99072-7

No. 80057-4

SUPREME COURT
OF THE STATE OF WASHINGTON

TVI, INC. d/b/a VALUE VILLAGE, a Washington corporation,

Petitioner,

vs.

KRISTIN CARNEY and STEVEN CARNEY, husband and wife,

Respondent.

RESPONDENT TVI, INC.'S
PETITION FOR REVIEW

Kimberly A. Reppart, WSBA #30643
FORSBERG & UMLAUF, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164
(206) 689-8500
KReppart@FoUm.law
Attorney for Respondent TVI, Inc.

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I. IDENTITY OF PETITIONER

Defendant/Respondent TVI, Inc. dba Value Village ("TVI") asks the Court to accept partial review of the Court of Appeals' decision designated in Part II of this Petition.

II. THE COURT OF APPEALS' DECISION

TVI requests partial review of the Court of Appeals' decision in *Carney v. Pac. Realty Assocs., LP*, No. 80057-4-I, 2020 WL 5117966 (2020), filed on August 31, 2020. TVI is a retail tenant in a shopping plaza. TVI does not assign error to the Court of Appeals' decision that TVI "did not exercise control over the parking lot sufficient to establish a duty…as possessor[s] of the common area." *Id.*, at *1. TVI *does* assign error to the Court of Appeals' decision that TVI, as a retail tenant in a shopping plaza, owes a separate "duty to ensure safe ingress and egress" to its business invitees "regardless of whether it owns or has control of the property on which a known hazard exists." *Id.*

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision conflict with the Supreme Court's decision in *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975), by exposing a retail tenant in a shopping plaza to liability for common area parking lot design over which it has no control?

2. Do retail tenants in shopping plazas owe a "duty to ensure safe ingress and egress" to invitees approaching from a common area parking lot controlled by the landlord when the issue is one of parking lot design?

IV. STATEMENT OF THE CASE

A. The Marysville Plaza Common Area Parking Lot Was Designed and Constructed before TVI's Tenancy

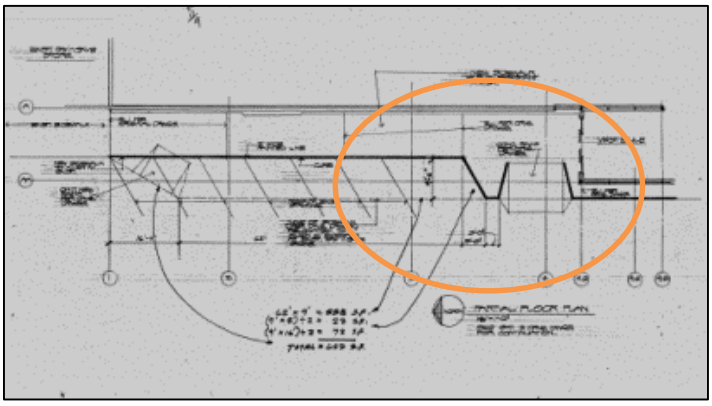
On August 27, 1973, Safeway Inc. ("Safeway") and landlord Marysville Plaza Associates ("MPA") executed a Shopping Center Lease, under which Safeway agreed to lease a "building, or portion of building, and related improvements to be constructed thereon by lessor [MPA]…" "as shown on the plan dated January 5, 1973, last revised May 7, 1973, attached hereto as Exhibit A." CP 18. The 1973 MPA/Safeway lease included the following provisions:

> **4. Common areas. completion and expansion of shopping center**. All those portions of the shopping center not shown as building areas on Exhibit "A" shall be common areas for the sole and exclusive joint use of all tenants in the shopping center, their customers, invitees and employees... Lessor [MPA] agrees that, **at lessor's expense, all common areas will be maintained in good repair, kept clean and kept clear of snow and ice and adequately lighted when stores are open for business…**
>
> **5. Construction of common areas and lessee's building. Plans and specifications…**.lessor [MPA] agrees, at lessor's sole cost, risk and expense, to construction the common areas…all parking and service areas, sidewalks, driveways and related improvements shown on Exhibit "A" and to

> construct on the leased premises a building or portion of a building, all in accordance with **plans and specifications to be prepared at lessor's expense by Mar, Hara, Goe & Associates (architect)**, and approved in writing by lessor and lessee….

CP 20-21 (emphasis added). Safeway agreed to pay a proportionate share of the common area maintenance ("CAM") charges along with the other shopping center tenants. CP 25. Safeway's lease was a "typical shopping center lease" under which "the tenants pay charges to the landlord who has the responsibility for maintaining the common areas." CP 680.

Safeway's store at Marysville Plaza was remodeled and expanded pursuant to an October 11, 1982 lease modification agreement. CP 789-803. As part of that remodel, a diagonal handicap stall was placed at its current location adjacent to the curb cutout leading to the north entry of the Safeway store:



CP 807. Landlord MPA reviewed and approved the design change. CP 993; CP 988.

MPA added a painted crosswalk to the curb cutout in 1994 at the request of Safeway. CP 809. Plaintiff Kristin Carney's ("Carney's") retail expert confirmed Safeway's request was appropriate, and that the design and placement of the crosswalk was the responsibility of the landlord:

> Q. And is it your opinion that Safeway, as tenant, had an obligation to retain any designer or architect with regard to the placement of that crosswalk or its configuration?
>
> **A. No.**
>
> …
>
> Q. And once that crosswalk is requested, do you agree it's the responsibility of the owner to design and ensure installation of the crosswalk in the best manner?
>
> **A. Yes. That's an owner's responsibility.**

CP 686.

