

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

Case Nos.: 09CA0271 &
09CA0560

Certification of Word Count: 3922

PLAINTIFF-APPELLANT SAFEWAY INC.'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the 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:

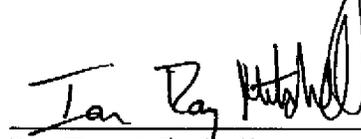
The brief complies with C.A.R. 28(g).

It contains less than 5,700 words, specifically 3,922 words.

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

The following brief incorporates the applicable standard of appellate review as noted in Safeway's Opening Brief.

THOMAS POLLART & MILLER LLC



Ian Ray Mitchell

Attorney for Plaintiff-Appellant Safeway Inc.

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I. INTRODUCTION

Martinson's Response Brief reiterates its belief under the trial court's ruling that it had no legal duty to either Safeway or Arellano in performing ice abatement services without negligence or by abiding by the contractual requirements on January 20, 2009. Martinson points to one portion of the Snow Removal Services Agreement ("SRSA") to the exclusion of all other applicable portions of the SRSA to denounce its duties under the agreement. However, Martinson performed snow removal services on the subject premises and requested its subcontractor to perform ice abatement services under the SRSA. Martinson had a duty and Safeway has alleged it breached that duty by performing in a manner inconsistent with the terms of the SRSA and by performing negligently by failing to address or warn of the dangerous icy condition.

The trial court's ruling that Martinson was under no duty to perform was an error of law and this Court should remand this matter so that Safeway may present evidence with respect to Martinson's breach of its duty and its negligence to a jury as, at a minimum, there remain genuine issues of material fact with regard to Martinson's breach of its duty to perform that must be determined at trial.

Furthermore, Martinson argues that Safeway's claims under the SRSA and arguments in the alternative outside the SRSA including waiver of a condition

precedent and assumption of duty are inapplicable. Martinson argues that because a party can only waive a “right” and not a condition of a contract, it could not have waived the two inch accumulation provision allegedly triggering performance. Martinson also argues that the assumed duty doctrine simply does not apply by suggesting this Court’s analysis of the assumed duty doctrine is restricted by the SRSA itself, and that Safeway did not rely on Martinson to render a service that was reasonably calculated to prevent the type of harm that befell Arellano and Safeway.

Additionally, Martinson ignores in its argument the clear intent manifested by the parties in attaching Exhibit C to the SRSA in attempting to avoid its own responsibilities under the indemnification provision.

II. ARGUMENT

Martinson goes to great lengths and repeatedly describes what it believes its duties were under the SRSA, and that its duty to perform services on the subject date did not arise absent two inches of snow accumulation. Martinson wholly fails, however, in reconciling its and the trial court’s reliance on the two inch accumulation condition by failing to answer or explain why Martinson representatives were on the property performing services, why Martinson had requested liquid de-icer be placed on the parking lot by its subcontractor, and why this occurred long after the time

contemplated under the SRSA. Those facts are in complete contradiction, if in fact, Martinson had no legal duty to abate the icy conditions absent two inches of snow.

Neither the trial court's reasoning nor Martinson's arguments address or withstand scrutiny when it remains undisputed that Martinson actually billed Safeway, under the terms of the SRSA, for services it now claims were not required to be performed. Additionally, Martinson argues that any negligence on its part for failure to act or to warn of the dangerous icy condition, which it was well aware of, is excused based on the same condition in the SRSA.

The general argument put forth by Martinson and relied upon by the trial court wholly ignores the undisputed facts of the events of January 20, 2006, the language of the SRSA, the parties' admissions with respect to requested services, and creates a legal fiction from which Martinson hopes to escape liability.

