COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
APPEAL FROM: Adams County District Court Judge John T. Bryan Case No. 2008CV44 Party Initiating Appeal: Safeway Inc. **Plaintiffs-Appellants:** Safeway Inc. and Michael Arellano, v. **Defendant-Appellee:** Martinson Snow Removal, Inc.	▲ COURT USE ONLY ▲
Attorneys for Appellant Plaintiff Safeway Inc.: Douglas A. Thomas (#23415) Ian Ray Mitchell (#34887) Thomas Pollart & Miller LLC 5600 South Quebec Street, Suite 220-A Greenwood Village, CO 80111 Telephone: (720) 488-9586 Facsimile: (720) 488-9587 Email: dthomas@tpm-law.com Email: imitchell@tpm-law.com Certification of Word Count: 7948	Case Nos.: 09CA0271 & 09CA0560
PLAINTIFF-APPELLANT SAFEWAY INC.'S OPENING BRIEF	

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).

It contains 7948 words.

It does not exceed 30 pages.

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

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, not to an entire document, where the issue was raised and ruled on.

THOMAS POLLART & MILLER LLC

Ian Ray Mitchell

Attorney for Plaintiff-Appellant Safeway Inc.

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STATEMENT OF THE ISSUES

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2) Did the trial court err in denying Safeway Inc.'s Motion for Directed Verdict and determining the indemnification provision contained in Exhibit C was not applicable?

3) Did the trial court err in awarding costs to the Defendant Martinson Snow Removal, Inc.?

STATEMENT OF THE CASE

Mr. Michael Arellano slipped and fell in Safeway's parking lot on January 20, 2006. Mr. Arellano was employed by Safeway Inc. ("Safeway") at the time and filed a workers' compensation claim against Safeway for which Safeway has paid benefits under the Colorado Workers' Compensation Statute. Safeway had contracted with Martinson Snow Removal, Inc. ("Martinson") to perform snow removal and ice abatement services prior to Mr. Arellano's fall. Safeway requested indemnification for the benefits paid to Mr. Arellano from Martinson under the Snow Removal Services Agreement ("SRSA"). Martinson refused to indemnify Safeway. Safeway filed a complaint against Martinson alleging breach of contract, indemnification and liability under a premises liability claim pursuant to C.R.S. § 8-41-203 and C.R.S. § 13-21-115.

Martinson filed a Motion for Summary Judgment alleging: 1) it had no knowledge of the dangerous condition of the snow and ice on the property; and 2) It argued there was no evidence that it, "failed to remove snow in the parking area after two inches had accumulated, as required by the contract." *(Defendant Martinson Snow Removal, Inc.'s Motion for Summary Judgment and Memorandum Brief in Support Thereof, CD page 312 of 1065).*

In its December 26, 2008 Order, the trial court granted Martinson's Motion for Summary Judgment and Dismissed Plaintiffs' claims. The trial court found that there was a condition precedent to Martinson's performance (the accumulation of two inches of snow) which did not occur and therefore, Martinson owed no duty to Safeway under the contract or to Safeway and Mr. Arellano under a theory of premises liability.

Safeway also filed a Motion for Partial Summary Judgment on whether the indemnification language contained in "Exhibit C" of the SRSA between Safeway and Martinson was enforceable. The trial court determined "Exhibit C" was not a part of the SRSA and was inapplicable. The trial court found a different indemnification provision in the SRSA was applicable, but that a question of material fact precluded summary judgment in Safeway's favor. Safeway filed both a Motion for Reconsideration on the granting of Martinson's motion and a Motion for Directed

Verdict on Safeway's Motion for Partial Summary Judgment.

STATEMENT OF THE FACTS

Safeway operates retail grocery stores along the Front Range. Safeway does not use its own employees to maintain or remove snow and ice from its parking lots and walkways at its grocery stores; rather, it contracts with maintenance companies to perform those services. On October 1, 2005, Safeway contracted with Martinson for snow and ice removal for the subject retail grocery store located at 6775 W. 120th Avenue Broomfield, Colorado 80020. *(Exhibit F to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 889 of 1065).*

As part of that agreement, Martinson executed a document titled Independent Contractor Agreement, which was referred to as Exhibit C to the SRSA *(Exhibit F to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 893 of 1065)* which specifically states:

> For and in consideration of the privilege of performing certain agreed upon or contracted for services on behalf of Safeway Inc., I/we agree to indemnify Safeway Inc. and their agents and employees, and hold them harmless from and against any 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.

