

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-004663

10/10/2018

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT  
M. Corriveau  
Deputy

N X P, U S A INC

MICHELLE M BUCKLEY

v.

SONORAN WASTE DISPOSAL  
CORPORATION INC

JARIN GIESLER

JUDGE BRODMAN

**RULING ON PENDING MOTIONS FOR SUMMARY JUDGMENT**

The Court received the following motions: 1) defendant Sonoran's Motion for Partial Summary Judgment Regarding Damages filed May 10, 2008; 2) Sonoran's Motion for Partial Summary Judgment Re: Contract Claim filed May 10, 2018; 3) NXP's Motion for Summary Judgment Re: Negligence filed July 17, 2018; 4) NXP's Motion for Summary Judgment Re: Defenses to Tort Claims filed July 17, 2018; and 5) NXP's Motion for Summary Judgment Re: Breach of Contract filed July 17, 2018. The Court reviewed the motions, responses and replies. The Court held oral argument on October 8, 2018.

**I. SONORAN'S MOTION REGARDING DAMAGES**

Sonoran moves for summary judgment on punitive damages and compensatory damages. The motion is granted in part and denied in part.

Defendant's driver failed to lower a hoist and accidentally ran into a trestle. The action was careless. It was foolish. It was a breach of any conceivable standard applied to drivers of waste disposal trucks. But it was an accident and not an action for which punitive damages are

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-004663

10/10/2018

appropriate. The fact that an alarm was disabled cannot be tied by clear and convincing evidence to an allegation that defendant was acting with the requisite evil mind. Clear and convincing evidence does not demonstrate that the alarm was disabled because defendant was consciously disregarding a substantial risk that its conduct might significantly injure the rights of others.

In *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330 (1986), the supreme court held that a defendant who has an evil mind “should be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others.” Most punitive damages cases involve spite or some sort of secondary gain. There is no spite or secondary gain here.

The Court finds that no reasonable jury could find by clear and convincing evidence that punitive damages are appropriate.

The second part of Sonoran’s motion fails. Here, evidence indicates that NXP needs to spend approximately \$3 million to fix the damages caused by Sonoran’s driver running into the trestle. If Sonoran has evidence that the repairs are unnecessary, it can present the evidence. If Sonoran has evidence that the repairs are an upgrade, Sonoran may present the evidence. But Sonoran is not entitled to summary judgment on plaintiff’s claimed damages.

Evidence suggests that the lines have been damaged to the extent they cannot be repaired and must be replaced. But plaintiff does not seek to replace the entire system. Rather, plaintiff seeks to replace three of the seven lines. SSOF ¶¶31-32.

Arizona law acknowledges that different rules for measurement of damages may apply depending on the nature of the injury. The cost of restoring or replacing the property is typically the proper measure. However, “a different rule is applied where the injury is of such a character as to be irremediable except at great cost, or where the property cannot be restored to its former condition.” *City of Globe v. Robogliatti*, 24 Ariz. 392, 398 (1922). In such cases, the measure of damages is the difference in fair market value before and after the injury.

The plaintiff has the burden of proving its damages. The Court finds that plaintiff satisfied its burden by providing evidence of the cost of repair. In fact, NXP is currently making the repairs. If defendant wishes to argue that plaintiff’s damages are overstated, defendant has the opportunity to come forward with such evidence. The Court will then instruct the jury on measures of damages supported by the evidence.

In short, the Court finds that it is not up to the plaintiff to show that the cost of repair does not exceed the diminution in value.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-004663

10/10/2018

**IT IS ORDERED** that Sonoran's motion for partial summary judgment on the punitive damages claim is granted.

**IT IS ORDERED** that Sonoran's motion for partial summary judgment on the remaining damages claim is denied.

## **II. COMPETING MOTIONS REGARDING BREACH OF CONTRACT**

In addition to the tort claim, NXP sued Sonoran for breach of contract. Both NXP and Sonoran seek summary judgment on the breach of contract count.

There is no question that Sonoran and its driver, Mr. Forristall, owed a duty to drive reasonably even without the existence of a contract. The Court views the instant action as fundamentally one in tort. Nevertheless, plaintiff's contract claims are not inconsistent with the tort claims.

Arizona law is clear that a contract that places the parties within striking distance of each other is not, by itself, sufficient to turn a tort claim into a breach of contract action. The issue is whether there is any sort of a special contractual undertaking that was breached.

