

THE
COURT OF APPEALS
STATE OF COLORADO

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COURT OF APPEALS

Trial Court:

Adams County District Court
Consolidated Case Numbers 2003 CV 3836
and 2004CV3625
Hon. Donald Marshall,
Hon. John E. Popovich, Jr., District Judges

Plaintiffs-Appellants:

WESTERN INNOVATIONS, INC., UNION
INSURANCE COMPANY, UNITED FIRE
& CASUALTY, TARTAN PRODUCTS
COMPANY, RANDY OVERLY, d/b/a CP &
D COMPANIES

Case Numbers: **06 CA 2275**
06 CA 2288
06 CA 2287

Defendant-Appellee:

SONITROL CORPORATION, formerly
known as Sonitrol Management Corporation

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APPELLANTS' CONSOLIDATED REPLY BRIEF

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The Appellants, Western Innovations, Inc., by Fasing Law Firm, P.C., and Union Insurance Company, United Fire & Casualty, Tartan Products Company, and Randy Overly, d/b/a/ C.P. & D. Companies, by the law firm of Vargo Myers Janson, P.C. respectfully submit their consolidated reply brief:

I. INTRODUCTION.

One cannot read Sonitrol's answer brief without concluding that Sonitrol believes it owes no duty to anyone under any theory, tort or contract, under any circumstances at any time, regardless of its conduct.

Sonitrol has completely lost sight of the only reason companies retain its services: to either prevent or mitigate a likely peril. That includes intentional misconduct caused by criminals as well as a broad range of accidental damage. Under Sonitrol's burglary service plan, it listens for suspicious sounds and notifies the authorities. For other perils, such as accidental fire, Sonitrol monitors other sensors. In either case, Sonitrol's active remote monitoring activities are critical.

In fulfilling this role, Sonitrol is not a passive bystander. As a corporation,

Sonitrol voluntarily places itself in the position of protector of property, particularly at times when property owners are most vulnerable.

In defending this lawsuit, Sonitrol emphasizes all of the ways it evades responsibility. It evades its contract duties by relying on fine print that it claims eliminates all meaningful obligations to perform. If one reads Sonitrol's contracts as Sonitrol argues, there are no consequences to Sonitrol for breach of contract that are remotely commensurate with the duties it undertakes. Companies place millions of dollars of property in the hands of Sonitrol to protect by carefully monitoring their premises. However, whether Sonitrol performs or fails to perform, the only consequences to Sonitrol are - according to Sonitrol - trivial expenses that amount to a microscopic fraction of the damage caused. It can hardly be a reasonable interpretation of contractual obligations and expectations of Sonitrol's customers to permit it to perpetrate the illusion of protection under the guise of contractual limitations. An agreement that purports to allow a party to perform or not perform in its discretion is illusory and unenforceable in Colorado. *Sentinel Acceptance Corp. v. Colgate*, 424 P.2d 380 (Colo. 1967).

Here, Sonitrol created the illusion of security and protection for Western Innovations and its customers after leading them to rely upon Sonitrol to provide competent alarm services. By voluntarily undertaking duties, Sonitrol clearly undertook to perform its duties competently. As further analyzed below, due to the willful and wanton nature of Sonitrol's breach of its duties, the appellants have shown that summary judgment in favor of Sonitrol was improper.

II. SONITROL HAD AN INDEPENDENT DUTY TO APPELLANTS UNDER *TACO BELL, INC. V. LANNON*

Sonitrol all but ignores the crucial independent duty factors that must be analyzed under *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987). In *Taco Bell*, the Colorado Supreme Court held that the factors that must be analyzed include the risk involved, the foreseeability and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor. 744 P.2d 46. The court added:

No one factor is controlling, and the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists. *Ibid.*

A brief analysis of the application of these factors to the facts of this case clearly establishes Sonitrol's duty.

A. The risk involved.

The risk is substantial. The alarm systems were designed to detect criminal activity. If that criminal activity is detected, but then affirmatively ignored due to the negligence of the alarm company, it is certain that the criminals will continue to steal or destroy valuable property or inflict bodily harm.

