

NO. 36216-3

01/17/2013

BY 

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AMERICAN BUILDING MAINTENANCE COMPANY WEST, dba
AMB 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,

Respondent/Defendants.

RESPONDENTS' BRIEF

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I. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court properly interpreted the indemnification clause at issue when the court held that neither ABM nor Morris Properties was entitled to attorney fees and costs since (1) plaintiff Robin Nunez provided no evidence that “the condition of the premises” had anything to do with her slip and fall; and (2) the slippery invisible mist-like substance was not “the condition” of the premises that triggers the indemnification clause.

II. STATEMENT OF THE CASE

This case arises from a slip and fall accident that occurred on July 31, 2002 in a building owned by respondent Morris Properties.¹ At all relevant times, Morris Properties was a partnership that developed and managed commercial real estate in Thurston County including the building where plaintiff Robin Nunez was employed. CP 23-24. In addition to having a

¹ Respondents Morris & Morris, dba Morris Properties, Frank E. Morris, Carroll A. Morris, James A. Morris, and Cheryl L. Morris will be referred to collectively as “Morris Properties.”

property manager whose office was across the street from the building, Morris Properties' also had a general maintenance man who went to the various buildings to perform routine repairs as needed. *Id.*

However, to perform the janitorial work, Morris Properties contracted with appellant ABM Janitorial Services ("ABM"). CP 23-25. ABM drafted the Janitorial Services Agreement and the agreement was signed by Morris Properties' property manager in September 2000. CP 23-32; 464-465.

Per the contract, ABM cleaned every evening Monday through Friday. CP 33-35. While the restroom cleaning included cleaning the toilets, basins and mirrors, ABM also cleaned the floors every evening by sweeping, damp mopping, and disinfecting them. *Id.* Every quarter, ABM Janitorial would strip and wax the restroom floors. *Id.*

At all relevant times, the building at issue had several tenants with various work hours and consequently, the building was opened at 6:00 a.m. CP 7; 33-36; 45-48. Several of the tenants at that time also had female employees and all of the

building's restrooms were open for use by any of the tenants or their visitors. CP 7-8; 45-49.

On July 31, 2002 at approximately 8:10 a.m. plaintiff Nunez walked into a handicapped stall in the women's restroom in the building at issue and slipped and fell on an invisible substance. CP 10; 79-82; 87-88. The substance was odorless, not oily, not powdery, not wax, not water and did not leave a stain on plaintiff Nunez' fingers when she touched it. CP 10-11; 80-81; 93-94; 108-109.

Morris Properties' maintenance man was called to the scene and tested the floor with his feet and found nothing slick. CP12-13; 118-119. The maintenance man then got on his hands and knees to feel the floor for any liquids or substances and crawled on the entire floor outside the stalls sweeping the surface with his hands and found nothing. *Id.* The maintenance man then crawled into the handicapped stall and felt nothing slick in the entry way of the handicapped stall, but found a "very light substance" that he could not identify near the partition that separated the handicapped and regular stall. CP 12-13; 118-120; 126.

The Morris Properties' maintenance man also could not tell the origin of the substance for it was something he had never encountered before and described the substance as being an odorless, invisible misty liquid, "as though it had come out of some type of spray bottle." CP 13; 120. He cleaned up the substance from the floor with one paper towel and floor was no longer slick. CP 13; 120-121.

On July 29, 2005, plaintiff Robin Nunez filed her complaint for personal injuries against ABM and Morris Properties. CP 222-229. The complaint alleged that ABM and Morris Properties "negligently, carelessly, and recklessly used improper cleaning substances in the restrooms which left a slippery substance on the floor and the location at which Plaintiff slipped and fell. CP 227.

On November 17, 2006, Morris Properties filed a motion for summary judgment. CP 5-22. The motion asked for a dismissal of plaintiff's claims on the basis that Morris Properties had no actual or constructive notice of a slippery condition in the women's restroom at the time of plaintiff's fall or at any time prior thereto, that Morris Properties exercised reasonable care by having the restroom in question cleaned

every evening including the evening before plaintiff's accident, and that the substance plaintiff slipped on was invisible, odorless and was not water or wax. CP 5-22. Morris Properties also asked that ABM's counter cross-claim be dismissed. *Id.*

On January 12, 2007, the trial court heard Morris Properties' motion for summary judgment and granted the same dismissing all of plaintiff Nunez' claims with prejudice. CP 503-506. The trial court explained his reasoning as follows:

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 saw 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 indicates 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.

