, all of which was gathered during the C.R.C.P. 56(f) discovery period. Record at ID000126 (Arellano) and ID000133(Safeway). The trial court rejected these arguments, even with the new facts presented, and denied the Motions for Reconsideration. Record at ID000173.

As will be discussed below, these legal concepts are not applicable under the circumstances in this case, and were presented by Safeway and Arellano to the trial court and rejected. Thus the proposed additional discovery would not and did not affect the outcome of Martinson's Motion for Summary Judgment. It is significant to note that Arellano deposed multiple individuals prior to responding to Martinson's Motion, including employees of Martinson and Safeway, and had the witnesses available to answer the very questions he now claims he was not able to ask because he was not on notice of Martinson's position concerning the two inch accumulation requirement.

Both Safeway and Arellano ask this Court to interpret the SRSA in a manner that is inconsistent with the clear and unambiguous language found in the document. "Extrinsic evidence is not admissible until the contract has been found to be ambiguous." *Union Insurance Company v. Hottenstein,* 83 P.3d at 1199. In

this case, the SRSA is not ambiguous, and thus extrinsic evidence should not be considered by the Court. For example, Arellano contends that the SRSA provides that "while a provision in the Service Agreement provides that Martinson will begin snow removal after 2 inches of accumulation, another provision provides that Martinson agreed to make additional visits to Safeway's parking lot and to perform additional services, such as ice abatement, regardless of the total amount of snow accumulation on Safeway's parking lot." Arellano Opening Brief, p. 6. Nowhere within the SRSA is there language that states that additional services, such as ice abatement, must be performed regardless of the amount of snow accumulation. See Record at ID000083.

Interpretation of a written contract is a question of law for the court. *Pepcol Manufacturing Co. v. Denver Union Corporation,* 687 P.2d 1310, 1313 (Colo. 1984). Arellano has provided no case law or other basis to support its contention that the trial court abused its discretion by interpreting a contract – based upon undisputed facts – which was presented to the Court as an exhibit to Arellano's brief. "A fundamental rule of contract law is that the court should strive to ascertain and give effect to the mutual intent of the parties." *Pepcol Mfg. Co. v. Denver Union Corp.,* 687 P.2d 1310, 1313 (Colo. 1984). As will be discussed in

further detail below, neither Safeway nor Arellano has established that the SRSA is ambiguous.

C. Summary Judgment in Favor of Martinson was Appropriate Based Upon the Undisputed Facts of the Case.

Once a moving party shows specific facts probative of its right to judgment, it becomes necessary for the nonmoving party to set forth facts showing that there is a genuine issue for trial. *See, Continental Air Lines, Inc. v. Keenan,* 731 P.2d 708, 713 (Colo. 1987); *Durnford v. City of Thornton*, 29 Colo.App. 349, 483 P.2d 977, 979 (1971); *Morphew v. Ridge Crane Service, Inc.*, 902 P.2d 848, 850 (Colo.App.), *cert. denied* (Colo. 1995). Rule 56(c) of the Colorado Rules of Civil Procedure provides that Martinson, as the moving party, bears the initial burden of presenting to the court the basis for its motion and establishing the absence of any genuine dispute of material fact. C.R.C.P. 56(c). *See also, Keenan,* 731 P.2d at 712 (citations omitted). When a party moves for summary judgment on an issue on which it would not bear the burden of persuasion at trial, the movant is not required to negate the opponent's claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Martinson's initial burden is met by showing the court that there is an absence of evidence in the record to support the Plaintiffs' claims. *Keenan,* 731 P.2d at 712. Once this initial burden is met by the moving party, the burden shifts to the opposing party, who must affirmatively set forth specific admissible facts of

record, demonstrating that a real controversy exists. *See Keenan,* 731 P.2d at 713; *see also Webster v. Mauz,* 702 P.2d 297, 298 (Colo. App. 1985); and *Ginter v. Palmer & Co.,* 585 P.2d 583, 585 (Colo. 1978).

