IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

OSWALD ZIMMERMAN, Plaintiff/Appellant, vs. JAMES R. BRINTON and PATRICIA J. BRINTON, husband and wife, Defendant/Respondent.	)	**CASE NO. CV-99-04569** **OPINION IN RE: APPEAL**

Plaintiff/Appellant brought the instant action for personal injury consisting of a severed finger which he received while he was moving a safe. He appeals from a ruling of the Magistrate Judge in favor of Defendants/Respondents. Affirmed.

R. D. Watson, WATSON LAW OFFICES, attorney for Plaintiff/Appellant.

Irving "Buddy" Paul, HUPPIN EWING ANDERSON & PAUL, P.S., attorneys for Defendants/Respondents.

I

FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 1997, Oswald Zimmerman was injured when a safe fell on his finger and severed it at the second joint. At the time, Mr. Zimmerman was helping a friend, Grady McCurry,[1] move the safe.

On a previous date, Mr. McCurry had purchased the safe from James Brinton for $200.00. The safe was located in the garage at the Brintons' residence. At the time of the sale, Mr. Brinton made it clear that Mr. McCurry had to move the safe. Mr. Brinton could not assist in moving the safe because he had a bad back.

Mr. McCurry asked Mr. Zimmerman to help him move the safe. Mr. McCurry and Mr. Zimmerman went to the Brintons' garage in Mr. McCurry's car. They intended to move the safe out of the garage to a location where a tow truck could pick it up.

Mr. Zimmerman and Mr. McCurry were propping the safe up and then slipping boards and pipes under it in order to move it. Although he was present, Mr. Brinton did not assist in lifting the safe.

Mr. Brinton made a statement to Mr. Zimmerman and Mr. McCurry about being careful and to not get their fingers caught under the safe. Mr. Zimmerman quoted Mr. Brinton as saying, "Don't get your fingers under the safe." ***See*** Deposition testimony of Oswald Zimmerman, pp. 9-10, attached to the Affidavit of Irving "Buddy" Paul; Affidavit of Oswald Zimmerman.

When Mr. McCurry propped the safe up too high, it fell and hit one of the boards that Mr. Zimmerman was holding. Mr. Zimmerman's index finger was severed.

[1] The spelling of Mr. McCurry's name is uncertain. It may be "McCurry" or it may be "McCurdy."

Mr. Zimmerman contends that Mr. Brinton's "continual conversation and useless comments to reflect 'don't get your fingers under there' caused a distraction which partially resulted in the safe being dropped and the loss of [his] index finger." ***See*** Affidavit of Oswald Zimmerman. Mr. Zimmerman claims that Mr. Brinton's comments were a distraction that caused his attention to be sufficiently averted to cause his injury.

On August 11, 1999, Mr. Zimmerman filed the instant action against James R. and Patricia J. Brinton. After the Brintons filed their Answer,[2] they moved for Summary Judgment.[3] The Brintons contended that Mr. Brinton's comments were warnings to Mr. Zimmerman that were sufficient for a release of liability under the invitee/licensee definitions of premises liability law.

The Motion for Summary Judgment was supported by an Affidavit of Irving "Buddy" Paul, to which deposition testimonies of Oswald Zimmerman and James R. Brinton were attached. In opposition to the Motion for Summary Judgment, an Affidavit of Oswald Zimmerman was filed. Both parties submitted Memorandums.

At a Hearing on December 21, 2000, the Honorable Scott Wayman, Magistrate Judge, granted the Defendants' Motion for Summary Judgment. The Order was based upon the Magistrate Judge's finding that, as a matter of law, the Brintons owed no duty to Mr. Zimmerman and that no reasonable juror could

[2] Along with their Answer, the Brintons filed a Demand for Jury Trial.
[3] The Brintons' homeowner's insurance company assumed responsibility for Mr. Zimmerman's medical bills. Mr. Zimmerman also requested compensation for loss of enjoyment of life and for pain and suffering.

infer the existence of a duty. A Summary Judgment was entered. Mr. Zimmerman has appealed.

II

STANDARDS ON APPEAL

The instant case involves Mr. Zimmerman's Appeal from the Magistrate's Division to the District Court. In an appellate review of a magistrate's decision, the district court must review the case on the record and determine the appeal in the same manner and upon the same standards as an appeal from the district court to the Supreme Court. ***Rule 83(u), Idaho Rules of Civil Procedure***.

