No. 99072-7

Court of Appeals No. 80057-4- I

SUPREME COURT OF WASHINGTON

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

Petitioner,

vs.

KRISTEN CARNEY and STEVEN CARNEY, husband and wife,

*Respondent*s.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Under Washington law, business owners have a common law duty to provide their business invitees with safe ingress and egress. TVI failed to meet that duty, and Kristen Carney was injured as a result.

Quoting the central holding in *Rockefeller v. Standard Oil Co. of California*, 11 Wn. App. 520, 522, 523 P.2d 1207 (1974), the Court of Appeals reiterated that business owners owe their invitees safe ingress and egress even when they do "not own or control the property on which the hazard [is] located" and did not "create the hazard." *Carney v. Pacific Realty Associates, LP*, No. 80057-4-I, 2020 WL 5117966, *6 (Wash. Ct. App. Aug. 31, 2020). The Court of Appeals did not create a new duty; it merely applied controlling precedent to the facts in this case.

Nor did the Court of Appeals contradict or "set aside" this Court's decision in *Geise v. Lee*, 84 Wn.2d 866, 529 P.2d 1054 (1975). That decision addresses a wholly distinct issue, one that is not presented by TVI's petition for review, and it is not controlling here. Absent any such conflict, the Court of Appeals' decision presents a straightforward—and wholly correct—application of this Court's precedent. For these reasons, as set forth more fully below, TVI's petition for review should be denied.

II. STATEMENT OF THE CASE

On August 15, 2016, Kristen Carney was hit by a minivan in a crosswalk outside Value Village in Marysville Plaza. The crosswalk in which Ms. Carney was injured led her from the parking lot directly to Value Village's northern entrance. CP 822. The minivan hit Ms. Carney in the head, forcing her to the ground, where witnesses saw her bleeding from her face and ear. CP 432–33, 509, 513. Ms. Carney suffered a severe traumatic brain injury. CP 455.

The driver of the minivan, Meagan Norris, hit Ms. Carney while she was backing out of an angled handicap parking space near the Value Village entrance. CP 430. The design of the parking space required Ms. Norris to reverse her minivan directly into the crosswalk in order to leave the parking lot. *See* CP 143, 171–72, 307, 430–31, 822. A diagram in the police report notes the location of the collision, illustrating how Ms. Norris necessarily backed into the crosswalk to exit the handicap parking space, and establishing how close Ms. Carney was to Value Village's entrance when she was hit. CP 524.

The trial court record confirms that the dangerousness of such a configuration was apparent to anyone looking for potential hazards, including TVI as operator of the Marysville Plaza Value Village. CP 308, 373. The configuration of the parking space with respect to the crosswalk

creates an unreasonable risk of a vehicle vs. pedestrian collision. CP 307–08. "[T]his risk of harm is 10 to 100 times greater than it would be if the stall was not so situated." CP 308. The risk to TVI's customers is heightened by the fact that crosswalks provide a sense of security for pedestrians. CP 328–29, 346, 373. Because crosswalks designate "pedestrian safe zone[s]," pedestrians are less likely to use the same level of caution that they would otherwise use, when crossing an unmarked road. CP 346; *see* CP 328–29. Pedestrians "feel protected in that particular space, thinking the [driver] is going to do their duty" by yielding to them. CP 329.

The trial court record also shows that TVI *knew* that the design of the angled handicap parking space in relation to the crosswalk posed an unreasonable risk to the safety of its business invitees. TVI admitted that it was well aware that "any customers" who backed out of the parking space "with the intention of going north afterwards would have to back out into the crosswalk itself in order to position their vehicle appropriately." CP 171–72. Despite knowing that the configuration of the angled handicap parking space and the crosswalk presented a hazard, TVI did nothing to reduce the risk posed by that hazard to its business invitees. For instance, TVI took no steps to warn its customers that vehicles necessarily would back directly into the crosswalk that ushered them to

the store's northern entrance. TVI's failure led to Ms. Carney's injury, and to the injury of another one of its business invitees just three weeks later, who was harmed in the same fashion, in the same crosswalk. CP 300-01.

