Supreme Court No. 101781-2

Court of Appeals No. 83487-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

LESLIE GORDON & FRED GORDON, individually and as wife and husband,

Respondents,

v.

PROVIDENCE HEALTH & SERVICES-WASHINGTON, d/b/a PROVIDENCE REGIONAL MEDICAL CENTER,

Appellants.

PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF PETITIONERS 1

II. COURT OF APPEALS DECISION 1

III. ISSUE PRESENTED FOR REVIEW 1

1. Did the Court of Appeals Err in its Application of the Restatement of Torts (Second) §343 Regarding Premises Liability When It Reversed the Trial Court? 1

IV. STATEMENT OF THE CASE 1

A. Underlying Facts 1

B. Decision by the Court of Appeals .....

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 5

A. The Court of Appeals Erred By Holding Summary Judgment Was Inappropriate to Determine Providence Was Negligent In Its Duty To Warn Invitees Of Dangerous Conditions In the Providence Parking Garage 6

(1) The Restatement Establishes A Set of Choices Available to Landowners To Deal With Dangerous Conditions on Land……..6

(2) Providence Elected to Warn Invitees of the Dangerous Condition in its Parking Garage However Was Negligent In Doing So…….7

(3) The Court of Appeals' Decision is Also in Error Because it Eliminates the Duty and Option to Warn Under the Restatement….20

B. The Jury's Verdict Should Not Be Disturbed Based on Any Other Grounds..... 24

VI. CONCLUSION..... 26

A**PPENDIX:**

Appendix A1 - A12 – Court of Appeals Decision in case number 83487-8-I filed February 6, 2023.

TABLE OF AUTHORITIES

Cases

Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 433 P.2d 863 (1967) 18
Charlton v. Toys R Us—Delaware, Inc., 158 Wn. App. 906, 246 P.3d 199 (2010) 18
Clark v. Payne, 61 Wn. App. 189, 193, 810 P.2d 931 (1991) ..20
Geise v. Lee, 84 Wn.2d 866, 529 P.2d 1054 (1975) 8
Hertog v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999) 19
Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) 18
Iwai v. State, 129 Wn.2d 84, 915 P.2d 1089 (1996) .. 5, 6, 13, 17
Jarr v. Seeco Construction Co., 35 Wn. App. 324, 327 (1983) 14
Maynard v. Sisters of Providence, 72 Wn. App. 878, 866 P.2d 1272 (1994) 11, 12
Pudmaroff v. Allen, 138 Wn.2d 55, 977 P.2d 574 (1999) 19
Queen City Farms, nc., v. Central Nat. Ins. Co. of Omaha 126 Wn.2d 50, 64 n.1, 882 P.2d 703 (1994) 25
State v. Korum, 157 Wn.2d 614, 640, 141 P.3d 13 (2006) 24
Steele v. State, ex rel. Gorton, 85 Wn.2d 585, 590, 537 P.2d 782 (1975) 20
Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 875, P.2d 621 (1994) 5, 6, 13 17
Wiltse v. Albertson's Inc., 116 Wn.2d 452, 457 n.3 (1991) 14

Rules

RAP 13.7(b) 24

Other Authorities

RESTATEMENT (SECOND) OF TORTS § 343 ..... 1, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24

I. IDENTITY OF PETITIONERS

The Petitioners are Leslie Gordon and Fred Gordon.

II. COURT OF APPEALS DECISION

Petitioners request review of the decision of the Court of Appeals terminating review in case number 83487-8-I, which was filed on February 6, 2023. A copy of the decision is in the Appendix at pages A-1 through A-12.

III. ISSUE PRESENTED FOR REVIEW

1. **Did the Court of Appeals Err in its Application of the Restatement of Torts (Second) §343 Regarding Premises Liability When it Reversed the Trial Court?**

IV. STATEMENT OF THE CASE

A. Underlying Facts

The basic facts in this case are undisputed. On the morning of November 21, 2019, Leslie Gordon drove to work at the Providence medical campus and parked on the top floor (P6) of the parking garage serving the Providence Regional Cancer Partnership (the cancer center).

Between 7:30 and 7:45 am, 57-45 minutes prior to Ms. Gordon's fall, another employee, Katlyn Etchey, arrived on P6 to park her car. CP 487. Upon exiting her vehicle slipped on the icy pavement of the parking garage floor. CP 487-88. Ms. Etchey began walking toward the entrance of the building when she saw a woman slip and fall on ice between the front parking stalls and the building entrance. CP 488. Ms. Etchey went to the woman, received assurances that she was okay, then immediately went to her office in the medical practice building at the campus. CP 488. When she arrived at her office, no later than 7:55 am, Ms. Etchey called Providence security and informed them of the icy parking surface, the woman's fall, and told them to get up there. CP 488.