SUMMARY OF THE ARGUMENT

The trial court erred in granting Martinson's Motion for Summary Judgment. The trial court misinterpreted the SRSA and failed to recognize that Martinson had a duty under the contract to perform services and to do so in conformity with the contractual provisions and to do so without negligence; regardless of a two inch snow accumulation condition either: 1) expressly under the contract clauses; 2) based on Safeway's standing request to perform ice abatement when less than half an inch of snow was present; 3) by assuming the duty; or 4) waiving the condition relied upon by the trial court.

The trial court also erred in granting the motion for summary judgment because material facts were in dispute as to whether Martinson had a separate duty under the Premises Liability Statute to Mr. Arellano and thus to Safeway. The trial court misapplied the law and misinterpreted the contract when it determined Martinson owed no duty to indemnify Safeway under the contract.

The costs and fees asserted by Martinson were inappropriately awarded because they bared no relation to the motion for summary judgment.

ARGUMENT

C.A.R. 28(k) Citations

Pursuant to C.A.R. 28(k) the appropriate standard of review of the trial court's order granting summary judgment to Defendant Martinson is *de novo*. Martini v. Smith, 42 P.3d 629, 632 (Colo.2002). Pursuant to C.A.R. 28(k) the appropriate standard of review of the trial court's denial of Safeway's Motion for Judgment as a Matter of law as it applies to a question of law not fact. We review a motion for directed verdict de novo. Fair v. Red Lion Inn, 943 P.2d 431 (Colo.1997); Brossia v. Rick Constr., L.T.D. Liab. Co., 81 P.3d 1126 (Colo.App.2003). Additionally, appellate review was preserved when Safeway filed its Motion for Judgment as a Matter of Law pursuant to C.R.C.P. 59(e). *(Plaintiff Safeway Inc.'s Rule 59(e) Motion for JNOV, CD page 670 of 1065)*. An award of costs to the prevailing party is within the trial court's discretion and will not be overturned absent a clear abuse of that discretion. Mullins v. Kessler, 83 P.3d 1203, 1205-06 (Colo.App.2003).

A. The Trial Court Erred in Granting Martinson's Motion for Summary Judgment Based on a "Two Inch Snow Requirement".

1. Scope of Defendant's Duty

The trial court's December 26, 2008 order relied specifically on Henderson v.

Master Klean Janitorial, Inc., 70 P. 3d 612 (Colo.App.2003) to analyze the scope of the Defendant's duty under the contract for the purposes of Plaintiffs' premises liability claims. The facts of both cases are distinguishable. The SRSA created broader duties on the part of Martinson then were imposed on the contractor in Henderson. Additionally, in Henderson, the contractor actually discharged his duty by "spot" checking the area just prior to the injured party's fall and discovered no dangerous condition as required under the contract. *Id.* at 616. Here, the dangerous condition was discovered by Martinson, however, no warnings or actions were taken to minimize the hazard and Martinson had a duty to do so.

Martinson admitted the following:

1. Martinson's agents were on the premises just prior to the incident;
2. Mr. Lunde (Martinson's Vice President in charge of Operations) had personally determined ice-abatement was necessary either on the night of January 19, 2006 or on the morning of January 20, 2006;
3. A liquid De-Icer Truck was called to perform de-icing services on the premises because of the condition;
4. Morning services were to occur prior to 7:00am;
5. Nothing precluded Martinson from de-icing or placing warning signs prior to Mr. Arellano's fall.

(Exhibit F to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 889 of 1065, and Exhibit C to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 855 of 1065).

Unlike the contractor in Henderson, Martinson was not simply charged with "spot" checking the parking lot, instead, the SRSA provided that Martinson **shall** make additional visits and perform additional services when necessary **and/or** when requested by Safeway. *(Exhibit F to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 890 of 1065).*

Pursuant to the SRSA, Martinson allegedly visited the premises, determined ice abatement was necessary and requested ice abatement services be done by its own subcontractor. Martinson was still negligent, however, when it failed to take any action upon discovering the dangerous and hazardous condition of the parking lot as early as 5:30 am on January 20, 2006 when its agents were on site; and it failed to inform its subcontractor to begin de-icing the area due to the hazardous condition prior 7:00 am. *(Exhibit D to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 887 of 1065).* Martinson also failed to provide any type of warning regarding the condition or notify any Safeway employees that the icy conditions would not be dealt with that morning.