Plaintiff points to three contractual provisions. First, the contract required Sonoran to comply with "highest standards." Second, the contract required Sonoran to comply with applicable OSHA regulations and to follow NXP's traffic regulations. Third, the contract required plaintiff to be named as a named insured in Sonoran's insurance contract. The Court rejects a breach of contract action based on the second and third claims. Requiring a party to comply with the law or traffic regulations is not a special contractual undertaking. The failure to name NXP as an additional insured has nothing to do with the damages alleged in this case.

The provision of the contract requiring Sonoran to comply with "highest standards" presents a closer call. A claim may arise "out of contract" if the contract imposes "additional duties beyond those implied by law." *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 15, ¶ 26 (App. 2000). The Court believes that a "highest standards" performance obligation requires effort beyond ordinary care. Sonoran's explicit promise to conform to the "highest standards" in Sonoran's field goes beyond any general duty implied-by-law to perform in a workmanlike or non-negligent manner. As such, the contract creates a special contractual undertaking. Sonoran's motion for summary judgment on this point is denied.

There is no ambiguity in the contract. There is no triable issue of fact that Mr. Forristall's driving did not reach the "highest standards" for performing services. Sonoran presents no

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-004663

10/10/2018

evidence that it conformed to “highest standards.” As noted below, Mr. Forristall’s driving didn’t even meet ordinary negligence standards.

The Court finds as a matter of undisputed fact that Sonoran breached the contract by failing to provide its services in accordance with the “highest standards” of the waste disposal industry.

**IT IS ORDERED** that Sonoran’s motion for partial summary judgment on the contract claim is granted in part and denied in part. The motion is granted on the claims that Sonoran failed to follow regulations and that Sonoran failed to name plaintiff as a named insured. It is denied on the claim that Sonoran failed to apply highest standards.

**IT IS ORDERED** that NXP’s motion for partial summary judgment on the claim that Sonoran breached the contract by failing to meet “highest standards” is granted.

**IT IS ORDERED** that plaintiff’s application for fees is denied without prejudice and held in abeyance pending final resolution to the merits of all claims.

### **III. NXP’S MOTION REGARDING NEGLIGENCE**

NXP moved for summary judgment on the claim that Sonoran was negligent as a matter of law. The only remarkable aspect of this motion is that it had to be filed in the first place. Even more remarkably, Sonoran filed an opposition. At oral argument, Sonoran conceded negligence.

Sonoran’s concession at oral argument was a long time coming. Uncontested evidence established that Mr. Forristall failed to use reasonable care when he drove the truck into the piping trestle. This evidence includes, but is not limited to, admissions demonstrating that Mr. Forristall knew that he should not drive the truck with the hoist in the up position, that Mr. Forristall was unaware that the hoist was in the up position, that he had driven the truck under the trestle three times without issue when the hoist was in the proper position and that he struck the trestle at a speed in excess of 20 mph. Other undisputed evidence demonstrated that an alarm warning a driver that the hoist was in the up position had been disconnected and was not operable at the time of the accident. Mr. Forristall testified that the accident would not have happened if the truck was equipped with an operable alarm system. Sonoran’s management acknowledged that its employee messed up, and he was fired a couple of days after the accident.

Given the overwhelming evidence, no reasonable jury could conclude anything other than Sonoran’s employee, for whom it was vicariously liable, was at fault as a matter of law.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-004663

10/10/2018

Given the overwhelming, uncontroverted evidence, the Court was puzzled as to why Sonoran filed a 14 page opposition and a nine page controverting statement of facts accompanied by 1.25 inches of supporting documentation. The Court received no satisfactory explanation from defendant's counsel during oral argument. Nor was it clear why defendant waited until oral argument to concede negligence. At a minimum, defendant's counsel could have contacted the Court with this acknowledgment after briefing was complete, thus saving plaintiff from having to prepare for oral argument and the Court from reviewing 65 pages of pleadings plus exhibits consuming two notebooks.

The Court finds that defendant's filing of the opposition and failure to concede negligence until oral argument was a violation of A.R.S. § 12-349. The Court finds that defense counsel defended this claim without substantial justification and unreasonably expanded the litigation by requiring plaintiff to respond to, and the Court to review, a frivolous argument. The assertion that Sonoran is without fault was groundless and was not made in good faith. The Court finds that defendant and its attorney should have known that the defense had no substantial justification after the depositions were completed and defendant and its counsel could easily determine that there was no good faith basis to argue that Mr. Forristall and Sonoran were without fault.