In response to Ms. Etchey's call, Providence security officer Travis Wise was called on his radio and told to go to the garage because "somebody had slipped", and "they wanted me to… see if it was icy, and if it was, to warn people that there was ice down … and … to keep people aware of the danger until

facilities could … put ice melt down." CP 461. Mr. Wise knew that the ice was specifically located on the top floor, P.6. CP 461. Mr. Wise testified he went to a position where he could make eye contact with people as they drove up the ramp from the floor below. At least three cars drove up the ramp, past Mr. Wise, prior to Ms. Gordon's arrival. CP 465. Mr. Wise testified as these vehicles approached, "I would yell at them in a voice saying, 'Be careful. It's slippery out here. There is ice on the concrete. Be careful when you are getting out of your car.'" CP 464. When Ms. Gordon arrived, Mr. Wise was still standing at the top of the ramp to intercept her. CP 465. But, according to Mr. Wise, he did not say anything to Ms. Gordon about the ice or anything else when he was in a position to do so. CP 465-66. Instead, he made a motion with his arms extended and palms facing down, which he claims was a signal to slow down. CP 465-67. When asked if he did anything else, Mr. Wise responded that he made eye contact with Ms. Gordon. CP 465. Mr. Wise did not tell Ms.

Gordon where to park or to avoid the area due to ice. CP 465. Shortly thereafter, Mr. Wise heard Ms. Gordon yell and then heard the sound of her body hitting the concrete. CP 466. Mr. Wise recorded the time of the fall as occurring at 8:26 am. CP 548. There were no witnesses to Ms. Gordon's fall. And, as the Court of Appeals found, it is undisputed that Ms. Gordon did not see any ice before she slipped and fell. Opinion at p. 7.

Based on the undisputed facts, Respondents moved for partial summary judgment on the issues of Providence's duty to Ms. Gordon and its breach of that duty. The Honorable Ana Alexander decided the motion, concluding Providence was negligent based on its failure to warn Ms. Gordon specifically about the ice, and entered partial summary judgment in favor of Respondents.

B. Decision by the Court of Appeals

On February 6, 2023, the Court of Appeals reversed the trial court's order granting partial summary judgment in favor of the Gordons, adopting Providence's arguments that a reasonable

juror could conclude (1) Providence did not have enough time after being informed of the icy condition, and (2) Providence responded reasonably under the circumstances by commencing to take action to attempt to remediate the problem. Appendix at 7.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The decision by the Court of Appeals in this case conflicts with this Court's decisions in *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 P.2d 621 (1994) and *Iwai v. State Employment Security Department*, 129 Wn.2d 84, 915 P.2d 1089 (1996), and other decisions regarding a landowner's liability for invitee injury caused by a known dangerous condition on that landowner's property. It also presents an issue of substantial public interest that should be determined by the Supreme Court. Review is appropriate under RAP 13.4(b)(1), (2) and (4).

A. The Court of Appeals Erred by Holding Summary Judgment Was Inappropriate to Determine Providence Was Negligent In Its Duty to Warn Invitees of Dangerous Conditions In the Providence Parking Garage.

(1) The Restatement Establishes A Set of Choices Available to Landowners to Deal With Dangerous Conditions on Land.

Washington has adopted the Restatement (Second) of Torts § 343. The Restatement establishes the standard for property owner liability for injuries to invitees caused by dangerous conditions on land. It provides a choice system for property owners to avoid liability for known dangerous conditions.

There are three possible choices for a landowner who knows of a dangerous condition that will impact invitees. They may either 1) repair the condition, 2) warn of the condition, or 3) both warn and repair, depending on the issues involved in each case. *See, Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 133, *Iwai v. State Employment Security Department*, 129 Wn.2d 84, 96.

Further, cmt. b. to § 343 of the Restatement provides:

> ..To the invitee the possessor owes not only this duty [reasonable care to disclose dangerous conditions], but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, *or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.*

(Emphasis added).

The salient point of the Restatement to this Petition for Review, is that regardless which option a landowner chooses, repair, warn or both, the action must be performed in a manner that meets the landowner's duty to protect the invitee, and failure to do so is subject to summary judgment determination as to negligence.

(2) Providence Elected to Warn Invitees of the Dangerous Condition in its Parking Garage, However Was Negligent in Doing So.

The Court of Appeals correctly noted that Providence had actual notice of the dangerous condition at issue in this case.

Appendix at 7. It is also undisputed that Providence sent an employee to proceed immediately to the parking garage and warn people entering the garage of the dangerous icy conditions and in fact warned people coming into the garage prior to Ms. Gordon with verbal communications about the dangerous icy conditions. It is also undisputed that Ms. Gordon did not receive any verbal warning, but at most the Providence employee waived his arms in an up and down manner with palms down and potentially made eye contact with Ms. Gordon.

In its analysis, instead of following the clear standards of the Restatement, the Court of Appeals reached back to *Geise v. Lee*, 84 Wn.2d 866, 529 P.2d 1054 (1975), a pre-Restatement case, to frame the issue on appeal as

> In short, "[t]o prevail, a plaintiff must prove (1) the landowner had actual or constructive notice of the danger, and (2) the landowner failed *within a reasonable time to exercise sensible care in alleviating the situation."*

Opinion at p.6.

