

65533-7

65533-7

NO. 65533-7

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

AHMBUR BLUE, a single individual,

Appellant,

vs.

MARKEE FOSTER and VERONICA FOSTER, individually and the
marital community comprised thereof,

Respondents.

BRIEF OF RESPONDENTS MARKEE AND VERONICA FOSTER

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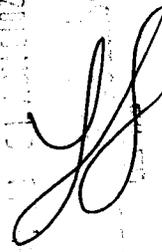
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I. INTRODUCTION

Longstanding Washington law holds that a landowner's duty of care turns on an entrant's status as an invitee, licensee, or trespasser. An entrant who does not bargain for any economic benefit, who does not have any expectations of remuneration, and whose purpose for entering the property is not connected with any mutually beneficial business dealings is a licensee.

Appellant Ahmbur Blue ("Blue") cared for Respondent Markee Foster's ("Foster") dog while Foster was on vacation as a gratuitous favor with no expectation of payment and no expectation that precautions would be taken for her safety. On February 13, 2006, after a visit to care for the dog, Blue fell on railroad tie stairs that she had used without difficulty less than an hour earlier.

Faced with clear and undisputed evidence that Blue's visit to Foster's house was not for a business purpose benefitting both Blue and Foster, the trial court properly determined that Blue was a licensee, that Foster did not breach any duty to "make safe" or warn of the known, open, obvious, and apparent railroad ties, and that summary judgment in Foster's favor was appropriate.

Blue appeals that ruling, arguing that her unsworn declaration flatly contradicting her earlier deposition testimony should have been

considered by the trial court in its ruling on summary judgment. However, Blue's argument is simply a red herring detracting from the real issues in this case. Blue's declaration does not change the most important and undisputed facts—conceded throughout Blue's brief—that Blue and Foster agreed that Blue would not be paid, that Blue did not care for the dog with any expectation of an economic benefit, and that Blue was simply doing Foster a favor.

The trial court properly ruled that Blue was a licensee because there was no mutuality of interest in a business or economic purpose benefitting both Blue and Foster, and that Foster did not breach any duty to make safe or warn of the known, open, obvious, and apparent railroad ties. The Court should affirm the trial court's order granting summary judgment.

II. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

A. Response

1. Foster assigns no error to the trial court's ruling that Blue's declaration filed in support of her opposition to Foster's motion for summary judgment directly contradicts her prior deposition testimony.

2. Foster assigns no error to the trial court's ruling that Blue is a licensee as a matter of law because her visit to the land was not for a mutually beneficial business purpose.

3. Foster assigns no error to the trial court's ruling that, as a matter of law, Foster did not breach any duty to make safe or warn Blue of the known, open, obvious, and apparent railroad ties.

B. Issues Pertaining to Assignments of Error

1. Blue entered Foster's land to care for Foster's dog as a gratuitous favor without promise or expectation of payment or other economic benefit. Did the trial court properly define Blue as a licensee because she entered Foster's land with no mutuality of interest in a business or economic purpose? (Appellant's Assignment of Error 2.)

2. Blue fell on railroad tie stairs that she had navigated less than an hour earlier. It was light outside, the weather was dry, the ties were unobstructed, and Blue was looking down at the ties as she was walking. Did the trial court properly grant summary judgment because any alleged dangerous condition was known, open, obvious, and apparent? (Appellant's Assignment of Error 3.)

3. Blue submitted a declaration contradicting her deposition testimony that she and Foster did not discuss payment for the care of Foster's dog. Did the trial court properly grant summary judgment regardless of Blue's directly contradictory declaration? (Appellant's Assignment of Error 1.)

III. COUNTERSTATEMENT OF THE CASE

Blue attempts to mislead the Court by presenting a statement of the case that is inaccurate, incomplete, and misstates facts relevant to her appeal. These misrepresentations require clarification.