B. TVI Became a Tenant at Marysville Plaza When It Acquired Shop & Save's Sublease

In 1998 Safeway subleased its Marysville Plaza space to Shop & Save, Inc. CP 994; CP 824-849. Section 4.1 of the Safeway/Shop & Save Sublease acknowledged that "Master Lessor [MPA] has the obligation under the Master Lease to maintain the Common Area, and Sublessor [Safeway] shall have no obligation to do so, except as expressly set forth herein…" CP 828. Section 4.1 further states:

> With respect to [MPA]'s obligation under the Master Lease to maintain the Common Area, [Safeway] shall be required only to use reasonable efforts to cause [MPA] to perform

> such obligation, and then only if [Safeway] has actual notice of [MPA]'s failure to perform such obligations… If such default or defaults remain as are specific in such notice remain uncured upon expiration of the cure periods set forth in the Master Lease, then [Safeway] shall perform such obligation of [MPA] with reasonable diligence following receipt of written notice from [Shop & Save] that [MPA] has failed to do so.…

Id. The Sublease did not confer upon Shop & Save any obligation to evaluate, design, maintain, revise or change the Marysville Plaza common area parking lot configuration.

On March 24, 2000, Safeway assigned its lease with MPA and sublease with Shop & Save, Inc. to Pacific Realty Associates, L.P. ("Pacific Realty"), pursuant to a Property Acquisition Agreement. CP 851. Defendant TVI acquired Shop & Save, Inc. in 2003, and now operates a Value Village at the Marysville Plaza location. CP 1001. On August 31, 2004, Pacific Realty entered into a Lease Modification Agreement with Shop & Save and TVI, which memorialized Shop & Save's assignment of its interests under the Sublease to TVI, Inc. CP 1003-1010. Except as otherwise stated therein, the Lease Modification Agreement ratified the original Sublease, which "remains in full force and effect." CP 1007.

C. TVI Had No Obligation to Evaluate the Design of the Common Area Parking Lot

This case arises out of a car-versus-pedestrian accident that took place on August 15, 2016, at the Marysville Plaza parking lot. CP 975.

Carney claims that at approximately 6:30 pm she drove to Marysville Plaza with the intention of shopping at Value Village, and that she was walking toward the store in the painted walkway when a vehicle backed out of a nearby handicapped parking space and struck her to the ground. CP 976.

Aerial Photo of Marysville Plaza Parking Lot, CP 1018.[1] Carney frequented Marysville Plaza since childhood, and had traversed the walkway numerous times. CP 656-657.

TVI is aware of no prior similar incidents at the painted walkway. CP 999. Carney strenuously argued to the trial court that the absence of prior accidents should not define TVI's ability to be "on notice" of a

[1] The photo referenced on page 2 of the Court of Appeals' decision is **not** a photo of the Marysville Shopping Plaza where Carney was injured. Rather, it is one of a collection of numerous photos of painted walkways in local shopping plaza parking lots. *See* CP 635-653. Such walkways are ubiquitous.

supposedly hazardous condition, but painted walkways in shopping plaza parking lots are common throughout the Pacific Northwest:

See CP 635-653 (multiple examples).

Moreover, although TVI asked Pacific Realty and landlord MPA to attend to various parking lot maintenance issues over the years (*e.g.* burned out lights, potholes), Carney's "retail expert" agreed TVI had no obligation with respect to the parking lot **design**:

> Q. So are you saying it should -- well, I guess -- I'm trying to understand, is it your opinion that a manager or a store director of a retail operation should take it upon themselves to gain some sort of expertise in parking lot design so they can properly critique a parking lot and inform an owner if they think something is wrong with the design?

MR. GAHAN: Objection, form.

…

THE WITNESS: No.

CP 675.

V. ARGUMENT

A. The Court of Appeals' Decision Conflicts with the Supreme Court's Decision in *Geise v. Lee* by Exposing Shopping Plaza Tenants to Liability for Common Area Parking Lot Design Over Which They Have No Control

Retail tenants in shopping plazas owe no duty to invitees with respect to the design and configuration of a common area parking lot, when such tenants do not have the authority or ability to control or make changes to the parking lot design. "The general rule in the United States is that where an owner divides his premises and rents certain parts to various tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is his duty to exercise reasonable care and maintain these common areas in a safe condition." *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975).

This rule is founded on the contractual agreement between landlord and tenant. When the landlord makes an explicit covenant to repair or maintain the common area, the landlord is liable for negligent performance or nonperformance of that duty. *Mesher v. Osborne*, 75 Wn. 439, 446, 134 P. 1092 (1913); *Teglo v. Porter*, 65 Wn.2d 772, 774, 399 P.2d 519 (1965);

Brown v. Hauge, 105 Wn. App. 800, 804, 21 P.3d 716, 718 (2001) (because the duty arises out of contract, the contract defines the extent of the duty owed).

The Restatement (Second) of Torts § 343 states:

> **A possessor of land** is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (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, at 215-16 (1965). Under RESTATEMENT (SECOND) OF TORTS § 343A (1965), 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." *Id.*, at 218.

These sections do **not** apply when the defendant is **not** the landowner or "possessor of land." *Pruitt v. Savage*, 128 Wn. App. 327, 331, 115 P.3d 1000 (2005). A "possessor of land" is:

> (a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession....

RESTATEMENT (SECOND) OF TORTS § 328E (1965).

After acknowledging "a person is in 'control' of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land,"[2] the Court of Appeals in the instant matter observed that:

- TVI's requests for maintenance are not evidence of its authority over the common areas;
- TVI cannot alter or re-design the parking lot without the owner's (MPA's) consent; and
- The "ability to veto changes to the parking lot proposed by MPA is not evidence of TVI's independent authority and ability to take precautions to reduce risk of harm."