....

As to the property owner, I'll likewise grant summary judgment in that I do not find that there is a specific showing in this particular case that a premises

liability claim is appropriate. The argument by plaintiff is that they didn't exercise reasonable care by inspecting ahead of time or by documenting after the fact, which I've not really considered because **we're talking about what led up to this. And again, there is no showing that reasonable care by a property owner would have discovered the substance, again, because we don't know when it was deposited or how.** And I simply find that there is a failure on the part of the plaintiff, based upon the facts that have been presented in the course of the pleadings, that would establish that such could be submitted to a jury.

....

This is primarily a situation in which defendants, by raising the motion in summary judgment, place a burden upon the plaintiff to come forward with evidence which would be presented, and there's simply a lack of sufficient evidence in regard to the areas that I've talked about.

VRP (January 12, 2007) p.25-27 (Emphasis provided).

Also on this day, the trial court stated that he did not want to go forward on the summary judgment motions on the defendants' cross and counterclaim and that the motions could be renoted. VRP (January 12, 2007) p. 28.

On March 23, 2007, the trial court heard ABM's and Morris Properties' motions for summary judgment against each other. One argument that Morris Properties made, among others, is that ABM's counter cross-claim seeking attorney fees based on the indemnification clause should be dismissed because a slippery mist-like substance was not "the condition of [Morris Properties] premises" as that term should be interpreted according to its context and plain language. CP 479-484.

In ruling on the indemnification issue, the trial court characterized his holding as denying both defendants' motions for summary judgment. CP 13-15. Nonetheless, the trial court for all intents and purposes granted Morris Properties' motion against ABM since the trial court found that ABM was not entitled to attorney fees and costs under the indemnification clause in the agreement. In giving his reasoning, the trial court stated that:

As to the janitorial service going against the owner, the applicable language, I guess, that was argued about was the condition of the premises. **I don't think there's any showing that the condition of the premises had anything to do with this.** I realize

there is a subtle difference between a claim of liability and a finding of liability, but based upon my ruling before denying the plaintiff the opportunity to go forward and granting summary judgment by the defendants, **I clearly stated I didn't think that there were facts that could be set forth under the scenario given me to prove anything about what caused this slip and fall. I think that that impacts the claim as far as indemnity is concerned.**

VRP (March 23, 2007) p.15-16 (Emphasis provided). Thus, the trial court essentially held that a slippery mist-like substance on which plaintiff Nunez slipped was not "the condition" of Morris Properties' premises and therefore the indemnification clause was not applicable to the facts as known.

On April 20, 2007, ABM filed its notice of intent to appeal the trial court's decision. CP 494-500.

III. ARGUMENT

Trial Court Correctly Held That A Slippery Substance Was Not "The Condition" of The Premises.

The issue in this appeal is whether the trial court was correct in his interpretation of the indemnification clause in the janitorial services agreement:

[Morris Properties] shall indemnify, defend and hold harmless [ABM] from claims for injuries to [ABM's] employees

and others resulting from **the condition of [Morris Properties'] premises or equipment** but only to the extent same are not caused by [ABM Janitorial's] fault. (Emphasis added).

CP at 27-28.

ABM criticizes the trial court for applying what it characterizes as a “premises liability” analysis to contract interpretation. However, whether applying a “premises liability” analysis or applying basic principles of contract interpretation, the result is the same and ABM is not entitled to indemnification from Morris Properties.

1. **Plaintiff provided no evidence that “the condition of the premises” had anything to do with her slip and fall.**

In trying to survive summary judgment, plaintiff Nunez argued that Morris Properties was liable for not exercising reasonable care by performing regular inspections of the property. CP 335-350. However, this argument was not persuasive since there was no evidence showing that if Morris Properties had exercised reasonable care and inspected the premises it would have discovered the slippery substance. VRP at 27. This was because it was unknown how the substance got on the floor and how long it had been on the floor. *Id.*

Notably, Morris Properties' maintenance man only discovered the substance when he crawled and sweep his hands across the floor. And, there was no evidence as to what the slippery was other than what the substance was not -- not water, not wax, not oily, not powdery and had no odor.