A. **Blue Took Care of Foster's Dog As a Gratuitous Favor With No Promise or Expectation of Payment or Economic Benefit.**

Blue agreed to take care of Foster's dog as a gratuitous favor for Foster, her co-worker at Microsoft. CP 36, 43, 61. She had, as a favor, taken care of the dog on a previous occasion. CP 40, 42. Blue testified about her conversation with Foster and her agreement to perform the gratuitous favor as follows:

Q Okay. So the second time, tell me how it came about.

A He said, hey, I need a favor again. Can you watch the dog?

Q What was your response?

A "Yes."

...

Q And during the second time, did you have a discussion about whether he was going to pay you or not?

A Not that I can recall, no.

Q **So were you expecting to be paid?**

A **No.**

Q **You were just doing this associate another favor, right?**

A **Yes.**

Q Do you do this for other friends?

A It's not usually dogs. It's babies.
Same thing to me. I mean, it's not
inconvenient is my point.

Q Are you one of those helpful people
who like to volunteer to help out?

A I don't go out of my way seeking
projects, but yeah, I'm helpful.

Q So the second time, you weren't
expecting to be paid, right?

A Yes.

...

Q Well, he didn't pay you before he
left, right?

A Correct.

Q And you guys didn't discuss that
you were going to be paid?

A Correct.

Q **And you weren't expecting to be
paid?**

A **Correct.**

Q **This was still another favor –**

A **Correct.**

Q **– according to you?**

A **Yes.**

CP 43 (emphases added). Indeed, Blue was not expecting anything from

Foster for taking care of the dog:

Q Were you expecting him to take any
type of precautions for your visit
more than you would have expected,
say, at the birthday party or the
Halloween party?

A I'm not expecting anything from him. I don't know.

Q What was the last part?

A Nothing.

Q You weren't expecting anything? Is that what you said?

A Yeah.

CP 51-52.

B. Blue Fell While Looking Down and Navigating the Railroad Ties in Front of Foster's House.

A set of open and obvious railroad ties are located on a parking strip in front of Foster's house. CP 44, 95. To reach the sidewalk from the street, or the street from the sidewalk, one can walk on the railroad ties or the bark on either side of the ties. CP 51.



CP 71.

Blue had successfully navigated the railroad ties before the February 13, 2006 fall. She used the ties “more than one” time during the first occasion for which she took care of the dog. CP 42. She had no trouble navigating the ties. *Id.*

Indeed, Blue successfully navigated the railroad ties on the same day as her fall. On February 13, 2006—Blue’s second visit to the house during Foster’s second vacation—Blue arrived at Foster’s house to feed and let out the dog. CP 43-44. It was light outside, and it was not raining or wet. CP 44. Blue parked on the street and proceeded from the street to the sidewalk by walking on the railroad ties. *Id.* Blue navigated the ties without difficulty. *Id.*

Less than an hour later, Blue exited the house the same way she came in. CP 44. It was still light outside, Blue could still see, and the conditions were the same. CP 44-45. Blue proceeded down the railroad ties and then fell to the ground. *Id.*

Blue cannot explain how or why she fell, and cannot explain what it was about the railroad ties that caused her to fall. *Id.* She agrees that there was nothing impeding her footing on the railroad ties:

Q When you were leaving Mr. Foster’s house on February 13th of 2006, did you notice any leaves or any other debris covering the railroad tie stairs?

A No.

Q Were you able to see the stairs okay as you were descending those stairs?

A Yes.

Q Do you still have those green shoes you were wearing that day?

A Yes.

Q **As you were walking down the stairs that day, where were you looking?**

A **Looking down the stairs to navigate down the stairs.**

CP 59 (emphasis added).

C. **After Returning From Vacation and Learning of Blue's Fall, Foster Gave Blue Money, a Gift Card, and Soaps.**

After Foster returned from his trip, Foster told Blue he felt bad.

CP 52. He gave Blue \$50 or \$75, a gift card to a spa, and soaps after he returned. *Id.*

Not only was Blue not expecting the gifts, but she thought that it was weird and was offended by the gesture. CP 58. She gave the gifts to her mother. *Id.*

D. **Procedural History**

Blue filed a complaint for personal injuries against Foster, his wife, and the City of Seattle on February 11, 2009. CP 3-5.