Carney v. Pacific Realty Associates LP, et al., 2020 WL 5117966 at *4-5. In the first part of its decision, the Court of Appeals concluded that Carney "provides no evidence that TVI could unilaterally change common areas," and "MPA **alone** 'had the requisite ability and authority to reduce the risk of harm to entrants such that it was' solely in control and possession of the property." *Id.*, emphasis added.

[2] Citing *Adamson v. Port of Bellingham*, 193 Wn.2d 178, 187, 438 P.3d 522 (2019).

This portion of the Court of Appeals' decision complies entirely with the Washington Supreme Court's decision in *Geise v. Lee*, 84 Wn.2d at 868 ("it is [the landlord's] duty to exercise reasonable care and maintain…common areas in a safe condition"). This is especially true considering the issue is one of parking lot configuration and design, rather than a transient hazard such as a broken curb or pothole. Had the Court of Appeals stopped there, its ruling would have had firm footing in longstanding legal precedent.

Unfortunately, the Court of Appeals set aside *Geise v. Lee* to find that retail tenants in shopping plazas have an additional duty to "ensure safe ingress and egress" of business invitees approaching from the common area parking lot, even when they do not "own or control the property on which the hazard is located." *Carney v. Pacific Realty Associates LP, et al.*, 2020 WL 5117966 at *6, citing *Rockefeller v. Standard Oil Co. of California*, 11 Wn. App. at 522. This pronouncement is difficult to reconcile with the Court's simultaneous observation that TVI had no authority or ability to change the parking lot design, for which MPA "alone" was responsible. *Carney*, at *4-5.

Indeed, the cases relied on by the Court of Appeals do not concern a retail shopping plaza situation, where the duties of the parties are established by contract. Nor do they concern allegations related to the

design and *configuration* of adjacent property, as opposed to situational hazards that may be somehow ameliorated the party accused. Rather, the Court of Appeals extrapolated from these dissimilar cases to impose a new "duty to **ensure** safe ingress and egress" on retail tenants in shopping plazas, effectively exposing them to liability for the design and configuration of the common area parking lot, even though they did not create the design and have no authority or ability to change it.

The Court of Appeals first cites *Baltzelle v. Doces Sixth Ave., Inc*., 5 Wn. App. 771, 774, 490 P.2d 1331 (1971), for the unremarkable proposition that business owners have an "obligation to use ordinary care to keep the approaches, entrances and exits in a reasonably safe condition for use of customers who are entering or leaving the business." *Baltzelle*, 5 Wn. App. at 774. But *Baltzelle* and similar cases relied on by Carney[3] do not stand for the proposition that a retail tenant in a shopping plaza owes a

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[3] Including *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 372 P.2d 193 (1962), *Tyler v. F. W. Woolworth Co*., 181 Wash. 125, 41 P.2d 1093 (1935), and *Knopp v. Kemp & Hebert*, 193 Wash. 160, 160, 74 P.2d 924, 924 (1938). These cases are notable only because they involve accidents that took place at or near entrances and exits. They do not address retail shopping plazas and they do not expand the scope of duty owed by business owners to invitees. *De Heer* concerned a woman who fell on exit stairs, but there was no question that the stairs were part of the premises at which the defendant was holding an event. *Tyler* involved a shopper who fell on a ramp attached to and part of a store exit door, not adjacent property. *Knopp v. Kemp & Hebert*, 193 Wash. 160, 74 P.2d 924, 924 (1938), concerned the slippery nature of terrazzo flooring located *between* the sidewalk and the door of a store – again, part of the store's premises. Not one case concerns a tenant's purported obligation to redesign a common area parking lot.

distinct or separate duty to invitees to ensure safe ingress and egress from a common area parking lot. *Baltzelle* did not involve a shopping plaza or a common area parking lot at all. Rather, *Baltzelle* concerned a standpipe and a false planter placed near the entrance of a furniture store on 6th Avenue in Seattle. *Baltzelle*, 5 Wn. App. at 772-773. *Baltzelle* is nothing more than a precursor to Washington's adoption of RESTATEMENT (SECOND) OF TORTS § 343, and it is a poor illustration for the Court of Appeals' theory that retail tenants can be liable for the landlord's parking lot design.

The Court of Appeals primarily relies on *Rockefeller v. Standard Oil Co. of California*, 11 Wn. App. 520, 523 P.2d 1207 (1974), to find that "TVI has a duty to its customer invitees to take reasonable precautions to eliminate foreseeable hazards to the ingress and egress from its store, even if it does not own or control the property on which the hazard is located." *Carney,* at *6, citing *Rockefeller*, 11 Wn. App. at 522. *Rockefeller* involved an obscure ditch near the entrance of a gas station which was poorly lit because the gas station failed to replace lights on its own premises. *Rockefeller* did not involve a common area parking lot in a retail shopping plaza (where the duties are established by contract), and it did not concern a parking stall and painted walkway in place for over 20 years where there had been no known prior injury-incidents.

TVI is *not* on similar footing to the gas station in *Rockefeller*. The *Rockefeller* court determined the gas station could "have taken reasonable precautions to eliminate [the hazard] by, for example, posting warnings or barriers or providing adequate illumination." *Rockefeller*, 11 Wn. App. at 522. Not so for TVI, which could not have "eliminated" the handicap stall or painted walkway with *warnings*, *barriers* or additional *illumination*. Barriers would have blocked cars and people, the accident happened during daylight hours and certainly there is no obligation to warn customers that cars in parking lots might back up out of parking stalls. In fact, on the issue of *warnings*, the decision in *Barker v. Skagit Speedway, Inc*., 119 Wn. App. 807, 82 P.3d 244, 247 (2003), is on point:

> Washington courts have long held that there is no duty to warn a business invitee about conditions of which the invitee has actual knowledge. To require Skagit Speedway to warn patrons present while sprint cars are being moved and loaded on trailers that they might be hit by a car being pushed would be **a futile warning because the risk is so obvious and well known. This court declines to impose a duty to warn of a risk as obvious as this one.**

Barker, 119 Wn. App. at 813 (emphasis added).

