DATE FILED: September 2, 2015 8:41 PM
FILING ID: 4BC4C24073A9C
CASE NUMBER: 2015CA285

COURT OF APPEALS STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203	
District Court of Summit County, Colorado Honorable Mark D. Thompson, Judge Case No. 13CV101, Division T Date of Ruling: October 21, 2014	
Appellant: **ANNE MARGARET HESFORD**, v. Appellee: **VAIL SUMMIT RESORTS, INC.**	▲ **Court Use Only** ▲
Attorneys for Plaintiff: Charles Crosse, Reg. No. 27971 Mike Lazar, Reg. No. 40046 Crosse Law LLC 360 S. Garfield St., Ste. 600 Denver, CO 80209 Phone: (303) 839-1137 Facsimile: Declined charliecrosse@crosselaw.com mikelazar@crosselaw.com	Case No. 2015CA285

REPLY BRIEF

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 2,131 words. (5,700 max per C.A.R. 28(g)).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

CROSSE LAW LLC
Duly signed original on file at
CROSSE LAW LLC

/s/ Mike Lazar
Mike Lazar - #40046
Charlie Crosse - #27971
Attorney for Plaintiff/Appellant

Contents

TABLE OF AUTHORITIES

Cases

ARGUMENT

A. The articulation of precisely what action Vail should have taken is immaterial when it is undisputed that Vail did nothing to clear ice from the bus boarding area.

Vail immaterially states that Ms. Hesford has not provided a precise definition of "reasonable care" in this case and, thus, concludes that failure to provide such a precise definition is fatal to Ms. Hesford's claims. Vail provides no authority that supports this extraordinary conclusion. Vail cites *Sofford v. Schindler Elevator*, 954 F. Supp. 1459 (D. Colo. 1997) as its authority, but the *Sofford* case provides no such support. The *Sofford* court did not rule on or even address the issue of what evidence is required showing a standard of reasonable care. The *Sofford* court accepted as a given that the defendant in that case did not exercise reasonable care. *Id.* at 1461. The issue before the *Sofford* court was whether the plaintiff presented sufficient evidence that the defendant had actual or constructive knowledge of a dangerous condition. *Id*. Furthermore, *Sofford* did not concern the alleged unreasonable failure to clear snow and ice; at issue was a defective elevator. *Id*.

In contrast to Sofford, *King Soopers, Inc. v. Mitchell*, 342 P.2d 1006 (Colo. 1959) very specifically addresses the issue of reasonable care in a failure-to-clear-ice case that is similar to Ms. Hesford's case. Citing Prosser and *Seng v. American*

Stores Co., 121 A.2d 123 (Pa. 1956), the *King Soopers* Court noted that in circumstances where invitees might be encumbered (as Ms. Hesford was with her ski equipment) or in circumstances where there is no means to safely navigate ice (such as Ms. Hesford claims), a landowner's mere posting of a warning sign may be inadequate. *Id.* at 1009-1010. The obvious implication is that, in these circumstances, the landowner has an obligation to either clear the ice or apply some substance to the surface that mitigates the slipping hazard.

From Ms. Hesford's point of view, Vail could have taken any number of actions to make the area where passengers board and de-board the bus either clear of ice or otherwise safe from the hazards of ice. Yet, and looking at the facts in the light most favorable to Ms. Hesford, Vail took **no action** that constitutes reasonable care. Nowhere does Vail argue – nor could it – that it attempted to clear ice or take any other action mitigate the danger of slipping on ice at the bus boarding area.[1] Vail states that it maintained the Airport Lot consistent with "other ski areas in Summit County." *Answer Brief*, pp. 10-11. However, this statement solely means that Vail plowed the lot without taking any action to clear ice from the bus boarding area. The one action that Vail took that **could** constitute reasonable care was posting the

[1] *See Amended Opening Brief*, pp. 14-15.

warning sign at the entrance of the Airport Lot. Nonetheless, looking at the facts in the light most favorable to Ms. Hesford, the posting of this sign does not constitute reasonable care for the reasons stated in the *Amended Opening Brief*:

> First, the sign was not posted near where Ms. Hesford fell; no sign was posted in the vicinity of where the bus stopped. Second, Ms. Hesford did not see it. CF, p. 247, ll. 4-15; *see also* CF, p. 271, ll. 23-25. Lastly, Ms. Hesford had no available path to board the bus without stepping on the ice upon which she fell. CF, p. 293, l. 23 – p. 294, l. 2; *see also* p. 297, ll. 9-13.

