72403-7

72403-7

NO. 72403-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Karon Steepy

Appellant

v.

Walkin' The Dogs & Pet Services, Inc. d/b/a Bow Wow Fun Towne, a Washington Corporation, and John Doe Company, an entity,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

In this case during the motion for summary judgment, the Trial Court failed to view the evidence in the light most favorable to the nonmoving party. Appellant Karon Steepy established a record with numerous material facts that would have allowed a jury to reasonably infer negligence on the part of Bow Wow Fun Towne.

There are genuine issues of material fact with regard to each element of this claim. Appellant's expert, Dr. Gary Sloan, explains how the pet enclosure and its gate was dangerous as used by Bow Wow Fun Towne. Differing witness reports on the cause of Ms. Steepy's fall create genuine issues of material fact on the issue of causation. Although this case fits squarely within an exception to the notice requirement because Bow Wow Fun Towne physically created the danger, assuming *arguendo* that it does not, genuine issues of material fact exist regarding whether Bow Wow Fun Towne had notice because it erected the doorway specifically for people to enter and exit.

II. ASSIGNMENT OF ERROR

1. The Trial Court erred in granting Respondent Bow Wow Fun Towne's Motion for Summary Judgment when genuine issues of material fact exist.

III. STATEMENT OF THE CASE

On August 10, 2010, Appellant Karen Steepy took her dog to an event sponsored on the premises of Respondent Bow Wow Fun Towne where dog owners were invited to bring their dogs to a free dog wash and a picnic. Respondent's business is pet day care. CP 10. The section of the premises where the dogs were washed was separated from the picnic area by a Gold Zinc Exercise Pen, Model #562-42. CP 45. The package insert for the exercise pen indicates that it is intended for use by pets and shows diagrams for the outdoor enclosure. CP 42-43. Unlike the diagrams shown in the package insert of a hexagonal pen, Bow Wow Fun Towne employees set the exercise pen flat between two walls as a doorway, which was located where a wooden gate is currently located. CP 34, 129-131. The purpose of setting up this doorway was to keep dogs from going into the street and to allow people to go through the gate of the fence to go in and out of the premises. CP 35. Mary Mark, the owner of Bow Wow Fun Towne, states in a declaration that at least 138 customers walked through the temporary fencing over the course of five events where this temporary fencing was installed. CP 185.

As Ms. Steepy walked through the exercise pen doorway, her foot became trapped and she fell to the cement floor sustaining serious injuries including a femoral head fracture and rotator cuff damage. CP 11. It is

undisputed that Ms. Steepy ended up with her ankle trapped by the gate, as she described in her deposition testimony (CP 74) and as shown by the pictures of the distorted gate threshold. CP 64-65. In answers to interrogatories, she described how her son, who was a witness, had to pry the gate off her ankle. CP 27.

There are multiple accounts of the incident and differing witness statements regarding what caused Ms. Steepy to fall. The differing versions, any of which a jury could believe, were acknowledged by the defense in its submittals to the trial court. CP 139, 144-145. In response to written discovery propounded by Bow Wow Fun Towne, Ms. Steepy asserted that the door/gate of the fence closed prematurely on her left foot as she walked through the doorway. CP 45. Colleen Cody, an ex-employee of Bow Wow Fun Towne witnessed the incident and testified in deposition that as Ms. Steepy walked through the gate and attempted to step over the bottom of the gate, her foot hit the bottom of the gate, causing her to trip and fall. CP 152-154. In addition, two employees filled out injury reports at the time of the incident, both of which stated that Ms. Steepy tripped over the bottom of the gate. CP 152-154, 158, 160.

Dr. Gary Sloan, a human factors expert, was retained to analyze and express expert opinions regarding how and why Ms. Steepy fell. CP 113. Dr. Sloan examined, inter alia, photographs taken by Respondent's

insurance adjuster measuring the door and threshold of the exercise pen and stated that the bottom of the assembly of the gate in the fencing, which constituted its threshold, was six inches in height. CP 115, 117. Dr. Sloan opined that the gate implicated in Ms. Steepy's fall failed to meet the applicable safety standards for sizes of doors and thresholds specified in the International Building Code (2009). CP 117. Under the building code standards adopted by the State of Washington, the doorway threshold should not have exceeded ½ an inch for a door of this kind. CP 117. Dr. Sloan went on to state that the doorway posed a serious risk to pedestrian safety. CP 117.

