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

RESPONDENTS' BRIEF

LAW OFFICES OF SWEENEY, HEIT & DIETZLER
By: Joshua Rosen
Attorney for Respondents
1191 Second Avenue, Suite 500
Seattle, WA 98101
206-473-4012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Other Authorities

I. NATURE OF THE CASE

Plaintiff/Appellant Karon Steepy ("Steepy") claimed injuries as a result of a slip and fall. Steepy filed suit and served Defendant/Respondent Walkin' The Dogs & Pet Services, Inc. d/b/a Bow Wow Fun Towne ("Bow Wow"). After a substantial amount of discovery, Bow Wow moved for summary judgment. The trial court, after reviewing the briefings of the parties and hearing oral argument, granted summary judgment in favor of Bow Wow on the grounds that Bow Wow did not breach any duties to Steepy. Steepy appeals the trial court's ruling.

II. ISSUE PRESENTED

1. Did the trial court properly conclude that no genuine issues of material fact existed to show Bow Wow breached any duties to Steepy and that a finding of summary judgment in Bow Wow's favor was proper?

III. STATEMENT OF THE CASE

Steepy contends that on August 21, 2010, a gate that was in place between activity areas at Bow Wow's location closed and proximately caused plaintiff to fall. CP 2. Steepy alleged the gate was negligently designed or manufactured by the gate

manufacturer and further alleged a premises liability cause of action based upon the allegedly negligent installation of said gate. CP 2.

The subject incident occurred at Bow Wow's business, which is a doggie day care that also provides full service grooming. Every year, Bow Wow has a Paws Dog Wash as a fundraiser. CP 59. Steepy had previously attended the Paws Dogs Wash the year before, on August 22, 2009. CP 59, CP 186. For the fundraiser, Bow Wow put up temporary fencing to keep the dogs from going into the street. CP 59. The fencing was a Gold Zinc Exercise Pen, Model #562-42, manufactured by Midwest Homes for Pets. CP 58. It is a step-through pen with a double latch door. CP 64. At the time of the subject incident, the fence panel which had a gate was fixed to a wall at one end using metal clips and the other end was attached to a wooden post using zip ties. CP 184. At the end of the day, Bow Wow took down the temporary fencing, as they did for the other five times the temporary fencing was in place prior to the date of the accident. CP 185.

Steepy's deposition testimony and responses to written discovery consistently stated that Steepy was walking through the door of the gate when it prematurely closed on her left foot. CP 68-69, CP 74-76. When asked in written discovery for the facts supporting her contention that Bow Wow was liable for her alleged damages and injures, Steepy provided a one sentence response: "The metal gate was unsafe and the defendants did not provide a safe environment." CP 70. Her deposition testimony was similarly concise. She thought that the gate should have remained open when she opened it because "[t]hat's usually how they work." CP 76. Steepy also clarified that when she was referring to the "safe environment" in her written discovery response, she was only talking about the gate (and nothing else on the premises), and the reason she thought something was wrong with the gate was because the gate closed on her foot. CP 78-79.

On July 11, 2014, Bow Wow filed its Motion for Summary Judgment. CP 44-52. Bow Wow argued that Steepy had no evidence to prove that Bow Wow breached any duties to Steepy or that any alleged breach was the proximate cause of Steepy's

alleged injuries. CP 48-49. Specifically, Bow Wow argued that no evidence existed that the gate at issue was a dangerous condition. CP 50-51. Bow Wow also argued that they would not be liable for any allegations regarding a defective gate, since they were not the designer or manufacturer of the subject gate or a product seller under the Washington Product Liability Act. CP 51. Bow Wow further argued that there was no evidence that Bow Wow had notice of the alleged dangerous condition existed in the gate. CP 51-52.