All defendants moved for summary judgment in March 2010. CP 10, 77. Foster argued that Blue is a licensee because Blue's taking care of the dog was not related to a business purpose benefiting both Blue and Foster, as Blue cared for the dog as a gratuitous favor without promise or expectation of remuneration. Foster also argued that given the undisputed facts that there was no evidence of an unreasonable risk of harm and that the railroad ties were known, open, obvious, and apparent, Foster did not breach any duty to Blue as a licensee. CP 12-23.

Blue argued that she was a business invitee because she conferred an economic benefit on Foster, and received gifts after Foster returned. CP 140-151. Blue submitted an unsworn declaration that flatly contradicted her prior deposition testimony. Blue testified in her declaration that Foster "asked how much I charged for my services. I told him I did not know the costs of dog sitting services," directly contradicting her earlier testimony that she and Foster did not discuss payment for her gratuitous favor. CP 43, 153.

On May 7, 2010, the Superior Court of King County, Washington, the Honorable Ronald Kessler presiding, granted Foster's and the City of Seattle's motions for summary judgment. CP 357-364. The trial court agreed that whether Blue received gifts after caring for the dog did not create an issue of fact because Blue testified that she was not expecting to

be paid. RP 36. The court also disregarded Blue's declaration because it directly contradicted her deposition testimony. RP 38. Finally, the court found that the evidence was undisputed that Blue had used the same ingress and egress before, including navigating the railroad ties, and any dangerous condition was known, open, apparent, and obvious. *Id.*

The trial court's May 7, 2010 order granting Foster's motion for summary judgment is the subject of Blue's appeal.

IV. ARGUMENT

A. Summary of the Argument

Blue's appeal arises from an obvious misunderstanding of Washington law defining business invitees as well as an unfounded and incorrect initial premise that the nature of an entrant's relationship with the landowner defines an entrant's status. Purpose of entry, not relationship of the parties, controls.

The duty of care owed to an entrant on land hinges on the entrant's status as an invitee, licensee, or trespasser. In turn, entrant status hinges on the entrant's purpose on the land. A business invitee enters the land for mutually beneficial purposes connected with business dealings. A licensee, on the other hand, is any person on the land with permission from the landowner, other than a business invitee.

It is undisputed that Blue took care of Foster's dog as a gratuitous favor performed without promise or expectation of payment or other economic benefit. Thus, there was no mutuality of interest in a business purpose. Blue is therefore a licensee.

A landowner's duty to a licensee is limited. Liability will only be imposed if the landowner knows or should know of an unreasonable risk of harm of which the licensee does not or should not know.

Blue navigated the railroad ties in front of Foster's house less than an hour before she fell. There was nothing impeding Blue's footing, and she was able to see the railroad ties as she descended. The railroad ties were known, open, obvious, and apparent. Blue knew, or should have known, of any alleged dangerous condition. Thus, Foster did not breach his duty of care to Blue.

A summary judgment determination resolves a case on its merits, and is favored where the evidence shows that the moving party is entitled to judgment as a matter of law. CR 56. The trial court correctly defined Blue as a licensee and held that Foster breached no duty to Blue as a matter of law.

B. Standard of Review on Appeal

Summary judgment orders, and trial court rulings in conjunction with summary judgment, are reviewed de novo. Summary judgment is

affirmed “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c); *Folsom v. Burger King*, 135 Wn.2d 658, 662-63, 958 P.2d 301 (1998).

C. **The Trial Court Properly Held That Blue Is a Licensee Because Her Gratuitous Favor Was Performed Without Promise or Expectation of Payment and Without a Mutually Beneficial Business or Economic Purpose.**

1. Where the Facts Are Undisputed, Whether an Entrant Is a Business Invitee or a Licensee Is a Question of Law.

A landowner’s duty to an entrant is determined by the entrant’s status as a business invitee, licensee, or trespasser. *Younce v. Ferguson*, 106 Wn.2d 658, 666, 724 P.2d 991 (1986). Where the facts are undisputed, as is the case here, the visitor’s legal status as an invitee, licensee, or trespasser is a question of law. *Beebe v. Moses*, 113 Wn. App. 464, 467, 54 P.3d 188 (2002) (citations omitted).