B. Foreseeability and probability of injury.

The probability of criminal conduct was not only foreseeable, it was nearly a certainty under the circumstances. This commercial warehouse was left unattended for long periods of time and contained valuable property. The reason that both Western Innovations and Core-Mark had separate contracts with Sonitrol was to protect their property.

Even in *Taco Bell*, where the foreseeability of an armed robbery was more remote than the burglary here, the Supreme Court had no trouble finding sufficient foreseeability and probability of injury, regardless of Taco Bell's inability to

predict the exact form of criminal activity: "foreseeability includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." *Taco Bell*, 744 P.2d 46 at 48, quoting 3 F. Harper, F. James & O. Gray, The Law of Torts sec. 18.2 at 658-59 (2nd ed. 1986). In *Ekberg v. Greene*, 588 P.2d 375 (Colo. 1978), vandalism of a gas station restroom ultimately led to severe burn injuries. In analyzing the issue of foreseeability, the Supreme Court rejected the narrow scope urged by the defendant. The Supreme Court held:

Where the circumstances make it likely that defendant's negligence will result in injuries to others and where this negligence is a substantial factor in causing the injuries sustained, the requirement of proximate causation is satisfied. An intervening act of a third party does not absolve the defendant from responsibility if that act is reasonably and generally foreseeable. *Ibid*, 588 P.2d 375 at 377.

Similarly, here, Sonitrol knew that there was a likelihood of criminal activity that would result in damages to the warehouse and property inside the warehouse. As in *Ekberg*, foreseeability does not require an actor to anticipate the precise injury or mechanism of injury. Despite its knowledge, Sonitrol negligently monitored the warehouse which ultimately led to severe damages.

C. Social Utility.

There is substantial social utility in Sonitrol's undertaking to properly monitor the burglar alarm system at the warehouse, and no social utility in its failure to do so. Although there is some minimal risk that Sonitrol would report false alarms, and therefore consume law enforcement resources, that is an unavoidable and small price to pay for the substantial savings in injury and property damage that results from timely and proper reporting of criminal activity.

D. Magnitude of the burden on Sonitrol.

The magnitude of the burden on Sonitrol is precisely zero because Sonitrol already voluntarily undertook the duty to properly notify the police of burglaries. Sonitrol was specifically equipped, and its personnel specifically trained, to properly monitor alarm systems. There would be no new burden placed on Sonitrol.

Sonitrol's answer brief attempts to limit its duty to the Core-Mark portion of the warehouse. However, The warehouse was a single building, and Sonitrol was already monitoring premises occupied by Western Innovations and Core-Mark.

Sonitrol effectively was monitoring and protecting the entire building. By its willful and wanton misconduct in ignoring repeated alarms, Sonitrol consequently endangered everyone's property in the entire warehouse, not merely the property in the Core-Mark section.

It does not matter whether Western Innovations possessed property of others upon which it was working (belonging to Tartan and Overly) in the warehouse. Sonitrol's duty extended to all property of all persons within the warehouse that was destroyed due to the wanton and willful misconduct of Sonitrol in repeatedly resetting tripped burglar alarms. Its conduct was a substantial cause of the continuation of the burglary that resulted in the intentional arson.

Western Innovations and its customers reasonably relied upon Sonitrol to perform its duty to monitor the Core-Mark section of the warehouse, because failure to do so could have and in this case did have extremely serious effects upon the remainder of the warehouse. It is clearly foreseeable that a burglar would cover up the existence of a burglary by starting a fire. Moreover, because Sonitrol monitored the entire building, its duty cannot be divided up into theoretical

segments as though the conduct of burglars in one part of the building had no effect on the remaining parts of the building. It was everyone's reasonable expectation, and certainly Sonitrol knew, that by failing to properly discharge his duties in one part of the building, it was fully foreseeable that damages could accrue to adjacent tenants. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 493 N.E.2d 1022 (Ill. 1986).