IV. LEGAL ARGUMENT

a. There were numerous facts presented to the Trial Court which allow a jury to draw reasonable inferences that raise material issues of fact on the issue of negligence.

When reviewing an order of summary judgment, the appellate court must consider **all facts submitted** and all reasonable inferences from the facts in the light most favorable to the nonmoving party. CR 56; *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 253, 59 P.3d 655 (2002) (emphasis added). It is important to remember that all facts must be considered and not solely the deposition testimony of Ms. Steepy, stating that the door closed prematurely, but also the testimony of the defendant's ex-employee,

Colleen Cody, and the other statements of two other employees. CP 152-154, 158, 160.

The following are some of the facts as set forth above, which were provided to the Trial Court, and some of the reasonable inferences therefrom that a jury could draw to find liability on the Bow Wow Fun Towne's part.

FACT	REASONABLE INFERENCE
1. Colleen Cody, an ex-employee of Defendant who witnessed the incident, testified in deposition that as Plaintiff walked through the gate and attempted to step over the bottom of the gate, her foot hit the bottom of the gate, causing her to trip and fall. CP 152-154.	Ms. Steepy tripped over the bottom of the gate because there was too high of a threshold, contrary to safety standards, and creating an unreasonable risk.
2. Defendant put up temporary fencing to keep dogs from going into the street. It consists of an x-pen with an access panel, which people can open to go in and out without letting the dogs out. CP 35.	Defendant was on notice that this fencing was being used as a doorway for people in addition to keeping dogs out of the street. Setting up a dog pen as a temporary doorway for people was itself dangerous and a negligent act.
3. Defendant does not contend that any person or entity other than it or its employees are responsible for installation and maintenance of the fence erected on premises. CP 34.	Defendant created the dangerous condition by erecting the fencing as a doorway with a six inch threshold.

4. According to Dr. Gary Sloan, a human factors expert, applicable safety standards are set forth in the International Building Code, limiting the bottom threshold to ½ inch for doors of this kind. The dimensions of the step-thru door used by Bow Wow Fun Towne posed a serious risk to pedestrian safety because it was 6 inches in height. CP 117.	A threshold that is twelve times the maximum height as established by safety standards set forth in the International Building Code poses an unreasonable risk and was a cause of Ms. Steepy tripping over the fencing being used as a doorway, and the resulting injuries.
5. Mary Mark, owner of Bow Wow Fun Towne, states in declaration that at least 138 customers walked through the temporary fencing, over the course of five events where the temporary fencing was set up. CP 185.	The fencing doorway was a known point of egress that customers used during this and other similar events to enter and exit the premises.

These are not the only facts of importance to this Court's review nor are these the only inferences that a jury could reasonably draw that raise material issues of fact on the issue of negligence. The trial court erred in deciding these factual issues itself rather than allowing this evidence to go to the jury.

b. There are genuine issues of material fact as to whether Bow Wow Fun Towne's use of the fencing as a doorway with a six inch threshold, in violation of safety standards, posed an unreasonable risk.

In the Order Granting Defendants' Motion for Summary Judgment, the trial court stated that "Plaintiff does not identify evidence tending to show that the condition created a foreseeable likelihood of harm to one who might encounter it, or that the fencing or the door posed an **unreasonable risk**" (emphasis added). The order goes to state that "the only allegation relevant to show Defendant's breach of duty was Plaintiff's expert's statement that the set-up was 'possibly' unstable." These assertions ignore Plaintiff's expert's reliance on safety standards as established by the building code, which in similar cases is utilized as evidence of negligence, and Plaintiff's expert asserting by declaration that the violation of the safety standards embodied in the building code created a serious or unreasonable risk.

The instructions given to a jury on premises liability frame how this Court we should view the dangerousness or unreasonable risk created. WPI 120.06 states:

> An *[owner] [occupier]* of premises owes to a *[business] [or] [public]* invitee a **duty to exercise ordinary care** *[for his or her safety]. [This includes the exercise of ordinary care] [to maintain in a reasonably safe condition those portions of the premises that the invitee is expressly or impliedly*

invited to use or might reasonably be expected to use] (emphasis added).

Ordinary care for an adult defined by WPI 10.02 as "the care a reasonably careful person would exercise under the same or similar circumstances."

These determinations are generally factual issues for a jury:

--Whether the defendant used 'ordinary care.'