A. Contractual Language

Safeway, like Martinson, contends the contract is not ambiguous for the purposes of its position that Martinson owed a duty under the SRSA to perform ice abatement services on January 20, 2006. Martinson and the trial court, however, ignored the specific contractual language in which Safeway had a right to request additional services, such as those at issue here, which, as admitted to by Martinson's

vice president, Safeway had done pursuant to the SRSA prior to January 20, 2006. Martinson incorrectly argues that the intent of the parties cannot be inferred by conduct when in fact Safeway has merely presented admissions by Martinson regarding an express contractual provision which was triggered by Safeway and was received and acted upon by Martinson. Martinson's admissions that under the contract Safeway specifically requested services be performed at the subject store when even a half inch of snow accumulation occurred specifically is provided for under the SRSA. (*Exhibit B to Plaintiff Safeway Inc. 's Reply in Support of Motion for Reconsideration, pp. 55-56, CD page 815 of 1065*).

Thus, under the specific language of the contract, Safeway requested additional services be performed with respect to ice abatement and snow removal at a lower accumulation amount than relied upon by the trial court, and Martinson in its arguments and admissions under oath support the fact that it was aware it had a duty to perform. Martinson consented to perform these "additional services" as contemplated under the SRSA.

Second, even if Martinson could argue it was unaware of Safeway's prior standing request for additional services, it necessarily follows that it actually performed under the second clause noted below in the SRSA, requiring inspection and

performance after Mr. Lunde inspected the property the night before or that morning and determined additional services, including ice abatement, were needed. The provision at issue states:

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.¹

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

Martinson's performance of making an additional visit and performing the services contemplated under the above provision of the SRSA is evidenced by its actions and Mr. Lunde's testimony regarding his agents' presence and performance of services including Mr. Lunde's specific request that ice abatement measures be taken with respect to the parking lot. *(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).*

B. Within the Four Corners

Martinson argues in its Response that the SRSA provisions are not ambiguous

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

and require Martinson to perform ice abatement at the subject location only after the condition precedent of an accumulation of two inches of snow.

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).

Obviously, it is Safeway's contention, which is supported by the undisputed facts and admissions on record, that Martinson was performing services under the Second Clause, quoted above, on January 20, 2006. The undisputed evidence shows Martinson was attempting to perform under the contract and Martinson intended (and actually did) perform ice abatement services.

It was Martinson's failure to timely and adequately perform the ice abatement services or mitigate the dangerous condition of the parking lot, of which its agents on the property actually knew or should have known, and which Martinson had a duty to inspect, that ultimately caused Arellano's and Safeway's damages.

C. The Second Clause

The trial court and Martinson's reliance on the "two inch snow accumulation" condition ignores and improperly extinguishes Martinson's duty to inspect the premises and abate dangerous conditions such as those that existed on January 20, 2006. Ignoring the Second Clause effectively suggests 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 and Martinson's argument render the entire Second Clause quoted above meaningless and wholly fails to account for Martinson's actual performance undertaken under the Second Clause.

The fact Martinson attempted to perform, and performed negligently, does not now support the trial court's determination that Martinson had no duty to perform on the date of the incident, nor does it provide any evidence of gratuitous or complimentary services performed by Martinson outside the express contractual provisions.

Martinson argues that consideration of the Second Clause completely negates the two inch snow removal condition. However, as the SRSA unambiguously states, Safeway could at anytime and without limitation request additional services based on

the condition of the property. Safeway did so during the contract term and pursuant to the Second Clause as admitted to by Martinson. (*Exhibit B to Plaintiff Safeway Inc. 's Reply in Support of Motion for Reconsideration, pp. 55-56, CD page 815 of 1065*). Martinson's allegation that "Safeway presented no evidence that it specifically requested Martinson's presence on the date of the Incident prior to Arellano's fall," is simply a misstatement of the undisputed admissions made by Mr. Lunde during his deposition. Based on Martinson's own admissions and pursuant to the express contractual language Safeway did in fact place a standing request to Martinson to perform the disputed services on January 20, 2006.