Consequently, when the trial court reviewed the language in the indemnification clause, he concluded that there was simply no evidence that "the condition" of the property caused plaintiff's slip but rather some unidentifiable substance. The trial court was correct in his reasoning and his judgment should be affirmed.

2. The slippery invisible mist-like substance was not "the condition" of the premises that triggers the indemnification clause.

When basic principles of contract interpretation are applied to the facts at hand, the trial court's ruling that the slippery invisible mist-like substance is not "the condition" of the premises is accurate. This is because "words and phrases [in a contract] are to be taken in their general and ordinarily accepted meaning and connotation unless otherwise defined by the parties or by the dictates of the context." *Wheeler v. East Valley School District No. 361*, 59 Wn.App. 326, 331, 796 P.2d

1298 (1990) (emphasis added), *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn.App. 634, 637, 745 P.2d 53 (1987) (the words used in a contract should be given their ordinary meaning.)

In the matter at hand, ABM refers to the slippery substance as “a condition” while the contract at issue clearly states “**the** condition” of the premises. While ABM will argue this is a subtle difference, clearly it is not. “A condition” implies something that is transitory in being, while “the condition” implies something that is continuous in being or continuing *i.e.* something over which Morris Properties would have had control.

In reviewing the entire service agreement, it is evident that the intent was to have Morris Properties indemnify ABM if its “employees or others” are injured due to something that Morris Properties would have control over – the condition of the property or the condition of the equipment used by ABM to perform the janitorial services. To hold otherwise, would give an absurd interpretation to the contract and make Morris Properties the insurer for all injuries that occur on the property.

Indeed, until Morris Properties filed its motion for summary judgment, ABM also had this same interpretation of the clause at issue. When ABM tendered its defense to Morris Properties, it rejected the same because the plaintiff alleged

“that her accident occurred because of the use of an improper cleaning substance” and this was not “the condition” of the premises.” CP 451-453. In addressing this issue and trying to convince Morris Properties to accept its tender, ABM noted that ABM had previously reported a leaky toilet to Morris Properties and consequently that was “the condition” of the property:

In relation to the third paragraph [of the indemnification provision], ABM supervisory personnel are prepared to testify under oath that the toilet where plaintiff fell leaked at the base and this leak had been pointed out to [Morris Properties] representative by ABM on more than one occasion prior to plaintiff's accident but had not been corrected.

CP 453.

Later it was learned that plaintiff Nunez did not slip on water. Thus, because ABM's “broken toilet” theory as the cause of plaintiff's fall was not supported by the evidence, ABM then argued that the slippery substance was “a condition” of the premises and the indemnification clause applied. CP 259-265.

Moreover, the clause should be read in context with the entire provision. Most of the indemnification provision protects ABM in specific defined instances. Nonetheless, the provision first provides that ABM shall indemnify and defend Morris Properties for all claims caused by ABM's negligence or

misconduct but ABM shall not be liable for things that are out of its reasonable control:

[ABM] shall indemnify, defend and hold harmless [Morris Properties] from loss, liability, or expense (including reasonable attorneys' fees) for bodily injury, death and property damage (hereinafter referred to as "claim(s)"), but only to the extent same are caused by negligence, misconduct or other fault of [ABM], its agents and employees which arose out of the work performed under this Agreement. The foregoing shall only benefit [Morris Properties] if [Morris Properties] notifies [ABM] in writing of such claim within five days of same being reported to [Morris Properties] or its representative. [ABM] shall not be liable for delay, loss or damage caused by warfare, riots, strikes boycotts, criminal acts, acts or omission of others, fire, water damage, natural calamity, or causes beyond [ABM] reasonable control.

CP 27-28.