This standard completely ignores the duty to warn option set forth in the Restatement and replaces it with the outdated analysis that any liability must be determined by the difficulty and timeliness of correcting a dangerous condition. More importantly, it completely ignores the fact Providence chose to warn by immediately sending an employee to warn invitees of the situation.

This case is *not* about a landowner's failure to discover or timely fix a dangerous condition. It is about Providence's failure to provide an adequate warning under the choice it made when the dangerous condition was known to Providence.

When a landowner chooses to warn as an immediate response to a known dangerous condition, the owner must warn in a manner that meets all negligence requirements. If an injury occurs as a result of inadequate warning, the owner cannot avoid liability for the injury by claiming they were not given a

reasonable amount of time to correct the danger that merited the warning.

In addition, the warning must be adequate for **each arriving invitee**. In the instant case, since the warning was given by an employee standing in the parking area to warn each arriving invitee, one warning may be adequate for one invitee, as in the fact specific verbal warning provided to some invitees, where a different attempt to warn, not including any verbal element, may not meet the negligence avoidance standard. Such was the case with Ms. Gordon.

Regardless of any plans Providence may have had to later remedy the situation with ice melt, their first chosen response to the known danger was to warn. The question on summary judgment was if the nature of the warning given to Ms. Gordon was sufficient to prevent Providence's liability for injuries she suffered as a result of the dangerous condition in the parking

garage. The court properly granted summary judgment on that point.

Instead, because the Court of Appeals incorrectly framed the issue and focused its attention on how much time Providence had to discover, and correct the dangerous condition in its garage, it concluded that created a question of fact for a jury.

The Court of Appeals relied on *Maynard v. Sisters of Providence*, 72 Wn. App. 878 (1994). That was a premises liability case in which the trial court's grant of summary judgment for the defendant was reversed on appeal. *Maynard* is an inapt comparison.

First, *Maynard* did not involve a defendant with actual knowledge of a dangerous condition. Instead, the *Maynard* court held that based on four days of low temperatures and precipitation that had been occurring, there was a "permissible inference" of the foreseeability of a dangerous condition that warranted investigation. *Id*. at 883.

That does not reasonably compare to the actual notice of a dangerous condition held by Providence in the instant case.

Then the Court of Appeals in the instant case determined, based on its reading of *Maynard*, "it is for a jury to decide whether, with between 15- and 30-minutes notice, Providence had any reasonable 'capacity' or time to take any remedial measures." Appendix at 8-9. The Court of Appeals went on to conclude that "where the record shows there was no warning and minimal time for remedial measures, summary judgment in favor of a potential victim is generally equally inappropriate." Appendix at 9.

Through this analysis, the Court of Appeals disregarded the warn or remedy options established by the Restatement. Rather than recognize the undisputed fact Providence knew of the hazard and chose to send an employee to warn of the known dangerous condition prior to trying to remedy the danger, the Court of Appeals ignored the choice established under the

Restatement and iterated by this Court in *Tincani* and *Iwai supra*. The error of the Court of Appeals' decision is evident in its statement,

> Finally, it cannot be the law that, unless the danger resulting from ice or snow is fully remediated, there is always "at least" an "additional" duty to warn. (Opinion at p.11).

The Court of Appeals, in adopting this view, quoted only a portion of cmt. b. to the Restatement, ignoring that Section 343 does, in fact, impose such an additional duty. The second paragraph of cmt. b. to the Restatement provides:

> As stated in § 342, *the possessor owes to a licensee only the duty to exercise reasonable care to disclose to him dangerous conditions which are known to the possessor, and are likely not to be discovered by the licensee. To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation*, or may protect himself against the danger if he does accept it.
> (Emphasis added).

Restatement (Second) of Torts § 343 (1965), cmt. b. This provision of the Restatement--which was adopted and cited with approval by the Supreme Court and the Court of Appeals--explains that a landowner does in fact owe an "additional duty" beyond the duty owed to licensees to give a warning that is sufficient so the invitee can make a knowing decision to accept the hazard warned of, and/or to protect himself from the hazard. *See Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 457 n.3 (1991); *Jarr v. Seeco Construction Co*., 35 Wn. App. 324, 327 (1983).

The landowner has a duty to both licensees and invitees to disclose dangerous conditions that are known to the landowner. To invitees, the landowner has the *additional* duty to make the premises safe for the invitee's arrival and, if the premises are not safe, to "at least" give a sufficient warning to allow the invitee to protect him or herself.

The Court of Appeals' decision presents an unworkable quandary that elevates the protections owed to licensees over

invitees, even though a landowner's duties to invitees are greater. Under the Court of Appeals' reasoning, a licensee is entitled to a warning but an invitee is not so long as the landowner has decided, though not started, to take steps to begin repairing a dangerous condition. It cannot be the case that a licensee is entitled to notice of a dangerous condition but an invitee is not.

