

NO. 36216-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AMERICAN BUILDING MAINTENANCE COMPANY
WEST, dba ABM JANITORIAL SERVICES,

Appellant/Defendant,

v.

MORRIS & MORRIS, dba MORRIS PROPERTIES, a
domestic partnership and FRANK E. MORRIS and
CARROLL A. MORRIS, and JAMES A. MORRIS and
CHERYL L. MORRIS,

Respondents/Defendants.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This appeal arises out of a typical slip and fall premises liability case filed by a Plaintiff Robin Nunez. There was nothing out of the ordinary about the case, except for the existence of a contractual defense and indemnification clause between the two Defendants that Plaintiff sued. Each Defendant filed a cross claim against the other, but all parties' claims were dismissed in the trial court. The question on appeal is whether janitorial company American Building Maintenance Company West d/b/a ABM Janitorial Services ("ABM") should have prevailed on its cross claim against building owners Morris & Morris d/b/a Morris Properties, Frank E. Morris, Carroll A. Morris, James A. Morris, and Cheryl L. Morris (collectively "Morris Properties" or Respondents).

- I. **Respondents effectively concede that this appeal turns on whether the slippery "mystery substance" on the floor was a condition of the premises.**

The contract language at issue in this appeal reads:

Owner [Respondent] shall indemnify, defend, and hold harmless Contractor [ABM] from **claims for injuries to Contractor's employees and others resulting from the condition of Owner's premises or equipment but only to the extent same are not caused by Contractor's fault.**

CP 236 (emphasis added). In the trial court below, and in its opening brief here, ABM explained that this language of the contract required a three

part inquiry. Respondents would be contractually obligated to indemnify ABM if ABM showed that the claim brought against it was (1) a claim for injury to ABM's employees or others (2) resulting from the condition of Respondents' premises or equipment and (3) not caused by ABM's fault.

In contrast to their argument in the trial court, in Respondents' Brief for this Court, Respondents argue only that the "mystery substance" on the floor in Respondents' building was not the condition of the premises. Thus, Respondents effectively concede that parts one and three of the inquiry have been satisfied, and narrow their argument to part two. Therefore, if this Court determines that a substance on the floor of Respondents' building that caused Plaintiff to slip and fall constituted a "condition of the premises," then ABM should prevail on its appeal.

II. Respondents' briefing at the trial court level compels the conclusion that the slippery "mystery substance" on the floor was a condition of the premises.

By their very nature, premises liability cases involve plaintiffs' claims that they were harmed by the condition of a defendant's premises. In moving for summary judgment against Plaintiff in this case, Respondents spoke in terms of the condition of the property. They conceded that they had "a duty of ordinary care to keep the premises in a reasonably safe condition," including "the affirmative duty to discover dangerous conditions." CP 14, lines 13-15 (emphasis supplied).

They argued that they had liability to Plaintiff only if they knew of “or by the exercise of reasonable care would discover the condition...” CP 14, lines 16-25 (emphasis supplied) (citing Ford v. Red Lion Inns, 67 Wn. Ap. 766, 769, 840 P.2d 198 (1992) review denied, 120 Wn.2d 1029, 847 P.2d 481 (1993)). They also argued that the Plaintiff’s first hurdle in opposing their motion was to prove that Respondents “...knew or should have known that there was a slippery substance on the restroom floor in time to warn or remedy the situation before [Plaintiff] fell.” CP 15, line 19 - CP 16, line 2.

In this section of their briefing, Respondents were unmistakably discussing the slippery substance on the floor as the condition of the property that gave rise to Plaintiff’s claim. CP 15, line 19 - CP 16, line 9. Respondents accepted that as a given, and argued instead that they did not have actual or constructive notice of the substance on the floor, and therefore had no liability to Plaintiff. CP 15, line 19 - CP 16, line 9.

III. The trial court judge’s reasoning at the hearing on Plaintiff’s motion for summary judgment also accepts that the slippery “mystery substance” on the floor was a condition of the premises.

