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NO. 64851-9I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

CATHERINE WEBERT,

Appellant,

v.

SEATTLE UNIVERSITY,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

REPLY OF APPELLANT

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Summary judgment on negligence is not proper where material issues of fact remain as to whether the defendant breached its duty. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). In particular, the jury, not the court, must determine whether the plaintiff's injury was reasonably foreseeable, unless the circumstances of the injury are "so highly extraordinary or improbable" as to be "wholly beyond the range of expectability." *Seeberger v. Burlington Northern R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)); accord *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 833, 166 P.3d 1263 (2007).

As stated in the plaintiff's opening brief, the scope of a land owner's duty to its invitees is summarized in the Restatement (Second) of Torts § 343 (1965):

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, [the possessor]

(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.

Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 49-50, 914 P.2d 728 (1996). A jury could properly find that all of these conditions apply here.

The Appellant tripped over a defect in the sidewalk that she did not and could not see. CP 17 The defect in the sidewalk was in an area where the defendant had allowed the shrubbery to grow such that it caused a perpetual shade over the defect. CP 66-67 The defendant was aware of the defect, because they had attempted to repair the area. CP 77 It was the shoddy repair of the defect that led to the plaintiff falling. CP 77 The defendant failed to put up any kind of warning sign or do anything to protect its business invitees against the harm that might be caused by this latent or hidden defect. However, after the plaintiff had already fallen, the defendant trimmed back the shrubbery and coincidentally took pictures of the area to use in its motion for summary judgment. CP 77 In fact, the defendant even took the plaintiff's words out of context to suggest that she actually saw the defect prior to her falling. CP 17

The plaintiff's actual testimony was the exact opposite. She said that she did not see the defect until she was in mid-fall and could not have prevented her injuries. CP 17 Although, in her deposition, the plaintiff testified that it was within the realm of possibility that she could have

stepped over the defect in the sidewalk, she was obviously only saying that in the context of the question. CP 17 The defendant's counsel posed an inarticulate question about whether the plaintiff had the physical ability to step over the defective sidewalk. The plaintiff answered in the affirmative, suggesting that, of course she had the ability to step over the defect. CP 17 However, it was clear by her answer that she obviously did not have any opportunity to do so, because she did not even see the defect until she was in mid-fall. CP 17 The lower court keyed in on the testimony without giving any consideration for the context in which it was made. RP 23 Then, the court used some incredibly strained syllogism to reach the conclusion that a reasonable jury could not find but that the plaintiff could have stepped over the defective sidewalk. RP 28-29

However, at trial, the jury would not be limited to reading the plaintiff's testimony from a transcript. The jury would be able to appreciate that the plaintiff is responding truthfully to an inarticulate question in the only logical way she could. The plaintiff would also have the opportunity to clarify her remarks. For instance, the plaintiff could highlight for the jury the fact that the physical conditions of the path prevented her from taking any reasonable effort to prevent the fall. CP 17 It was dark and as a result, the defect was hidden. CP 17 Had the

defendant provided any kind of warning, the plaintiff would have been able to act appropriately to avoid the fall. CP 17

CONCLUSION

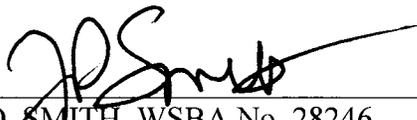
The plaintiff respectfully requests that this Court reverse the trial court's grant of the defendant's motion for summary judgment. Genuine issues of material facts existed as to whether defendant exercised reasonable care.

Whether the plaintiff saw the root upheaval in the sidewalk prior to her fall presented a genuine issue of material fact. Whether the defendant had actual or constructive notice of the sidewalk's dangerous condition presented a genuine issue of material fact. Whether the defendant took any steps, reasonable or otherwise, to warn the plaintiff of the dangerous conditions presented a genuine issue of material fact.

DATED this 28th day of October, 2010.

RESPECTFULLY submitted,

WARD SMITH PLLC

By: 

J.D. SMITH, WSBA No. 28246
Attorney for the Appellant

CERTIFICATE OF SERVICE

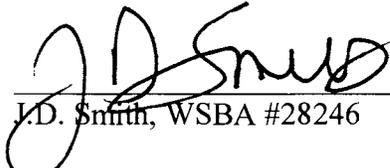
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

REPLY BRIEF

TO: WILLIAM W. SPENCER

Murray, Dunham & Murray Attorneys At Law 200 West Thomas St., Suite 350 Seattle, WA 98109-0844 <i>Attorneys for Respondent</i>	VIA FEDERAL EXPRESS [] VIA REGULAR MAIL [] VIA CERTIFIED MAIL [] VIA EMAIL [X] VIA FACSIMILE [X]
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Dated at Seattle, Washington, this 28th day of October, 2010.



J.D. Smith, WSBA #28246