D. Assumed Duty Doctrine

Martinson's argument that it could only assume a duty under the contract in writing fails to address Safeway's original position that Martinson's performance was undertaken under the contract. Martinson's performance was either undertaken as: 1) a direct result of Safeway's "standing request" for services under the specific clause at issue here; 2) Martinson performed under, the Second Clause by making an **additional visit and performing additional services**, giving rise to its duty to perform without negligence; or 3) Martinson assumed the duty to not perform negligently when it undertook the snow removal and ice abatement processes at the premises on the

morning of January 20, 2006.

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).

Martinson's position, relying on BRW, Inc. v. Duffice & Sons, Inc., 99 P.3d 66, 73 (Colo.2004), confuses two distinct issues: 1) the duty to perform and to do so without negligence; and 2) whether the "duty of care", or negligence standard, is specifically addressed under the contract. Martinson misapplies the Supreme Court's analysis on whether a defendant's "duty of care" is defined by contract as opposed to whether defendant undertook affirmative acts to render a service that was reasonably calculated to prevent the type of harm that befalls a plaintiff and whether plaintiff relied on the defendant to perform that service, ultimately giving rise to a duty to perform.

The assumed duty doctrine is not premised on an express contractual agreement. See Jefferson County School District R-1 v. Justus, supra. To the contrary, an assumed duty arises when there is no agreement. Therefore, Martinson's suggestion

that the assumed duty doctrine does not apply based specifically on the SRSA as opposed to its rendering of services confuses the issue. If, in fact, the SRSA was not triggered because of a two inch snow condition, then Martinson's rendering of services was conducted under an assumed duty and Martinson was to perform that duty under the appropriate standard of care.

Although the trial court determined the services provided by Martinson were somehow outside the SRSA or were gratuitous, this finding is incorrect as a matter of law based on Martinson's own admissions and actions when it choose to remove snow and ice from the parking lot. It is this undertaking that gives rise to the assumed duty. It is also clear that Safeway and Arellano both relied on Martinson to perform these services, and by failing to address the icy parking lot until much later than contemplated by the SRSA or warn of its condition, Martinson breached its duty. Therefore, under the assumption of duty doctrine, Martinson assumed the duty and whether that duty has been breached remains a genuine issue of material fact.

To the extent Martinson breached that duty under a general negligence standard or based in part on the provisions of the SRSA is a wholly separate issue from whether a duty existed in the first place.

It remains undisputed that Martinson's Vice President of Operations, Chad Lunde, requested that those services be performed for Safeway to reduce the hazardous condition of the icy parking lot and that his request to have a de-icer truck at the premises likely occurred on January 19, 2006. (*Exhibit B to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, pp. 70-71, CD page 819 of 1065*).

Martinson admitted that those services were expected to be done by Safeway's previous requests to Mr. Lunde and that Safeway relied on Martinson to perform those services regardless of whether two inches of snow accumulated on the lot. Under these undisputed facts, Martinson's duty was either assumed, or alternatively, was an express duty under the SRSA.

If, as argued by Martinson, the SRSA did not include a duty to perform on the part of Martinson on January 20, 2006, then alternatively, both prongs of the assumed duty doctrine are met as a matter of law.

Therefore, the two inch snow accumulation clause should have no effect on the Court's analysis. It is anomalous to suggest a party could undertake to perform services outlined in a contract yet arguably perform outside those contractual provisions and charge for those services but then avoid all liability if their conduct was negligent by arguing that its rendering of the services was not required by the contract

nor could any duty have been assumed when it performed.

E. Waiver by Conduct

Safeway has argued in the alternative that Martinson waived any pre-condition to performance under the contract by either performing under a separate provision of said contract or by waiving a pre-condition to performance.

Waiver is “the intentional relinquishment of a known right or privilege.” Dep't of Health v. Donahue, 690 P.2d 243, 247 (Colo.1984). 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.” Id.

Martinson attempts to avoid application of this legal theory by defining a condition, two inches of snow accumulation, as a “duty”. Martinson further argues that because a condition precedent to performance was referred to in the SRSA, it could not be waived.

The two inch requirement is a condition, which can be and was waived by Martinson. “A party always has the option to waive a condition or stipulation in his own favor.” Reliance Life Ins. Co. v. Wolverton, 296 P. 793, 795 (Colo.1931).