After Ms. Carney was hit in the crosswalk just as TVI could have predicted, she and her husband filed a Complaint against Ms. Norris, the at-fault driver, and later amended the Complaint to add additional defendants, including TVI. Ms. Carney alleged a negligence claim against TVI, arguing that TVI owed her a duty of care for two reasons. First, Ms. Carney argued that TVI possessed the parking lot by exercising control over it, thus giving rise to a duty of care. Second, Ms. Carney asserted that TVI had a duty to provide her with safe ingress and egress as a business invitee regardless of whether it possessed the parking lot.

TVI moved for summary judgment, and the trial court granted the motion, ruling that TVI owed no duty of care to Ms. Carney under either theory. CP 559–61. The court then entered partial judgment under CR 54(b), and Ms. Carney appealed. CP 8–10, 1. Relevant here, the Court of Appeals ruled that, under *Rockefeller*, business owners owe their invitees safe ingress and egress and that this duty exists even when the business owner does "not own or control the property on which the hazard [is] located" and did not "create the hazard." *Carney*, 2020 WL 5117966 at

*6 (quoting *Rockefeller*, 11 Wn. App. at 522). TVI now seeks discretionary review of that ruling under both RAP 13.4(b)(1) and (4) .

III. APPELLANT'S PETITION FOR REVIEW SHOULD BE DENIED

A. Contrary To TVI's Assertion, The Court Of Appeals Did Not "Set Aside" *Geise v. Lee*, Nor Does The Court Of Appeals' Decision Conflict With Precedent.

TVI first argues that this Court should accept discretionary review under RAP 13.4(b)(1) because the Court of Appeals' decision in this matter conflicts with precedent established by *Geise*. Pet. 8, 11. In so arguing, TVI conflates two separate legal duties: (1) the landlord's duty to maintain common areas, which was at issue in *Geise*; and (2) the business owner's duty to provide safe ingress and egress to its business invitees, which was at issue in *Rockefeller*. *See Geise*, 84 Wn.2d at 871; *Rockefeller*, 11 Wn. App. at 522. This Court's broad holding in *Geise* that a landlord must take reasonable steps to keep "all common areas reasonably safe from hazards likely to cause injury" does not preclude or negate other parties' legal duties that may arise in different scenarios, such as this one, where a retail tenant owes separate duties to its business invitees. 84 Wn.2d at 871.

Indeed, *Geise* does not discuss the duty of a retailer to provide safe ingress and egress, nor does it foreclose the imposition of such a duty.

Unlike the case at hand, *Geise* did not involve commercial property, where retail tenants rent space to operate their businesses. *See* 84 Wn.2d at 867. Instead, it dealt with residential tenants who leased spaces in a mobile home park. *Id*. Therefore, there was no reason or occasion for the *Geise* court to make any findings related to retailers' duties and responsibilities, like the duty to provide safe ingress and egress to their business invitees. The Court of Appeals' decision in this matter does not, therefore, undermine or negate *Geise*'s reasoning or holding. Absent any such conflict, review is not warranted under RAP 13.4(b)(1).

B. As The Court of Appeals' Decision Relies On The Business Owner's Longstanding Duty To Provide Safe Ingress And Egress To Customers, The Decision Does Not Raise Any Issue Of Substantial Public Interest That Should Be Determined By This Court.

TVI also maintains that this Court should accept review under RAP 13.4(b)(4) because the Court of Appeals' decision establishes a significant new duty on retail tenants, which in turn creates an issue of substantial public interest. Pet. 15–16. TVI defines this purported new duty as a retail tenant's "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.'" Pet. 11 (quoting *Carney*, 2020 WL 5117966 at *6); *see also* Pet 17–18. But the duty of safe ingress and egress that the Court of Appeals

applied to TVI is nothing new. Accordingly, there is no issue of substantial public interest that warrants this Court's consideration.