The Court of Appeals took pains to find an "issue of fact" with respect to TVI's responsibility to preserve Carney's case, citing an expert opinion that "TVI should have known about the poor design and sought to correct the problem." *Carney*, at *7. This makes no sense, as the Court

already determined there was *nothing* TVI could have done as a retail tenant to "correct the problem" because it had no "authority and ability to take precautions to reduce [the] risk of harm" in the common area parking lot.[4] *Carney,* at *5. The Court of Appeals' decision not only conflicts with *Geise v. Lee*, it is internally inconsistent.

This case is the same as *Barker,* and the Court should similarly decline to impose on retail tenants a duty to "ensure" their customers are protected from the obvious and well-known risk of cars backing up in parking lots. TVI respectfully seeks review of the Court of Appeals' decision otherwise, as it conflicts with the Supreme Court's longstanding precedent in *Geise v. Lee*.

B. The Court of Appeals' Decision Involves an Issue of Substantial Public Interest That Should Be Decided by the Supreme Court As It Imposes a New Duty on Retail Tenants to "Ensure" the Safety of Customers in Parking Lots Controlled by Landlords

The Court of Appeals took *Rockefeller's* general proposition that "[a] proprietor owes a duty to its business invitees of safe ingress and egress from its property," and transformed it into a retail tenant's "duty to **ensure** safe ingress and egress for its invitees" in a common area parking lot. *Carney*, at *6, citing *Rockefeller,* 11 Wn. App. at 522. The imposition of

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[4] Carney's expert testified that the design and placement of the painted walkway is the *owner's* responsibility, and retail tenants do NOT have a duty "to gain some sort of expertise in parking lot design so they can properly critique a parking lot and inform an owner if they think something is wrong with the design." CP 675, 686.

this novel duty is a "a matter of continuing and substantial interest," that "presents a question of a public nature which is likely to recur" for which "it is desirable to provide an authoritative determination for the future guidance." *See, e.g., State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005).

Rockefeller does not use the word "ensure." A duty to "ensure" the safe ingress and egress of customers in a common area parking lot is unreasonably and unfairly expansive in scope – especially when there is no corresponding "authority and ability" to make changes to the parking lot design. Nor does the word "ensure" correlate with the RESTATEMENT (SECOND) OF TORTS § 343 and § 343A (1965), which requires only that landowners and possessors of land take "reasonable" care to inspect for and protect customers from hazardous conditions, and disclaims liability altogether for known or obvious conditions. Because the word "ensure" knows no bounds, the Court of Appeals' decision implicitly means that retail tenants may be obligated to hire parking lot experts upon assumption of a retail space in a shopping center to review the common area parking lot design so the tenant can discharge its duty by…*asking* the landlord to make changes.

First, this expansive and expensive new duty may or may not make the shopping center parking lot *safer*, as the tenant has no control over

whether the landlord will implement recommended changes (not to mention, even Carney's expert testified this is not something tenants are expected to do). CP 675, 686.

Second, retail lease documents are typically lengthy and spell out in *detail* the obligations of the landlord and the obligations of the tenant with respect to leased areas and common areas, as the lease documents did in this case. The Court of Appeals' decision essentially ignores the parties' contractual agreement, rendering retail tenants everywhere responsible for common area design issues entirely outside of their control.

Simply put, the Court of Appeals imposed a "duty to ensure safe ingress and egress" without considering the particular situation presented: a retail shopping plaza with a common area parking lot and multiple tenants. *Rockefeller* and similar cases finding a "duty to ensure safe ingress and egress" are simply unworkable in this context, especially when the various retail tenants have no control over the parking lot design. Such an unbounded expansion of the rule in *Rockefeller* would negatively impact commercial leaseholds throughout Washington, and render meaningless the division of duties between landlords and tenants established by contract.

Moreover, there is a marked difference between the generic duty of a business owner to use ordinary care to keep the approaches, entrances, and exits to a store in a reasonably safe condition, and imposing a duty on

the business owner for the design of a nearby parking lot that the owner neither owns nor controls. Does the Court of Appeals' decision mean a business tenant in a skyscraper may be liable for the design of the parking garage below simply because its visitors may park there? What about the building lobby? May a salon be liable for the design of an adjacent public parking lot because its clients park there?

Prior Washington Courts have answered these questions in the negative. For example, *McMann v. Benton County, Angeles Park Communities, Ltd*., 88 Wn. App. 737, 946 P.2d 1183 (1997), *review denied*, 135 Wn.2d 1005 (1998), addressed the question of whether landowners have a duty to protect people on their land from dangers on adjacent land. Agreeing with the majority of jurisdictions, the court held that landowners have no duty to protect people on their land from dangers on adjacent land. *McMann*, 88 Wn. App. at 742–743. In *McMann*, residents of a mobile home park sued the park when their child drowned in an adjacent irrigation canal owned by an irrigation district. The court stated:

> There is no claim or fact issue presented that Angeles Park used or failed to use its property in any way so as to render the adjacent property more unsafe or to increase any risk posed by the canal to its invitees. Furthermore, there is no inference which can be drawn from this record that Angeles Park was in any position to correct the hazardous condition of the canal or control it.

McMann, 88 Wn. App. at 743. This is the precise issue for TVI, which did not use its leased space in any way that rendered the common area parking lot more unsafe or increased any supposed risk posed by the painted walkway. Nor is TVI in a position to correct the condition or control it (as the Court of Appeals conceded). Such a massive departure from *McMann* and *Geise v. Lee* presents a question of a public nature which is likely to recur – essentially a "duty to ensure safe passage" affecting every retail tenant in the state.