Based on the trial court's reasoning, Martinson was under no duty to perform any snow or ice abatement on the subject parking lot. Martinson further argues that under the express terms of the SRSA, it could not waive this condition. It has been recognized however, "[T]he parties to an agreement may modify that agreement at any time after its execution and even in a manner expressly forbidden by that agreement. James H. Moore & Associates Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367 (Colo.App.1994). In contract, waiver as a matter of law may occur when the contract establishes that an obligation by one party is a condition precedent to that of the other, and it is undisputed that the latter has proceeded in spite of the former's failure to fulfill the condition. See also Hart v. Dominion Insurance Co., 29 Colo.App. 404, 487 P.2d 826 (1971)(rev'd on other grounds). Although the condition here was related to the weather as opposed to an obligation on the part of Safeway, Martinson proceeded to provide services in spite of the failure of the condition to occur. Therefore, Martinson waived any two inch snow accumulation condition and the trial court's reliance on that provision was in error.

F. EXHIBIT "C"

The trial court erred as a matter of law when it determined Exhibit C and its indemnification language was a stand-alone agreement and was not to be treated as

part of the SRSA because it was not specifically referenced or that there was no clear implication that it applied to the SRSA. This is clearly wrong as a matter of law. Martinson's Response that because other indemnification provisions are contained in the SRSA negates the effectiveness of the indemnification agreement contained within Exhibit C is in error. Safeway has repeatedly asserted that Exhibit A, B, and C of the SRSA make up one agreement.

When an agreement between parties is contained in more than one instrument, those instruments must be construed together as though they comprised a single document. Chambliss/Jenkins Associates v. Forster, 650 P.2d 1315, 1318 (Colo.App.,1982)(citing Fuller & Co. v. Mountain States Investment Builders, 546 P.2d 977 (1975)).

If simultaneously executed agreements between same parties, relating to same subject matter, is contained in more than one instrument, documents must be construed together to determine intent as though entire agreement were contained in single document; although it is desirable for documents to refer to each other, there is no requirement that they do so. Bledsoe v. Hill, 747 P.2d 10 (Colo.App.1987)

Further, written documents containing ambiguities or unclear language must be construed in accordance with the intent of the parties, and relevant extraneous evidence

may be considered to resolve the factual question of the parties' intent. Chambliss/Jenkins, supra (citing Palipchak v. Kent Construction Co., 554 P.2d 718 (1976). “In appropriate circumstances, the parties' intent may be determined by construing together separate documents that pertain to the same subject matter, even if the documents are not executed by the same parties. This is particularly true of documents executed simultaneously.” E-470 Public Highway Authority v. Jagow, 30 P.3d 798, 801 (Colo.App.2001) (citing Powder Horn Constructors, Inc. v. City of Florence, 754 P.2d 356 (Colo.1988) and Ainsworth v. Colorado Division of Gaming, 973 P.2d 727 (Colo.App.1999)). Here, the document entitled Exhibit C was executed on the same date as the SRSA and specifically references the “certain agreed upon or contracted for services” noted in the SRSA. (*Exhibit F to Plaintiff Safeway Inc. 's Reply in Support of Motion for Reconsideration, CD page 893 of 1065*).

Here, based on the undisputed testimony of Martinson's President, Larry Martinson, which can be considered and wasn't in error by the trial court under Chambliss/Jenkins and the express language of the indemnification clause, Martinson must indemnify Safeway for its damages unless Safeway was solely negligent in causing Arellano's injuries. Because there is undisputed evidence that Martinson failed to timely perform its duties under the SRSA and because it failed to warn anyone

of the conditions existing at the time, it is undisputed that Safeway cannot be solely negligent for the incident and therefore the indemnification provision applies.

G. Premises Liability - Landowner

Martinson was responsible for the condition of the premises at the time of Arellano's fall and therefore was a landowner under C.R.S. §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."