The Court of Appeals is simply incorrect on this point. First, if a landowner is aware of a known dangerous condition and is unable to remedy it in a timely manner, there is a duty to warn invitees pursuant to the Restatement and this Court's decisions. Conversely, under the Court of Appeals' reasoning in this case, a landowner could be aware of a dangerous condition and try to repair without warning, thus knowingly put invitees in danger. Creating a specific warning of the hazard to be faced is not an onerous burden compared to the harm that could befall an invitee.

Second, the premise set forth by the Court of Appeals was not involved in Ms. Gordon's claim on summary judgment. Ms. Gordon did not claim Providence failed to clear up the danger from the ice. Ms. Gordon's claim was that because Providence elected to employ the warn option under the Restatement, Providence failed to provide her an effective warning. Ms. Gordon's claim was based on the Restatement which allows the landowner to meet its duty to invitees by specifically warning of dangerous conditions.

Finally, compare the Court of Appeals' statement of the law above[1], to this Court's explanation of a landowner's duty under the Restatement:

> .."reasonable care" imposes on the landowner the duty "to inspect for dangerous conditions, '***followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitees] protection under the circumstances***"'.

[1] Court of Appeals' framing of the issue *supra* at p.8.

Iwai v. State Employment Security Department, 129 Wn.2d 84, 96 (1996), *quoting from Ticani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121 at 139 (1994) (emphasis added).

Under the Restatement and this Court's standard, it is not, as contemplated by the Court of Appeals, necessary that:

> ..every landowner at every snow or ice storm would need to place a sign or an employee over every icy patch until every icy patch was fully alleviated, regardless of what other actions the landowner took.

Opinion at p.11-12.

It is, however, the law that if a landowner has actual knowledge of a dangerous condition on his or her land and chooses to warn an invitee of a dangerous condition, the warning must be sufficient under the negligence standards as described in cmt. b. of § 343 of the Restatement. In this case, the Superior Court properly determined as a matter of law, Providence did not meet that standard.

To prevail on a claim that a landowner breached its duty to warn of an unsafe condition, "[a] plaintiff must establish that the defendant had, or should have had, knowledge of the dangerous condition in time to warn the plaintiff of the danger." *Charlton v. Toys R Us—Delaware, Inc.*, 158 Wn. App. 906, 915, 246 P.3d 199 (2010). Or, to state it another way, "[t]he plaintiff must establish that the defendant had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the plaintiff of the danger." *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (citing *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 451-52, 433 P.2d 863 (1967)).

As to the sufficiency of the notice to Providence, there is no basis to submit to the jury the question of whether Providence had any reasonable "capacity" or time to take any remedial measures. That is because it is undisputed that Providence's agent *did* specifically warn some drivers of ice on the ground on top of

the parking garage as the drivers approached the area, but not Ms. Gordon.

The Court of Appeals decision faults Petitioners for not citing caselaw authority on this point, which is puzzling because it is a matter of straightforward reasoning that no reasonable juror could conclude that Providence did not have enough time to warn Ms. Gordon of ice when it warned multiple drivers of ice *prior to Ms. Gordon's arrival*.

This is not "some sort of negligence per se," as the Court of Appeals put it—it is in keeping with the well-established precedent that breach of a duty may be determined as a matter of law "where reasonable minds could not differ in their interpretation of the factual pattern." *Pudmaroff v. Allen*, 138 Wn.2d 55, 67, 977 P.2d 574 (1999); *see also Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) ("[I]f reasonable minds could not differ, these factual questions may be determined as a matter of law.").

No reasonable juror could possibly conclude Providence did not have the capacity to warn Ms. Gordon. The issue was appropriately resolved on summary judgment.

(3) The Court of Appeals' Decision is Also in Error Because it Eliminates the Duty and Option to Warn Under the Restatement.

The Court of Appeals' decision effectively eliminates the opportunity and duty of a landowner to make the choice to warn invitees of a dangerous condition. Further, the Court of Appeals' decision essentially holds that if a landowner chooses to warn of a dangerous condition, it may do so in a manner that doesn't really protect invitees.

The Court of Appeals decision renders a significant element of the Restatement nugatory. *See Steele v. State ex rel. Gorton*, 85 Wn.2d 585, 590, 537 P.2d 782 (1975) (Proper statutory construction means a statute will not be rendered futile and meaningless); *Clark v. Payne*, 61 Wn.App. 189, 193, 810 P.2d 931 (1991) (A basic rule of statutory construction is that

statutes should be construed so that no portion is superfluous and so strained that absurd or unlikely consequences result.)

The fact it might take time to perform the alternative response to a dangerous condition, i.e., fixing the problem, is irrelevant to the duty to warn when the duty to warn is elected by the property owner and when the landowner has the time to warn, and actually undertook to warn.

In Gordon, the question is not whether Providence acted quickly enough, or what a jury might find was a reasonable response to the knowledge of the dangerous condition, the question is, since Providence chose to warn invitees, did their warning efforts meet the standard to avoid liability for invitee injury. Whatever other action Providence might have chosen to do later does not absolve them of their duty to properly warn when they elected that option, and let invitees subject themselves to the hazard.