The role of the district court in reviewing a finding of fact is limited. The district court does not weigh the evidence or substitute its view of the facts for the view of the magistrate. The district court must determine whether the record contains substantial evidence to support the magistrate's findings of fact. If so, the findings cannot be deemed clearly erroneous and will not be set aside. ***Ortiz v. Department of Health and Welfare***, 113 Idaho 682, 747 P.2d 91 (Ct.App. 1987).

If the findings of the magistrate are so supported, then the district court must turn to the conclusions of law. If the conclusions of law demonstrate the proper application of legal principles to the facts found, the district court will affirm the magistrate's judgment. ***Balderson v. Balderson***, 127 Idaho 48, 896 P.2d 956 (1996).

III

STANDARDS FOR SUMMARY JUDGMENT

In this case, the Magistrate Judge granted the Brintons' Motion for Summary Judgment. Summary Judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Rule 56(c), Idaho Rules of Civil Procedure.***

I.R.C.P. 56 requires the entry of summary judgment against a non-moving party who "fails to make a showing sufficient to establish the existence of an element essential to the party's case and in which that party will bear the burden of proof at trial."

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. Where a jury has been requested, the party opposing the motion is to be given the benefit of all favorable inferences which might be drawn from the evidence. If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied. ***Roell v. City of Boise***, 120 Idaho 199, 938 P.2d 1237 (1997); ***Bonz v. Sudweeks***, 119 Idaho 539, 808 P.2d 876 (1991). A mere scintilla of evidence, however, is not enough to create a genuine issue of material fact. ***G & M Farms v. Funk Irrigation Co.***, 119 Idaho 514, 808 P.2d 851 (1991); ***Edwards v. Conchemco, Inc.***, 111 Idaho 851, 727 P.2d 1279 (Ct.App. 1986).

If there are no genuine issues of material fact, the court will determine whether a party is entitled to judgment as a matter of law. ***Zumwalt v. Stephan, Balleisen & Slavin***, 113 Idaho 822, 748 P.2d 406 (Ct.App. 1987).

According to ***Berg v. Fairman***, 107 Idaho 441, 444, 690 P.2d 896 (1984), the "purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain."

In this case, the Magistrate Judge granted the Brintons' Motion for Summary Judgment as a matter of law. According to the Order Granting Defendants' Motion for Summary Judgment, "Defendants James R. Brinton and Patricia J. Brinton owed no duty to the Plaintiff . . . and[,] considering all facts and reasonable inferences therefrom, no reasonable juror could infer the existence of a duty owed by Defendants . . . ."

IV

ISSUE PRESENTED

The issue on appeal is whether or not the Magistrate Judge erred in deciding that there was no genuine issue of material fact as to the inferences that might be drawn from the undisputed facts and that, as a matter of law, the Brintons were entitled to Summary Judgment.

V

DISCUSSION

At the conclusion of the Hearing, the Magistrate Judge found certain facts and applied those facts to legal principles of tort law. In general, the material facts were not disputed by either party. On Appeal, Mr. Zimmerman does not dispute the facts found by the Magistrate Judge; instead, he contends that

distinctly different inferences might be drawn from those undisputed facts. Therefore, he claims that a genuine issue exists so that Summary Judgment cannot be granted to the Brintons.

In the instant case, Mr. Zimmerman is alleging a cause of action for negligence against the Brintons. To prove a cause of action for negligence, a plaintiff must establish the following four elements:

> (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage.

Turpen v. Granieri, 133 Idaho 244, 247, 985 P.2d 669 (1999), citing from ***Orthman v. Idaho Power Co.***, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995).

There is no liability under the law of negligence unless the defendant owes a duty of care to the plaintiff. The existence of a duty is a question of law for the trial court to determine. ***Turpen v. Granieri, supra; Landvik by Landvik v. Herbert***, 130 Idaho 54, 936 P.2d 697 (1997).

