

06CA2288

COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Lower Court:
ADAMS DISTRICT COURT
2004 CV 3625
The Honorable Donald W. Marshall, Jr. and
The Honorable John E. Popovich

Appellants:

UNION INSURANCE COMPANY,
UNITED FIRE & CASUALTY,
TARTAN PRODUCTS COMPANY,
RANDY OVERLEY d/b/a C.P. & D. Companies

Appellee:

SONITROL CORPORATION,

Attorneys for Plaintiffs-Appellants:

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FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

NOV 09 2006

Clerk, Court of Appeals

▲ COURT USE ONLY ▲

Case Number:

NOTICE OF APPEAL

I. NATURE OF THE CASE

A. Nature of the Controversy.

Appellants are insurance companies and under-insured companies which sustained damages from an arson warehouse fire which occurred on December 21, 2002 in Aurora, Colorado. Three burglars broke into an adjoining portion of the warehouse leased to Core-Mark with the intention to steal non-prescription drugs used in the illegal manufacturer of methamphetamine. At the conclusion of the robbery one of the burglars set the warehouse ablaze by spreading and igniting flammable liquids in various locations on the warehouse floor. The fires could not be extinguished by the responding fire departments in time to prevent fire, smoke and water damage to the property either insured or owned by the Appellants in the adjoining tenancy of the warehouse.

Numerous plaintiffs filed some eight lawsuit against several defendants in Adams County District Court alleging various claims for relief. The trial court granted a motion to consolidate the cases for purposes of trial; but the cases remained separate for purposes of discovery and pretrial motions. As against the Appellee, Sonitrol Corporation, Appellants alleged that it was negligent in the monitored of its burglar alarm installed in the Core-Mark warehouse. Appellants argued that had it used due care in the monitoring of the alarm, the presence of the burglars would have been detected by Sonitrol Corporation and the burglars would have been

apprehended before one of them set the arson fires.

However, the trial court granted Sonitrol's motion to dismiss the common law negligence claim against Appellants. All other claims against Sonitrol were subsequently dismissed by the trial court on motions for judgment on the pleadings or summary judgment or voluntarily dismissed by Appellants. Before trial the Appellants dismissed the remaining defendants except Core-Mark. In an Order dated September 22, 2006 the Trial Court stayed the remaining claims against Core-Mark and certified the case for appeal pursuant to C.R.C.P. 54(b).

B. Order Being Appealed and Basis for Appellate Court Jurisdiction.

The Order being appealed is that portion of Judge Marshall's April 18, 2005 Order dismissing Appellants' common law negligence claim (First Claim for Relief) as against Sonitrol. The Appellate Court has jurisdiction because all claims against Sonitrol were eventually dismissed, all claims against the remaining defendants were dismissed (except Core-Mark claims), and finally on September 22, 2006 the Trial Court stayed the claims against Core-Mark and certified the case for appeal pursuant to C.R.C.P. 54(b).

C. Whether Order Resolved all Issues before the Trial Court.

Judge Marshall's April 18, 2005 Order being appealed did not resolve all of Appellants' claims before the trial court until subsequent orders dismissed all claims

against Sonitrol and the other defendants (except Core-Mark) and until the court stayed the trial against Core-Mark and certified the case for appeal pursuant to C.R.C.P. 54(b).

D. Whether the Judgment was Made Final for Purposes of C.R.C.P. 54(b).

The judgment in 2004CV3625 being appealed herein was made final for purposes of C.R.C.P. 54(b).

E. Date Order was Entered and Mailed to Counsel.

The Order being appealed was entered and mailed to counsel on April 11, 2005 and the final Order certifying the case for appeal and staying 2004CV3625 was entered and mailed to counsel on September 22, 2006.

F. Extension Granted for Post-Trial Relief.

There were no extensions requested or granted for post-trial relief.

G. Filing of Motions for Post-Trial Relief.

There were no motions filed for post-trial relief.

H. Denial of Post-Trial Relief.

There were no motions or denial of motions for post-trial relief.

I. Extensions Granted to File Notice of Appeal.

There were no extensions granted to file the Notice of Appeal.

II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

Whether the Trial Court erred in dismissing Appellants' common law negligence claim against Sonitrol based upon a lack of duty of due care owed by Sonitrol to Appellants.

III. EVIDENCE TO RESOLVE ISSUES ON APPEAL

There was no transcript of any evidence taken before the Trial Court. The case was dismissed upon Sonitrol's motion to dismiss various claims, motion for judgment on the pleadings, motion for summary judgment and the voluntary dismissal of various claims brought by Appellants against Sonitrol and the voluntary dismissal of all claims against the remaining defendants except Core-Mark.

IV. PREARGUMENT CONFERENCE

Appellants do not request a preargument conference.