VI. CONCLUSION

Washington law instructs that "where an owner divides his premises and rents certain parts to various tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is his duty to exercise reasonable care and maintain these common areas in a safe condition." *Geise v. Lee*, 84 Wn.2d at 868. No Washington case imposes a duty on shopping plaza tenants with respect to hazards posed by the common area parking lot design, because the lease documents and *Geise* place this responsibility on the landlord. TVI respectfully asks the Supreme Court to review and reverse the portion of the Court of Appeals' decision finding that retail tenants owe a duty to "ensure safe ingress and egress" of customers approaching from a common area parking lot when the tenant has no authority or ability to make changes to the parking lot. The trial

court correctly dismissed plaintiff's claims against TVI for lack of duty as a matter of law.

RESPECTFULLY SUBMITTED this 29th day of September, 2020.

FORSBERG & UMLAUF, P.S.

By:_____

Kimberly A. Reppart, WSBA #30643
901 Fifth Avenue, Suite 1400
Seattle, WA 98164
(206) 689-8500
KReppart@FoUm.law
Attorneys for Respondent TVI, Inc.

APPENDIX

Title of Document	Date of Filing
Carney v. Pac. Realty Assocs., LP, No. 80057-4-I, 2020 WL 5117966 (2020)	8/31/2020

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***RESPONDENT TVI, INC.'S PETITION FOR REVIEW*** on the following individuals in the manner indicated:

Mr. Steve Sitcov
Steve Sitcov, PLLC
1000 Second Ave., Suite 3000
Seattle, WA 98104
(X) Via Email Service Agreement

Mr. Michael S. Wampold
Mr. Tomas A. Gahan
Ms. Stephanie Messplay
Peterson Wampold Rosato Feldman Luna
1501 4th Ave., Suite 2800
Seattle, WA 98101
(X) Via Email Service Agreement

Mr. Mark Dietzler
Law Offices of Sweeney & Dietzler
1004 4th Ave., Suite 3300
Seattle, WA 98154
(X) Via Email Service Agreement

Ms. Anne Marie Hoovler
Lewis Brisbois Bisgaard & Smith, LLP
1111 Third Avenue, Suite 2700
Seattle, WA 98101
(X) Via Email Service Agreement

Ms. Patricia A. Brockway
Goehler & Associates
4000 Kruse Way Place, Suite 135
Lake Oswego, OR 97035-5545
(X) Via Email Service Agreement

Mr. William W. Spencer
Mr. Jason E. Soderman
Murray Dunham & Murray
100 West Harrison
North Tower, Suite 340
Seattle, WA 98119-0844
(X) Via Email Service Agreement

SIGNED this 29th day of September, 2020, at Seattle, Washington.

s/ Lynda T. Ha
Lynda T. Ha

APPENDIX

FILED
8/31/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KRISTEN CARNEY and STEPHEN CARNEY, husband and wife, Appellants, v. PACIFIC REALTY ASSOCIATES, LP, d/b/a PACIFIC REALTY ASSOCIATES, A LIMITED PARTNERSHIP, a foreign limited partnership; and TVI, INC., d/b/a VALUE VILLAGE, a Washington corporation, Respondents, MEAGAN NORRIS and JOHN DOE NORRIS, husband and wife; MARYSVILLE PLAZA ASSOCIATES, LLP, a limited liability partnership; SAFEWAY, INC., a foreign corporation; and EILAT MANAGEMENT CO., a Washington corporation, Defendants.	)	No. 80057-4-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Kristen and Stephen Carney (collectively Carney) appeal summary judgment dismissal of their negligence claims against defendants Pacific Realty Associates LP d/b/a Pacific Realty Associates (Pacific Realty) and TVI Inc. d/b/a Value Village (TVI) for injuries sustained when Kristen[1] was struck by a van in a parking lot crosswalk near the entrance of a Value Village store at

[1] We use Kristen Carney's first name when necessary for clarity and mean no disrespect by doing so.

the Marysville Plaza shopping center. TVI operates the Value Village store and leases the commercial space from Pacific Realty. Carney argues that both Pacific Realty and TVI exercise control over the common-area parking lot and had a duty to protect Kristen from unreasonable harm in the crosswalk. Carney also argues that TVI owed Kristen a separate duty of safe ingress and egress from its place of business. We conclude that TVI and Pacific Realty did not exercise control over the parking lot sufficient to establish a duty to Kristen as possessors of the common area. But TVI owes a separate duty of safe ingress and egress to its business invitees regardless of whether it owns or has control of the property on which a known hazard exists. We affirm summary judgment dismissal of Carney's claims against Pacific Realty but reverse and remand for further proceedings related to TVI.

FACTS

Marysville Plaza is a shopping center owned by Marysville Plaza Associates LLP (MPA). In August 1973, lessor MPA and lessee Safeway Incorporated executed a "Master Lease" for a portion of the shopping center. Safeway agreed to lease a "building, or portion of the building," with "related improvements to be constructed" by MPA. The Master Lease contains provisions pertaining to the common areas of the shopping center, including its parking lot:

> 4. Common areas. Completion and expansion of shopping center. All those portions of the shopping center not shown as building areas . . . shall be common areas for the sole and exclusive joint use of all tenants in the shopping center, their customers, [and] invitees and employees . . . . Lessor agrees that, at lessor's expense, all common areas will be maintained in good

> repair, kept clean and kept clear of snow and ice and adequately lighted when stores are open for business. . . . Lessor further agrees that . . . following completion of construction of any portion of the shopping center, the sizes and arrangements of said buildings and common areas[ ](including parking areas) will not be changed without lessee's written consent.

In exchange for MPA's control and maintenance of the common areas, Safeway and other shopping center tenants agreed to a common-area maintenance charge.