--Were the premises in 'a reasonably safe condition'?

--Was the offending portion of the premises a place that a customer 'might reasonably be expected to use"?

Summary judgment has often been precluded because the trier of fact needed to determine whether something was reasonable, or whether a person acted reasonably. See, e.g. *Security State Bank V. Burk*, 100 Wn. App. 94, 995 P.2d 1273 (2000) (whether disposition of collateral was commercially reasonable); *Van Noy v. State Farm*, 98 Wn. App, 487, 983 P.2d 1129 (1999) (whether insurer acted reasonably); *Demelash v. Ross Stores*, 105 Wn. App. 508, 20 P.3d 447 (2001) (in suit for conversion, whether defendant had retained plaintiff's property for an unreasonable length of time). See Tegland and Ende, WA Handbook of Civ Proc., sec 69.19 (2015 ed.).

Washington law is clear that compliance or deviation with a safety code is relevant evidence for a trier of fact to consider on the issue of

negligence. *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 453 P.2d 619 (1969); *Martini ex rel. Dussault v. State*, 121 Wn. App. 150, 89 P.3d 250 (2004). The seminal case on the matter, *Nordstrom*, holds that governmental standards or standards published by private bodies, which are relevant, trustworthy, and necessary, are admissible to prove elements of a case. *Nordstrom,* at 641. In *Breivo v. City of Aberdeen*, 15 Wn. App. 520, 550 P.2d 1164 (1976), multiple publications that included safety standards were admitted into evidence to form the basis for expert testimony that an off-road hazard constituted an inherently dangerous condition.

The International Building Code is "relevant, necessary and trustworthy" to prove the unreasonable risk that Bow Wow Fun Towne created in this case. Washington has a state building code, RCW 19.27 et seq., which expressly adopts the current International Building Code. RCW 19.27.031.

The purpose of adopting these uniform safety standards is clearly delineated in Washington's state building code as promoting "**the health, safety and welfare of the occupants or users of buildings and structures and the general public** by the provision of building codes throughout the state." RCW 19.27.020. (emphasis added)

The use of the safety standards set forth in relevant codes, both public and private, is not a novel idea and the Court has consistently allowed evidence of deviation or compliance with safety standards on the issue of negligence. In *Martini ex rel. Dussault v. State*, 121 Wn. App. 150, 154, 89 P.3d 250 (2004), the plaintiff was seriously injured from rear-ending a commercial truck on the highway when the truck slowed to about three miles per hour in traffic and failed to initiate its hazard lights. The trial court dismissed the case on the defendant's summary judgment motion, despite the plaintiff's response that the defendant had breached its duty of care by not activating its hazard lights, supported by evidence of a safety standard for using hazard lights in such circumstances from The Washington State Commercial Driver's Guide, and expert testimony that a truck needs to turn on its hazard lights when it slows down below 10 to 15 miles per hour. *Id.* at 155, 162. In reversing the trial court's decision and holding that the plaintiff raised questions of fact with the evidence proffered, the Court stated:

> A jury could take this evidence in the light most favorable to [the Plaintiff], and if it chose to do that, it could rationally find that a reasonable person in [the truck driver's] shoes would have activated his four-way flashers while slowing, and that [the truck driver] was negligent when he did not do that. [The Defendant] presented contrary evidence, but its effect was to create, not

> eliminate, an issue of fact on whether [the truck driver] had complied with his duty of ordinary care. We conclude that the trial court erred by granting Walsh's motion for summary judgment
>
> *Id.* at 162-63.

In this case, Ms. Steepy proffered nearly identical evidence showing that the gate posed an unreasonable risk. Much like *Martini*, where The Washington State Commercial Driver's Guide set out standards regarding when a commercial driver should activate its hazard lights, The International Building Code sets forth safety standards for the widths and thresholds of doorways that Ms. Steepy's expert relies upon. Again, like *Martini*, where the plaintiff's expert testified that a commercial truck needs to turn on its hazard lights when it slows to about 10-15 miles per hour, Ms. Steepy's expert states by declaration that "**the dimensions** and possible instability of the step-thru door **posed a serious risk to pedestrian safety**" (emphasis added). The dimensions being referred to in the declaration are the step-thru door's deviation from the width and threshold requirements of the International Building Code. Certainly there is a factual question raised regarding whether the dimensions of the step-thru door, which are contrary to the safety standards sets forth in the International Building Code, create an unreasonable risk, as stated by Ms. Steepy's expert.