Amended Opening Brief, p. 15.

Accordingly, the extent to which the sign constitutes reasonable care is an issue for the jury to decide.

Again, the key issue is whether Vail exercised reasonable care to protect its invitees from ice that had accumulated at the bus boarding area at the Airport Lot. Ms. Hesford has never argued that Vail had a duty to keep the entire Airport Lot clear of ice. Her position is that Vail did have a duty to do **something** to mitigate the danger posed by accumulations of ice at the bus boarding area, where persons laden with ski equipment, such as Ms. Hesford, were particularly prone to slipping on ice. But Vail did nothing, leaving invitees such as Ms. Hesford with no ice-free means of ingress to the bus. Whether Vail doing nothing constitutes reasonable care is for the jury to decide.

B. Vail's arguments that the ice upon which Ms. Hesford slipped could not have been the result of an artificial accumulation are deficient, because they are not based upon a reading of the facts in the light most favorable to Ms. Hesford.

Vail advances numerous arguments that the ice upon which Ms. Hesford slipped was naturally occurring and did not constitute a "substantial build up" that had existed for several days. *Answer Brief*, pp. 11-12. However, underlying all of these arguments is a misunderstanding of the applicable standard of care in this instance. The proper standard for summary judgment is that all facts must be viewed in the light most favorable to the non-moving party. *Parrish v. DeRemer*, 187 P.2d 597 (Colo. 1947). Vail's arguments do not adhere to this standard. For example, Vail states that Ms. Hesford's testimony that the ice upon which she slipped had been around for several days is "pure speculation" and that this testimony may be contradicted by other statements of Ms. Hesford's that are in the record. *Answer Brief*, pp. 11-12, n. 4. These points that Vail raises concern the weight that the trier of fact may afford Ms. Hesford's testimony, which is a consideration that falls outside of the scope of a summary judgment analysis. Likewise, Vail argues that Mr. Hoerter's testimony may not be reliable, because he did not remember whether the barricades present in the photographs of the scene were present in December of

2010. *Answer Brief*, pp. 12. Again, this concern goes to the weight of Mr. Hoerter's testimony on the point that snow plowing activities would cause an accumulation of ice at the bus boarding area. Accordingly, and looking at the facts in the light most favorable to Ms. Hesford, sufficient facts were presented suggesting that the ice upon which Ms. Hesford slipped may have accumulated artificially as a result of Vail's activities.

C. Vail has provided no authority for the proposition that expert testimony on industry standards of care is required in a case such as this.

Vail again cites no authority in support of its proposition that expert testimony is required to discuss the standard of care with regards to removing ice in routine slip-and-fall cases such as this one. Indeed, Vail's admissions that "snow and ice are a fact of life in a high alpine environment during the winter months[2]" in previous sections of its brief undercut Vail's position that routine snow and ice removal fall outside of the common knowledge and experience of ordinary persons. Simply put, every prospective juror in this case will be intimately familiar with properly dealing with accumulations of ice on residential and commercial property. If the Court were

[2] *Answer Brief*, p. 8, n. 3.

to determine that expert testimony was required in this instance, one wonders when a liability expert would not be necessary in a negligence case.

The case of *Bland v. Davison County*, 566 N.W.2d 452 (S.D. 1997) is instructive on why expert testimony on the standard of care should not be required in routine cases concerning the mitigation of snow and ice on walkways and roadways. The plaintiff in *Bland* was driving along a road owned and maintained by the defendant where a patch trees created a shady spot prone to ice accumulation. *Id.* at 454. The plaintiff reduced her speed upon entering the shady area, but still lost control of her vehicle, resulting in a crash. *Id*. The plaintiff brought negligence claims against the defendant, alleging that the defendant should have sanded the shady area. *Id*. At trial, the plaintiff attempted to introduce an expert to testify that the industry standard of care required sanding the shady portion of the road. *Id.* at 461. The trial court denied admission of the expert testimony, in part, because the trial court determined that the expert's testimony did not fall outside of a layman's breadth of knowledge. *Id*. The *Bland* court agreed with the trial court, stating:

> The trial court held that expert testimony was not necessary to assist the jury on the question of the necessity of sanding. [Plaintiff's] offer of proof goes into no specifics which an expert might possess as to what types of icy conditions benefit from sanding, what types of sand should be used, whether to mix in salt, the amount of sand required per the size of the ice on the highway or any other technical data. It simply goes to whether sanding should have been done on the ice at the accident site.
> ….