Further, the Court of Appeals' recognition that a property owner has the option of repair or warning under the disjunctive language of the Restatement is not carried out in the ultimate reasoning of the Court's opinion.

> We conclude that the "or" is disjunctive, and do not interpret the "or" as an "and" which would impose an additional per se obligation upon a landowner. And we do not ignore the term "safeguards," which is broader than either just fixing or warning.
> (Opinion at p.11)

In reversing the trial court, the Court of Appeals ignores its own reasoning. In the instant case, Providence chose to warn invitees of the danger and posted an employee to do so. In fact, the employee made specific verbal warnings to some invitees, but not to Ms. Gordon. The trial court found that as a matter of law, the warning to Ms. Gordon did not meet the standard of warning under the Restatement.

On appeal, the Court of Appeals accepted Providence's claim that it did not have enough time to warn arriving employees and that Providence acted reasonably under the

circumstances. (Opinion at p.7). The Court of Appeals found that Providence dispatched employees to assess the situation, provide warnings as they were able, and put down rock salt or de-icer. *Id.* Essentially, the Court of Appeals excused Providence's negligence because Providence purportedly did not have time to *perform all three elements of the Restatement's potential remedies!*

The record in the case shows Providence *did have time to warn invitees and did so, but negligently as it pertained to Ms. Gordon.* That negligence under the disjunctive choice selected by Providence cannot then be excused by Providence's claim it did not have enough time to remove the danger, a second disjunctive choice available.

The Restatement does not afford a landowner the option to make one choice, perform negligently, and then claim there can be no liability for that negligence because they also selected

another remedy which would be completed at a later time. The interpretation adopted by the Court of Appeals would not protect invitees who are injured through negligent implementation of the first choice.

B. The Jury's Verdict Should Not Be Disturbed Based on Any Other Grounds

The Court of Appeals did not address Providence's contention that the jury should have been permitted to consider the issue of comparative fault because the court reversed on the other grounds. "When this court reverses a decision of the Court of Appeals that did not consider all of the issues raised that might have supported the court's decision, this court must either decide those issues or remand the case to the Court of Appeals to decide the issues." *State v. Korum*, 157 Wn.2d 614, 640, 141 P.3d 13 (2006) (citing RAP 13.7(b)).

Rather than remand to the Court of Appeals for further consideration, the issue of Ms. Gordon's putative comparative fault "should be resolved [by this court] to promote justice and

facilitate the decision of the case on the merits." *See Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 64 n.1, 882 P.2d 703 (1994), and because there is no evidence, and none was presented, that Ms. Gordon committed any negligent act in proceeding to park, parking her car and exiting her car.

The Court of Appeals determined that Ms. Gordon did not see the ice before she slipped and fell (Opinion p. 7); it is undisputed that Mr. Wise did not tell her about the ice, or to be careful in exiting her vehicle so she could take precautions; she was not told where to park, CP 351; it was the location where she usually parked for safety reasons, under the light and near the entrance, CP 353; and there was no evidence she did anything to contribute to her fall, or conducted herself in a fashion on exiting other than her normal method of exiting on a day to day basis. CP 191. In short, there is no evidence of any comparative fault whatsoever, and Providence provided no witness that implicated

comparative fault.[2] The Court should resolve that issue, make that finding, and reverse the Court of Appeals' decision and remand it back to the Superior Court.

VI. CONCLUSION

Leslie Gordon and Fred Gordon request that the decision of the Court of Appeals be reversed and the decision of the trial court granting summary judgment be affirmed.

DATED: March 7, 2023.

This document contains 4298 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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[2] Before trial Gordon filed a Motion in Limine that would prohibit any at fault or comparative fault witnesses or evidence to be presented by Providence. (Motion in Limine No. 9, CP 218-223). The Court denied that Motion, allowing Providence to submit such witnesses, evidence (except for its failed attempt to warn). Providence did not call any comparative fault witnesses or submit evidence of Gordon's comparative fault. (RP 11-2-21, Volume II, p. 68).

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I filed with the Washington State Court of Appeals, Division I a copy of the foregoing document and caused a true and correct copy of the foregoing document to be served on the following counsel of record in the manner(s) indicated below:

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DATED: March 7, 2023.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LESLIE GORDON and FRED GORDON, Respondents, v. PROVIDENCE HEALTH & SERVICES-WASHINGTON, d/b/a PROVIDENCE REGIONAL MEDICAL CENTER, Appellant.	No. 83487-8-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Respondent Leslie Gordon (Gordon) slipped and fell on ice in a garage where she parked for work. Appellant asserts that the trial court erred by granting before trial partial summary judgment to respondents as to liability, and by effectively dismissing at trial appellant's comparative fault defense. We agree as to the former argument and need not reach the latter argument. Thus, we reverse the order granting partial summary judgment and remand for a new trial.

I. FACTS

On November 21, 2019, two employees slipped on ice which had formed on the pavement of the top level of the Cancer Care Center parking garage of the Providence Health & Services-Washington Medical Center (Providence) in Everett, Washington.