2. Contractual Provisions

The trial court found and Martinson argued that the following contractual provisions were not ambiguous and required Martinson to perform ice abatement at the

subject location only after the condition precedent of an accumulation of two inches of snow. The following is the disputed language of the SRSA for the purposes of Martinson's duties:

> Each Safeway premise shall be served for snow removal, when the snow depth is 2" or more and still snowing. All snow is to be plowed to the lowest spot on the parking lot, unless otherwise stated by the store manager. The curbs should be blown thoroughly and sidewalks shoveled, as directed.[1]
>
> Contractor's representatives shall make additional visits and perform additional services as necessary and/or upon request by a designated Safeway representative. Contractor's services shall be performed so as to minimize interference with Safeway employees and other persons in or about the premises served.[2]

(Exhibit F to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 890 of 1065).

To determine the meaning of a contract, courts are guided by the general rules of contract construction and should seek to give effect to all provisions so that none will be rendered meaningless. Roberts v. Adams, 47 P.3d 690, 694 (Colo.App.2001). Any construction that would render any clause or provision unnecessary, contradictory, or insignificant should be avoided. Sulca v. Allstate Ins. Co., 77 P.3d 897, 899 (Colo.App.2003). The trial court rendered the Second Clause, meaningless by finding

1. This clause is referred to as the "First Clause" throughout this brief.
2. This clause is referred to as the "Second Clause" throughout this brief.

that Martinson only had a duty if, and only if, two inches of snow fell.

The trial court's narrow reading of the SRSA failed to interpret the plain language of the contract and imposed limitations that were not present within the four corners of the document. The trial court's order states, "[D]efendant had no legal duty to inspect or perform operations on the parking lot area absent a specific request from Safeway or a snow accumulation of more that two inches." *(Exhibit A to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 799 of 1065).*

The SRSA's language is directly contradictory to the trial court's finding that Martinson had no independent duty to make additional visits and perform additional services as necessary. The trial court failed to consider the language of the Second Clause which includes "and/or". Martinson argued the "and/or" language in the Second Clause can only mean additional services were required when necessary **and** when requested by Safeway. The phrase "and/or" means either "and" or "or" or both. Denver-Metro Collections, Inc. v. Kleeman, 491 P.2d 64, 66 (Colo.Appl.1971). Therefore, Martinson was to perform additional services after inspection if needed regardless of whether Safeway specifically requested them, and irrespective of a two inch accumulation condition. The term "shall" denotes mandatory compliance. (*See* RCS Lumber Co. v. Sanchez, 316 P.2d 1045, 1047 (Colo.1957). Therefore,

Martinson's duty to make visits when less than two inches of snow fell was mandatory as was ice abatement services when they were necessary. Here, even Martinson must concede the services were necessary because they requested that their subcontractor perform ice abatement. *(Exhibit C to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 855 of 1065).*

Safeway contends that Martinson was performing services under the Second Clause and therefore had a duty to abide by the requirements of the SRSA and to perform its services without negligence.

Martinson independently determined the subject lot needed ice abatement services as early as January 19, 2006. This is supported both by Martinson's own invoice for services and the testimony of its subcontractor/agent Douglas Swink. *(Exhibit D to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 887 of 1065, and Exhibit C to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 855 of 1065).*

The trial court's reliance on the "2 inch snow accumulation" language ignores and extinguishes Martinson's duty to inspect the premises and abate dangerous conditions such as those that existed on January 20, 2006. By ignoring the Second Clause, the trial court inappropriately determined the provision was unnecessary,

contradictory or insignificant. This failure to address to specific contractual language in the Second Clause is expressly in conflict with Sulca v. Allstate Ins. Co, supra. The trial court's interpretation rendered the Second Clause meaningless and wholly failed to account for Martinson's actual performance undertaken the Second Clause.

The fact that Martinson attempted to perform, and performed negligently, does not support the trial court's interpretation that Martinson had no duty to perform on the date of the incident. Martinson was not performing complimentary services outside the terms or its duties under the SRSA.

The two clauses are separate and distinct, and even if ice abatement services are contemplated under the First Clause, the Second Clause is not a more general description of Martinson's duty, nor is it limited or tied to the First Clause. The Second Clause unambiguously requires Martinson to visit the property and perform additional necessary services.

Martinson had agents on the property prior to Mr. Arellano's fall and took no steps to either warn patrons of the hazard or to abate the ice in the parking lot. Martinson merely waited for the subcontractor, who performed services well beyond the time contemplated under the SRSA. *(Exhibit F to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 892 of 1065).*

3. Safeway specifically requested services without regards to the two inch snow requirement.

Alternatively, Safeway did specifically request services be performed when less than a half inch of snow had fallen. The trial court's order states, "[D]efendant had no legal duty to inspect or perform operations on the parking lot area absent a specific request from Safeway..." Martinson was fully aware through its course of dealings with Safeway that: 1) Inspection of the lot was required for even a "half inch" accumulation; and 2) that performance of ice abatement was required when less than two inches of snow accumulated.