The Master Lease also provides that "at lessor's sole cost, risk and expense," MPA agrees to "construct on the common areas . . . all parking and service areas, sidewalks, driveways and related improvements." All construction was to be done "in accordance with plans and specifications" prepared at MPA's expense and by its designated architects.

In October 1982, Safeway executed a lease modification agreement and remodeled and expanded its Marysville Plaza store. The remodel included the addition of a diagonal handicap parking stall located next to the curb cutout that led to the north entrance of the store. MPA reviewed and approved the addition. At Safeway's request, MPA painted a crosswalk to the curb cutout in 1994.

In 1998, Safeway sublet its Marysville Plaza space to Shop & Save Inc. The sublease provides nonexclusive use of the common areas of the shopping center subject to the terms of the Master Lease and "to such reasonable rules and regulations as Sublessor [Safeway] may from time to time promulgate. Sublessor shall [also] have the right to use portions of the Common Area for any commercial purposes." The sublease includes a provision explicitly reserving master lessor MPA's obligation to maintain the common areas under the Master Lease as well as recourse for sublessee Shop & Save should MPA fail to fulfill its obligations:

> 4.1 Master Lessor's Obligation to Maintain. Sublessee hereby acknowledges that Master Lessor has the obligation under the Master Lease to maintain the Common Area, and Sublessor shall have no obligation to do so, except as expressly set forth herein. With respect to Master Lessor's obligation under the Master Lease to maintain the Common Area, Sublessor shall be required only to use reasonable efforts to cause Master Lessor to perform such obligation, and then only if Sublessor has actual notice of Master Lessor's failure to perform such obligations. If Master Lessor fails to perform such obligation, then Sublessee shall prepare and deliver to Sublessor a written notice specifying such failure to perform in reasonable detail. Sublessor shall then transmit such notice to Master Lessor. If such default or defaults as are specified in such notice remain uncured upon the expiration of the cure periods set forth in the Master Lease, then Sublessor shall perform such obligation of Master Lessor with reasonable diligence following receipt of written notice from Sublessee that Master Lessor has failed to do so.

In March 2000, Safeway assigned its interest in the Master Lease with MPA and its sublease with Shop & Save to Pacific Realty under a property acquisition agreement. TVI acquired Shop & Save in 2003. Pacific Realty then entered a sublease modification agreement with Shop & Save and TVI,

memorializing the assignment of interests. TVI now operates a Value Village store in the Marysville Plaza under the Master Lease and sublease.

On August 15, 2016, Kristen parked her car in the Marysville Plaza parking lot and used the painted crosswalk to walk toward the north entrance of Value Village. At the same time, Meagan Norris backed her minivan out of the diagonal handicap parking stall in front of the store. The diagonal orientation of the handicap parking stall in relation to the crosswalk required Norris to reverse into the crosswalk to exit the parking lot northward. Norris' minivan struck Kristen in the crosswalk. Kristen sustained a traumatic brain injury as a result of the collision.

Carney filed a personal injury complaint against Norris and MPA, alleging negligence and requesting damages for medical expenses, pain and suffering, loss of wages, and loss of consortium. They later amended the complaint to add Safeway, Pacific Realty, TVI, and Eilat Management Co.[2] as defendants.

Safeway moved for summary judgment dismissal of all claims with prejudice. The trial court granted the unopposed motion. Carney and Eilat Management entered a stipulation that dismissed all claims against Eilat with prejudice.

TVI and Pacific Realty also filed separate summary judgment motions to dismiss Carney's claims with prejudice. The trial court concluded that TVI and Pacific Realty owed no duty of care to Kristen and granted the motions. The trial court entered a partial final judgment under CR 54(b) and certified the case for

[2] Carney alleged MPA retained Eilat to provide property management services at Marysville Plaza.

appeal, finding that "[a] resolution on appeal of Plaintiffs' claims against TVI and [Pacific Realty] will be dispositive of a trial against Norris."

ANALYSIS

Carney appeals the trial court's summary judgment dismissal of her negligence claims against TVI and Pacific Realty. We review orders on summary judgment de novo. Kim v. Lakeside Adult Family Home, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). "Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (citing CR 56(c)). The moving party bears the burden of proving there are no issues of material fact. Kim, 185 Wn.2d at 547. We consider all evidence and reasonable inferences in the light most favorable to the nonmoving party. Kim, 185 Wn.2d at 547. Summary judgment is appropriate "only if, from all the evidence, a reasonable person could reach only one conclusion." Folsom, 135 Wn.2d at 663.

To establish negligence, a plaintiff must show (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Summary judgment is proper if a plaintiff cannot meet any of these elements. Ranger Ins., 164 Wn.2d at 553. In a negligence action, "the threshold question is whether the defendant owes a duty of care to the injured plaintiff." Schooley v. Pinch's Deli

Mkt., Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). The existence of a legal duty is a question of law. Schooley, 134 Wn.2d at 474.

Duty as Possessor of Common Area

Carney argues both TVI and Pacific Realty owed Kristen a duty of reasonable care as possessors in control of the common-area parking lot where she was injured. TVI and Pacific Realty contend that MPA retained sole control over all Marysville Plaza common areas under the Master Lease. We agree with TVI and Pacific Realty.

A landowner has a duty to maintain common areas in a reasonably safe condition. Mucsi v. Graoch Assocs. Ltd. P'ship # 12, 144 Wn.2d 847, 854, 31 P.3d 684 (2001). As a general rule,

> where an owner divides his premises and rents certain parts to various tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is [the owner's] duty to exercise reasonable care and maintain these common areas in a safe condition.

Geise v. Lee, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975). But a landowner may not be liable for injury on its property if it has given exclusive control of the property to a lessee. Adamson v. Port of Bellingham, 193 Wn.2d 178, 184-85, 438 P.3d 522 (2019).