2. A Licensee Includes a Social Guest Who Does Not Meet the Legal Definition of a Business Invitee.

A business invitee is “a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.” *Younce*, 106 Wn.2d at 667 (citing Restatement (Second) of Torts § 332(3) (1965)).

A licensee, on the other hand, is “privileged to enter or remain on land only be virtue of the possessor’s consent.” *Younce*, 106 Wn.2d at 667 (citing Restatement § 330). In Washington, a licensee enters the occupier’s premises with the occupier’s permission or tolerance either without invitation, or with invitation but for a purpose unrelated to any business dealings between the two. *Dotson v. Haddock*, 46 Wn.2d 52, 55, 278 P.2d 338 (1955); *Thompson v. Katzer*, 86 Wn. App. 280, 285, 936 P.2d 421 (1997). Licensee status is a catch-all category for those entrants, such as “social guests,” who are neither invitees nor trespassers. *See Younce*, 106 Wn.2d at 667.

Blue misunderstands the definition of a social guest. *See* App. Br. pp. 26, 29, 31. A social guest, as defined by Washington law, need not be a friend. Similarly, a social guest need not enter the land to attend a party or socialize with the landowner. **Rather, a social guest is simply defined as “a person who has been invited but does not meet the legal definition of invitee.”** *Younce*, 106 Wn.2d at 667 (emphasis added). Blue falls squarely into the social guest definition.

Social guests are categorized as licensees because “there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will

be taken for his safety, in any manner in which the possessor does not prepare or take precautions for his own safety.” *Younce*, 106 Wn.2d at 668-69 (citing Restatement § 330, cmt. (h)3). Blue was not expecting Foster to take any type of safety precautions for her visit. CP 51-52. Blue is a social guest.

3. A Business Invitee Enters the Land With a Mutuality of Interest in a Business Purpose Resulting in an Economic Benefit to Both the Landowner and the Entrant.

An entrant whose purpose only economically benefits the landowner **or** the entrant is a licensee. *See Younce*, 106 Wn.2d at 669. As Blue recognizes, there must be some “real or supposed mutuality of interest in the subject to which the visitor’s business or purpose relates.” *Dotson*, 46 Wn.2d at 54 (citations omitted); *Thompson*, 86 Wn. App. at 286 (citations omitted). Thus, an entrant is an invitee only when the entry is made for a business or economic purpose benefitting **both** the entrant and the occupier. *Thompson*, 86 Wn. App. at 286-87 (citations omitted); *Beebe*, 113 Wn. App. at 467-68 (citations omitted). Otherwise, the distinction between invitees and licensees would be obliterated. *Thompson*, 86 Wn. App. at 286-87. “[E]very guest who brings a bottle of wine to the host of a residential dinner party would be a ‘business visitor.’” *Id.* at 286. Conversely, every guest who receives a party favor

would also be an invitee. Such an elimination of entrant status has been rejected by the Washington Supreme Court. *Younce*, 106 Wn.2d at 666.

4. Blue Is a Licensee Because Her Visit to Foster's Land Was a Gratuitous Favor Unrelated to Any Mutually Beneficial Business Dealings.

The material facts in this case are undisputed. Blue cared for Foster's dog as a favor. CP 36, 43, 61. Blue was neither promised nor expecting payment. CP 43. Blue's gratuitous act for Foster was therefore not for a mutually beneficial economic purpose. The trial court correctly defined Blue as a licensee.

Washington courts have repeatedly held that gratuitous favors, including those with economic value, are insufficient to establish invitee status. In *Porter v. Ferguson*, 53 Wn.2d 693, 694, 336 P.2d 133 (1959), a mother agreed to help in completing preparations of a Sunday dinner at her daughter's house. In the course of preparing dinner, the mother slipped on the kitchen floor. There was testimony that the mother's help had economic value. However, the parties did not agree to compensation. *Id.* The mother's help was gratuitous, and she was therefore a licensee. *Id.* at 695.