Defendant's Vice President of Operations, Chad Lunde, testified at his deposition that he was aware of the fact that Safeway required snow removal services and ice abatement without regard to the 2 inch requirement and that he personally determined ice abatement was needed on January 20, 2006. The following portions of Mr. Lunde's deposition support Safeway's position that Martinson's duties were broader than those relied upon by the trial court in reaching its conclusion:

> Q: We can all agree that Martinson...did perform snow-removal services out at the Safeway Store on 01/20/06, correct?
> A: Yes.
> Q: And Martinson is not saying today that they shouldn't have been out there because it wasn't snowing, pursuant to the contract, are they?

A: No.
Q: Martinson charged Safeway for snow-removal services on that day, didn't they?
A: Yes. Mary Solak is the Safeway lady, and I talk to her a lot, and I know what she expects or want.
Q: Tell me what she expects – does she work at the store?
A: Yes. She works at Safeway. She doesn't work at that exact building.
Q: Is she –
A: She's the Safeway property manager.
Q: What does she expect and want that would have sent Martinson…to the property on 01/20/06?
A: **If there's a half-inch or some snow on the sidewalk, to go to it, and 2 inches to plow the whole lot…**
…
Q: And that would include, with this half-inch of snow, Doug Swink [Subcontractor] to drive up and down the drive lanes with his ice melt truck?
A: Yes, we do that.

(Exhibit B to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, pp. 55-56, CD page 814 of 1065).

Not only did Mr. Lunde admit that deicing the parking lot was a part of Martinson's expected performance under the SRSA, as had been previously communicated by Safeway's Property Manager Mary Solak, Mr. Lunde admitted that when a half-inch of snow was present, Martinson performed de-icing services on the parking lot. This sworn testimony is in direct conflict with the trial court's conclusions.

Mr. Lunde further admitted at his deposition that the Second Clause required Martinson to perform ice abatement on the parking lot in question on January 20, 2006 regardless of snow accumulation amounts.

> Q: Let's go to the second paragraph here under B. Can you read that for me? It says, "Contractor's"
> A: Contractor's representatives shall make additional visits and perform additional serves as necessary and/or upon request by a designated Safeway representative."
> Q: Now, concerning that paragraph, that's why you make the snow removal and ice melt amount to be when there's only half an inch at this property because you know that what [Safeway] want, pursuant to your customer service, correct?
> A: Yes.
> Q: That's why you did it on that day?
> A: Yes.

(Exhibit B to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, pp. 58-59, CD page 815 of 1065).

Mr. Lunde further testified that he, as Vice President of Operations, determined as required under the SRSA that services were necessary and requested that deicer be placed on the parking lot on January 20, 2006.

> Q: If we had question about how the deicing was placed down, Doug at Extreme Week Control would be the person who could answer those questions because he was actually there on-site, allegedly, performing those services?
> A: One of his employees. **I tell them if they're going to spray or not. I tell them to spray, not spray.**
> Q: It was your understanding, though, that morning on 01/20/06 that they were **supposed to spray the parking lot**

at the Safeway store on 120th?
A: Yes, I would have told them per a phone cal to go spray.
Q: And you did, didn't you?
A: Yes.

(Exhibit B to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, pp. 70-71, CD page 818 of 1065).

Chad Lunde testified that he was given a standing request by a Safeway representative (Mary Solak), prior to January 20, 2006, to perform snow and ice removal services when less than two inches of snow accumulated on the premises. The undisputed facts show Safeway had requested that the services be undertaken by Martinson regardless of the two inch snow requirement. Martinson had a duty to do so under the terms of the SRSA and to do so without negligence.

It is beyond argument that in Colorado snow and ice removal services and specifically ice abatement services will become necessary without an accumulation of two inches of snow. Safeway and Martinson directly addressed this type of circumstance in the language of the Second Clause. Safeway specifically requested, as was its right under the Second Clause, that Martinson perform under the contract even in the event of less than two inches of snow accumulation.

Even if Safeway's standing request for ice abatement is disputed, it would remain a material question of fact that precludes summary judgment.

4. Martinson Assumed the Duty to Perform on January 20, 2006

Alternatively, Martinson assumed the duty by attempting to perform services for Safeway; whether that performance was done negligently is a question of fact for the jury. Thus, the trial courts determination that Martinson owed no duty was error.