Though neither injured themselves, one of these employees notified Providence of the icy conditions by phone by no later than 7:55 a.m. In response, Providence sent security officer Travis Wise (Wise) to the parking garage. Wise went to the parking garage to assess the situation and, "if it was [icy], to warn other people that there was ice down." Wise was instructed to "do [his] best to keep people aware of the danger until Facilities could get up there and put ice melt down." Wise saw ice in sporadic areas, and so, for about 10 to 15 minutes, Wise walked around the whole area, "holler[ed] at" at least three people that there was ice and to be careful, and motioned to vehicles that were coming up to slow down or be careful, as "best [he] could."

At or about that time, Gordon drove up to the top level of the garage, saw Wise, and parked her car for work. At his deposition, Wise testified that he made eye contact with Gordon and made a motion with his arms to try to signal for her to slow down. Although Wise did not audibly say anything to Gordon, he testified that Gordon nodded her head and he thought she had "figured out that it was probably slick out and so she should slow down." Wise testified that, indeed, it appeared she slowed her car down as she went up the ramp.

When Gordon stepped out of her car and shut the door, she immediately slipped on ice and fell. Wise heard Gordon yell and fall. Wise recorded the time of her fall as 8:26 AM. Wise testified that two Providence employees had arrived at nearly the same time to put down rock salt or ice melt. Gordon sustained serious and permanent injuries.

Respondents moved for partial summary judgment, asking the trial court to find that Providence had a duty to warn Gordon of the danger, which it breached based on its failure to audibly warn her about the ice. Clerk's Papers (CP) at 495; CP at 304-05 (in

their reply, respondents stipulated that their motion for summary judgment was limited to only the failure to warn, and not a failure to inspect). The superior court granted respondents's motion for partial summary judgment, without holding oral argument and without providing any reasoning for the order.

At trial, the trial judge granted respondents's motion in limine no. 9, which asked the court to bar any mention that Gordon was contributorily negligent or comparatively at fault. The trial judge further granted motion in limine no. 10, which asked the court to limit the witness testimony to preclude any inference that appellant was not wholly and solely liable, and which included the exclusion of substantive testimony about Wise's non-verbal warnings to Gordon and the denial of jury instructions and a verdict form on these issues.

Notably, the jurors asked the trial court whether they could "consider or apportion blame to determine damages? Is that allowed?" The court referred the jury back to its instructions.

The jury returned a verdict for respondents, and awarded Gordon $940,197.52 and her husband $131,340.00.

II. ANALYSIS

A. Applicable Law

We review a trial court's decision on a summary judgment motion de novo, and we "'draw all inferences in favor of the nonmoving party.'" Merceri v. Bank of N.Y. Mellon, 4 Wn. App. 2d 755, 759, 434 P.3d 84 (2018) (quoting U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc., 104 Wn. App. 823, 830, 16 P.3d 1278 (2001)). "'Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law.'" Keck v. Collins, 184 Wn.2d 358, 370,

357 P.3d 1080 (2015) (quoting Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014)). "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." Id. at 370 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Herron v. KING Broad. Co., 112 Wn.2d 762, 768, 776 P.2d 98 (1989)). "Since the nonmoving party is given the benefit of any factual doubt on a summary judgment motion, it is seldom granted on the basis of the unreasonableness of alleged facts." Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Finally, we may affirm summary judgment on any basis supported by the record regardless of whether the argument was made below. Bavand v. OneWest Bank, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

"To prevail on a negligence claim, a plaintiff 'must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury.'" Ehrhart v. King County, 195 Wn.2d 388, 396, 460 P.3d 612 (2020) (quoting N.L. v. Bethel Sch. Dist., 186 Wn.2d 422, 429, 378 P.3d 162 (2016)). The "[e]xistence of a duty is a question of law." Vargas v. Inland Wash., LLC, 194 Wn.2d 720, 730, 452 P.3d 1205 (2019) (quoting Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)). "Breach and proximate cause are generally issues for the trier of fact, but the court may resolve them as a matter of law 'if reasonable minds could not differ.'" Id. at 730 (citation omitted).

"According to premises liability theory, a landowner owes an individual a duty of care based on the individual's status upon the land." Curtis v. Lein, 169 Wn.2d 884, 890, 239 P.3d 1078 (2010) (citing Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 128, 875 P.2d 621 (1994)). The parties do not dispute Gordon's status as an invitee.

Our Supreme Court has adopted the view of the Restatement (Second) of Torts § 343 (Am. L. Inst. 1965) as to a landowner's duty of care to an invitee:

> "[A] landowner is subject to liability for harm caused to his tenants by a condition on the land, if the landowner (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to tenants; (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect the tenant against danger."

Curtis, 169 Wn.2d at 890 (alteration in original) (quoting Mucsi v. Graoch Assocs. Ltd. P'ship No. 12, 144 Wn.2d 847, 855, 31 P.3d 684 (2001)).