Similarly, in *Lucas v. Barner*, 56 Wn.2d 136, 136-37, 351 P.2d 492 (1960), a mother agreed to babysit her grandchildren at her daughter's house while her daughter went on a trip. The mother slipped on loose

carpet. There was no agreement for the mother to be compensated for babysitting. *Lucas*, 56 Wn.2d at 137. Again, the service was gratuitous and the mother was a licensee. *Id.* at 138.

Likewise, in *Thompson, supra*, the plaintiff, Thompson, slipped and fell on ice while visiting a house at which his stepfather, Berg, was house-sitting. Prior to the visit, Berg had asked Thompson for a favor – for Thompson to bring Berg his car. Berg agreed to pay for gas, but no other consideration was bargained for or promised. Thompson fell in the driveway after delivering the car. *Thompson*, 86 Wn. App. at 283-84.

That Thompson's favor may have had economic value was not material to the court's holding that Thompson was a licensee. *Id.* at 286. Rather, the court noted that economic value had not been bargained for, Thompson had acted without promise of remuneration, the promise to pay for gas was merely incidental, and there were no business dealings between the two. *Id.* at 284, 288. There was simply no mutuality of interest in a business purpose. *See id.* at 288; *see also Dotson*, 46 Wn.2d at 55 (economic benefit to defendants of holding church meeting at defendants' home for their convenience and to save them the expense of hiring a babysitter did not result in invitee status; the plaintiff's only expected benefit was spiritual or humanitarian, not economic).

The same is true here. The undisputed facts, even considering Blue's flatly contradictory declaration, are that Blue's visit was unrelated to any mutually beneficial business purpose: Blue and Foster did not bargain for payment or other economic benefit, Foster did not promise any payment or other economic benefit, Blue had no expectation of payment or other economic benefit, and Blue was simply doing a favor for Foster.

Q So were you expecting to be paid?

A No.

Q You were just doing this associate another favor, right?

A Yes.

CP 43. Blue did not enter Foster's land for a mutually beneficial business or economic purpose.

Foster's gift of \$50 or \$75, a gift card to a spa, and soaps after he returned and learned of Blue's fall does not change Blue's licensee status. Because the gifts were neither promised nor expected at the time Blue was on the land, they could not have had any effect on Blue's gratuitous purpose for entering Foster's land and caring for his dog. Indeed, Blue testified that she thought receiving the gifts was weird, and she was offended by the gesture. CP 58. She had simply performed a favor for Foster.

5. *Beebe* Is Factually Distinguishable From This Case Because *Beebe* Presented Evidence of Mutuality of Interest in a Business or Economic Purpose and Mutual Expected Economic Benefits Whereas Blue Cannot.

Blue concedes in her brief, as she must, that the agreement with Foster “was for her not to be paid.” App. Br. p. 14. She concedes in her brief, as she must, that Blue “did not perform this service with the belief that she would be paid.” App. Br. p. 8. She concedes in her brief, as she must, that any “discussion’s result [was] that she would watch the dog as a favor” and she “decided to do [Foster] a favor.” App. Br. pp. 17, 20.

Despite these admissions, Blue attempts to rely on *Beebe, supra*, to argue that there are genuine issues of material fact as to whether she is an invitee or licensee. Blue’s argument is unpersuasive and incorrect. *Beebe* contains a different factual scenario. In that case, *Beebe* presented testimony that the sole reason he went upon his stepdaughter Moses’s property, where he fell, was to attend a Tupperware party at which a Tupperware consultant was selling product. *Beebe*, 113 Wn. App. at 466, 468. Moses, as host and not seller, received a little bowl and a \$15 credit toward purchasing more Tupperware, and *Beebe* bought a pitcher from the consultant. *Id.* at 466, 468.