Sonitrol's actions did increase the risk of harm to Western Innovations and its customers. One does not have to create a "new" risk of damage in order to actively assist a tort in progress. The intentional fire caused by the burglars occurred at the end of the burglary after Sonitrol had reset tripped burglary sensors repeatedly over the course of several hours. By wantonly and willfully resetting tripped burglar alarms repeatedly, Sonitrol increased the risk of harm by allowing the burglars to remain in and return to the warehouse, which eventually led to one of the burglars setting the fire. In contrast, in the absence of wanton and willful conduct, had Sonitrol not reset the alarms and had properly notified the police according to its voluntarily undertaken duty, the police would have arrived long before the fire was set, and prevented virtually all of the damage. In effect,

Sonitrol encouraged the burglars and gave them more time to ultimately burn the entire building, not just the Core-Mark leased part of the warehouse.

It was not merely foreseeable that a burglar would steal property; it was equally foreseeable that a burglar would cause vandalism or intentionally set a fire. Under those circumstances, Sonitrol's active, willful and wanton conduct in resetting the burglar alarm, thereby giving the burglars additional time to not only steal property but to torch the warehouse, actively assisted the burglars and falls squarely within the holding of *Ekberg v. Greene, supra*.

Although Sonitrol cites three nonfeasance alarm cases from other jurisdictions on pages 16 and 17 of its answer brief, none of the cases cited has even the remotest resemblance to the facts of this case. Two of the cases involved accidental water damage and one was an accidental fire case, all from New York. None of them involved burglars causing arson after an alarm company repeatedly reset tripped alarms. Sonitrol fails to cite a single case where an alarm company had a duty to monitor alarms affecting an entire warehouse, repeatedly reset tripped burglar alarms over a lengthy period of time, and the burglars then torched the

warehouse, resulting in millions of dollars of property damage. Every single case cited by Sonitrol is clearly distinguishable on that basis alone.

Sonitrol attempts to falsely distinguish its duty between damages caused by a property burglary compared to accidental fire. This is not an accidental fire case. It is an intentional arson case caused by burglars that Sonitrol had a duty to report. Of course, if the burglars had committed only a property burglary, then only the Core-Mark premises would have been impacted. But those are not the facts here. Sonitrol fails to cite a single case where a Colorado appellate court has limited the scope of duty of an alarm company to the immediate area of a burglary where the consequences of the burglars' conduct extended beyond the boundaries of the immediate area of the break-in.

III. SONITROL'S INDEPENDENT DUTY IS FURTHER BUTTRESSED BY RESTATEMENT OF TORTS (SECOND) §323.

Sonitrol overlooks the significant and controlling authority of *Jefferson County School District R-1 v. Justus*, 725 P.2d 767 (Colo.1986). There, the Colorado Supreme Court held that a separate and distinct body of law holds that a party may assume duties of care by contract or by voluntarily undertaking to

render a service, citing, among other authority, the Restatement of Torts (Second) § 323. In *Lester v. Marshall*, 352 P.2d 786 (Colo. 1960), the “assumed duty” rule was accepted by the Supreme Court which stated that:

Where a person represents by word or act that he has done or will do something upon the performance of which he should realize that others will rely, he is liable for expectable harm caused by the reliance of others and his failure of performance, if his representation was negligently or intentionally false, or if without excuse he fails to perform. *Ibid*, 352 P.2d 786 at 791.

A plaintiff must prove that by its conduct the defendant undertook to render a service that was reasonably calculated to prevent the type of harm that befell the plaintiff, and that the plaintiff relied upon that conduct or the defendant’s conduct increased the plaintiff’s risk. *Jefferson County School District R-1 v. Justus*, 725 P.2d 767 at 771.

Significantly, for this principle to apply, it does not matter whether or not the misconduct of the defendant is based upon misfeasance or nonfeasance.