"In contrast to what a licensee may expect, an invitee 'is . . . entitled to expect that the possessor will exercise reasonable care to make the land safe for his [or her] entry'." Tincani, 124 Wn.2d at 138-39 (alterations in original) (quoting RESTATEMENT (SECOND) OF TORTS § 343 cmt. b). "Reasonable care requires the landowner to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'" Id. at 139 (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 343 cmt. b).

Additionally, Restatement (Second) of Torts § 343 cmt. d states:

> An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, *either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.* Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of *contributory negligence* in failing to discover a defect, as well as in determining whether the defect is one which the

> possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

(Emphasis added).

"An accumulation of snow or ice is analyzed under the general rules of a landowner's duty to invitees." Mucsi, 144 Wn.2d at 856 (quoting Maynard v. Sisters of Providence, 72 Wn. App. 878, 884, 866 P.2d 1272 (1994)). "This duty extends to the removal of snow and ice and is based upon the tenant's expectation that the premises have been made safe for the tenant's use." Id. (citing Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 53, 914 P.2d 728 (1996)). "Landowners do not become insurers of the safety of those invitees using their parking lots, but they are not absolved of responsibility merely because the injury is caused by accumulations of ice or snow." Maynard, 72 Wn. App. at 884. Finally, "[w]here the hazard is the result of heavy snowfall, the landowner is entitled to reasonable time to alleviate the situation." Mucsi, 144 Wn.2d at 860 (citing Fuller v. Housing Auth., 108 R.I. 770, 770–74, 279 A.2d 438 (1971)).

In short, "[t]o prevail, a plaintiff must prove (1) the landowner had actual or constructive notice of the danger, and (2) the landowner failed *within a reasonable time to exercise sensible care in alleviating the situation*." Id. at 859 (citing Geise v. Lee, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975)) (emphasis added).

B. Application of Law to Facts

Appellant asserts that "the trial court erred in granting partial summary judgment because – viewing the evidence in the light most favorable to Appellant, there are numerous issues of material fact and a reasonable juror could have concluded that Appellant did not breach its duty." Specifically, appellant argues that "a reasonable juror

could have concluded that (1) Providence did not have enough time (thirty minutes or less) after being informed of the icy condition; and (2) Providence responded reasonably under the circumstances." As to the former, appellant asserts that "there was not enough time for Mr. Wise to be able to warn the arriving employees." As to the latter, Providence enumerates the actions it did take, and claims "the court must credit all of these actions and draw all reasonable inferences from them."

Respondents assert, and focus almost exclusively on the claim, that, "Providence's duty . . . was to provide [a verbal] warning of the specific condition so that she would appreciate the specific risk involved." Respondents assert that "if a landowner does not make premises safe, it has an additional duty to *at least* give such [verbal] warning to allow invitees to protect themselves."

We agree with Providence as to both of its arguments and reject respondents's constrained view of the law and the proffered facts.

That Providence had notice of the dangerous condition is not seriously disputed. Nor is it disputed that Providence had between 15- and 30-minutes notice before Gordon fell. Nor is it disputed that Providence dispatched employees (a) to assess the situation, (b) to provide warnings as they were able, and (c) to put down rock salt or de-icer, which arrived contemporaneously with Gordon's fall, all of which occurred.

As to the first of Providence's arguments (insufficient time), it is also undisputed that neither Wise nor Gordon saw ice on the top floor before they inspected and slipped on it respectively. Moreover, the other employee who slipped and notified Providence also did not notice the ice before they slipped. Furthermore, Wise testified that "it was really the first cold . . . the first one I had worked where there was ice on parking

structures." Indeed, it is undisputed that there had been no frost yet in Everett that year. Finally, it is also undisputed that it had been raining for several days prior to the incident; that the day before the accident, the temperatures recorded in Everett were all above freezing; and that the weather forecast for the day of the accident was for an overnight low temperature of 34 degrees and a daytime high temperature of 48 degrees. In short, a reasonable jury could conclude Providence had absolutely no notice of the anticipated or actual presence of ice until either the reporting employee advised them of the ice or Wise confirmed it. The clock would start then.

These facts stand in great contrast to the facts present in Maynard, where this court reversed summary judgment which was granted in favor of Providence for "obvious and known" icy conditions. Maynard, 72 Wn. App. at 881-83. In Maynard, the record showed that "low temperatures and precipitation had been occurring for the preceding 4 days", "ice and snow were likely to be present and that what was slush when Maynard arrived could turn to ice", and a different "parking lot was sanded between 2 and 3 hours before" the accident. Id. at 883. In short, "Providence was plainly aware of the hazardous condition on the day in question and, anticipating some form of harm, exercised precautions with respect to the staff parking lot but not as to the visitor's lot. This also establishes that Providence had the capacity to take some remedial measures." Id. Thus, this court concluded that it was for the jury to determine Providence's negligence and plaintiff's comparative fault. Id. at 884.