The court determined that the evidence created an issue of fact as to whether *Beebe*’s entrance was made for a business or economic purpose mutually benefiting **both** *Beebe* and Moses. *Beebe* presented evidence

that he was there for the business purpose of buying Tupperware, thus having heightened expectations regarding precautions for his safety that he did not have on previous visits to Moses's house. However, because Washington law requires a beneficial business purpose for **both** the entrant and the occupier, the jury had to decide whether Moses's hosting of the party, where the Tupperware consultant was the one selling product, was a business or economic purpose for Moses. Similarly, Beebe presented evidence that the pitcher he purchased was an economic benefit for him, but the jury had to decide whether the gift of the small bowl and the credit for more Tupperware were more than nominal and incidental economic benefits for Moses. *Beebe*, 113 Wn. App. at 468.

Blue, however, has not provided any evidence of mutuality of interest in a business or economic purpose for both her and Foster's benefit. Unlike Beebe, who presented testimony that he entered the land for the Tupperware party, and thus had an expected economic benefit, it is undisputed here that Blue entered the land for the sole purpose of performing a gratuitous favor without any expectation of any economic benefit and without any heightened expectations for her safety:

Q Okay. So the second time, tell me how it came about.

A He said, hey, I need a favor again. Can you watch the dog?

Q What was your response?

A "Yes."

...

Q Do you do this for other friends?

A It's not usually dogs. It's babies.
Same thing to me. I mean, it's not
inconvenient is my point.

...

Q And you weren't expecting to be
paid?

A Correct.

Q This was still another favor –

A Correct.

Q – according to you?

A Yes.

CP 43.

Q Were you expecting him to take any
type of precautions for your visit
more than you would have expected,
say, at the birthday party or the
Halloween party?

A I'm not expecting anything from
him. I don't know.

Q What was the last part?

A Nothing.

Q You weren't expecting anything? Is
that what you said?

A Yeah.

CP 51-52.

Unlike in *Beebe*, Blue produced no evidence of mutuality of interest in a business or economic purpose because her undisputed purpose for entering Foster's land was to perform a gratuitous favor. Likewise, Blue presented no evidence of an expected economic benefit because of her entry on the land, which was demonstrated in *Beebe*. Given the complete lack of evidence of a mutually beneficial business or economic purpose, there are no issues of fact for a jury to consider. The trial court properly concluded that Blue was a licensee as a matter of law.

6. Blue Confuses Purpose of Entrance with the Nature of the Relationship – Purpose of Entrance Controls.

Blue mistakenly and repeatedly argues that her relationship with Foster controls this case. She argues, without any evidentiary support, that “there was a certain expectation and career benefit for Ms. Blue to do a service for her boss.” App. Br. p. 26.

The record is completely devoid of any evidence that Blue's decision to take care of Foster's dog had anything to do with any business at Microsoft. There is no evidence that there was an expectation for Blue to take care of Foster's dog because of their working relationship. There is similarly no evidence that there was any career benefit for Blue for taking care of Foster's dog. In fact, the evidence is actually to the contrary:

Q Regardless of whether Mr. Foster was an associate, friend, superior, you were doing him a favor by going to check on his dog on these two dog-feeding occasions. Is that fair to say?

A Yes.

CP 61 (emphasis added).

Blue's reliance on her employment at Microsoft shows a fundamental misunderstanding of the law governing entrant status as it relates to premises liability. The nature of the relationship between the parties does not control. Rather, it is the entrant's purpose for going upon the land. Otherwise, an employee would become an invitee every time he or she is invited to a co-worker's home. Likewise, a family member would always be a licensee, even if the family member goes upon the land to conduct business. Such absolute conclusions contradict Washington law and clearly fail to consider the many different purposes for which a person enters land. *See, e.g., Lucas*, 56 Wn.2d at 138 (family members may contract with each other or enter into commercial relationships, thereby elevating a family member from licensee to invitee status); *Beebe*, 113 Wn. App at 468 (holding the same).