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VI. APPENDIX

A copy of the Trial Court's April 18, 2005 Order is attached as well as the Order dated September 22, 2006 staying 2004CV3625 and certifying the case for purposes of appeal pursuant to C.R.C.P. 54(b).

Respectfully submitted this 3rd day of November, 2006.

VARGO MYERS JANSON, P.C.



By: Todd A. Myers #14799
Attorneys for Appellants-Plaintiffs
Union Insurance Company and
Randy Overley d/b/a C.P. & D. Companies

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2006 a correct copy of the foregoing NOTICE OF APPEAL (with Attachments) was deposited in the U.S. mails postage prepaid addressed to:

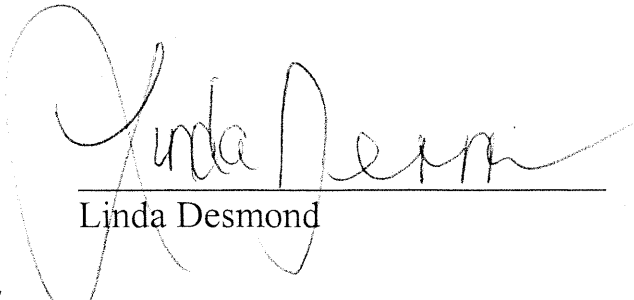
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Linda Desmond

<p>District Court, Adams County, State of Colorado</p> <p>Court Address: Adams County Justice Center 1100 Judicial Center Drive Brighton, Colorado 80601 Phone Number (303) 659-1161</p> <hr/> <p>WESTERN INNOVATIONS, INC., UNION INSURANCE COMPANY, UNITED FIRE & CASUALTY, TARTAN PRODUCTS COMPANY and RANDY OVERLY dba C.P. & D. COMPANIES,</p> <p>Plaintiffs,</p> <p>v.</p> <p>SONITROL CORPORATION, CORE-MARK INTERNATIONAL, INC., FLEMING COMPANIES, INC., and ROCKY MOUNTAIN FIRE AND SAFETY, INC.,</p> <p>Defendants.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: O4CV3625</p> <p>Div.C Ctrm: 504</p>
<p>ORDER</p>	

The court has received and reviewed Sonitrol Corporation's Motion to Dismiss. The court has also received plaintiffs' response and Sonitrol's reply. The court now dispenses with oral arguments and enters its ruling on the motion as stated herein.

Plaintiffs sue for property losses resulting from fire. The core facts alleged in the Amended Complaint are summarized as follows. Core-Mark leased a portion of a warehouse in which it stored personal property. Core-Mark contracted for burglar alarm services from Sonitrol of Denver, now Sonitrol, for Core-Mark's portion of the warehouse. The contract to provide the burglar alarm services was subsequently assigned to and assumed by Sonitrol. On the date of the fire Sonitrol was responsible to Core-Mark to perform the obligations of the contract. Western Innovations, Inc., Tartan Products and Randy Overly stored goods in a separate section of the warehouse separated from Core-Mark by a common fire wall. On December 21, 2002, burglars entered the Core-Mark area of the warehouse. While the burglars were present,

the Sonitrol system detected noise in the warehouse on several occasions. However, the Sonitrol employees monitoring the system disregarded the system alarm and took no action to call police or otherwise act to protect the Core-Mark property. Before leaving the premises, the burglars set a fire in the Core-Mark section of the warehouse. The fire ultimately spread past a common fire wall into the Western Innovations area where property owned by Western Innovations, Tartan Products and Overly was destroyed. Union Insurance Company sues as subrogee of Western Innovations. United Fire & Casualty sues as subrogee of Tartan Products. In their Amended Complaint, plaintiffs sue each defendant for negligence.

Sonitrol now moves pursuant to C.R.C.P. 12(b)(5) to dismiss the negligence claims asserted against it. In its motion Sonitrol separately discusses the negligence claims based on failure to use reasonable care, claims for negligent hiring, training and supervision, and those based on defective product. Plaintiffs oppose the motion.

In ruling on a motion submitted pursuant to C.R.C.P. 12(b)(5) to dismiss an action for failure to state a claim for which relief may be granted, the court must apply well established legal standards. Such motions are viewed with disfavor and are rarely granted. *Davidson v. Dill*, 503 P.2d 157 (Colo. 1972); *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992). The court may only consider matters stated in the Complaint and cannot go beyond the confines of the pleading. *Troxel v. Town of Basalt*, 682 P.2d 501 (Colo.App. 1984). All material allegations of the Complaint are assumed to be true. *Schmaltz v. St. Luke's Hospital*, 521 P.2d 787, modified 534 P.2d 781 (Colo. 1975). In the Complaint the plaintiff need not set forth the underlying facts giving rise to the claim with precise particularity. *Schockley v. Georgetown Valley Water and Sanitation District*, 548 P.2d 928 (Colo.App. 1976). A Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Davidson v. Dill*, supra.