> As limited by [Plaintiff's] offer of proof, we disagree with [Plaintiff's] argument that road maintenance is not within a layman's breadth of knowledge. **Anyone who has owned and maintained a sidewalk, driveway or even driven a car in South Dakota during the winter would be able to form their own conclusion as to whether a reasonable standard of care requires that an icy road be sanded.**

Id. at 461-462 (emphasis added).

The issues in this case are far simpler than those in *Bland*. Rather than dealing with ice mitigation on a roadway, this case involves ice mitigation in a pedestrian walking area where people board buses. Ice mitigation here is analogous to average people having to consider ice mitigation on their own front porches at home. For these reasons, expert testimony on the standard of care should not be required.

D. The lack of prior slip-and-fall incidents at the bus boarding area is not dispositive of whether Vail had knowledge of a dangerous condition.

Citing *Casey v. Christie Lodge Owners Ass'n, Inc.*, 923 P.2d 365 (Colo. App. 1996), Vail argues that the lack of prior slip-and-fall incidents at the bus boarding area in the Airport Lot is dispositive of whether Vail knew or should have known of a dangerous condition. This reliance on *Casey* is misplaced; *Casey* does not stand for the proposition that a lack of prior incidents *per se* means that a defendant does not have sufficient notice of a dangerous condition. The *Casey* court merely noted that, by showing a lack of prior incidents, the defendant had met its initial burden on

summary judgment of showing lack of notice. *Id*. at 366-367. The *Casey* plaintiff was then unable to present any evidence showing knowledge that rebutted the defendant's evidence of lack of prior incidents, which is why the *Casey* plaintiff's claim failed on summary judgment. *Id.* at 367.

Such is not the case here. Though *Casey* is a PLA case, it concerns a faulty storage door rather than the accumulation of ice. This distinction is critical, because Colorado jurisprudence allows for plaintiffs in slip-and-fall-on-ice cases to prove defendant landowners' knowledge in ways that would not be available to the *Casey* plaintiff. *See, e.g.*, *King Soopers*, 342 P.2d 1006 (Colo. 1959) (holding that weather conducive to producing ice, combined with defendant's failure to take any action to discover and mitigate ice hazards in parking lot, was sufficient to impute constructive notice of dangerous condition upon defendant). As discussed in the *Amended Opening Brief*, Ms. Hesford presented sufficient evidence that Vail had constructive knowledge of the ice upon which Ms. Hesford slipped. She testified that the ice upon which she had slipped was a "substantial buildup" that appeared to have been around for several days. CF, p. 291, l. 8 – p. 292, l. 6; *see also* p. 298, ll. 16-21; *see also* p. 301, ll. 9-17. This "substantial buildup" that appeared to have been around several days, combined with Vail's failure to take any action to de-ice the

boarding area[3], is sufficient evidence to impute knowledge of a dangerous condition to Vail pursuant to *King Soopers*. Moreover, and as is discussed in the Amended Opening Brief in more detail, Ms. Hesford presented evidence that Vail's contractor, Stan Miller, knew that plowing activities piled up snow along the barricade at the bus boarding area, thereby creating the circumstances for ice to accumulate at the bus boarding area where Ms. Hesford slipped. *See Amended Opening Brief*, pp. 23-24; CF, p. 396, l. 8 – p. 397, l. 10. The sum of this evidence is sufficient to create a triable issue of fact regarding whether Vail had constructive or actual knowledge of a dangerous condition.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff-Appellant A. Margaret Hesford respectfully requests that this Court reverse the District Court's order granting summary judgment in favor of Defendant-Appellee Vail Summit Resorts, Inc. on Ms. Hesford's Colorado Premises Liability Act claim, and remand this case for further proceedings.

---

[3] *See Amended Opening Brief*, pp. 2-3; CF, p. 448, ll. 11-17; CF, p. 60, ll. 4-8.

Respectfully submitted this 2nd day of September, 2015.

CROSSE LAW LLC
Duly signed original on file at CROSSE LAW LLC

/s/ Mike Lazar
Mike Lazar - #40046
Charlie Crosse - #27971
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 2nd day of September, 2015, a true and complete copy of the foregoing **REPLY BRIEF** was filed with the Court and served upon the below listed parties via ICCES addressed as follows:

Samuel N. Shapiro
Litigation Counsel
Vail Resorts Management Company
390 Interlocken Crescent
Broomfield, CO 80021

CROSSE LAW LLC
Duly signed original on file at CROSSE LAW LLC

/s/ Mike Lazar
Mike Lazar - #40046
Attorney for Plaintiff/Appellant