The duty to provide safe ingress and egress to one's business invitees is well established in Washington. *See Rockefeller*, 11 Wn. App. at 522–23; *Baltzelle v. Doces Sixth Ave.*, 5 Wn. App. 771, 774, 490 P.2d 1331 (1971) (citing *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 372 P.2d 193 (1962)); *Tyler v. F.W. Woolworth Co.*, 181 Wash. 125, 127, 41 P.2d 1093 (1935). Washington courts have defined that duty as the business owner's responsibility to keep the business's "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 (citing *DeHeer*, 60 Wn.2d at 123–24). Contrary to TVI's argument, the Court of Appeals did not alter this duty—or create a new duty—in its decision. Rather, it correctly followed the precedent set forth in *Rockefeller*, which explains the applicable standards. 11 Wn. App. at 520–22.

In *Rockefeller*, the plaintiff and his wife were driving their truck toward a Standard Oil service station. *Id*. at 520. On their way to the service station, "the left wheels of the truck ran into a ditch which was located on property owned by the State of Washington." *Id*. The ditch was approximately four feet from the Standard Oil entrance, on property

that was not owned Standard Oil. *Id*. Nevertheless, the court found that Standard Oil "owed a duty to its business invitees of safe ingress and egress from its property," and that "[w]hether th[at] duty was discharged was a proper question for the jury." *Id*. at 522.

In reaching its decision, the Court of Appeals in *Rockefeller* clarified that Standard Oil could not escape liability by arguing that the ditch was located on property that the State of Washington controlled. *Id*. at 522. The court held, "[t]o 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." *Id*. The court further explained that a reasonable juror could find that Standard Oil "should have taken reasonable precautions to eliminate" the hazard caused by the ditch, including "posting warnings or barriers or providing adequate illumination." *Id*. Although these actions would not have removed the ditch itself or changed the design of the road, they would have made the ditch more visible and/or more notable to Standard Oil's business invitees, or prevented them from reaching the hazard.

The Court of Appeals correctly applied *Rockefeller's* express holding in this matter when it rejected TVI's argument that TVI's duty to provide safe ingress and egress was somehow altered or eliminated because Ms. Carney tried to enter the store from an area that TVI did not

control. As the above discussion makes clear, business owners owe their invitees safe ingress and egress under *Rockefeller* even when they do not own or control the property on which the hazard is located or create the hazard. The Court of Appeals did not create a new duty; it merely applied controlling precedent to the facts in this case.

TVI's numerous attempts to distinguish or otherwise undermine *Rockefeller*—and thereby manufacture an issue of substantial public interest that should be determined by this Court—easily fail. TVI first argues that *Rockefeller* is "unworkable" in this context because there are multiple tenants in Marysville Plaza, and none of them have control over the parking lot design. Pet. 17. But *Rockefeller* expressly stands for the proposition that, "[t]o incur liability, [the business owner] need not own or control the property on which the hazard [is] located, nor is it required that [the business owner] create the hazard." *Rockefeller*, 11 Wn. App. at 522. Following this precedent, the Court of Appeals here correctly found that TVI is not excused from its duty to provide safe ingress and egress because it does not control the property on which the threat to safe ingress and egress is located. *See id*.

Similarly, TVI makes much of the fact that this case involves parking lot "design" and that TVI did not design the space itself.[1] Pet. 12, 17–18. But an entity like TVI need not design the hazard in order for the entity to face liability for failing to make its own egress and ingress safe from known hazards. After all, in *Rockefeller*, Standard Oil did not design, build, or even maintain the hazardous ditch. 511 Wn. App. at 522. Nevertheless, the Court still found that Standard Oil could incur liability because the hazard threatened its customers' ingress and egress and because Standard Oil took no steps to reduce the risk like "posting warnings or barriers or providing adequate illumination." *Id*. It made no difference that Standard Oil had not created the hazard, or that the hazard was on adjacent property: "[t]o 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." *Id*. Because *Rockefeller* dealt with a hazard that the business owner did not create or control, its analysis is controlling here.