On July 25, 2014, Steepy filed her response to Bow Wow's Motion for Summary Judgment. CP 82-89. Steepy conceded in her response that the product liability claims could be dismissed. CP 89. The remainder of Steepy's response essentially relied on a declaration submitted by Gary D. Sloan, Ph.D., Steepy's human factors' expert. CP 112-137. Dr. Sloan opined that by attaching the temporary gate to the wall at one end using metal clips and the other end was attached to a wooden post using zip ties, this constituted a door and a threshold that was subject to the International Building Code, stating:

> 22. In my opinion, the step-thru door implicated in Karon Steepy's fall failed to meet the applicable standards

specified in the International Building Code (2009). More specifically:

> a. **1008.1.1 Size of doors.** The minimum width of each door opening shall be sufficient for the occupant load thereof and shall provide a clear width of 32 inches (813 mm).

The step thru-door at Bow Wow Fun Towne was 24-inches wide.

> b. **1008.1.7 Thresholds.** Thresholds at doorways shall not exceed ¾ inch (19.1 mm) in height for sliding doors serving dwelling units or ½ (12.7 mm) for other doors.

The bottom assembly of the step-thru door, which constituted its threshold, was 6 inches in height.

CP 117.

Dr. Sloan then stated the only other opinion contained in his declaration:

> In my opinion as a human factors specialist, when Karon Steepy attempted to pass to the other side of the step-thru door at Bow Wow Fun Towne on August 21, 2010, her left foot became caught in a pinch point. Whether or not her left foot made contact with the bottom assembly before her ankle was caught in a pinch point is, in my opinion, less important than the fact that the dimensions and possible instability of the step-thru door posed a serious risk to pedestrian safety.

CP 117.

On August 4, 2014, Bow Wow filed its reply in support of its Motion for Summary Judgment. CP 178-183. Bow Wow argued

in response that the International Business Code does not apply to this case, since the purpose of the temporary fencing used on the day of the accident was to keep the dogs from running out of the dog wash area and into the street. CP 179-180, CP 184. Bow Wow further argued that even if Dr. Sloan is correct, the existence of a code violation does not establish negligence. CP 182. Steepy needed to demonstrate that material facts exist to show that any alleged code violation caused or contributed to her fall and Bow Wow argued that Dr. Sloan's opinion falls well short of that mark. CP 182.

On August 8, 2014, the parties appeared before Judge Samuel S. Chung to argue Bow Wow's Motion for Summary Judgment.[1] During Steepy's argument, the Court commented:

> Based on what – even in the facts most favorable to your client, it doesn't rise to the level of dangerousness because it is so obvious to everyone using that gate that there's hardly any danger involved in going in and out of the gate.
>
> So the first element, never mind the second and third have reached all those issues, the plaintiff -- or the defendant is arguing that there is there's no dangerousness regarding the gate at all. I think that's the one you have to deal with.

[1] Steepy had also filed a Motion for Partial Summary Judgment as to certain affirmative defenses of Bow Wow. Steepy's Motion was also heard on this date.

RP 15.

Judge Chung took the matter under advisement and on August 14, 2014 issued his Order Granting Summary Judgment in favor of Bow Wow. CP 191-193. Judge Chung held that Steepy did not identify evidence tending to show that the fencing or the door posed an unreasonable risk or that the gate created a foreseeable likelihood of harm to one who might encounter it. CP 192. Judge Chung noted that the only allegation relevant to show Bow Wow's breach of duty was Dr. Sloan's statement that the gate as it was set up on the date of the accident was "possibly unstable," which was insufficient to defeat summary judgment. CP 192-193. Judge Chung also noted a lack of evidence showing Bow Wow's actual or constructive knowledge of the "danger" of the gate at issue, and noted that "[Steepy's] failure to submit such evidence provides a second basis for the Court to grant [Bow Wow's] Motion for Summary Judgment. CP 193.

IV. SUMMARY OF ARGUMENT

The trial court properly granted summary judgment because there were no issues of material fact that the temporary fencing created a foreseeable likelihood of harm or that the door

posed an unreasonable risk. Bow Wow provided clear and convincing evidence that the temporary fencing did not create a dangerous condition of the premises and that Steepy failed to demonstrate that any alleged dangerous condition was a proximate cause of her accident. Bow Wow also provided clear and convincing evidence that there was no actual or constructive notice of any dangerous condition on Bow Wow's premises.

