NO. 31393-0

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RAYMOND ROBINSON

Appellant,

v.

U.S. BANCORP

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLES OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

RULES

OTHER AUTHORITIES

I. RESTATEMENT OF THE ISSUE PRESENTED BY MR. ROBINSON'S ASSIGNMENT OF ERROR

Whether the trial court properly dismissed this case on summary judgment where Plaintiff Raymond Robinson did not prove that U.S. Bank breached any duty where Mr. Robinson, 5'8" tall, was injured due to a "freak accident," when, without ducking, he consciously and looking straight ahead, in broad daylight, walked directly into a 4'11" tall staircase landing.

II. COUNTERSTATEMENT OF THE CASE

Mr. Robinson alleges that on December 16, 2010 he was injured on U.S. Bank property in Moses Lake, Washington. CP 4. On that day, Mr. Robinson went to the Moses Lake branch in order to withdraw money for his wife, and after doing so, he returned to his vehicle which was parked in the U.S. Bank parking lot. CP 29, 30. Once inside his vehicle, Mr. Robinson decided to exit the vehicle again and return to the bank to withdraw money for himself. *Id.* Embarrassed to return to the teller a second time, Mr. Robinson chose to utilize the outdoor ATM machine, which was located on the opposite end of the building from where he was parked. CP 34. Rather than walk from the parking lot to the sidewalk nearby (CP 36), Mr. Robinson, 5'8" tall, chose to take a shortcut under a

staircase that was adjacent to the building with a clearance of only 4'll.''

See CP 37, 38; CP 33; and CP 31:

Q. Here's Exhibit 2, which is another photograph you took.
A. Yes.
Q. Now, does that show the place that you were going to walk under and through?
A. Right down this way.
Q. Okay.
A. Yes.
Q. Now, there's some lattice work up there now.
A. Yes.
Q. That wasn't there at the time; right?
A. No.
Q. Okay. And so it was your intention to walk under that stairway?
A. Yes.
Q. All right. Now, where were you looking when you were walking under the stairway?
A. Straight ahead.
Q. Okay.
A. Straight ahead.
Q. All right. And did you see that the -- there was a kind of a metal landing there at the bottom of the stairs?
A. I didn't think about it.
Q. Okay.
A. I just didn't think about it.
Q. All right.
A. I just assumed that you could -- it was there. The walkway was there, and I just assumed you could walk on around it.
Q. Where did the metal actually hit your --
A. Right here.
Q. On the forehead?
A. Right here.
Q. All right. So you didn't duck at all?
A. It just happened like that.

Q. All right. You shook your head "no." I just -- I'm looking for a verbal answer. Did you duck or not?
A. No.

CP 11, 12. Labeling it as a "freak accident," Mr. Robinson agreed that there is no way a person could walk under that staircase without hitting his head. CP 32.

III. ARGUMENT

A. U.S. Bank Met Its Burden On Summary Judgment And Showed That There Was No Genuine Issue Of Material Fact In This Case.

There is no evidence that U.S. Bank breached any duty to Mr. Robinson. In a negligence action, a plaintiff must 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 Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Whether a legal duty exists is a question of law, not of fact. *E.g.*, *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998); *Tortes v. King Cy.*, 119 Wn. App. 1, 7, 84 P.3d 252 (2003), *rev. denied*, 151 Wn.2d 1010 (2004).

The legal duty owed by a landowner to a person on the premises depends on whether the person falls under the common law category of a trespasser, licensee, or invitee. *See Kamla v. Space Needle Corp.,* 147

Wn.2d 114, 125 (2002). In this case, Mr. Robinson's status as an invitee is not disputed because he was a customer of U.S. Bank.

A landowner is only subject to liability for physical harm caused to his invitees by a condition on the land, however, 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. *See Id.*, at pp. 125-126, citing RESTATEMENT SECOND OF TORTS § 343, at 215-16.

A landowner is not liable to his invitees for physical harm caused to them by a condition on the land whose danger is known or obvious to them, unless the landowner should anticipate the harm despite such knowledge or obviousness. *See Id.* at p. 126, citing RESTATEMENT (SECOND) OF TORTS § 343A at 218.

The question in this case was whether U.S. Bank should have anticipated Mr. Robinson's harm, despite the obvious hazard posed by a 5'8" tall man, in broad daylight, walking directly head-on into a 4'11" landing. Mr. Robinson had to show that U.S. Bank knew that the subject area posed a danger, and that it could have anticipated the harm despite the obviousness of the height of the landing.