I.

The Negligence Claim for Failure to Act.

In their Amended Complaint plaintiffs assert a multitude of factual circumstances to support their negligence claim against Sonitrol. These include failure to monitor and maintain the audio alarm system, failing to properly test and inspect the system, failure to report received alarms to authorities, failure to take reasonable precautions to protect against potential damage to property, and "any other acts and/or omissions constituting negligence, willful and wanton conduct and/or negligence per se."¹ Sonitrol moves to dismiss plaintiffs' negligence claim contending it owed no duty to plaintiffs. Sonitrol argues that its conduct amounted only to nonfeasance which is not actionable absent limited special relationships.

The initial determination of whether a defendant owes a duty to the plaintiff, as well as the scope of that duty, is a question of law for the court. *Bath Excavating & Construction Co. v. Wills*, 847 P.2d 1141 (Colo. 1993). In determining whether a defendant owes a duty to a particular plaintiff, the law distinguishes between acting and failure to act, i.e. misfeasance, on one hand, which is active misconduct that injures others, and nonfeasance, on the other hand, which is the failure to take positive steps to protect others from harm. *University of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987); *Smit v. Anderson*, 72 P.3d 369 (Colo.App. 2002). In nonfeasance cases, the existence of a duty has been recognized only in a limited number of special relationships parties including common carrier/passenger, innkeeper/guest, employer/employee, possessor of land/invited entrant, parent/child and hospital/patient. *Lewis v. Emil Clayton Plumbing Co.*, 25 P.3d 1254 (Colo.App. 2000).

The negligence claims in this case are based on nonfeasance, i.e. the failure to take positive steps to protect others from harm. The Amended Complaint specifically alleges that employees of Sonitrol received audio activation signals from the Core-Mark warehouse burglar alarm system but failed to act on those signals. The complaint does not allege any affirmative action on the part of Sonitrol. This case does not fall within the limited area where a duty exists for inaction or nonfeasance. None of the special relationships where liability for nonfeasance might be imposed are alleged in the plaintiffs' Complaint. Therefore, the

¹ See Amended Complaint paragraph 52.

court rules, as a matter of law, that no duty existed such as to support plaintiff's common law negligence claim against Sonitrol for any of its failures to act to protect plaintiffs' property. The motion to dismiss these claims is granted.

II.

The Negligent Hiring, Supervision and Training Claims.

Plaintiffs allege in their Amended Complaint that Sonitrol failed to hire, train, supervise and control competent, qualified, careful and prudent employees to perform their responsibilities in a safe and workmanlike manner and/or adequately train such employees in the safe and proper design, manufacture, testing, monitoring and/or inspection of the product. They also allege Sonitrol failed to hire, train, supervise and control competent, qualified, careful and prudent employees to perform their responsibilities while monitoring the facility a 3650 Fraser Street in a reasonable and prudent manner so as to protect plaintiffs' property.² Sonitrol separately moves to dismiss this portion of the negligence claim asserted against it.

Liability for negligent hiring, training and supervision is based on section 213 of the Restatement (Second) of Agency §213 which is clearly now adopted in Colorado. The principles of liability, however, are not based on rules of agency but rather on the law of torts. *Connes v. Molalla Transport Systems, Inc.*, 831 P.2d 1316 (Colo. 1992). Like other forms of negligence, negligent hiring, supervision and training require the existence of a legal duty by the defendant to the plaintiff, breach of that duty by the defendant, injury to plaintiff, and a sufficient causal relationship between defendant's breach and plaintiff's injuries. A negligence claim will fail if it is predicated on circumstances for which the law imposes not duty of care upon the defendant. *Connes*, supra at 1320.

This court sees no reason to address the claims for negligent hiring, supervision or training differently from the other negligence claims discussed above. These claims are also based entirely on the failure of Sonitrol employees to act to protect plaintiffs from injury. There is no allegation that any Sonitrol employee caused the fire or took any other affirmative action which injured plaintiffs. The allegation is that Sonitrol employees were passive and failed to intercede in the situation.

² See paragraph 52 (e) and (f) of Amended Complaint.

Therefore, it is this court's ruling that the same distinction between malfeasance and nonfeasance applies to these claims and that they must be dismissed for the same reasons as stated in Section I of this order.³

III.

The Negligence Claims Based on Product Defects.

Plaintiffs' negligence claim also includes the conclusory allegation that Sonitrol failed to properly design and manufacture the Sonitrol audio alarm system in a manner that it would not fail.⁴ Sonitrol separately moves to dismiss these aspects of the negligence claim.