1. The SRSA is not ambiguous.

Contrary to Arellano's argument, the SRSA only requires Martinson to perform ice abatement on the parking lot if two inches of snow accumulate. The SRSA enunciates this requirement without ambiguity. First, the SRSA contains a section specifically applicable to lots, where Arellano alleges the Incident occurred. There, the SRSA states "[Martinson] will begin snow removal after (2) inches accumulation." Record at ID000083, p.5. In the general "Frequency or Time of Performance" paragraph, the SRSA further declares "each Safeway premise shall be served for snow removal, when the snow depth is 2" or more and still snowing." *Id.* These provisions unambiguously reveal no ice abatement duty arose unless two inches of snow accumulated.

Arellano contends that an ambiguity exists in the SRSA because a sentence in a different portion the document reads "Contractor's representatives shall make additional visits and perform additional services as necessary and/or upon request by a designated Safeway representative." Record at ID000083, p.3. Specifically, Arellano urges that the SRSA requires Martinson to perform additional snow

plowing services as necessary or upon request Safeway, rather than and upon request by Safeway. Arellano takes the position that "as necessary" means that services are required to be performed by Martinson irrespective of whether two inches of snow had accumulated. Based upon the plain language of the SRSA, and reading all provisions together, "as necessary" means services are to be provided as needed after two inches of accumulation has occurred. Record at ID000083.

A basic rule of contract interpretation is that contracts are to be construed to give effect to the intent of the parties. In so doing, the Court should use the plain meaning of the terms contained in the contract.

Contract interpretation requires that "a more specific provision controls the effect of more general provisions." *Massingill v. State Farm Mut. Auto. Ins. Co.*, 176 P.3d 816, 825 (Colo.App. 2007); *E-470 Pub. Highway Auth. v. Jagow*, 30 P.3d 798, 801 (Colo.App. 2001). The sentence relied on by Arellano comes from a paragraph elaborating Martinson's general duties. Record at ID000083, p.3. As found by the trial court, however, the specific section applicable to snow removal in the parking lot instead governs Martinson's duties to abate ice on the parking lot. Record at ID000113, p.4. This more specific section only requires ice abatement "after two (2) inches accumulation." Record at ID000083, p.5. Based upon basic contract interpretation principles, since this specific section controls the

effect of the general section, "necessary" means that Martinson does not have a duty to perform ice abatement on the parking lots unless and until two inches of snow accumulate. To find otherwise, the Court must completely negate the two inch accumulation requirement, which would require the Court to ignore a provision that is found in more than one location in the SRSA.

In this case, the general provision conforms with the specific provision. Given the specific provision and the SRSA's repeated two-inch requirement, the reasonable interpretation of "as necessary" as applicable to ice abatement in the parking lot is that this service is to be performed as needed after two inches of snow accumulation.

As Safeway presented no evidence that it specifically requested Martinson's presence on the date of the Incident prior to Arellano's fall, and because it is undisputed that two inches of snow had not accumulated prior to the Incident, the trial court correctly held that Martinson had no duty to remove the alleged ice from the parking lot on the date of the Incident. To hold otherwise would require a strained construction of the SRSA, which is not supported by the plain language of the document. See *Allstate Ins. Co. v. Huizar,* 52 P.3d 816, 819 (Colo. 2002).

2. *Martinson's Alleged Conduct Did Not Modify the SRSA.*

Safeway's and Arellano's modification by conduct arguments fail because Martinson could not modify its duties by conduct under the SRSA. In *Nelson v. Elway*, the Colorado Supreme Court considered a modification clause which reads "[n]o modification or amendment of this Agreement shall be binding unless in writing and signed by the parties. . . ." 908 P.2d 102, 107-08 (Colo. 1995). Given this requirement, the Colorado Supreme Court held "it would be improper for this court to rewrite that transaction by looking to evidence outside the four corners of the contract to determine the intent of the parties." *Id.* at 107. The Court stated, "[w]e will not step into a commercial transaction after the fact and attempt to ascertain the intent of the parties when that intent is clearly manifested by an express term in a written document." *Id.* Similarly, the Court should only look to the SRSA to determine the intent of the parties here.