As a general matter, even the Trial Court acknowledged that dangerousness is inherently a factual question when it asked counsel for Bow Wow Fun Towne, "regardless of whether [Ms. Steepy] tripped over the stepping portion or not, doesn't that create an issue of fact precluding summary judgment?" VRP page 9, line 18-20. The Trial Court erred by not taking into account the entire declaration of Dr. Sloan, as well as the different accounts of how the doorway of the pet pen caused Ms. Steepy to fall.

'Dangerousness' or 'unreasonable risk' are generally common law questions of fact for jury determination. The common law nature of these terms and their inherent factual nature was discussed in the context of Washington's Recreational Land Use Act, acknowledging that the term "danger" is not expressly defined by the statute, "but at the very least, should be **defined in terms of common law negligence, namely, a condition that poses an unreasonable risk of harm**. *Tabak v. State*, 73 Wn. App. 691, 697, 870 P.2d 1014, 1018 (1994) (emphasis added). In *Tabak*, the court noted the record contained evidence of a dangerous condition, considering "the fact that the dock sank unexpectedly beneath Mr. Tabak's feet and that he tripped and fell, together with the extent of Mr. Tabak's injury, provides a basis for a rational trier of fact to find that the condition posed an unreasonable risk of harm." *Id.* Ms. Steepy has

presented facts regarding the threshold exceeding maximum heights established by safety standards and the extent of her injuries of fracturing her femoral head, which required surgery. Under the analysis in *Tabak*, a reasonable jury could find that the fencing designed for use as a pet enclosure that defendant used as a doorway created an unreasonable risk of harm.

c. There are genuine issues of material fact as to whether Bow Wow Fun Towne had actual or constructive notice of a dangerous condition on its premises and failed to exercise reasonable care.

In the Order Granting Defendants' Motion for Summary Judgment, the Trial Court stated that Plaintiff failed to submit evidence showing Defendants' actual or constructive knowledge of the danger. Again, this disregards the reasonable inferences that a jury could draw from the fact that the Defendant erected the doorway, i.e., Bow Wow Fun Towne had actual notice, and the fact that the threshold was twelve times the maximum height established by safety standards, i.e., it was a dangerous condition.

Under the Restatement (Second) of Torts § 343, and endorsed by Washington case law, a landowner's duty of care attaches if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk. . ." *Iwai v. State*,

129 Wn.2d 84, 96, 915 P.2d 1089 (1996). The phrase "reasonable care" imposes a duty on the landowner "to inspect for dangerous conditions, 'followed by such repair, safeguards, or warnings as may be reasonably necessary for [the invitee's] protection under the circumstances.'" *Id.* (citing *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983)). In applying this knowledge requirement to premise liability actions, Washington law requires that Ms. Steepy show that the landowner had actual or constructive notice of the unsafe condition, or that one of the two recognized exceptions to the "notice" requirement is met. *Iwai v. State*, 129 Wn.2d at 96.

Here the facts and inferences viewed most favorably to the nonmoving party establish that Bow Wow Fun Towne had actual notice of the risk of harm to others posed by using the fencing as a doorway for people. It is clear that Bow Wow Fun Towne had notice that the condition existed, given that the fencing was erected by the business and no contention is made that any other person or entity took part. Thus, the real issue is whether they had actual notice that using the fencing as a doorway created a danger. The case of *Tabak v. State*, 73 Wn. App. 691, 870 P.2d 1014 (1994) is highly instructive on the issue of actual notice of a dangerous condition.

In *Tabak*, the plaintiff brought a negligence action against the State of Washington, arising from a trip and fall on a floating fishing platform, under Washington's Recreational Land Use Act. *Id.* at 693-694. Despite the different context, the Recreational Land Use Act is helpful in our understanding of the evidentiary requirements of actual notice of a dangerous condition. The Recreational Land Use Act requires that a landowner warn of (1) known, (2) dangerous, (3) artificial and (4) latent condition. *Id.* at 695. In order to constitute a "known" condition, the landowner must have actual, as opposed to constructive knowledge, of the dangerous condition. *Id.* at 696 (citing *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 609, 774 P.2d 1255 (1989). The State argument that the plaintiff failed to produce any written or oral statement establishing actual knowledge was rebuffed by the Court of Appeals, stating:

> The State's argument confuses the fact of actual knowledge with how it can be proven. A plaintiff may establish any fact by circumstantial evidence. Where actual knowledge is denied, a plaintiff must come forward with evidentiary facts from which a trier of fact could reasonably infer actual knowledge, by a preponderance of the evidence.