Mr. Robinson cited *Trueax v. Ernst Home Center, Inc.* in support of his argument that when an owner of land creates a dangerous condition, there is no requirement of "notice," asserting that if the staircase is dangerous, U.S. Bank breached its duty to him. 70 Wn.App. 381 (1993). But Mr. Robinson ignored the foreseeability requirement, and the general rule cited in *Trueax*, that a possessor of land is not liable to an invitee unless the possessor of land knew or should have known that the condition presented an unreasonable risk of harm, could not reasonably expect its invitees to realize the risk themselves, and failed to make the condition reasonably safe or warn the invitee. *Id.* Assuming arguendo that U.S. Bank created a dangerous condition by installing the staircase (which Mr. Robinson did not prove), that does not change the requirement that the existence of a danger must be reasonably foreseeable. *Id.*, at 387-388 (1993).

> Basic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed.

Leek v. Tacoma Baseball Club, 38 Wn.2d 362, 365 (1951).

Washington courts have affirmed summary judgments dismissing premises liability claims on the grounds that a hazard was obvious, and the owner could not have anticipated what happened to the plaintiff.

In *Kamla*, Jeff Kamla was installing fireworks on the 200-foot level of the Space Needle, an open-core hexagonal platform through which three elevators pass. Mr. Kamla attached his safety line at the 200-foot level, dragging it across an open elevator shaft. The elevator subsequently traveled down through the shaft through the 200-foot level and snagged the Mr. Kamla's safety line, dragging him through the elevator shaft and injuring him. *Kamla,* 147 Wn.2d at 118.

The trial court dismissed Mr. Kamla's claim on summary judgment, and Mr. Kamla appealed. The Washington Supreme Court affirmed the trial court's order on summary judgment, finding that a landowner is liable for harm caused by an open and obvious danger only if the landowner should have anticipated the harm, and that "we believe no reasonable trier of fact could find Space Needle should have anticipated that Kamla would drag his safety line across the open elevator shaft." The Supreme Court held that "Space Needle had no duty to anticipate the harm that befell Kamla." *Id.*, at p. 127.

In *Leek*, the plaintiff invitee attended a baseball game at the defendant owner's baseball park and was injured when he was struck by a foul ball. The plaintiff brought an action against the defendant owner alleging that the owner failed in its duty to provide overhead screening. The trial court dismissed the action and the plaintiff appealed. The

Washington Supreme Court affirmed the dismissal, finding that the owner did not have reason to believe that the lack of overhead protection involved an unreasonable risk of injury to the plaintiff and, accordingly, had no duty to protect against such injury. There was nothing in the record to indicate that by prior incident or common experience the owner had any indication that foul balls were hit over the existing vertical screening with sufficient frequency to be considered an unreasonable risk. *Id.*

Moreover, in *Leek*, the claimed "dangerous condition" (lack of an overhead screen) was found to be open and obvious to the plaintiff, also precluding recovery against the defendant owner. The Court stated:

> The proprietor was entitled to assume that patrons walking into the grandstand would note that there was no roof, and hence nothing to which overhead screening could attach. A somewhat similar contention was advanced in *Hudson v. Kansas City Baseball Club*, 349 Mo. 1215, 164 S. W. (2d) 318, the plaintiff there claiming that he was under the impression that there was screening between him and home plate. In affirming a judgment for the defendant, the court said: "A business invitee may not recover for a condition as well known to him as it is to his invitor and neither may he impose liability on the owner or proprietor by failing and neglecting to see and observe that which is perfectly open and obvious to a person in possession of his faculties. [Citing cases.]"@ (p. 1226.)

Id., at pp. 368-369.

In *Suriano v. Sears, Roebuck & Co.*, the plaintiff tripped over the base of an advertising sign, and sued Sears for negligence regarding its placement of the sign. 117 Wash.App. 819 (2003). The jury returned a

defense verdict in favor the store, and the plaintiff appealed. The main issue was the trial court's instruction which read:

> the owner of a retail store was not liable to customers for physical harm caused to the customers by an activity or condition in the store whose danger was known or obvious to the customers, unless the owner should have anticipated the harm, despite such knowledge or obviousness.