Steepy contends the trial court erred when (1) numerous facts were presented to allow a trier of fact to draw reasonable inferences that raise material issues of fact of negligence; (2) there were issues of material fact that the use of the temporary fencing was a violation of safety standards posed an unreasonable risk; (3) that there were issues of material fact as to whether Bow Wow had notice of a dangerous condition and failed to exercise reasonable care; and (4) there were issues of material fact as to whether an exception to the notice requirement created a dangerous condition. The trial court correctly exercised its broad authority to determine matters before it. Steepy failed to provide any evidence regarding these issues. The trial court's order should be affirmed.

V. ARGUMENT

a. The granting of summary judgment was proper as there were no issues of material fact that the temporary fencing created a foreseeable likelihood of harm or that the door posed an unreasonable risk

The cause of action for negligence requires the plaintiff to establish: (1) the existence of a duty owed; (2) breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Society,* 124 Wn.2d 121, 128, 875 P.3d 621 (1994); *Walters v. Aberdeen Recreation, Inc.*, 75 Wash.App. 710, 714, 879 P.2d 337 (1994). The failure to create an issue of fact as to any of these elements warrants a claim of summary judgment in favor of defendant. See *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992); *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 457, 805 P.2d 793 (1991).

In this matter, Bow Wow admits that Steepy was a business invitee. A landowner is liable to invitees for injury resulting from a condition on the premises if he or she:

> (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 such invitees; and

(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 them against the danger.

Restatement (Second) of Torts §343.

Steepy did not identify any evidence that showed that use of the gate by Bow Wow involved an unreasonable risk of harm. The evidence submitted by Steepy that the gate presented an unreasonable risk of harm was that the door of the gate prematurely closed on her foot. CP 68-69, CP 74-76. This is the factual version of the events relied upon by Steepy's expert in formulating his opinions. CP 116. The gate was not a spring-loaded gate and taking the facts of the case in a light most favorable to Steepy, it was gravity which caused the gate to close. The manner in which Steepy's foot got trapped is akin to a door closing. A closing door does not present an unreasonable risk of harm.

The only allegations Steepy makes regarding the unreasonable risk of harm presented by the gate is Dr. Sloan's opinion that the temporary fencing used by Bow Wow did not meet the two standards of the International Building Code ("IBC").

CP 117. As an initial matter, there is no evidence that the building code applies to this temporary fencing. Dr. Sloan's opinions do not state any basis for the application of the IBC to this temporary fencing. A review of the IBC indicates the opposite.

First, the IBC applies to "the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings or structures." *IBC Intl Building Code §101.2.* Its purpose is to "establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, *means of egress* facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to fire fighters and emergency responders during emergency operations." *Id. at §101.3.* "Means of egress" is defined as "[a] continuous and unobstructed path of vertical and horizontal egress travel from any occupied portion of a building or structure to a *public way*. A means of egress consists

of three separate and distinct parts: the *exit access*, the *exit* and the *exit discharge*. *Id. at 1002.1*.[2] In other words, an egress door is an exit designed to allow the occupants of a building to evacuate safety during an emergency.

In this case, the purpose of the temporary fencing used on the day of the accident was to keep the dogs from running out of the dog wash area and into the street, since the back garage, which was normally closed, was open for the Paws Dog Wash event. CP 184-185. This was not a permanent fixture; in fact, this set up was taken down at the end of the day and the same set up was used 5 times since February 29, 2009. CP 184-185. The purpose of the temporary fencing was for the dogs – the only time a person entered into the area through the gate was when they went to drop off or pick up their dog from the dog was area. CP 59, CP 184-185. Since the temporary fencing was not a means of egress, the code sections cited by Dr. Sloan do not apply. This was a view shared by the trial court in this matter. At the summary judgment hearing, Judge Chung was equally skeptical of the application of the IBC to the temporary pen, pointing out

[2] The two code violations plaintiff alleges are both location in Chapter 10 – Means of Egress of the IBC

that the pen was put up temporarily to wash dogs and was not affixed to the main structure of the building or a commercial building entrance. RP 15-16.