An assumed duty may arise if 1) a defendant promises or **undertakes affirmative acts to render a service** to the plaintiff that was reasonably calculated to prevent the type of harm that befell plaintiff, and 2) plaintiff relies on the defendant to perform the service or defendant's undertaking increased plaintiff's risk. Jefferson County School District R-1 v. Justus, 725 P.2d 767 (Colo. 1986).

It is undisputed Martinson undertook to perform snow removal and ice removal from Safeway's parking lot on January 20, 2006. *(Exhibit D to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 887 of 1065).* It is further undisputed that Defendant's Vice President of Operations, Chad Lunde, requested that those services be performed for Safeway to reduce and mitigate the hazardous condition of the icy parking lot.

It was shown that Martinson knew ice abatement was expected by Safeway and that Safeway relied on Martinson to perform those services regardless of whether two inches of snow accumulated on the lot. Because both prongs of the assumed duty

doctrine as described in Justus have been met by Martinson's undisputed conduct and by Safeway's reliance on Martinson's performance.

It is undisputed that Defendant knew that it was to begin services no later than 5:00 am and have them completed by 7:00 am. *(Exhibit F to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 892 of 1065).* It is undisputed that Martinson knew or should have known of the condition of the premises either the night of January 19, 2006 or at least by 4:30 am on January 20, 2006 when Martinson's agents were on site. It is also undisputed that nothing would have prevented Martinson's subcontractor from commencing deicing services at the subject store as contemplated by the SRSA by 5:00 am. *(Exhibit C to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, pp. 43-44, CD page 866 of 1065).*

If the SRSA did not include a duty on the part of Martinson, then alternatively, both prongs of the assumed duty doctrine are met as a matter of law. The two inch snow accumulation clause should have no effect on the court's analysis. It is anomalous to suggest a party could conduct services outlined in a contract and charge for those services, but then avoid all liability if their conduct was negligent.

5. Waiver by Conduct

Martinson waived any two inch accumulation condition and therefore the trial

court erred in limiting Martinson's duties under the contract or under the premises liability statute. Waiver is, "the intentional relinquishment of a known right or privilege." Waiver may be express, or it may be implied when a party's actions manifest an intent to relinquish a right or privilege. However, in establishing implied waiver by conduct, "the conduct itself should be free from ambiguity and clearly manifest the intention not to assert the benefit." Dep't of Health v. Donahue, 690 P.2d 243, 247 (Colo.1984).

An express provision in a written agreement may be waived, either expressly or by implication. Ebrahimi v. E.F. Hutton & Co., 794 P.2d 1015 (Colo.App.1989). Such a waiver may be implied if a party engages in conduct which manifests an intent to relinquish the right or privilege or acts inconsistently with its assertion. Cooper v. First Interstate Bank of Denver, N.A., 756 P.2d 1017 (Colo.App.1988). And, the question of waiver is a question of fact which is also not normally appropriate for summary judgment. See Burman v. Richmond Homes Ltd., 821 P.2d 913 (Colo.App.1991).

A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. The determination of whether such a waiver has occurred is a question of law if the material facts are not in dispute. Sung v.

McCullough, 651 P.2d 447 (Colo.App.1982).

The trial court erred as a matter of law in allowing Martinson to stand on a right ("2 inch accumulation" condition) for which it did not enforce at the time of the incident, nor through its course of dealing with Safeway. Mr. Lunde's testimony as to his course of dealings and understanding of the agreement are sufficient to show that Martinson knowingly waived its right not to perform. If any dispute remains regarding Martinson's waiver, then it is a material question of fact, as to whether waiver occurred and must be determined by a jury. *Id.*

"A party always has the option to waive a condition or stipulation in his own favor." Reliance Life Ins. Co. v. Wolverton 88 Colo. 353, 358, 296 P. 793, 795 (Colo.1931) Although Reliance dealt specifically with an insurance company's waiver of a insured's "condition" of providing premium payments, the principle remains the same. In Reliance, the insurance company refused to provide coverage arguing that it had not received premium payments when they had become due. The insured successfully argued that the insurer had waived that condition by accepting late premium payments.

Martinson waived any snow accumulation condition by expressly and affirmatively providing services to Safeway. Martinson cannot now rely upon a

condition triggering performance when it chose to perform.

Martinson's performance, course of prior dealings and its executive's testimony are properly considered in interpreting the contract as extrinsic evidence.