The indemnification provision then specifically addresses the application of wax and provides that Morris Properties will indemnify ABM if Morris Properties requires ABM to wax the floors during business hours when employees, customers, tenants or business visitors are present:

If [ABM] is required to clean or wax floors when being used by employees, customers, tenants, or business visitors, [Morris Properties] shall, notwithstanding [ABM's] negligence and to the full extent permitted by law, indemnify and hold harmless [ABM Janitorial] from claims for injury and death resulting therefrom.

CP 27-28.

Thus, ABM is not liable for cleaning and waxing the floor at a time when people are likely to be present when required to do so by Morris Properties, something it would not have control over.

Consequently, when the clause in dispute is read in context with the entire clause, the clause means to hold Morris Properties liable for injuries resulting from something that it had control over --some inherent condition of the building such as a broken toilet, dilapidated stairs, or busted and damaged equipment. The clause is present to protect ABM against claims by its own employees (or others) for injuries caused by an owner's rundown or dilapidated building and equipment.

Interestingly, if ABM wanted Morris Properties liable for any and all injuries on the property not caused by ABM's negligence, then the contract could have been drafted in that manner since ABM drafted the agreement. Like with the beginning of the clause that holds ABM liable for all claims caused by ABM's negligence or misconduct, the clause at issue could have been written using the same or similar language.

ABM also argues that Washington Courts have found that substances on the floor are a dangerous "condition" and hence the trial court should have found the slippery substance to be "a condition" of the premises. Appellant's Brief at 14-15.

However, none of the cases cited by ABM concern the interpretation of an indemnification clause that assigns liability for “the condition” of the premises but rather concern the concept of “dangerous conditions.” In addition, the cases are distinguishable from the matter at hand or support Morris Properties’ argument.

Ciminski v. Finn Corp., 13 Wn. App. 815, 537 P.2d 850 (1975) concerned a self-service restaurant where actual or constructive notice of a dangerous condition was not required since the owner was already on notice of the possibly of dangerous conditions due to the manner of operation. *Id.* Obviously, Morris Properties’ building was not a “self-service” operation and other than the plaintiff’s fall, no other slips or falls had ever been reported. CP 23-25; 33-36.

Falconer v. Safeway Stores, 49 Wn.2d 478, 303 P.2d 294 (1957) concerns a slip and fall that occurred from a piece of suet on the floor that the owner regularly disposed of in such a manner that the suet’s presence was likely. *Id.* Thus, the owner had notice of the possibility of there being a dangerous condition unlike Morris Properties that had no notice of the slippery invisible substance.

In *Placanica v. Riach Oldsmobile*, 53 WN.2d 171, 332 P.2d 47 (1958), the jury found for the plaintiff since the owner should have known about the accumulation of oil and snow and ice on the floor on which the plaintiff slipped. Again, it is undisputed that Morris Properties had no notice of the transitory slippery substance.

However, in *Carlyle v. Safeway Stores*, 78 Wn. APP. 272, 896 P.2d 750 (1995), the plaintiff slipped on some shampoo that had fallen to the floor. The Appellate Court affirmed the summary judgment granted to the defendant dismissing plaintiff's claim since the "dangerous condition" was not reasonably foreseeable. *Id.* This is similar to the matter at hand since plaintiff Nunez' claim against Morris Properties was dismissed for the same reason.

Finally, if this Court finds that "the condition of the Owner's premises or equipment" is ambiguous, then the provision should be construed against ABM Janitorial since ABM Janitorial drafted the agreement. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 745 P.2d 53 (1987).

IV. CONCLUSION

For all the reasons stated herein, the slippery substance on which plaintiff Nunez slipped was not “the condition” of Respondent Morris Properties’ premises as that term is used in the service agreement nor did plaintiff have any evidence to support her claim that “the condition” of the premises caused her slip and fall. Consequently, Morris Properties requests that this Court affirm the trial court’s ruling granting its motion for summary judgment. In addition, pursuant to RAP 14.2, Morris Properties seeks a award of costs for this appeal.

DATED this 26th day of September, 2007.

ABEL & MALONEY



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NO. 36216-3

APPELLANT'S STATEMENT
FILED
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I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

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copie(s) of the following document(s) enclosed:

1. Respondents' Brief

on the date indicated below.

Date: 9/26/07


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