The Court draws a distinction between the instant claim and plaintiff's claim for punitive damages or defendant's claim of comparative fault. Although the Court found both of those positions to be unsuccessful, there was a reasonable good faith basis to make the claim or defense. By contrast, there is no reasonable good faith basis to argue that a driver who crashes his truck hoist into a trestle because he failed to lower a hoist which he knew must be lowered, and who drove the truck in uncontested violation of company policies was somehow not at fault.

In considering sanctions, this Court is mindful that "[c]ourts should not impose sanctions lightly." *Estate of Craig v. Hansgen*, 174 Ariz. 228, 239 (App. 1992). But this Court takes a global view of this litigation, and the Court considers the instant situation a continuation of questionable positions taken by defendant's attorney throughout the litigation.<sup>1</sup> This case has been excessively litigated from the beginning.

A.R.S. § 12-349(B) allows the Court to assess fees against the offending attorneys and parties, jointly and severally. Here, the Court finds that the defendant's attorneys' actions on this

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1. Other examples of questionable conduct include: a) defendant's disregard of discovery orders concerning United Fire and the sanctions awarded in conjunction with that debacle; b) the ultimately dismissed counterclaim; c) the DPR order to show cause hearing; and d) defendant's cancellation of an out-of-state deposition after plaintiff's counsel had already travelled to Texas.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-004663

10/10/2018

claim were without substantial justification, so the Court assesses fees against both the attorneys and the defendant, jointly and severally. Defendant's attorney signed pleadings he should not have filed.

The Court therefore assesses reasonable attorneys' fees against defendant and its counsel, Elardo, Bragg & Rossi, P.C., for the reasonable attorneys' fees incurred in preparing the motion for summary judgment on the negligence claim, preparing the reply in support of the motion for summary judgment on the negligence claim, and the portion of time preparing for oral argument devoted to the negligence claim.

**IT IS ORDERED** that plaintiff's motion for partial summary judgment on the negligence claim is granted.

**IT IS FURTHER ORDERED** that plaintiff's request for sanctions under A.R.S. § 12-349 is granted against defendant Sonoran and the firm of Elardo, Bragg & Rossi, P.C., jointly and severally. Plaintiff shall be entitled to recover its reasonable attorneys' fees spent preparing the motion for summary judgment on negligence filed July 17, 2018, the reasonable attorneys' fees spent reviewing defendant's opposition and preparing the reply in support of the motion for summary judgment, and time allocated to preparing for the negligence portion of the oral argument held on October 8, 2018.

**IT IS FURTHER ORDERED** that plaintiff shall file its application for fees within ten days of the filed date of the order or such claim will be waived.

#### **IV. NXP'S MOTION ON DEFENSES TO TORT CLAIMS**

NXP asks for summary judgment on defendant's defenses to tort claims. Sonoran claims it should be allowed to argue comparative fault based on: 1) the subject incident was not the first time a trestle was hit; 2) the subject trestle bridge is lower than most others at the NXP facility; 3) the subject trestle had no alerting or protective measures to warn a driver of possible impact; 4) no protective measures were implemented after the first time it was hit; and 5) the original piping plans called for the trestle system to be underground.

Of course, a defendant has the burden of proving that a particular risk was the cause of plaintiff's injury. RAJI FAULT 10.

As noted at oral argument, even if the Court assumes the truth of the allegations, there is no evidence allowing a reasonable jury to conclude that any of the aforementioned factors caused the accident. Indeed, undisputed evidence showed that Mr. Forristall thought he lowered the hoist prior to the accident, that he did not know he was driving with the hoist extended, that he

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-004663

10/10/2018

would not have driven the truck through the NXP facility if he had known the hoist was in the raised position and that he would not have driven the truck with the hoist extended if the alarms had been operable. There is no suggestion that Mr. Forristall's conduct would have been different if he had received different warnings. Indeed, Mr. Forristall was aware of the presence and location of the trestle, since he received training on driving conditions in NXP's facility and drove underneath the subject trestle without incident three times prior to the crash on the day of the accident. Moreover, there is no evidence that building a trestle at 14'3" was negligent.

In conclusion, there is no reasonable basis from which a jury could infer that the accident would not have occurred had a different warning had been provided or the trestle was at a different height. No reasonable jury could conclude that NXP's fault was a legal cause of this accident.

NXP did not need to name Mr. Forristall as a non-party at fault because Sonoran is vicariously liable for Mr. Forristall's conduct. Undisputed evidence shows that all of Mr. Forristall's conduct was within the course and scope of his employment.

**IT IS ORDERED** that NXP's motion for partial summary judgment on Sonoran's defenses to the negligence and gross negligence claims is granted. The application for fees is denied.