"In Colorado, [the courts] have adopted [a] more flexible approach. [The courts] may consider extrinsic evidence bearing on the meaning of the written terms such as evidence of local usage and of the circumstances surrounding the making of the contract. Ad Two, Inc. v. City and County of Denver, 9 P.3d 373, 380 (Colo. 2000)(dissent citing Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229, 1235 (Colo. 1998)(holding that extrinsic evidence may be introduced to determine whether a deed is ambiguous)).

Whether the second clause of the agreement required ice abatement services, on January 20, 2006, can be interpreted on its face differently, evidencing a potentially ambiguous contractual clause. Whether the presence of Martinson's agents was an "additional visit" under the contract and whether ice abatement was a "necessary" service that morning is a factual dispute (although this appears conceded by Martinson).

If Martinson had no duty under the First Clause of the contract relied upon by the trial court then its actual performance of services must have been done under the

Second Clause. Although Martinson's actual performance is outside the four corners of the contract, Martinson's performance bears directly on the meaning of the Second Clause. The parties conduct (actual performance) must be considered, just as local usage or other circumstances surrounding the making of the contract to determine whether the Second Clause was ambiguous. Here too, the nature of the contract, and the type of services contracted for must be considered in determining the intent of the parties. The type of services noted in the contract, and specifically ice abatement, was considered a possibility absent two inches of snow accumulation as evidenced by the parties actions.

Mr. Lunde's testimony is proper extrinsic evidence on whether the Second Clause was ambiguous and whether Martinson was under a duty to perform and is also properly considered by the court on the issue of whether Safeway triggered the second clause by making a standing request to Mr. Lunde.

B. Martinson was a landowner pursuant to C.R.S. § 13-21-115(1) and Owed a Duty to Mr. Arellano and to Safeway

Unlike the Defendant in Henderson, where the janitorial company was not actually in possession of the stairwell, 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 and therefore had a duty under C.R.S. § 13-21-115(1). Martinson also had a duty under the contract to perform "additional services as necessary".

The Premises Liability Statute sets forth when a "landowner" may be held liable for the condition of or activities conducted on its property, Casey v. Christie Lodge Owners Ass'n, 923 P.2d 365 (Colo.App.1996), and provides the exclusive remedy against a landowner for injuries sustained on the landowner's property. Thornbury v. Allen, 991 P.2d 335 (Colo.App.1999).

Under § 13-21-115(1), a "landowner" is defined as including, "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."

Similar to Henderson, Martinson was responsible for the condition of the parking lot which ultimately resulted in injury making it a "landowner" under C.R.S. § 13-21-115(1). Therefore, the trial court's conclusion that Martinson only owed a duty if two inches of snow fell is incorrect. Martinson was at the subject property and was solely responsible for the condition of the lot. Unlike the circumstances in Henderson however, Martinson breached its duty by failing to adequately abate the ice on the

property when it had the opportunity to do so.

C. The Trial Court Erred in Denying Safeway's Motion for Judgment as a Matter of law as it related to Partial Summary Judgment

1. Basis for Appeal

Generally, a denial of a motion for summary judgment is not a final determination on the merits and, therefore, is not an appealable interlocutory order. Manuel v. Fort Collins Newspapers, Inc., 631 P.2d 1114, 1116 (Colo.1981). However, in light of the court's granting of Martinson's motion for summary judgment in the same order, the court's order was a final determination. Additionally, Safeway preserved this issue for appeal by filing a Motion for Judgment as a Matter of Law pursuant to C.R.C.P. 59(e) as procedurally described in Feiger, Collison & Killmer v. Jones, 926 P.2d 1244, 1249 (Colo.1996). Therefore, Safeway is requesting review of the trial courts denial of its motion for judgment as a matter of law, which is appealable. Id. at 1250.

2. Martinson Was Required to Indemnify Safeway and the Indemnification Agreement was part of the SRSA

Martinson executed Exhibit C of the SRSA which included an indemnification clause, in which the parties intended to set their respective duties and liabilities with regards to performance of the snow removal services. *(Exhibit F to Plaintiff Safeway*

Inc.'s Reply in Support of Motion for Reconsideration, CD page 893 of 1065).

Agents for Martinson worked on the subject store on the morning of January 20, 2006, but did not complete the removal of snow and ice from the parking lot. *(Exhibit E to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 888 of 1065).* The agents did not erect any type of barrier or notice to alert or prevent store employees or store patrons to the inherent danger of the icy conditions.