Even if the SRSA did allow modifications by conduct, neither Safeway nor Arellano has established an enforceable modification by conduct. Under section 89 of the Restatement (Second) of Contracts, applicable to service contracts, a party can only modify a contractual duty with a "promise." Even then, this promise is only binding "(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when they made the contract, (b) the

extent provided by statute; or (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise." Restatement (Second) of Contracts § 89 (1981). The Restatement further defines a "promise" as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Id.* § 2; *see also Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 148 (Colo. 2003). A promisor "manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct." Restatement (Second) of Contracts § 2, cmt. b.

Here, Arellano provides no evidence showing Martinson made a "promise" manifesting intent to Safeway or Arellano to act in a "specified way." Arellano cites alleged conversations between Martinson and its subcontractor as evidence of the alleged modification by conduct; however, Martinson's conversations with its subcontractor, certainly do not manifest any intent towards Safeway or Arellano. In fact, no evidence exists suggesting Safeway or Arellano had knowledge of conversations between Arellano and its subcontractor before discovery was conducted in this case. Arellano further argues Martinson's alleged conduct in removing snow before the accident establishes modification; however, this alleged conduct does not manifest an intent to act in a "specified way" - specifically, an

intent to perform ice abatement on the parking lot. The trial court recognized in its Order granting Martinson's Motion, that Martinson had some personnel on the premises performing snow removal. Record at ID000113, p.4. Martinson's general presence does not, however, manifest a specific intent to modify the SRSA's specific requirement of ice abatement in the parking lot after two inches of snow accumulation. Neither Arellano nor Safeway has provided evidence establishing that Martinson intended to modify this specific provision applicable to ice abatement in the parking lot – which modification Arellano and Safeway essentially argue deleted the two inch accumulation requirement.

Neither Safeway nor Arellano provides evidence showing (a) the alleged modification was fair and equitable in view of unanticipated circumstances, (b) a statute requires the alleged modification, or (c) that they relied on the alleged modification. In short, there is no evidence to support the contention that Martinson modified the SRSA to delete the two inch accumulation requirement. The Court should instead make the reasonable assumption that the parties were generally aware of what a Denver winter entails and contracted accordingly.

Since the SRSA only allows modifications in writing and, even without the SRSA's express prohibition of unwritten modifications, Safeway and Arellano

have not provided any evidence of an enforceable modification of the parking lot provision, and therefore cannot prove an enforceable modification by conduct.

3. Waiver Does Not Apply to These Facts.

Contrary to both Safeway's and Arellano's argument, Martinson could not have waived the SRSA's requirement that Martinson abate parking lot ice after two inches of accumulation because this requirement is a duty, not a right. "Waiver of a contract term occurs when a party to the contract is entitled to assert a particular right, knows the right exists, but intentionally abandons that right." *High Country Movin', Inc. v. U.S. W. Direct Co.*, 839 P.2d 469, 472 (Colo.App. 1992) (finding no waiver of a contractual right and affirming summary judgment). A "right" is a "legally enforceable claim that another will do or will not do a given act." Black's Law Dictionary 1322 (7th ed. 2001). The SRSA's requirement that Martinson abate parking lot ice after two inches of accumulation is not a right. This requirement does not force Safeway to do or not do a given act; rather, this requirement obligate Martinson to do a given act - remove snow after two inches of accumulation. Because the snow removal requirement is not a right, Martinson could not have waived the disputed contractual requirement.