Second, assuming Steepy's argument is correct and the IBC applies to this temporary fencing, the mere fact that a code violation may exist does not establish negligence. *RCW 5.40.050; see also Schwartz v. Elerding,* 166 Wash.App. 608, 635-37, 270 P.3d 630 (Div. 3 2012), *review denied,* 174 Wash. 2d 1010, 281 P.3d 686 (2012); *Alston v. Blythe,* 88 Wash. App. 26, 37-39, 943 P.2d 692 (Div. 2 1997), *Gilliam v. Department of Social Health Services, Child Protective Services,* 89 Wash.App. 569, 585-586, 950 P.2d 20 (Div. 1 1998). It is not evidence that necessarily creates a jury question. *Schwartz,* 166 Wash.App. at 635. If there is a statutory violation, the trial judge "must determine whether, in light of all the facts and circumstances of the case, reasonable minds can differ on whether the defendant used ordinary care." *Mathis v. Ammons,* 84 Wash.App. 411, 418, 928 P.2d 431 (1996). If no genuine issues of material fact exist regarding the breach of defendant's duties, the trial court can find an absence of negligence as a matter of law. *Id.* at 419.

In other words, assuming that the IBC applies and the temporary gate utilized by Bow Wow violated the provisions of the IBC, Steepy needed to provide evidence how the alleged code violations caused or contributed to her fall. No evidence was provided. Dr. Sloan stated that he felt this set-up "posed a serious risk to pedestrian safety," but does not relate this violation to Steepy's conduct or the accident in question. CP 117. Steepy herself provided no evidence that the narrowness of the doorway or the step-thru aspect of the gate caused her fall. In fact, she had navigated this set up previously with no problems. CP 186. Her sole contention about this set up is that the gate itself closed prematurely. CP 68-69, CP 74-76. The narrowness of the doorway and the step-thru portion of the gate are irrelevant to the facts of the accident. Neither Steepy nor Dr. Sloan ties the facts of the accident to his opinions to show any evidence of causation.

Washington courts have found an expert's opinion to be unduly speculative when an expert's opinions can only offer a generalized opinion, without sufficiently tying the opinion to the facts of the case. *Johnson v. Recreational Equipment, Inc.,* 159 Wash.App. 939, 956, 247 P.3d 18 (2011), *review denied,* 172

Wash.2d 1007, 259 P.3d 1108 (2011); *Moore v. Hagge,* 158 Wash.App. 137, 154-158, 241 P.3d 787 (2010), *review denied,* 171 Wash.3d 1004, 249 P.3d 181 (2011). In *Johnson*, plaintiff filed suit against REI, the seller of a bicycle which was branded as its own, alleging that her injuries were caused by a defect in the carbon fiber fork of the bicycle. *Johnson,* 159 Wash.App. 943. Plaintiff filed a summary judgment motion against REI, asserting that REI was strictly liable for her injuries. *Id.* In support of her motion, plaintiff submitted an expert declaration from a forensic engineer, who stated that based upon his examination and testing of the fork, he found defects in the fork that could only occur at the time of its manufacture. *Id.* at 943-944. In response, REI submitted a declaration from its own engineering expert, who asserted that "there is presently insufficient information to rule out the accumulation of prior damage to the front fork as the cause of the ultimate fork separation." *Id.* at 944. He noted that the bicycle itself was "clearly a high mileage vehicle" that displayed "substantial wear and tear" *Id.* He suggested a prior accident could have contributed to the fork's fracture and opined that "[i]f an element of that crash involved the front fork without creating

visible damage, then it could be considered an initiating event for the fracture that serves as the basis for this lawsuit." *Id.* at 944-955. The trial court granted summary judgment in favor of plaintiff. *Id.* at 945.