Mr. Arellano filed a workers' compensation claim against Safeway for which Safeway has paid benefits. The trial court denied Plaintiff Safeway's motion for judgment as a matter of law as it related to partial summary judgment based on the trial court's determination that Exhibit C was a stand alone agreement entered in conjunction with the SRSA. *(Exhibit A to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 798 of 1065).* Thus, the Court found that "Exhibit C" was not incorporated into the SRSA by reference or clear implication.

The clear implication that the independent contractor agreement was part of the SRSA is not only in the primary clause of the indemnification provision itself, "For and in consideration of the privilege of performing certain agreed upon or contracted for services on behalf of Safeway Inc.," but was also understood to be a part of the entire agreement by Martinson's president and signatory of Exhibit C, as well as its

inclusion as an "exhibit". The "certain agreed upon services" are noted in the SRSA and no other agreements between Martinson and Safeway exist. The indemnification provision plainly refers to Martinson's snow removal services.

Additionally, the following pertinent statements were made by the President of Martinson, Larry Martinson at his deposition:

> Q: When you entered into [the Snow Removal Service Agreement] did you believe that Exhibit A and B were part of the contract?
> ...
> A: Yes.
> Q: On Exhibit B of the Snow Removal Service Agreement ... does that describe the services to be performed under this agreement?
> A: Yes.
> ...
> Q: Since Exhibit A and Exhibit B are part of the Snow Removal Services Contract, do you have any basis to suggest that Exhibit C is not part of this entire agreement?
> A: No.

(Plaintiff Safeway Inc.'s Rule 59(e) Motion for JNOV, CD pages 672-673 of 1065).

The trial court's determination that Exhibit C of the SRSA and its terms were not incorporated, included or tied to the snow removal services provided by Martinson is incorrect as a matter of law, given that the intention of the parties, as admitted to by

Martinson was that it was to be incorporated and included as part of the entire agreement and that the indemnification provision in Exhibit C was tied to Martinson's performance of snow removal services.

Mr. Martinson admitted it was the intent of the Defendant and Safeway to have Exhibit C incorporated into the service agreement, just as Exhibit A and Exhibit B are incorporated, it was incorrect for the trail court to determine that it was a separate agreement entered into by the parties with no connection to the overall services provided by Defendant. *(Exhibit A to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 796 of 1065, and Order Denying Motion for JNOV, CD page 1063 of 1065).*

Based on the undisputed testimony of Martinson's President, Larry Martinson, and the express language of the indemnification clause, Safeway Inc., argues that as a matter of law, Defendant must indemnify Safeway for its damages unless Safeway Inc. was solely negligent in causing Mr. Arellano's injuries.

Indemnification clauses which are clear and unambiguous must be enforced as written. Public Service Co. v. United Cable Television of Jeffco, 829 P.2d 1280 (Colo. 1992). The provision requires indemnification: 1) for "any claim" asserted against Safeway because of "any all claims or cause of action", 2) that "arises out of or in

connection with the performance of the contract" by Martinson Snow removal or its subcontractors: 3) except when the injury "is caused by the sole negligence or willful misconduct of Safeway."

As a matter of law, Mr. Arellano brought a claim "against Safeway because of an injury." See, e.g., May Department Stores Company v. University Hills, Inc., 824 P.2d 100 (Colo. App. 1991) (contractual indemnification provisions using the term "claim" means any assertion or demand); Titan Steel Corp. v. Walton, 365 F. 2d 542 (10th Cir. 1966) (indemnification language concerning "any claim" includes claim for workers' compensation benefits); Neustrom v. Union Pacific Railroad Company, 156 F.3d 1057 (10th Cir. 1998) (holding indemnification clause similar to Safeway's includes injuries to employees).

It is also undisputed Mr. Arellano's injury occurred in connection with the performance or lack thereof, of the work by Martinson or its agents. Having demonstrated, as a matter of law, that Mr. Arellano has brought a claim against Safeway for injuries occurring in connection with the services performed by Martinson, the burden shifts to Martinson to prove an exception. See, Rodriquez v. Safeco Insurance Company, 821 P.2d 849, 851 (Colo. App. 1991)(burden to prove exception rests the party asserting it). The only exception contained in the

indemnification provision is if Mr. Arellano's injuries occurred because of the, "sole negligence or willful misconduct of Safeway." In interpreting a similar indemnification provision, the Tenth Circuit Court of Appeals stated the "sole negligence provision carves out from the otherwise inclusive indemnification language the lone circumstance where the indemnity clause does not apply." Neustrom, 156 F.3d 1063.