Instead, the two-inch snow accumulation requirement is a duty. A duty is a "legal obligation that is owed or due to another and that needs to be satisfied; an

obligation for which somebody else has a corresponding right." Black's Law Dictionary 521. Under the SRSA, Martinson owes an obligation to Safeway to apply ice abatement materials on the parking lot when two inches of snow accumulates. Safeway has a corresponding right to have ice abatement materials applied to its parking lot after two inches of accumulation. Instead of analyzing this duty with the inapplicable waiver doctrine, the Court should instead consider whether Martinson could modify this duty by conduct. *See, e.g.*, Restatement (Second) of Contracts § 89 (applying explicitly to a "promise modifying a duty under a contract" (emphasis added)). As demonstrated above, the SRSA only permitted Martinson to modify the document in writing. Therefore, Martinson could not have modified or waived its contractual duty by conduct.

4. The Assumed Duty Doctrine is not applicable.

The SRSA unambiguously states the duties Martinson assumes under it, and further provides Martinson can only modify its duties in writing. Record at ID000083. Arellano's argument that Martinson assumed an additional duty by conduct runs afoul of the express contractual language allowing Martinson to only assume duties in writing. The Court should reject this argument and give effect to the intent memorialized in the SRSA. *See BRW, Inc. v. Duffice & Sons, Inc.*, 99 P.3d 66, 73 (Colo. 2004) ("If we conclude that the duty of care owed by [the

defendants] was memorialized in the contracts, it follows that the plaintiff has not shown any duty independent of the interrelated contracts. . . .").

The SRSA exclusively specifies the duties owed by Martinson and requires any modification of these duties to occur in writing. Even without the SRSA, however, Martinson still did not assume a duty by conduct. A defendant assumes a duty by conduct when (1) the defendant undertakes through affirmative acts to render a service reasonably calculated to prevent the type of harm that befell the plaintiff, and (2) the plaintiff relies on the defendant to perform the service or the defendant's undertaking increased plaintiff's risk. *Jefferson County Sch. Dist. v. Justus*, 725 P.2d 767, 771 (Colo. 1986).

Here, neither Safeway nor Arellano provides evidence Martinson that assumed a duty to create an ice-free environment, that either of them relied on Martinson to remove the alleged ice, or that Martinson increased the risk to Arellano. First, Safeway and Arellano have not met their burden of proving Martinson's alleged duty to provide services on the date of the Incident. The trial court noted Martinson's general presence at the premises and did not hold Martinson assumed a duty to specifically apply ice abatement materials at the parking lot when less than two inches of snow accumulates.

Martinson certainly did not increase the risk to Arellano. Safeway and Arellano have maintained Arellano fell because Martinson allegedly failed to alleviate the alleged icy condition. Undisputedly, Martinson did not create the alleged icy condition and therefore could not have increased the risk to Arellano by performing snow removal before the accident. Arellano and Safeway cannot establish their assumed duty theory under the facts that are before the Court.

D. Martinson not a "landowner" under the Colorado Premises Liability Statute.

In its Opening Brief, Safeway asserts that Martinson was a "landowner" under the Colorado Premises Liability Statute, C.R.S. § 13-21-115. Safeway asserted that Martinson was a landowner in its Response to Martinson's Motion, but did not provide further argument on this issue to the trial court. A "landowner" includes, without limitation, an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property. C.R.S. § 13-21-115(1); see also *Wilson v. Marchiondo,* 124 P.3d 837, 839 (Colo.App. 2005); *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1221 (Colo.2002) (an entity is "legally responsible" if it is "legally entitled to be on the real property and ... is responsible for creating a condition on real property or conducting an activity on real property that injures an entrant"); and *Land-Wells v. Rain Way Sprinkler*

and Landscape, LLC, 187 P.3d 1152, 1154 (Colo.App. 2008). The Land-Wells Court explained, "[a]t the time of the accident, however, defendant was not in possession of the property or conducting any activity related to, or creating the condition of, the icy sidewalk." *Land-Wells,* 187 P.3d at 1154, citing *Pierson,* 48 P.3d at 1220. In the *Land-Wells* case, the Court determined that the defendant was not a landowner, and that the premises liability statute did not apply. *Land-Wells,* 187. P.3d at 1154.