To determine premises liability, we look to "whether one is a 'possessor' of property, not whether someone is a 'true owner' (the titleholder) of property." Gildon v. Simon Prop. Grp., Inc., 158 Wn.2d 483, 496, 145 P.3d 1196 (2006). A "possessor" of land is

> (a) a person who is in occupation of the land with intent to control it or

> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

RESTATEMENT (SECOND) OF TORTS § 328E (AM. LAW INST. 1965); Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 655, 869 P.2d 1014 (1994).

A person is in "control" of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land. Adamson, 193 Wn.2d at 187. Control may be shared over certain areas of property. Adamson, 193 Wn.2d at 187. To determine control,

> [w]e look to the specific terms of the agreement to see who had authority and ability to reduce risk of harm and whether there were temporal and practical limits on the lessee's possession such that the lessor is still liable as a possessor of land.

Adamson, 193 Wn.2d at 187.

Here, the governing leases establish MPA as a possessor of the common areas. In section 4 of the Master Lease, MPA agreed to construct the common areas—including parking lots—at its expense. The Master Lease also establishes that "all common areas will be maintained in good repair" by MPA and at MPA's expense. Section 4.1 of the sublease explicitly affirms MPA's control of the common areas. It provides that the "Master Lessor has the obligation under the Master Lease to maintain the Common Area, and Sublessor shall have no obligation to do so, except as expressly set forth herein." Despite the plain language of the Master Lease, Carney argues that other lease provisions and the actions of TVI and Pacific Reality show that they share control of the common-area parking lot with MPA.

TVI

Carney contends that TVI owed Kristen a duty to protect her from harm in the crosswalk because "specific rights and responsibilities" granted to TVI under the leases give TVI the authority and ability to act with regard to the common area. In support of their argument, Carney points to TVI's successful requests for repair and restriping of the parking stalls and fire lanes, replacement of burned out lightbulbs in the parking lot, removal of trailers from the back parking lot, repair of a loose concrete slab on the sidewalk in front of the store, and pothole repair.

TVI's requests for maintenance are not evidence of its authority over the common areas. To the contrary, under the leases, TVI must make written requests for maintenance, and MPA will perform the work only if it approves the request. TVI submits its written requests to Pacific Realty, who then forwards the requests to MPA. For example, in March 2008, TVI notified Pacific Reality in writing that the parking lot needed repairs, restriping, and stenciling. Pacific Realty forwarded the request to MPA, noting that "[a]s the Master Lessor of the Property, you are responsible for maintenance of the parking lot." On another occasion, TVI e-mailed Pacific Realty to request repair of a "concrete slab that has come loose at the front of the Value Village." Pacific Realty forwarded the information to MPA, who then scheduled the repair.

Carney also points to evidence that TVI and Pacific Realty collaborated on a plan for significant alterations to the parking lot to improve TVI's customer donation drop-off experience. Carney asserts the collaboration is proof that TVI

could alter the parking lot without MPA's consent. While evidence showed that TVI and Pacific Realty worked with an architect to design a plan to modify the parking lot for a donation drop-off lane, the evidence also showed that TVI and Pacific Realty stopped short of implementing any changes without MPA's approval. Pacific Realty notified TVI by e-mail that "[w]e need to get this approved by the Master Lessor first." And during depositions, Pacific Realty confirmed that it advised TVI of the need for MPA's approval. Pacific Realty informed TVI that moving forward with construction before MPA's authorization "would be a violation of the master lease."

Finally, Carney contends that a lease provision restricting MPA from changing the common-area parking lot without TVI's written consent is evidence of TVI's control over the property. But the ability to veto changes to the parking lot proposed by MPA is not evidence of TVI's independent authority and ability to take precautions to reduce risk of harm. Carney provides no evidence that TVI could unilaterally change the common areas. MPA alone "had the requisite ability and authority to reduce the risk of harm to entrants such that it was" solely in control and possession of the property. Adamson, 193 Wn.2d at 188.

Pacific Reality

Carney contends that Pacific Reality is also a "possessor" of the parking lot and owed Kristen a duty of care. Carney argues that many of the same lease provisions that give TVI authority to act independently to reduce risk of harm also apply to Pacific Realty. Additionally, Carney argues that lease provisions giving Pacific Realty the ability to impose rules over the common area and to use the

common area for commercial purposes, as well as Pacific Realty's obligation under the leases to maintain the common areas if MPA fails to act, are evidence of Pacific Realty's control over the property.

Section 2.2 of Pacific Realty's sublease with TVI states, in pertinent part:

> Sublessee's use of the Common Area shall be subject to such reasonable rules and regulations as Sublessor may from time to time promulgate. Sublessor shall have the right to use portions of the Common Area for any commercial purposes.

Although Carney cites these provisions as evidence of Pacific Realty's control over the common areas, the provisions only allow Pacific Realty to restrict how TVI uses the property and reserve the right to use portions of the property for its own commercial purposes. Nothing in these provisions of the sublease authorizes Pacific Realty to make unilateral changes to the property.

The sublease also requires Pacific Realty to maintain the common areas if MPA fails to perform its obligations under the lease:

> If Master Lessor fails to perform such obligation [under the Master Lease to maintain the Common Area], then Sublessee shall prepare and deliver to Sublessor a written notice specifying such failure to perform in reasonable detail. Sublessor shall then transmit such notice to Master Lessor. If such default or defaults as are specified in such notice remain uncured upon the expiration of the cure periods set forth in the Master Lease, then Sublessor shall perform such obligation of Master Lessor with reasonable diligence following receipt of written notice from Sublessee that Master Lessor has failed to do so.