Jefferson County School District R-1 v. Justus, footnote 4¹. And, because it was

¹ “There remains a question in many jurisdictions as to whether the Restatement rule applies to both nonfeasance, a complete omission or failure to perform, and misfeasance, a negligent performance. Some courts have held that proof of reliance or increased risk is necessary only where the case is one of nonfeasance. See *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 770-71 (Ind. App. 1986); *Chisolm v. Stevens*, 47 Ill. App. 3d 999, 365 N.E.2d 80, 85-86, 7 Ill. Dec. 795 (1977) (by

Sonitrol's burden to establish the absence of a triable fact for purposes of summary judgment, it was its burden to show for purposes of summary judgment that Western Innovations and its customers did not rely upon Sonitrol to provide proper monitoring services. That it failed to do.

Here, based upon all of the documents in the record, it is clear that everyone with property within the warehouse was relying upon Sonitrol to perform its duty

implication). Conversely, the authors of the Restatement state unequivocally that § 323 applies to all cases of misfeasance, see Restatement (2d) of Torts § 323 comment a ("This section . . . applies whether the harm . . . results from the defendant's negligent conduct in the manner of his performance of the undertaking, or from his failure to exercise reasonable care to complete it or to protect the other when he discontinues it."), but leave open the question of "whether a mere promise, without in any way entering upon performance, is an undertaking sufficient to make the promiser liable under the rule stated in this Section," *id.* at comment d. However, while the difference between misfeasance and nonfeasance is fairly clear in theory, courts have found the line between the two far from easy to draw, and the distinction has had a steadily decreasing significance in practice. See W. Prosser and W. Keeton, *The Law of Torts* § 56 at 374, 379 (5th ed. 1984); *Brown v. McPherson's, Inc.*, 86 Wash.2d 293, 545 P.2d 13, 18 (1976) (citing 4th ed. or Prosser); see also Restatement (2d) of Torts § 323 commented ("The modern law has . . . witnessed a considerable weakening and blurring of the distinction [between misfeasance and nonfeasance], in situations where the plaintiff's reliance upon the defendant's promise has resulted in harm to him."). We believe that the reference in *Lester v. Marshall* to representation "by word or act" that something has been or will be done, 143 Colo. at 197, 352 P.2d at 791, makes it clear that in Colorado the terms of § 323 apply to nonfeasance as well as misfeasance. Moreover, we are not persuaded that the distinction between misfeasance and nonfeasance warrants adoption of two different standards for assumption of duty, see *LaMoureaux v. Totem Ocean Express, Inc.*, 651 P.2d 839, 840 n.4 (Alaska 1982), and therefore follow the majority rule requiring either reliance or increased risk for both. See Prosser and Keeton, *Law of Torts* § 56 at 381 ("In most cases finding liability [for assumed duties], the defendant has made the situation worse, either by increasing the danger, by misleading the plaintiff into the belief that it has been removed, or by depriving him of the possibility of help from other sources.") (footnote omitted)."

to monitor the premises to prevent damage. That includes not only fire damage, both intentional and accidental, but also burglar damage. Sonitrol was the only alarm company monitoring the entire warehouse. Contrary to Sonitrol's brief, Western Innovations was not relying upon Core-Mark burglar alarm sensors to detect fire. Rather, Western Innovations and its customers relied upon Sonitrol to properly detect and promptly and reasonably report burglar activities which were reasonably foreseeable to lead to intentional arson - precisely the damage that occurred here. Likewise, by analogy, if an accidentally caused fire had started in Core-Mark's portion of the warehouse, Western Innovations and its customers would have also reasonably relied upon Sonitrol to monitor and promptly report that fire to the fire department. The important distinction is that this intentionally set fire was caused by illegal entry into the building that should have been detected and reported by Sonitrol. It was and is perfectly reasonable for Western Innovations and its customers to rely upon Sonitrol to promptly report burglaries, and when the activities of the burglars caused damage to an adjacent tenant and its customers, Sonitrol's misconduct fits well within the analytical parameters of *Taco Bell*.