In the case at bar, the contractual agreement between Safeway and Martinson is the only avenue by which Martinson could be deemed a "landowner" under the premises liability statute. If Martinson did not have an obligation under the SRSA to provide services on the date of the Incident, and did not create the icy condition, Martinson is not a "landowner" under the Colorado Premises Liability Statute.

Safeway erroneously contends that Martinson was "solely responsible for the condition of the lot." Safeway Opening Brief, p. 27. If this were an accurate statement of the intent of the parties to the SRSA, language such to this effect could have been, and should have been, included in the document. The SRSA is void of any language placing Martinson under such an obligation. In fact, if this were the intention of the SRSA, there would be no need for the two inch

accumulation requirement, since Martinson would be obligated, under Safeway's interpretation, to provide services irrespective of whether and to what extent ice or snow had accumulated on the Property. Martinson would also be responsible for ensuring there were no pot holes, cracks, debris other hazardous conditions on the lot, in order to meet such an obligation. There is no indication in the SRSA that Martinson was responsible for an conditions in the lot other than those related to snow and ice removal, under the specific conditions expressed in the written contract. Safeway, as the landowner, has its own non-delegable duty and obligation to make the premises safe for its employees and customers, and this obligation is not extinguished by the SRSA. See *Teneyck v. Roller Hockey Colorado, Ltd.,* 10 P.3d 707, 709 (Colo. App. 2000), citing *Jules v. Embassy Properties, Inc.,* 905 P.2d 13 (Colo.App. 1995).

A plaintiff asserting a premises liability claim must still establish the elements of duty, breach, harm and causation, similar to a negligence claim. See *Vigil v. Franklin,* 103 P.3d 322, 328 (Colo. 2004). See also *Henderson v. Master Klean,* 70 P.3d 612 (Colo.App. 2003) (plaintiff must show the following in order to prevail on a premises liability claim: 1) the landowner's actual or constructive knowledge of a danger; 2) the landowner's failure to exercise reasonable care unreasonably; and 3) resulting damage to the plaintiff). In this case, Martinson

cannot be a landowner under the premises liability statute unless, or until, its contractual obligation under the SRSA is invoked.

Safeway further contends that "Martinson's contractors were in actual possession of, and responsible for the condition of the sidewalks and the parking lot, to the exclusion of Safeway employees." Safeway Opening Brief, p.36. Safeway has never provided any evidence to establish that Martinson's services were exclusive, and that Safeway employees were instructed or otherwise required to not provide snow removal and ice abatement for the sidewalks and parking lot in situations where Martinson's contractual obligations were not invoked. In addition, Martinson's work on the date of the Incident prior to Arellano's fall was limited to the sidewalk areas, and did not extend into the parking lot.

The Colorado Premises Liability Act sets forth the circumstances under which a "landowner" may be held liable for the condition of or activities conducted on its property. In this case, absent a duty to provide services on the date of the Incident, Martinson was not a "landowner" under the statute.

E. The trial court correctly interpreted the indemnification provision in the ICA in finding that it did not apply to this lawsuit.

The contract at issue between Safeway and Martinson is a "Snow Removal Service Agreement" for Martinson to remove snow from the Safeway store's parking lot. The first page of the SRSA includes an indemnity clause which only

requires Martinson to indemnify Safeway for Martinson's negligent conduct and gives Martinson the right to defend itself against any claims against Safeway for which Safeway demands indemnity. Record at ID000083, p. 2. This indemnity clause ("SRSA Indemnity Clause") specifically provides:

> [Martinson shall] indemnify and hold harmless from and against all claims, demands, actions or losses, that may arise or be asserted for injuries, damage, or loss received or alleged to have been received or incurred by any person, including employees of Safeway as a result of willful or negligent conduct on Safeway's premises, en route thereto, or departing therefrom, in performing said services. Contractor shall have the right to defend any such claim, demand, or action and Safeway shall not compromise same without Contractor's consent.