In ruling on the motions for summary judgment against the Plaintiff, Judge Tabor clearly recognized that there was a substance on the

floor that could have given rise to liability for Respondents in the right circumstances. However, as he explained:

In this particular case, the plaintiff does not know what the substance was, does not know how it got there, does not know when it got there. We have the mystery substance that someone has characterized as being invisible, although they say that it appeared to be of a nature like something sprayed from a spray bottle, that it was clear – maybe that’s why they said invisible – that it was not water. The plaintiff herself indicated that it definitely was not water, it was not wax, and it was not oily in texture. I don’t know what the substance is. Nevertheless, the problem here for the plaintiff is, there’s no showing of how that substance got there or when it got there.

VRP (January 12, 2007) p. 25, line 25 – p. 26, line 13. Consistent with Respondents’ argument in the trial court, Judge Tabor accepted without discussion that the substance on the floor was a condition of the premises, but held that the claim failed for other reasons; namely, because Plaintiff could not show how or when the substance (i.e., the condition) came to be on the premises.¹

¹ Unfortunately, in ruling on the cross claims between ABM and Respondent approximately two months after the hearing on Plaintiff’s claims, Judge Tabor erroneously, and in contrast with his previous ruling, stated that there was no evidence of what caused Plaintiff’s slip and fall

IV. Washington case law also compels the conclusion that the slippery “mystery substance” on the floor was a condition of the premises.

In its opening brief, ABM identified numerous examples of cases where Washington Courts discussed “conditions of the premises” that potentially gave rise to liability. These included Falconer v. Safeway Stores, 49 Wn.2d 478, 479-480, 303 P.2d 294 (1956), where fatty animal tissue on the sidewalk was a “condition of the premises” in a slip and fall premises liability case; Placanica v. Riach Oldsmobile Co., 53 Wn.2d 171, 174-175, 332 P.2d 47 (1958), where snow and ice on the floor was a “dangerous condition” of the premises in a slip and fall premises liability case; Ciminski v. Finn Corp., 13 Wn. App. 815, 853, 537 P.2d 850 (1975), where food, grease, or other debris on the floor was a “condition causing the injury” on the premises in a slip and fall premises liability case; and Carlyle v. Safeway Stores Inc., 78 Wn. App. 272, 275, 896 P.2d 750 (1995), rev. denied, 128 Wn.2d 1004 (1995) where shampoo on the floor

and that therefore Respondents’ indemnification obligation was not triggered. VRP (March 23, 2007) p. 13, line 23 – p. 16, line 16. However, it was undisputed, and the evidence clearly showed, that the slippery “mystery substance” on the floor caused Plaintiff’s slip and fall. VRP (January 12, 2007) p. 25, line 25 – p. 26, line 13.

was an “unsafe condition” or “dangerous condition” of the premises in a slip and fall premises liability case.

Respondents attempt to distinguish these cases, arguing that the inquiry for purposes of interpreting the contract at issue here is not whether the slippery substance was a dangerous condition but rather whether it was “the condition” of the premises. This is a distinction without a difference.

The particular conditions of the premises addressed in the cases cited above happen to also be dangerous, but this does not make them any more or any less conditions of the property. This makes them simply conditions that are also dangerous. The cases illustrate that a foreign substance on the floor that can cause someone to fall -- like what happened here -- is a condition that is also dangerous.²

Moreover, the indemnification language at issue here does not exclude indemnification for dangerous conditions. Instead it requires Respondents to indemnify, defend, and hold ABM harmless from claims “...resulting from the condition of Owner’s premises or equipment...” If the parties to the contract wished to exclude dangerous conditions from

² Respondents’ other efforts to distinguish these cases, for example pointing out that the types of businesses differ, are equally unpersuasive.

the conditions requiring defense and indemnification, they could have done that. They did not. Therefore all conditions of the property, including dangerous conditions, fall within the indemnification clause's coverage. Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (the meaning of an agreement must be determined according to the words used).

This fact is not changed by Respondents' argument that there is a significant difference between the language "a condition of the property" and "the condition of the property." ABM requests the Court to reject this argument outright and without consideration as it was not made at the trial court level. E.g., State v. Carter, 138 Wn. App. 350, 367, 153 P.3d 420 (2007) (party cannot raise new argument on appeal unless it meets certain exceptions that do not apply here) (citing RAP 2.5(a); State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)).