The Court upheld the finding of the lower court, that REI did not establish how the fact that the bicycle was a "high mileage vehicle" explained the fracture of the fork and that the alleged wear and tear on the bicycle was not a fact upon which the litigation depends. *Id.* at 956 (citations omitted). The Court further noted that REI's evidence did not explain how the prior collision could have contributed to the fracture and that its expert's opinion that "[i]f an element of that crash involved the front fork without creating visible damage, then it could be considered an initiating event for the fracture that serves as the basis for this lawsuit" was conjecture. *Id.* The Court stated that REI could not rely on speculation and conjecture to raise a genuine issue of material fact. *Id.*

This is precisely the circumstance with Dr. Sloan's opinions. Dr. Sloan's opinion is "[whether or not her left foot made contact with the bottom assembly before her ankle was caught in

a pinch point is, in my opinion, less important than the fact that the dimensions and possible instability of the step-thru door posed a serious risk to pedestrian safety." Dr. Sloan's statement about "possible instability" of the temporary fencing is purely speculative. CP 117. Dr. Sloan states himself in paragraph 21 of his Declaration that he could not tell from the evidence provided how the panel was secured in place and there is nothing else stated in Dr. Sloan's declaration regarding his testing or methodology to support such a condition. CP 117.

More importantly, Dr. Sloan does not state that the code violations were a proximate cause of Steepy's accident or why the alleged IBC violations presented an unreasonable risk to Steepy. He states the dimensions of the temporary gate posed a "serious risk" to pedestrian safety. Walking down a steep staircase is a "serious risk" to pedestrian safety. Bicycles and automobiles pose a "serious risk" to pedestrian safety. But that does not make it an "unreasonable risk." Steepy relies solely on Dr. Sloan to demonstrate that the temporary gate involves an unreasonable risk of harm. Dr. Sloan provided no supportable evidence on the unreasonable risk of harm present or on causation.

Steepy alleges that evidence of a different version of how the accident occurred somehow creates an inference that the temporary gate creates a question of fact regarding whether the temporary fencing presented an unreasonable risk of harm. Specifically, Bow Wow employees who witnessed the accident state that Steepy tripped over the bottom of the gate. CP 152-154, 158, 160. Forgetting about the fact that the basis for her expert's opinions are that the gate "prematurely" closed on her, the only thing that is shown by the two versions of how the accident occurred is merely that an accident occurred.

The mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence. *Marshall v. Bally's Pacwest, Inc.*, 94 Wash.App. 372, 378, 972 P.2d 475 (1999). In order to prove negligence, a plaintiff must establish the existence of a duty, a breach of this duty, and a resulting injury. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash.2d 468, 474, 951 P.2d 749 (1998). For legal responsibility to attach to the negligent conduct, the alleged breach of duty must be a proximate cause of the resulting injury. *Pratt v. Thomas,* 80 Wash.2d 117, 119, 491 P.2d 1285 (1971); *Ferrin v. Donnellefeld,* 74 Wash.2d 283, 285, 444

P.2d 701 (1968). Even if negligence is established, Bow Wow may not be held liable unless its negligence *caused* the accident. *Marshall,* 94 Wash.App. at 378. As demonstrated above, Steepy presented no evidence of proximate cause.

b. **The granting of summary judgment was proper as there were no issues of material fact that the Bow Wow had actual or constructive notice of a dangerous condition**

Pursuant to Restatement (Second) of Torts §343, a possessor of land is subject to liability for physical harm if she has actual or constructive knowledge of a dangerous condition. Steepy failed to provide any evidence of actual or constructive knowledge. Steepy's sole argument regarding notice is that because Bow Wow set up the temporary fencing, they knew or should have known that the fencing constituted a dangerous condition. In support of this premise, Steepy assumes that the alleged code violations of the IBC are the dangerous condition. As discussed at length above, Steepy's reliance on the IBC applying to the temporary fencing affixed to a post is misplaced.