Id. Safeway's Motion fails to acknowledge the SRSA Indemnity Clause, and instead cites an indemnity clause found in a separate contract entitled "Independent Contractor Agreement" ("ICA indemnity clause.") Record at ID000083, p.6. In the ICA, Martinson only (1) acknowledges it is an independent contractor and cannot pursue a claim for workers' compensation against Safeway and (2) agrees to obtain workers' compensation insurance if it hires a subcontractor and provide proof of this insurance to Safeway. *Id.* The ICA does not create any snow removal duties because those duties come from the separate SRSA. The indemnity clause relied on by Safeway, and found in the ICA, states as follows:

> [Martinson] agree[s] to indemnify Safeway, Inc. and their agents and employees, and hold them harmless from and against any and all claims or causes of action of any sort arising out of or in connection

> with the performance of this contract or agreement, whether caused by the active or passive negligence of Safeway, Inc., unless caused by the sole negligence or willful misconduct of Safeway, Inc.

Id. Based on its plain language, the ICA Indemnity Clause cited by Safeway does not apply to the SRSA because the SRSA contains its own indemnity clause which only requires indemnification if Martinson willfully or negligently caused Arellano's alleged damages, and Martinson had an opportunity to defend itself against Arellano's worker's compensation claim. Safeway did not establish that Martinson negligently caused Arellano's alleged damages, nor did it establish that Martinson was allowed its contractually required opportunity to defend itself against the underlying claim, and therefore denial of Safeway's Motion by the trial court was appropriate.

Courts must give effect to the plain language of indemnity clauses. *Mid Century Ins. Co. v. Gates Rubber Co.*, 43 P.3d 737, 740 (Colo. Ct. App. 2002). However, to the extent any ambiguity exists in an indemnity clause, courts resolve ambiguities against the party seeking indemnity. *Williams v. White Mountain Constr. Co.*, 749 P.2d 423, 426 (Colo. 1988).

Here, the indemnity clause cited by Safeway from the ICA clearly states it applies only to claims "arising out of or in connection with the performance of this contract or agreement." Record at ID000083, p.6. Plainly, "this contract or

agreement" is the ICA. The ICA only requires Martinson to acknowledge it is an independent contractor, that it obtain workers' compensation insurance for subcontractors, and that it provide a copy of this insurance to Safeway. *Id.* As such, the ICA Indemnity Clause bears no relevance to this suit. Furthermore, although the ICA Indemnity Clause contains no ambiguities, the Court must construe any perceived ambiguities against the party who seeks indemnity, which in this case is Safeway. *Williams,* 749 P.2d at 426.

As in its underlying Motion for Summary Judgment, in its Opening Brief Safeway does not mention or otherwise address the indemnity clause found on the first page of the SRSA. See Safeway Opening Brief, pp. 28-34. This indemnity clause only requires Martinson to indemnify Safeway for claims resulting from Martinson's willful or negligent conduct. Record at ID000083, p. 2. The SRSA further specifies Martinson has the right to defend itself against any claim for which Safeway demands indemnity, and Safeway cannot compromise this right without Martinson's consent. *Id.* Safeway bears the burden of establishing these elements based on undisputed facts. *See Keenan*, 731 P.2d at 712.

As discussed above, the SRSA's indemnity clause's explicit language only requires Martinson to indemnify Safeway if the claim against Safeway results from Martinson's negligent conduct. Safeway provided no evidence to establish that

Martinson acted negligently or that its negligence caused the underlying claim in its Motion for Partial Summary Judgment. Martinson only contracted to remove snow when the "snow depth is 2" or more and still snowing." The SRSA does not require a permanently ice free parking lot - an obviously impossible goal in a Colorado winter. In fact, Safeway did not contract for ice removal; Safeway contracted for "snow removal" and, even then, only removal of significant accumulations of snow. Record at ID000083. Since Safeway did not present any evidence, much less undisputed facts, suggesting Martinson acted negligently and that its alleged negligence caused Arellano's underlying claim, the trial court properly denied Safeway's Motion for Partial Summary Judgment.