Id. The Court of Appeals upheld the verdict, finding that the instruction was grounded on Restatement (Second) of Torts § 343A(1) (1965), was supported in Washington case law, and was applicable to retail establishments. *Id.* Moreover, the court found that the evidence supported the trial court's instruction because the potential tripping hazard was obvious:

> Ms. Suriano contends no substantial evidence supports instruction 10. But, substantial evidence indicates the sign and its base were out in the open for all to see. Ms. Suriano saw the sign and its base from a distance of approximately 20 feet. She perceived it to be an obstacle to be avoided and walked toward it. *See Connor v. Taylor Rental Ctr., Inc.*, 278 A.D.2d 270, 270, 718 N.Y.S.2d 605 (2000) (noting plaintiff saw and tried to walk around, but tripped over, "readily observable" forklift parked in marked stall). Then, Ms. Suriano veered and fell as she passed it. Here, the sign was an open and obvious obstruction in the center of a major aisle of the department store, at least for a person perceiving and approaching it from a distance of 20 feet. *See* Linda A. Sharp, Annotation, Liability for Injury to Customer From Object Projecting Into Aisle as Passageway in Store, 40 A.L.R. 5th 135, 154 (1996) (noting that the "relationship between the customer and the obstruction" is considered in determining whether the condition was open and obvious). The potential tripping hazard was obvious as well, as the sign and its base were situated in the middle of a main aisle; a shopper's thoroughfare.

Id., at pp. 828-829.

Here, there was no evidence that the staircase posed an unreasonable risk, or that it was not compliant with any applicable building code, standards or regulations. Like Ms. Suriano in *Sears*, who saw the sign and its base from a distance of approximately 20 feet and still walked toward it and tripped over it, Mr. Robinson, a 5'8" tall man with no professed vision impairment, and who made no claim that his attention was distracted, walked directly into an obviously low-clearance, 4'11" metal landing in broad daylight without ducking, for the purpose of taking a shortcut because he was too embarrassed to enter the bank a second time. Mr. Robinson admittedly made the decision to take the shortcut rather than use the available sidewalk.

The *Sears* Court held that a base of a sign at foot level was an obvious condition. In this case, the landing at U.S. Bank was located at eye-level, and Mr. Robinson was looking straight ahead at it and hit the middle of his forehead on it. There was no reason to expect U.S. Bank to anticipate that someone 5'8" tall would try to pass under the 4'11" landing walking erectly. Reasonable minds could not differ on that fact, because, as Mr. Robinson acknowledged, this was merely a "freak accident."

In this case, just like the plaintiff in *Leek*, Mr. Robinson submitted no evidence that the staircase posed any danger, or that U.S. Bank had reason to believe that the staircase was dangerous. Here, just as in *Leek*, there is nothing in this record to indicate that by prior incident or common experience, U.S. Bank had any idea that any person of Mr. Robinson's height would attempt to walk under the staircase given the 4'11" clearance; let alone walk under it without even ducking.

Moreover, similar to *Leek*, U.S. Bank should be entitled to assume that patrons walking around the building would note the obviously low clearance of the staircase and refrain from walking underneath it; especially without ducking. The landing of the staircase was as well known to Mr. Robinson as it was to U.S. Bank, and he should not be entitled to impose liability on U.S. Bank by neglecting to see and observe that which is perfectly open and obvious to a person "in possession of his faculties." *See Id.*

There was no evidence that the existence of the staircase or the 4'11" clearance underneath it violated any regulation or law, or that it was a dangerous condition. There was no evidence that U.S. Bank knew or should have anticipated that anyone of Mr. Robinson's height would or could be injured by attempting to walk under the staircase without ducking. Moreover, as Mr. Robinson correctly pointed out (CP 42), U.S.

Bank had no record of any other such accidents occurring prior to this incident. U.S. Bank breached no duty, and, therefore, the trial court properly dismissed this case on summary judgment.

B. Mr. Robinson Failed To Set Forth Any Specific Facts Showing That There Was A Genuine Issue For Trial In This Case.

After U.S. Bank met its initial burden of showing the absence of a genuine issue of material fact, the burden fell upon Mr. Robinson to set forth specific facts rebutting U.S. Bank's showing. *See Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624 (1991). In making a responsive showing, a plaintiff may not merely rely on the allegations made in its pleadings. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26 (1989); *See also Seven Gables Corp. v. MGM/UA Entm't Co.* 106 Wn.2d 1, 13 (1986). The response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." CR 56(e). If a plaintiff fails to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial, then the defendant's motion for summary judgment should be granted. *See Seven Gables Corp.*, 106 Wn.2d at 13, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Mr. Robinson had the burden, in his Response to U.S. Bank's Motion for Summary Judgment, to set forth specific facts in support of his