The phrase, "sole negligence or willful misconduct of Safeway," is clear and unambiguous. *Id.* As the Tenth Circuit Court of Appeals stated, "The sole negligence phrase implies that all other negligence e.g., joint negligence, are included within the [indemnification language]." In other words, Martinson can escape indemnification only when Mr. Arellano's injuries are 100% attributable to Safeway's negligence. It is also undisputed that Martinson has not provided indemnification in relation to Mr. Arellano's claim even after being provided the opportunity by Safeway. Defendant has provided no evidence of any negligence attributable to Safeway. Therefore, the only issue remaining in regards to Safeway's indemnification and breach of contract claims between Safeway and Martinson is whether Safeway Inc. is 100% negligent; for which Martinson must carry the burden to prove.

Therefore, Safeway requests that its Motion for Judgment as a Matter of Law be

granted ant the remaining issues for trial on Safeway's indemnification claim are Safeway's damages and alternatively, Martinson's burden to show Safeway was 100% negligent.

D. Defendant's Bill of Costs Should Not have Been Awarded

Safeway disputes the reasonableness and necessity of those costs awarded by the trial court which were associated with the Depositions and Transcript costs asserted by Martinson. Martinson prevailed on Summary Judgment on the sole basis of contract interpretation conducted by the trial court, which determined that a condition precedent in the SRSA had not occurred and without such an occurrence, Martinson owed no duty to Plaintiff Safeway and owed no duty which sounded in tort to either Plaintiff Arellano or to Safeway.

The costs for deposition transcript fees and the depositions themselves were wholly unrelated to the issues relied upon by the court when it granted summary judgment. Because those costs were wholly unassociated with the basis for Martinson prevailing and therefore awarding them is an abuse of discretion. Alternatively, Safeway requests that the award of costs be reversed because Martinson was under a duty to perform services either under the contract or as a Landowner under C.R.S. 13-21-115.

CONCLUSION

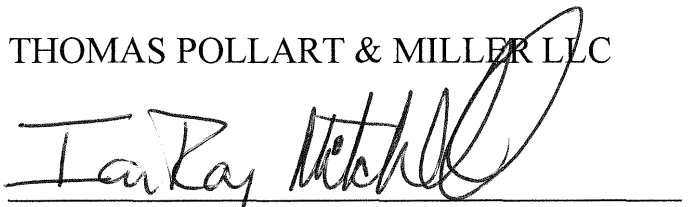
Appellant Safeway respectfully requests that the courts order granting Defendant Martinson's Motion for Summary Judgment be reversed and remanded. The court's determination that Defendant Martinson did not owe a duty to Safeway was error. Defendant Martinson owed a duty to Safeway to perform services without negligence on January 20, 2006 either expressly under the contract, as requested, as an assumed duty, or Martinson waived the condition precedent relied upon by the trial court.

The court's order denying Safeway's Motion for Judgment as a Matter of law pursuant to C.R.C.P. 59(e) should be reversed and remanded because the indemnification at issue was applicable to the circumstances of this case and Martinson is required to indemnify Safeway unless it is shown at trial that Safeway was 100% negligent in causing Mr. Arellano's and its own injuries.

The award of costs to Defendant Martinson should be reversed and remanded given the fact that Martinson did owe a duty to Safeway, and in the alternative the costs submitted by Martinson were unrelated to the Motion for Summary Judgment and therefore it was an abuse of discretion to award those costs.

Dated this 6th day of July, 2009.

THOMAS POLLART & MILLER LLC



Ian Ray Mitchell
Attorney for Plaintiff-Appellant Safeway Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2009, I served the forgoing **PLAINTIFF-APPELLANT'S OPENING BRIEF** via LexisNexis File & Serve to the following:

Clerk of the Court
Colorado Court of Appeals
2 East 14th Ave., Third Floor
Denver, CO 80203

Miles M. Dewhirst, Esq.
Barbara J. Stauch, Esq.
Dewhirst & Dolven, LLC
650 S. Cherry St., Ste. 600
Denver, CO 80246

Alan C. Shafner, Esq.
Kristin D. Sanko, Esq.
Fogel Keating Wagner Polidori & Shafner, P.C.
1290 Broadway, Ste. 600
Denver, CO 80203

and by delivering a courtesy copy of the foregoing **PLAINTIFF-APPELLANT'S OPENING BRIEF** via LexisNexis File & Serve to the following:

Judge John T. Bryan
District Court Judge
Adams County District Court
1100 Judicial Center Drive
Brighton, CO 80601

Original signature of Kim Brown on file at Thomas Pollart & Miller LLC

Kim Brown