Whether a defective product claim is based on strict liability or negligence, the plaintiff must plead and prove the product is defective. *Mile High Concrete, Inc. v. Matz*, 842 P.2d 148 (Colo. 1992). While plaintiffs make the conclusory allegation that Sonitrol negligently designed and manufactured the alarm system, the Amended Complaint nowhere alleges the product itself was defective. To the contrary, plaintiffs only allegation of alarm system failure is that one microphone in the system never produced an audio activation because its sensitivity was set at its lowest level by defendants, effectively disabling the microphone.⁵ In fact, the substantial essence of plaintiffs complain it that the alarm system performed properly sending audio alarms to the Sonitrol monitoring facilities where they were neglected by the monitoring employee. These allegations do not support a claim based on a defective product. Therefore, the court dismisses the negligence claims based on negligent design or manufacture.

IV.

Summary.

In summary, the court dismisses the negligence claim asserted against Sonitrol in its entirety.

³ Also see *Arnold v. Colorado State Hospital*, 910 P.2d 104 (Colo.App. 1995) holding a claim for negligent supervision can only be sustained where damage results from the wrongful actions of the person supervised. The court sees no reason why the same principle would not apply to claims for negligent hiring or training.

⁴ See Amended Complaint, paragraphs 52(a) and (b).

⁵ See Amended Complaint, paragraph 18.

Dated at Brighton, Colorado this 18th day of April, 2005.

By the court:

Duly signed original
in court file

Donald W. Marshall, Jr.
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via JusticeLink (e-file) to all counsel of record and all pro se parties this 18th day of April, 2005.

Duly signed original
in court file

Division Clerk

<p>DISTRICT COURT, ADAMS COUNTY, COLORADO Court Address: 1100 Judicial Center Drive, Brighton, CO 80601 Phone Number: (303) 654-3260</p> <p>CORE-MARK MIDCONTINENT, INC., and CORE-MARK INTERNATIONAL, INC., et al., Plaintiffs,</p> <p>SONITROL MANAGEMENT CORP., CORNERSTONE SECURITY, INC., d/b/a SONITORL OF DENVER and SONITROL CORPORATION, et al., Defendants.</p>	
	<p>Case Nos. 03-CV3836 03-CV-3873 03-CV-3875 04-CV-1978 04-CV-3625 04-CV-3637 04-CV-3644</p> <p>Div. C. Ctrm.: 504</p>
<p style="text-align: center;">ORDER CERTIFICATION C.R.C.P. 54(b)</p> <p style="text-align: center;">ORDER STATUS OF 04 CV 3625</p>	

The Court having reviewed all pleading to issue and being advised enters the following Findings and Orders.

CERTIFICATION C.R.C.P. 54(b)

The Court having considered all submitted pleadings and statements of counsel and being advised enters the following Findings and Orders.

The Court Finds and Concludes that the omnibus Order entered on September 8, 2006 was dispositive of all legal issues and substantially dispositive of all but minor factual issues.¹ The Court in its September 8, 2006 Order limited substantial claims and rights of certain parties, and therefore those determinations are questions of law now ripe for appellate review. The Court specifically Finds that there is no just reason for delay and directs entry of judgment to allow for appellate review of questions of law determined by the Court in the September 8, 2006 Order.²

The Court hereby Grants the parties fifteen (15) days to submit a stipulated and agreed upon Order as to certification under C.R.C.P. 54(b). Further and upon execution of the above Order, the Court will certify all issues as Final and subject to Appeal under C.R.C.P. 54(b).

STATUS OF 04 CV 3625

The Court notes that case 04 CV 3625 was consolidated for trial with all related and captioned and cited cases. The Court's omnibus September 8, 2006 Order determined substantial legal issues in all cases, including case 04 CV 3625. The Court Finds that the issues and claims of the parties are substantially intertwined and dependent upon the claims of other parties in other related cases.

The Court therefore Finds and Concludes under the general rationale of *Trans Central Airlines v. McBreen & Associates*, 497 P. 2d 1033 (1972) and *Ireland v. Wynkoop*, 539 P.2d 1349 (1975) to establish consistency of rulings, judicial and litigant economy, and overall resolution of both factual and legal issues common in all of the interrelated cases that a continuance and stay of case 04 CV 3625 is warranted pending appellate review.

The Court hereby Orders that trial in 04 CV 3625 be vacated and all proceeding be stayed pending appellate review of all matters herein. Further, all interest is tolled as between the parties as of October 2, 2006.³

DONE AND SIGNED, this 22nd day of September, 2006.

BY THE COURT:

Original in Court's file signed by

John E. Popovich, District Court Judge

¹ Minor factual issues as to determination of damages as to breach of contract remain.

² Court's determination of contract and not tort liability of Sonitrol, et al.

³ The Court accepted the judicial admission of counsel for plaintiffs that interest would be tolled in the event the court continued the subject proceedings herein.

CERTIFICATE OF SERVICE

A copy of the within Order was e-filed to counsel of record on this 22nd day of September, 2006.

Original in court's file signed by

District Court Judicial Assistant