Steepy relies on *Tabak v. State,* 73 Wash. App. 691, 870 P.2d 1014 (1994) regarding notice of a dangerous condition. *Tabak* held that 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. *Id.* at 696. *Tabak* in involved a slip and fall which occurred in May 1991 on a floating fishing platform where Mr. Tabak, prior to his fall, noted that there was a slight difference in height between the two floats on his right prior to walking on the platform, which sank 3-4 inches as he was walking, causing his fall. *Id.* at 694. The deposition testimony of the area manager stated he learned of broken bolts which hold the floats together prior to Mr. Tabak's accident sometime between February and May 1991. *Id.* at 696. The manager submitted a declaration which stated the floats were repaired in March 1991 and he did not learn of another problem with the float until June 2011, which was inconsistent with his deposition testimony. *Id.* The Court held that a trier of fact could have reasonably inferred actual knowledge of the condition which caused Mr. Tabak's fall based upon this testimony. *Id.* at 696-697.

Steepy's accident is not analogous to *Tabak.* *Tabak* held that an issue of fact existed regarding actual knowledge based upon the knowledge that the State had of the broken bolts prior to

the fall, which was the cause of Mr. Tabak's accident. In this case, there is no evidence, circumstantial or otherwise, that Bow Wow was aware of any dangerous condition caused by the temporary fencing.

In addition, Steepy also did not identify any evidence that Steepy would not discover or realize the alleged danger or protect herself against it. Restatement (Second) of Torts §343(A) states:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

See McDonald v. Cove to Clover, 180 Wn.App. 1, 4-5, 321 P.3d 259.

As stated above, Steepy's contention is that the door of the temporary gate prematurely closed on her foot causing her to fall. CP 68-69, CP 74-76. There are no allegations that the physical components of the gate were not visible to Steepy. There is no allegation that Steepy did not know how the gate worked. Because she stepped over the gate with her right foot before having it "prematurely close" on her left foot, Steepy clearly saw the bottom of the gate. CP 45, CP 74. In addition, Steepy

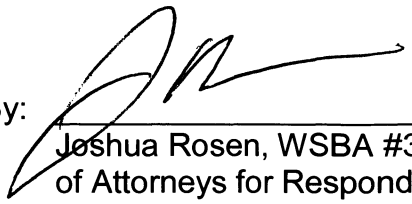
controlled the opening and the closing of the gate door. Steepy had used the gate prior to the date of the accident, without incident. CP 186. There is no evidence that Bow Wow should have anticipated any harm to Steepy, since the temporary fencing had been used by at least 138 different customers on five prior occasions without incident. CP 185-186.

V. CONCLUSION

The trial court granted Bow Wow's Motion for Summary Judgment, finding Steepy provided no evidence that a dangerous condition created a foreseeable likelihood of harm to one who might encounter it, or that the fencing of the door posed an unreasonable risk. The trial court also found that Steepy provided no evidence of actual or constructive knowledge of any alleged danger. Both the process undertaken by the trial court and its conclusions are sound. Dismissal should be affirmed. The finding of summary judgment should be affirmed.

DATED this 24th day of February, 2015 at Seattle, Washington.

LAW OFFICES OF SWEENEY, HEIT & DIETZLER



By: _____
Joshua Rosen, WSBA #37779
of Attorneys for Respondent
Walkin' The Dogs & Pet
Services, Inc. d/b/a Bow Wow
Fun Towne

DECLARATION OF SERVICE

I certify that on the 24th day of February, 2015, I caused a true and correct copy of the **RESPONDENT'S BRIEF** to be served on the following, at the address listed below, by ABC Legal Messengers:

David J. Balint
Attorney for Appellant
2033 Sixth Ave., Ste. 800
Seattle, WA 98121

LAW OFFICES OF SWEENEY,
HEIT & DIETZLER

By:_____
Nina Cordova
Legal Assistant to Joshua
Rosen