Tabak v. State, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994)

A reasonable jury could conclude that Bow Wow Fun Towne did have actual notice, or should have known, of this danger because the business erected the doorway and safety standards indicate that the threshold was too high. Rather than allowing a jury to draw such reasonable inferences, Bow Wow Fun Towne seeks to create a standard where a defendant must explicitly state that they knew a condition was dangerous. Such a statement is never made. Instead, Ms. Steepy presented evidence enabling a jury to make reasonable inferences that Bow Wow Fun Towne had actual notice of the danger, far exceeding the burden of showing that reasonable minds could differ.

The inherent factual nature of the question as to 'reasonable foreseeability' and 'dangerousness' was pointed out to the Trial Court not only by Appellant but also was an issue conceded by the defense. At CP 146 the defense told the court:

> "In order for plaintiff to recover without demonstrating actual or constructive notice, they need to provide that the danger was reasonably foreseeable. Plaintiff has not shown any such evidence, and **there is certainly a question of material fact as to whether the alleged danger was reasonably foreseeable.**" (emphasis added)

This concession was expressly called to the Trial Court's attention at VRP 17.

d. There are genuine issues of material fact as to whether an exception to the notice requirement created a dangerous condition.

The Supreme Court of Washington "has created two exceptions to the notice requirement in premises liability cases.[1]" *Iwai v. State*, 129 Wn.2d 84, 98, 915 P.2d 1089 (1996). Under the second exception, it is well established that if landowner creates the hazardous condition, then a plaintiff's duty to establish notice is waived. *Iwai v. State*, 129 Wn.2d at 102 (citing *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 275, 896 P.2d 750 (1995)); See also *Falconer v. Safeway Store, Inc.*, 49 Wn.2d 478, 480, 303 P.2d 294 (1956) ("The rule requiring such notice is not applicable where the dangerous condition of the premises was created in the first instance by the occupant.... One is presumed to know what one does."); See also *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 45 n. 35, 920 P.2d 241, (1996) *aff'd,* 133 Wn.2d 192, 943 P.2d 286 (1997), as amended (Oct. 1, 1997) (The "plaintiff must establish 'actual or constructive notice' of [the] hazard . . . or that it was created by the land occupier.")

In this matter it is undisputed that Bow Wow Fun Towne erected the gate as a doorway for people to go in and out without letting their dogs out. Not only did Bow Wow Fun Towne create the condition of the

[1] The first exception is a reasonable foreseeability exception that arose in the context of self-service stores, which is not being argued in this appeal.

doorway, but they knew or should have known it was a hazardous condition to allow people to come in and out of this doorway with a six inch threshold. This case falls squarely within this exception and notice of this hazardous condition is not required because it was created by the landowner.

V. CONCLUSION

The Order Granting Summary Judgment for Respondent should be reversed and the case remanded for a jury trial under Ms. Steepy's well plead and well supported theories of action. Appellant Karon Steepy should have her day in court before a jury of her peers.

DATED this 19th day of December, 2014 at Seattle, Washington.

BALINT & ASSOCIATES, PLLC

By: _____
David J. Balint, (WSBA # 5881)
Of Attorneys for Appellant/Plaintiff Karon Steepy

NO. 72403-7-1

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

DECLARATION OF SERVICE OF APPELLANT'S OPENING BRIEF

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DECLARATION OF SERVICE

I, Kirsten Olsen Underwood, hereby state and declare as follows:

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and competent to be a witness in the above action, and not a party thereto; that I effected the service on the 19th day of December, 2014 by delivering via legal messenger service, the original of the following document: Appellant's Opening Brief, to Division One of Court of Appeals; and a true copy of the Appellant's Opening Brief to the following:

1) Joshua Rosen, Sweeney, Heit & Dietzler, 1191 2nd Av. # 500, Seattle, WA 98101; Joshua.rosen@libertymutual.com

I hereby declare under penalty of perjury under the laws of the State of Washington that the above is true to the best of my knowledge and belief.

DATED this 19th day of December, 2014, in Seattle.

Kirsten Olsen Underwood
Paralegal to David J. Balint