In the same vein, TVI asserts that *Rockefeller* should not apply here because TVI "could not have 'eliminated' the handicap stall or painted the walkway with *warnings, barriers* or additional *illumination*."

[1] It should be noted that TVI's predecessor in interest, Safeway, did design the hazardous condition, requesting the placement of the crosswalk behind the parking space in order to create the ingress/egress that Ms. Carney eventually used. CP 809.

Pet. 14 (italics in original). TVI essentially argues that, if it cannot eliminate a particular hazard to its invitees through the exact means suggested by the Court of Appeals in *Rockefeller,* then no duty to address that hazard exists. *See id*. As the Court of Appeals pointed out in this case, TVI reads *Rockefeller* far too narrowly. *Carney*, 2020 WL 5117966, at *6. The actions that a business owner can and should take to alleviate a hazard will vary from case to case and from hazard to hazard. The steps that TVI could have taken to alleviate the problem, and the steps that would have been reasonable to take, are questions of fact for the jury, precluding summary judgment. Accordingly, the Court of Appeals was correct to remand the case "for further proceedings related to TVI's duty of safe ingress and egress." *Id*. at *7.

Next, TVI argues that, by applying *Rockefeller*'s holding to this case, the Court of Appeals' decision "essentially ignores the parties' contractual agreement" where another entity (Marysville Plaza Associates) agreed that it was responsible for the parking lot. Pet. 17. The Court of Appeals was correct to reject this argument and instead follow the central holding in *Rockefeller*: "[to] incur liability, [the business owner] need not own or control the property on which the hazard is located." *Rockefeller*, 11 Wn. App. at 522. Allowing TVI to argue that it is not liable because it is not contractually responsible for the area in which the threat to ingress

and egress is located would contravene *Rockefeller*. The Court of Appeals recognized this problem and reiterated *Rockefeller's* rule rather than creating a new rule of liability based on the parties' private contract.

TVI also argues that the Court of Appeals "transformed" *Rockefeller*'s holding by defining the business owner's duty to provide safe ingress and egress as a duty "to ensure" safe ingress and egress. Pet. 15. TVI overstates the significance of the Court of Appeals' word choice in this instance: any concern that the Court of Appeals' use of the phrase "to ensure" expands the business owner's existing responsibilities is quickly alleviated by reading the portion of the decision that details TVI's actual responsibilities. *See Carney*, 2020 WL 5117966, at *6. That portion specifies as follows:

> 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.

Id. (citing *Rockefeller*, 11 Wn. App. at 522). This statement is a direct application of *Rockefeller's* holding to the facts of this case. Accordingly, mere use of the phrase "to ensure" when describing TVI's duty to provide safe ingress and egress to its business invitees did not somehow expand *Rockefeller*.

Finally, TVI argues that *McMann v. Benton County, Angeles Park Communities, Ltd.*, 88 Wn. App. 737, 946 P.2d 1183 (1997), is controlling here and precludes liability in this case as a matter of law. Pet. 18–19. But *McMann* does not address the common law duty of safe ingress and egress at all. That case discusses whether a landlord has a "duty to protect its tenants from dangers caused by [an] irrigation canal adjacent to its property." *Id*. at 741. The duty to provide safe ingress and egress to business invitees was not implicated by the facts of that case; there is no indication that the irrigation canal posed a threat to business invitees attempting to enter or exit the property. Therefore, while *McMann* discusses the landlord's responsibilities related to hazards on adjacent land, it does not address the applicable duty of care, which is the business owner's duty of safe ingress and egress. That issue, as noted, is controlled by *Rockefeller*.

In short, the Court of Appeals correctly applied controlling precedent. Because the court did not create a new duty, there is no issue of substantial public interest that warrants review under RAP 13.4(b)(4).

IV. CONCLUSION

TVI's Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 26th day of October, 2020.

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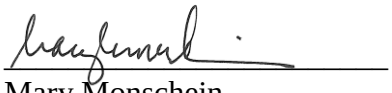

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