But this provision gives Pacific Realty only limited authority to act on notice of MPA's failure to perform needed maintenance after multiple requests. There is no evidence that Pacific Reality could change the common areas absent these conditions precedent. To the contrary, the evidence shows that Pacific Realty

halted plans to renovate the donation drop-off area of the parking lot to obtain MPA's approval to make the changes. Pacific Realty is not a "possessor" of the common area because it lacked sufficient "authority [over the area] and [the] ability to reduce risk of harm." Adamson, 193 Wn.2d at 187.

Duty of Safe Ingress and Egress

Carney argues that TVI also owed a duty of safe ingress and egress from its retail store to its business invitees. TVI claims that business owners do not have a duty to ensure safe ingress and egress over adjacent land that they do not control. TVI also argues that even if it had such a duty, it is not liable for Kristen's injuries because the risk associated with using the crosswalk was "open and obvious."

Proprietors of a store "have a duty to exercise reasonable care to keep those portions of the premises used by their customers in a reasonably safe condition, or to warn the customer-invitees of the dangerous condition." Baltzelle v. Doces Sixth Ave., Inc., 5 Wn. App. 771, 774, 490 P.2d 1331 (1971). This includes "the obligation to use ordinary care to keep the approaches, entrances and exits in a reasonably safe condition for use of customers who are entering or leaving the business." Baltzelle, 5 Wn. App. at 774. The duty to business invitees of safe ingress and egress arises even if the proprietor does not own or control the property on which the hazard is located. Rockefeller v. Standard Oil Co. of Cal., 11 Wn. App. 520, 522, 523 P.2d 1207 (1974).

Carney relies on Rockefeller to support their argument that TVI owed a duty of safe ingress and egress. In Rockefeller, the plaintiffs were injured when

the wheels of their pickup truck ran into a ditch located on property next to the entrance of a Standard Oil service station. Rockefeller, 11 Wn. App. at 520-21. Although Standard Oil did not own the property where the ditch was located, the ditch was within four feet of the entrance to its service station. Rockefeller, 11 Wn. App. at 520. The Rockefellers claimed Standard Oil knew the ditch was difficult to see and that it was negligent for failing to post warnings or provide adequate lighting to make the ditch visible to those entering the service station. Rockefeller, 11 Wn. App. at 521.

TVI argues that Rockefeller is distinguishable from this case. TVI contends that Standard Oil was liable for injuries caused by a hazard on property it did not control only because Standard Oil failed to replace a light on its own property, which contributed to the hazardous condition. But Rockefeller defines the duty of safe ingress and egress more broadly—"To incur liability, Standard Oil need not own or control the property on which the hazard was located, nor is it required that Standard Oil create the hazard." Rockefeller, Wn. App. at 522. Standard Oil's liability did not stem only from its failure to replace a light on its property as TVI asserts. Instead, liability arose from Standard Oil's failure to take any reasonable precautions to eliminate a known hazard to invitees entering its parking lot. Rockefeller, 11 Wn. App. at 522. We held that Standard Oil "should have taken reasonable precautions to eliminate [the hazard] by, for example, posting warnings or barriers or providing adequate illumination." Rockefeller, 11 Wn. App. at 522.[3]

[3] Emphasis added.

TVI also argues that unlike the hazardous ditch in Rockefeller, "the condition at issue in this case is located in the common area of a shopping plaza: a location MPA already signed up to be responsible for under the terms of the lease." But the true owner or entity in control of the property plays no role in assessing the retail owner's duty to ensure safe ingress and egress for its business invitees. TVI has a duty to its customer invitees to take reasonable precautions to eliminate foreseeable hazards to the ingress and egress from its store, even if it does not own or control the property on which the hazard is located. Rockefeller, 11 Wn. App. at 522.

Finally, TVI argues that even if it owed Kristen a duty of safe ingress and egress, it is not liable for her injuries because the hazard at issue was "open and obvious." A "landlord has no duty to protect a tenant or guest from dangers that are open and obvious" unless the landlord should have anticipated the harm. Sjogren v. Props. of Pac. Nw., LLC, 118 Wn. App. 144, 148-49, 75 P.3d 592 (2003). And "there is no duty to warn a business invitee about conditions of which the invitee has actual knowledge." Barker v. Skagit Speedway, Inc., 119 Wn. App. 807, 813, 82 P.3d 244 (2003). TVI contends that Kristen had "actual knowledge" of the hazard because she frequented the shopping center. But a plaintiff's respective knowledge of a hazard and whether the hazard is open and obvious are generally questions of fact for a jury. See Millson v. City of Lynden, 174 Wn. App. 303, 313, 317, 298 P.3d 141 (2013); Sjogren, 118 Wn. App. at 149-50.

Here, several experts testified that the design of the handicap parking stall is dangerous to pedestrians because it requires drivers who want to drive north out of the parking lot to back into the crosswalk when pulling out of the space. The experts opined that TVI should have known about the poor design and sought to correct the problem. These material issues of fact as well as whether the hazard was open and obvious are properly decided by a jury.

We affirm summary judgment dismissal of Carney's claims against Pacific Realty but reverse and remand for further proceedings related to TVI's duty of safe ingress and egress. [4]

Brennan, J.

WE CONCUR:

Mann, C.J.

Leach, J.

[4] TVI requests attorney fees and costs on appeal under RAP 14.2 (costs awarded to substantially prevailing party on appeal). A party is entitled to fees on appeal only if applicable law grants this right. RAP 18.1(a). A party must demonstrate the right to attorney fees and costs under private agreement, a statute, or a recognized ground of equity. Buck Mountain Owners' Ass'n v. Prestwich, 174 Wn. App. 702, 731, 308 P.3d 644 (2013). Because TVI fails to establish that it is entitled to attorney fees and costs on any ground, we decline its request.

FORSBERG & UMLAUF, P.S.

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