Depending upon the circumstances, owners of land have various duties toward individuals who come upon their land. In general, however, the owners of land have a duty to keep the premises in a reasonably safe condition. ***Peterson v. Romine***, 131 Idaho 537, 960 P.2d 1266 (1998); ***Holzheimer v. Johannesen***, 125 Idaho 397, 871 P.2d 814 (1994).

An "invitee" is a person who enters upon the land of another for a visit that may confer a business, monetary, or other tangible benefit to the landowner. In such a case, the landowner has a duty to warn of hidden or concealed dangers. ***Peterson v. Romine, supra***. ***See also Morgan v. State Department of Public***

Works, 124 Idaho 658, 862 P.2d 1080 (1993). A "licensee" is a visitor who goes upon the land of another with the consent of the landowner for the visitor's own purpose. In that case, the landowner has a duty to disclose dangerous conditions or activities on the land. ***Holzheimer v. Johannesen, supra***.

In the instant case, Mr. Zimmerman went to the Brintons' residence at the request of Mr. McCurry to assist in moving a safe that Mr. McCurry had recently purchased from Mr. Brinton. It is immaterial whether Mr. Zimmerman was an "invitee" or a "licensee." Even if the safe was considered to be a part of the premises and even if the safe was considered to be a hidden or dangerous condition in the Brintons' garage, it is undisputed that Mr. Brinton warned Mr. Zimmerman to watch his fingers and disclosed that moving the safe could be dangerous. Furthermore, Mr. Zimmerman acknowledged his own awareness of the danger of moving the safe and the warning from Mr. Brinton. ***See*** Deposition testimony of Oswald Zimmerman, pp. 9-10, attached to the Affidavit of Irving "Buddy" Paul; Affidavit of Oswald Zimmerman. Therefore, it can be concluded that, even if there was a duty under the law applying to premises liability, there was no breach of that duty.

The question then becomes whether another kind of duty should be imposed upon the Brintons. Mr. Zimmerman argues that there was, in effect, a duty not to distract him while he was in the process of moving the safe by continuously warning him and/or making comments to him.

Every person has a duty to exercise ordinary care to "prevent unreasonable, foreseeable risks of harm to others." ***Turpen v. Granieri***, 133

Idaho at 247, citing ***Sharp v. W. H. Moore, Inc.***, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990). In determining whether a duty will arise in a particular context, the Idaho Supreme Court has identified several factors to consider. Those factors were set forth in ***Turpen v. Granieri***, 133 Idaho at 247, as follows:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. (Citing ***Rife v. Long***, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995).

In the instant case, the Magistrate Judge found that there were no disputed material facts and recognized that it was a question of the reasonable inferences to be drawn from those facts. The Magistrate Judge applied the law by addressing each of the factors. ***See*** Transcript of Motion for Summary Judgment, December 21, 2000, pp. 14-19. After reviewing the application of the law to the facts of this case, it cannot be found that the Magistrate Judge erred in holding that the Brintons did not owe a duty of care to Mr. Zimmerman.

If premises liability does not apply here, then the focus must be upon the activity of moving the safe and the effect that continued warnings might have upon that kind of activity.[4] On Appeal, the ***Turpen*** factors that are most applicable will be addressed.

[4] There may be some dispute about the extent of Mr. Brinton's warnings. For purposes of the analysis here and in accord with the standards for summary judgment, it is assumed, without so deciding, that the warnings were continuous.

As to the factor of foreseeability, the risk of moving the safe was undertaken by Mr. McCurry and Mr. Zimmerman – not by Mr. Brinton. It cannot be said that it is foreseeable that Mr. Brinton's warnings during the moving of an object on his property would result in harm; quite the opposite, warnings would generally result in a more careful approach.

Regarding the factor of the moral blame attached to Mr. Brinton's conduct, warnings are usually desirable because they avoid accidents. Even repeated warnings are frequently encouraged. Therefore, there is no moral blame attached to Mr. Brinton's warnings.

Concerning the factor of the policy of preventing future harm, it cannot be said that it would be good public policy to dissuade persons from warning others involved in moving a heavy object. In fact, such warnings would generally tend to prevent future harm.