The applicable indemnity clause found in the SRSA further includes an unambiguous precondition to indemnity which guarantees Martinson the right to defend itself against any underlying claims and prohibits Safeway from abrogating this right without Martinson's express consent. Record at ID000083, p.2. Safeway admits to settling the underlying worker's compensation claim with Arellano, but states no facts demonstrating that Martinson had an opportunity to defend itself in the underlying claim, or that it consented to the settlement. Safeway has provided no documentation evidencing that Martinson expressly consented to settlement of Arellano's underlying claim, as required by the SRSA's indemnity clause.

Therefore, since Safeway does not and cannot cite undisputed facts proving Martinson had an opportunity to defend itself in the underlying claim for which Safeway demands indemnity and Martinson consented to the abrogation of this contractual right, Safeway cannot demonstrate the SRSA permits a claim for contractual indemnity against Martinson.

F. The trial court did not abuse its discretion in awarding Martinson its costs as the prevailing party.

Plaintiff Arellano asked for further discovery prior to submitting its Response to Martinson's Motion for Summary Judgment. A significant amount of additional discovery was conducted after Martinson filed its Motion, and before Arellano filed its Response to Martinson's Motion. Martinson was required to participate in this discovery, as well as discovery to prepare the case for trial.

Safeway has provided no assertion that the costs awarded were unreasonable, or excessive. Rather, Safeway contends that because the facts developed during the discovery requested by Arellano were not ultimately used by the Court in granting the Martinson Motion, that Martinson should not be awarded these costs. In Colorado, costs are recoverable by the prevailing party. See C.R.C.P. 54(d) and C.R.S. § 13-16-105. Safeway does not dispute that Martinson was the prevailing party in the litigation, based upon the Court's Order.

Facts developed during discovery confirmed the previously stated undisputed fact that less than two inches of accumulation of snow had occurred on the date of the Incident prior to the Plaintiff's fall, which was a necessary fact in the Court's determination that Martinson did not have a duty under the SRSA to perform services on the date of the Incident. In addition, Martinson's participation in the discovery was not optional, as it had an obligation to defend the case while awaiting Arellano's Response to its Motion for Summary Judgment, and awaiting the trial court's ruling.

Safeway has not demonstrated that the trial court abused its discretion in awarding Martinson's litigation costs as the prevailing party, and therefore the trial court's award should be upheld.

V. CONCLUSION AND REQUEST FOR COSTS.

Martinson respectfully asks this Honorable Court for an award of its costs incurred in defending this Appeal, in the event the Court affirms the trial court's findings in this case.

Based upon the foregoing, Martinson Snow Removal, Inc. respectfully requests this Court affirm the trial court's Order of December 26, 2008, dismissing all claims asserted against Martinson in this matter, in which the trial court found Martinson did not owe a duty under its contract with Safeway on the date of the

Incident, and for such further relief as the Court may deem proper pursuant to C.A.R. 38(d) and C.A.R. 39.

Respectfully submitted this 2nd day of September, 2009.

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/s/ Barbara J. Stauch

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Court of Appeals, State of Colorado **2 East 14th Avenue, Denver, CO 80203** Adams County District Court Trial Court Judge: The Honorable John T. Bryan Case Number: 2008 CV 44 **Appellant(s): Safeway, Inc. and Michael Arellano** **v.** **Appellee(s): Martinson Snow Removal, Inc.**	▲ **COURT USE ONLY** ▲
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CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

■ It contains 9235 words.

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☐ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.____), not to an entire document, where the issue was raised and ruled on.

■For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/ Barbara J. Stauch

Signature of attorney or party

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2009 a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE MARTINSON SNOW REMOVAL, INC.** was filed Lexis/Nexis File & Serve to the following:

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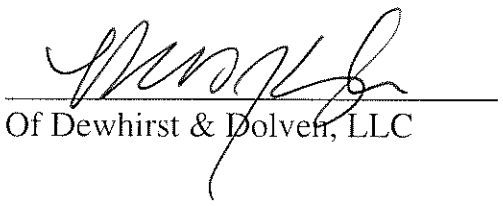

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