The fact that Sonitrol ultimately monitored the fire alarm system protecting

Western innovation's portion of the warehouse does not vitiate Sonitrol's extreme departure from a reasonable standard of care when it antecedently detected the burglars but then repeatedly reset the burglar alarms.

Sonitrol's argument that its customers should buy more insurance to make up for its failures is likewise without merit. Sonitrol asserts the strawman argument that because it is not an insurance company, it is immune from all tort liability because to impose tort liability would in effect make it an insurance company. This *non sequitur* means that Sonitrol would never incur any liability, and the only remedy would be for a victim of its misconduct to buy insurance. This theory of liability shifting for violating one's legal duties is not recognized by any Colorado legal authority - nor should it be.

Sonitrol's argument that Western Innovations and its customers did not argue any reliance in the trial court is wrong. The first complaint filed against Sonitrol, R. 1/10, paragraphs 68-69, incorporated by paragraph 80 at R. 1/13, alleges that the plaintiffs relied upon Sonitrol to properly monitor the premises. In addition, in one of numerous filings of Western Innovations, in its brief opposing

summary judgment at R. 4/1040, we argued, on behalf of Western Innovations and its customers, citing the closest case to our facts in the United States:

Sonitrol voluntarily undertook the duty to carefully monitor the burglar alarm. All warehouse tenants relied on Sonitrol's proper monitoring of burglar and fire alarms to protect the whole warehouse, not just one of the tenants in the warehouse. In *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 493 N.E.2d 1022 (Ill. 1986), a warehouse fire spread, damaging property of adjoining tenants. The Illinois Supreme Court held that the trial court erred in dismissing the claims of the adjoining tenants against the alarm company because a jury could reasonably have found that the alarm company's negligence in failing to transmit all of the alarm signals to the local fire department was the proximate cause of the adjoining tenant's losses. "*One possible consequence of placing this burden on alarm system contractors - would be their future exercise of reasonable care in maintaining their systems.*" *Id.* 493 N.E. 2d 1022, 1026. [emphasized]

Therefore, from the very beginning, and throughout this case, Western Innovations and its customers and insurers have consistently maintained that they relied upon Sonitrol to properly monitor the entire premises consistent with the persuasive analysis in *Scott & Fetzer Co. v. Montgomery Ward & Co.*, *supra*. Accord, *DCR, Inc. v. Peak Alarm Co.*, 663 P.2d 433 (Utah 1983)(substantial property stolen from clothing store when burglar alarm deactivated by burglars with a simple technique known to both criminals and alarm company, which therefore had legal duty to correct the system defect rather than do nothing.)

IV. CONCLUSION.

The trial court erred in dismissing Appellants' negligence and gross negligence claims in its orders granting the motions to dismiss and for summary judgment. Appellants should be allowed to try their case against Sonitrol and Core-Mark. Sonitrol's monitoring operators were negligent in resetting its burglar alarm system several times over a several hour period while the warehouse was being robbed. Had the alarm system not been reset and had Sonitrol acted to call the police, the fire would not have occurred.

Respectfully submitted,

FASING LAW FIRM P.C.



Vargo Myers Janson P.C.



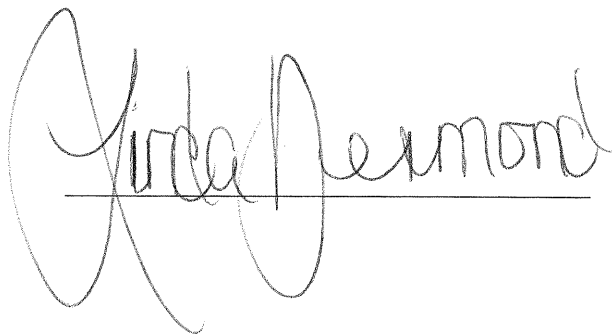
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A handwritten signature in cursive script, reading "Linda Permond", is written over a horizontal line. The signature is fluid and somewhat stylized, with large loops and a clear, legible name.