Another factor is "the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach."[5] Essentially, Mr. Zimmerman is requesting that Mr. Brinton's duty as a landowner be extended beyond that of safety of the premises to safety of the moving activity conducted on the premises. Mr. Zimmerman is also requesting that any duty to warn include a duty to refrain from repeated warnings that could be distracting. If such a duty were to be imposed, there

[5] Mr. Zimmerman has indicated that the Brintons' homeowners insurance paid his medical bills. Apparently, he is seeking only general damages at this point. The Brintons object to evidence regarding the payment of Mr. Zimmerman's medical bills. Evidence of payment of medical bills is not admissible as evidence of liability. ***Rule 409, Idaho Rules of Evidence***. Furthermore, evidence of payment has not been filed in the record. ***See Puckett v. Oakfabco, Inc.***, 132 Idaho 816, 979 P.2d 1174 (1999); ***Johnson v. City of Homedale***, 118 Idaho 285, 796 P.2d 162 (Ct.App. 1990); ***Shacocass, Inc. v. Arrington Construction Co.***, 116 Idaho 460, 776 P.2d 469 (Ct.App. 1989).

would be a great number of situations where a property owner, including one who issued warnings, would face liability for the tortuous conduct of third parties over whom they had no control. The consequences to the community would be adverse.

Finally, there is the factor of "the availability, cost, and prevalence of insurance for the risk involved." The imposition of such a duty would tend to have an impact on insurance to homeowners because it would act to extend liability considerably. It could limit availability and increase the cost of such insurance.

When the applicable factors are considered, there is no basis for imposing a duty on Mr. Brinton, as a homeowner, to refrain from repeated warnings as Mr. Zimmerman was assisting Mr. McCurry in moving his safe. Mr. Zimmerman has not cited any legal authority for a duty upon a person to refrain from repeated safety warnings. As a matter of law, a homeowner's duty not to distract by refraining from continued warnings cannot be recognized.

In some instances, a duty is imposed upon a person because of a special relationship with another person. For example, there may be an affirmative duty to control imposed upon a parent with his child, an employer with his employee, or a law enforcement official with a dangerous prisoner. ***Turpen v. Granieri, supra; Sterling v. Bloom***, 111 Idaho 211, 723 P.2d 755 (1986).

In this case, however, there was no such special relationship involving Mr. Brinton. Mr. Brinton did not have a special relationship with Mr. McCurry which

would have imposed a duty upon Mr. Brinton to control Mr. McCurry. Mr. Brinton was simply the seller of the safe and Mr. McCurry was the buyer.

In conclusion, no duty of care can be imposed on the Brintons. Without a duty of care, there can be no cause of action for negligence and no liability. Therefore, the Magistrate Judge did not err in granting the Motion for Summary Judgment.

Mr. Zimmerman argues that there are two inferences that can be drawn from Mr. Brinton's undisputed comment of "don't get your fingers under the safe." First, it can be inferred that it was only a warning. Second, it can be inferred that it was a distraction that averted enough attention to the task at hand that Mr. Zimmerman was injured. Based upon the discussion above of the ***Turpen*** factors, however, it does not make any difference which inference is drawn. Rather, it is a matter of law that no duty of care to refrain from such comments existed. Even drawing the inference most favorable to Mr. Zimmerman, the Brintons are entitled to Summary Judgment.

If a duty of care to refrain from continued warnings were to be recognized, Mr. Zimmerman still failed to show that a breach of that duty caused his injury. Mr. Zimmerman contends that he was distracted by Mr. Brinton's "continual conversation and useless comments" to reflect "don't get your fingers under there . . . ." There must, however, be more than a mere scintilla of evidence that the warnings were repeated so continuously that they actually distracted Mr. Zimmerman and caused the safe to be dropped so that his finger was severed.

In conclusion, the Magistrate Judge did not err in granting the Brintons' Motion for Summary Judgment. The decision is affirmed.

VI

CONCLUSION

Based on the foregoing discussion, the decision by the Magistrate Judge to grant the Motion for Summary Judgment of the Plaintiffs/Appellants and the entry of the Summary Judgment by the Magistrate Judge are hereby affirmed as set forth herein.

DATED this _____ day of May, 2002.

_____
John Patrick Luster
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing OPINION IN RE: APPEAL was mailed, postage prepaid, sent by interoffice mail, or sent by facsimile transmission, on the _____ day of May, 2002, to the following:

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DANIEL J. ENGLISH
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By: _____
Deputy Clerk