Although the procedural posture and the facts in Maynard are inverted to those here, such cases are instructive and we conclude that it is for a jury to decide whether, with between 15- and 30-minutes notice, Providence had any reasonable "capacity" or

time to take any remedial measures. Maynard, 72 Wn. App. at 883; Mucsi, 144 Wn.2d at 863 ("There must be . . . a reasonable time to alleviate the situation.") (citing Iwai v. State, 129 Wn.2d 84, 91, 915 P.2d 1089 (1996)). Stated otherwise, our courts have held that, as a general matter, where the record shows there was ample warning of and time for remedial measures, summary judgment in favor of a potential tortfeasor is inappropriate. In turn, where the record shows there was no warning and minimal time for remedial measures, summary judgment in favor of a potential victim is generally equally inappropriate.

Respondents argue that, because "Providence did in fact provide warnings to the drivers who preceded Ms. Gordon" into the garage, that meant "it had enough time to warn Ms. Gordon." In other words, because Providence "warned some invitees (but not Ms. Gordon) of the dangerous condition," there are no facts to resolve and its failure to do so was some sort of negligence per se. Respondents provide no authority to support such a bright line rule. "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205 (2020) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

As to Providence's second argument (defending the full substance of what remedial measures Providence did take), the ultimate question is whether those measures to alleviate the situation were "sensible." Mucsi, 144 Wn.2d at 859. In Mucsi, our Supreme Court analyzed several cases involving ice or snow where "the opportunity of a landowner to take corrective action" was examined. Id. at 860-861. In Mucsi as in

those cases it analyzed, the landowner had several days to take corrective action, but did not. Id. at 862. In Mucsi, the record showed that there was de-icer available, which the landowner did not avail itself of. For these reasons, the court concluded that "there [was] sufficient evidence to proceed to the jury" for a "full trial on the merits." Id.

Again, the conclusion should be the same here although the facts are inverted. Providence did not have several days to remediate all the ice present. Instead, within those 15 to 30 minutes, it – among other actions — dispatched de-icer, which arrived unfortunately seconds too late. Thus, whether there was sufficient time for Providence to do any more than it did should be considered by the jury. Finally, as we concluded in Maynard, "[a] jury must determine whether the defendant was negligent . . . *in light of all the existing circumstances*." Maynard, 72 Wn. App. at 884 (emphasis added). In other words, the jury should also consider whether all of Providence's actions, taken together, or in light of the totality of the evidence, were sensible.

Respondents's entire argument in response rests on a strained reading of Restatement (Second) of Torts § 343 cmts. b and d, which they claim means "if a landowner cannot make the premises safe, it nevertheless has a duty, at the minimum, to give a sufficient [verbal] warning." Br. of Resp't at 19; Report of Proceedings (RP) (November 2, 2021) at 71 ("[Providence] had a duty to repair *and* fix *and* remediate, and they didn't do it.") (emphasis added). In other words, a landowner must entirely make safe every single icy patch and, if not, verbally warn the invitee of each icy patch. This is a misstatement of the law.

The obligation on the landowner is not limited to either fixing the hazard and, if not, warning the invitee. Instead, the law states, "Reasonable care requires the landowner to

inspect for dangerous conditions, 'followed by such repair, *safeguards*, *or* warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'" Tincani, 124 Wn.2d at 139 (quoting RESTATEMENT (SECOND) OF TORTS § 343 cmt. b) (emphasis added). We conclude that the "or" is disjunctive, and do not interpret the "or" as an "and," which would impose an additional per se obligation upon a landowner. And we do not ignore the term "safeguards," which is broader than either just fixing or warning.

In turn, there are several questions that a jury should consider on the merits: (a) what were the safeguards Providence took, (b) again, were those safeguards "sensible," and (c) did Providence warn Gordon sufficiently.

As to that final point, respondents assume "moving his arms up and down—did not serve as any warning to the presence of ice on the parking surface." We conclude that it is for the jury to decide whether, given all the circumstances (including Gordon driving by), that handwaving was a reasonable attempt to warn Gordon, or in fact did warn Gordon, assuming as we must that Wise is correct that they "made eye contact" and she understood the meaning of that motion. Indeed, it is a reasonable inference that Wise's waving of his arms was meant to communicate some danger on the road ahead. In turn, a reasonable jury could conclude Gordon, in slowing down, understood that warning, however imperfect it may have been.

Finally, it cannot be the law that, unless the danger resulting from ice or snow is fully remediated, there is always "at least" an "additional" duty to warn. If this were the law, every landowner at every snow or ice storm would need to place a sign or an

employee over every icy patch until every icy patch was fully alleviated, regardless of what other actions the landowner took. This is not the law of our state.[1]

III. CONCLUSION

We reverse and remand for a new trial.

Díaz, J.

WE CONCUR:

Coleman, J.

Brennan, J

[1] Appellant claims the trial court further erred by effectively dismissing its defense of contributory negligence, even after it claims respondents opened the door. Because the evidence that will be offered at the new trial will be different than the evidence offered at the prior trial, we need not reach this issue.

COGDILL NICHOLS REIN WARTELLE ANDREWS

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