claims. He submitted no testimony, documents or expert opinion to support his claims, and agreed with U.S. Bank's recitation of the facts. He submitted a 2.5 page brief that contained only the unsupported assertion that "if indeed the stairway was unreasonably dangerous, Defendant breached its duty to Plaintiff." *See* CP 43 (emphasis added). That is not enough to defeat a motion for summary judgment. This record, even when viewed in a light most favorable to Mr. Robinson, would not allow a rational trier of fact to infer that U.S. Bank breached any duty to Mr. Robinson. Accordingly, the trial court properly granted U.S. Bank's Motion for Summary Judgment.

C. Mr. Robinson's Argument That The "Feasibility" Of Placing Latticework On The Staircase Before The Accident Is Both Irrelevant And A Non-Issue.

U.S. Bank never disputed the feasibility of its ability to place latticework on the staircase before this incident occurred. But an argument as to the feasibility of such a measure fails to recognize the essential element that Mr. Robinson had to prove in response to U.S. Bank's summary judgment motion: whether U.S. Bank foresaw a need to install latticework on the staircase before this incident.

ER 407 provides an exception to the exclusion of subsequent remedial measures only if the feasibility of those measures is controverted. Mr. Robinson's feasibility argument therefore fails, and is not relevant

here. In addition, U.S. Bank's admission of the feasibility of the placement of the latticework before the accident does not constitute an "inference" of negligence, nor is it an element of proof in a negligence claim. *See Bartlett v. Hantover*, 84 Wn.2d 426, 431 (1974).

In *Bartlett v. Hantover*, 84 Wn.2d 426 (1974), the Washington Supreme Court held that where the defendant conceded feasibility, the plaintiff alone could not then make it an issue. *Id.*, at 429 ("It takes, however, two parties to make a factual allegation a contested matter in a case."). In *Bartlett*, the trial court admitted testimony concerning the installation of bulletproof glass to protect an office area of a motel behind the counter after an employee was shot. *Id.* In holding that evidence regarding safety measures taken after an injury has occurred is irrelevant when the defendant stipulates to the practicality of such measures, the Court stated:

> We have heretofore allowed evidence of safety measures after an accident as admissible when the issue of practicability or feasibility is made an issue by either the plaintiff or defendant… The facts of this case, however, fail to bring it within the exception... The defendant stipulated at a pretrial conference his dominion and control over the motel and the feasibility of better protecting his employee from a third party's crime by installation of bulletproof glass. The evidence was, therefore, not relevant to matters before the jury for consideration… The evidence of actual subsequent alterations which the trial court admitted into evidence had the prejudicial effect of showing by inference that the defendant himself must have believed his prior inaction was negligent because he subsequently altered the premises. The

> subjective belief of a defendant in a negligence action is not relevant to the issue of his negligence; it is the objective test which determines whether one has breached his duty of due care to another, and we have long so held. *Peterson v. Betts*, 24 Wn.2d 376, 165 P.2d 95 (1946)...This added inference is not an element in the proof of negligence, and in the circumstances of this case where the properly contested matters of feasibility, dominion and control were admitted by the opposing party, the "proof" was prejudicial.

Id., at pp. 429-431.

As a matter of law, Mr. Robinson's "feasibility" argument failed, and was improper given that feasibility does not and cannot constitute an "inference" of negligence. Moreover, on U.S. Bank's Motion for Summary Judgment, Mr. Robinson was required to present specific facts that support his claims, not inferences. He failed to do so, and, accordingly, the trial court properly ignored Mr. Robinson's "red herring" argument and granted U.S. Bank's Motion for Summary Judgment.

IV. CONCLUSION

There are no genuine issues of material fact in this case. Mr. Robinson, a 5'8" tall man, attempted to walk directly under a 4'11" tall landing, in broad daylight, looking straight ahead without ducking in order to take a shortcut. He made a conscious decision to do so, seeing the staircase directly in front of him as he approached it. The fault lies with Mr. Robinson alone, and he presented no evidence that U.S. Bank

breached any duty. For these and for all of the foregoing reasons, U.S. Bank respectfully requests that this Court affirm the trial court's dismissal of this case on summary judgment.

RESPECTFULLY SUBMITTED this 13th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 13th day of May, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondent(s)," to be delivered by U.S. mail, postage prepaid, to the following counsel of record.

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