If the Court will consider this argument over ABM's objection, the argument still fails as nothing more than a red herring. The condition of the property is determined by examining the specific conditions that exist on the property. This is a basic concept obvious in all of the premises liability cases cited above, and is found throughout Washington law.

For another example, the Court need only review Pimentel v. Roundup Co., 100 Wn.2d 39, 49, 666 P.2d 888 (1983), where Plaintiff

claimed injury from a falling paint can. There, the Court defined the proper liability inquiry in a standard premises liability case in these terms: “To impose liability for failure to maintain business premises in a reasonably safe condition generally requires the plaintiff to prove (1) the unsafe condition was caused by the proprietor or its employees, or (2) the proprietor had actual or constructive notice of the dangerous condition.” Id. The issue was the manner in which the paint can was shelved, but the Court explained that the manner of shelving could give rise to a claim “for failure to maintain business premises in a reasonably safe condition.” Put another way, a single dangerous condition on the premises could render “the condition of the premises” to be unsafe.

Similarly here, the slippery “mystery substance” gave rise to Plaintiff’s claim that the condition of the premises was unsafe. Plaintiff did not prevail on her claim because she could not demonstrate how or when the condition was created, and -- on that basis -- could not establish liability. However, the plain language of the indemnification clause does not require a finding of liability before the indemnification obligations are triggered. Indeed, the indemnification clause would not be triggered if ABM were liable, because the clause only provides for indemnification if ABM is not at fault for creating the condition that gave rise to the claim.

If the parties wanted different terms, including predicating indemnification obligations upon a finding of liability to Plaintiff, they could have built those terms into the contract. This is particularly true in a situation like the one before this Court where one of the Respondents is an attorney who is presumably not only familiar with the case law set out above, but also with the principles of contract interpretation. CP 24, lines 7-9.

However, even if one of the Respondents were not an attorney, the plain language used in the contract governs its interpretation. Berg, 115 Wn.2d at 669. Because “condition of the premises” is not defined in this contract, it is given its ordinary meaning. Universal/Land Constr. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987).

To determine the ordinary meanings of words, our Courts are permitted to turn to standard English language dictionaries. Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990). Merriam-Webster Collegiate Dictionary, Eleventh Edition defines condition as “a state of being.” Using this definition, the “condition of the premises” is the state the premises was in. This interpretation of the contract language is perfectly consistent with Washington premises liability law as set out above.

Ultimately, this Court must enforce the contract as it was written, looking to its plain language. See Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (the meaning of an agreement must be determined according to the words used). The language of the contract at issue here requires Respondents to defend and indemnify ABM when (1) a claim for injury is made against ABM, (2) resulting from the condition of Respondents' premises or equipment, and (3) the claim was not caused by ABM's fault. This is precisely the circumstance before this Court. The trial court erred when it ruled otherwise.

For these reasons and those contained in ABM's opening brief and briefing below, ABM requests the Court Appeals to reverse that portion of the trial court's March 23, 2007 order that granted Respondents' Motion for Summary Judgment on ABM's counter cross claim for contractual indemnification and denied ABM's cross motion for summary judgment on its counter cross claim for contractual indemnification. It further requests that the Court of Appeals direct the trial court to enter judgment in ABM's favor and against Appellant, requiring Appellant to reimburse ABM for the attorney's fees and costs ABM incurred below defending against Plaintiff's claims (the specific amount to be determined by the trial court). Finally, ABM requests an award of its costs on appeal pursuant to RAP 14.2.

DATED this 29th day of October, 2007.

Respectfully submitted,

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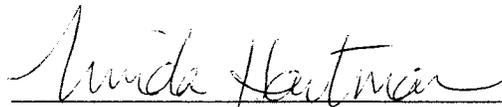
PROOF OF SERVICE

THIS IS TO CERTIFY that a copy of Appellant's Reply Brief was served October 29, 2007, on the following individual:

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The original and a copy of Appellant's Reply Brief were sent via U.S. mail to the Court of Appeals for filing on October 29, 2007. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 29th day of October, 2007, at Seattle,
Washington.



Trinda Hartman, Legal Assistant