Although Martinson was not responsible for the snow falling as it notes in its Response, it alleges that it was not conducting an activity at the time of the accident and therefore was not a landowner. This is incorrect on two grounds. First, the icy conditions of the parking lot were specifically created by Martinson's failure to address the parking lot within the time frame contemplated under the SRSA. Although it had planned to de-ice the parking lot, it did not notify its subcontractor to have the work completed by 7:00 a.m. (*Exhibit D to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 887 of 1065*).

Second, Martinson's bill to Safeway shows that its agents were on the premises conducting services from 4:30 a.m. to 5:30 a.m., from 5:30 a.m. to 6:30 a.m., and the liquid de-icer records note that Martinson's agent was there from 7:30 a.m. to 8:30 a.m. (*Exhibit E to Plaintiff Safeway Inc.'s Reply in Support of Motion for Reconsideration, CD page 888 of 1065*). Arellano fell at 6:30 a.m. and therefore, unlike the subcontractor in Land-Wells v. Rain Way Sprinkler and Landscape, LLC, 187 P.3d 1152 (Colo.App.2008), Martinson was on the premises and responsible for the condition of the parking lot at the time of Arellano's fall.

Additionally, Martinson's liability under C.R.S. § 13-21-115 arises in two ways. First, irrespective of its contractual duties, it was actually conducting services at the time of the fall and was in possession and control of the parking lot. Second, and as previously argued by Safeway, Martinson was under a contractual obligation for performing services on the subject parking lot and like the subcontractor in Henderson v. Master Klean, 70 P.3d 612 (Colo.App.2003), Martinson was under a duty to perform services at the time of Arellano's incident.

H. Martinson's Bill of Costs Should Not have Been Awarded

The trial court abused its discretion by failing to make any factual determinations that the costs asserted by Martinson barred any relationship to the

production of relevant information that contributed to the trial court's decision on summary judgment.

III. CONCLUSION AND REQUEST FOR COSTS

The undisputed facts and Colorado case law clearly support and require a reversal and remand of the trial court's order granting summary judgment to Martinson as well as a reversal of the trial court's denial of Safeway's motion for judgment as a matter of law pursuant to C.R.C.P. 59(e) because the indemnification language relied upon by Safeway is unambiguous and is part of the SRSA.

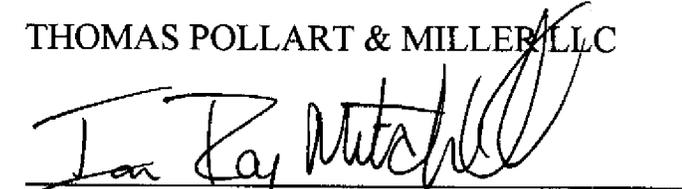
Martinson was under a contractual duty to perform and that duty is expressly under the contract either by Safeway's standing request or based upon Martinson's duties to inspect the property and perform additional services.

Alternatively, Martinson waived a condition precedent to performance by undertaking to provide services, which fell below the applicable standard of care causing Safeway's damages. Alternatively, if Martinson was not under a contractual duty based on a two inch snow accumulation then Martinson assumed the duty to provide snow removal and ice abatement services and was required to do so without negligence. Ultimately, Martinson had a duty to perform ice abatement services at the subject property and its failure to timely and adequately perform those services,

whether under the express agreement, its waiver of any condition by conduct or an assumed duty resulted in a breach of that duty. Martinson cannot simply perform in a negligent manner and then escape liability based on a two inch snow requirement. Safeway also respectfully requests it be allowed to recover its costs pursuant to C.A.R. 39(a).

Respectfully submitted this 16th day of September, 2009.

THOMAS POLLART & MILLER LLC



Ian Ray Mitchell

Attorney for Plaintiff-Appellant Safeway Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2009, I served the forgoing **PLAINTIFF-APPELLANT'S REPLY BRIEF** via LexisNexis File & Serve and via United States Mail, first class postage prepaid, including a CD containing the hyperlinked document, to the following:

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 REPLY 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



Kim Brown