Blue and Foster's employment with Microsoft cannot define Blue's entrant status given the clear and undisputed evidence that Blue was simply performing a favor and had no expectation of payment or other

economic benefit. Given this undisputed evidence, the trial court correctly held that Blue was a licensee as a matter of law.

7. Blue's Declaration, Whether or Not Considered, Fails to Raise an Issue of Fact of Invitee Status.

Blue assigns error to the trial court's ruling that it would not consider Blue's inconsistent and unsworn declaration pursuant to *Marshall v. AC&S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). Blue's declaration, however, fails to raise a genuine issue of fact. With or without the declaration, Foster prevails.

Blue's declaration flatly contradicts her deposition testimony:

DEPOSITION TESTIMONY	DECLARATION
<p>Q And during the second time, did you have a discussion about whether he was going to pay you or not? A Not that I can recall, no. ... Q And you guys didn't discuss that you were going to be paid? A Correct. CP 43.</p>	<p>Mr. Foster asked how much I charged for my services, I told him I did not know the costs of dog sitting services. CP 153.</p>

The trial court properly rejected Blue's declaration. On its face, Blue's declaration is inadmissible because it is not signed under penalty of

perjury.¹ CR 56(e), GR 13, RCW 9A.72.085. Standing alone, the fact that Blue's declaration is unsworn is sufficient grounds for this Court to affirm the trial court's decision to disregard Blue's declaration. *Wilkerson v. Wegner*, 58 Wn. App. 404, 408 n. 3, 793 P.2d 983 (1990) (unsworn statements not competent proof in summary judgment proceeding).

Moreover, a party cannot create a genuine issue of material fact sufficient to avoid summary judgment by submitting a declaration controverting his or her prior testimony. *Marshall*, 56 Wn. App. at 185. Taken together, both Blue's deposition testimony and her declaration cannot be true.² Foster could not have asked Blue how much she charged, as alleged in the declaration, and not discussed with Blue whether she was going to be paid, as testified to in the deposition. *Compare, e.g., Marshall*, 56 Wn. App. at 185 (plaintiff could not have been told that he suffered from asbestosis for the first time in 1985 and for the first time in

¹ Although this particular issue was not raised in the trial court, the Court may consider a ground for affirming a trial court decision not presented in the trial court. RAP 2.5(a).

² Blue provides no explanation for her contradictory testimony. At the hearing on Foster's motion for summary judgment, Blue's counsel argued that Blue did not fully understand the law when she gave her deposition – an explanation that the trial court correctly rejected. RP 24, 37. Notably, at no time did Blue ask for clarification of the questions in her deposition, nor did she submit a correction sheet for her deposition testimony.

1982 of 1983) *with Duckworth v. Langland*, 95 Wn. App. 1, 7-8, 988 P.2d 967 (1999) (a “modified oral agreement” for the transfer of land could still be an “agreement” for the transfer of the land).

However, regardless of Blue’s declaration, the undisputed evidence remains that Blue and Foster did not bargain for any mutually economic benefit, that there was no agreement for payment, that Blue had no expectation of any economic benefit, and that Blue’s visit to the land was solely for the performance of a favor for Foster. Blue’s attempts to mask the real issues in this case fail. Her declaration cannot raise an issue of fact as to entrant status, and she is a licensee as a matter of law.

D. Foster Did Not Breach His Duty of Care to Blue Because the Railroad Ties Were Open and Obvious.

Something more than a fall must be shown to establish liability against a landowner. *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 451, 433 P.2d 863 (1967). Foster is subject to liability for physical harm caused to licensees such as Blue, **if, and only if, all three of the conditions are met:**

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) the possessor fails to exercise reasonable care to make the condition safe, or to warn

the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

Younce, 106 Wn.2d at 667-68 (citing *Memel v. Reimer*, 85 Wn.2d 685, 689, 691, 538 P.2d 517 (1975) and Restatement § 342). A landowner has no duty to prepare a safe place for the licensee, or to affirmatively seek out and discover hidden dangers. *Memel*, 85 Wn.2d at 689.

Here, Blue cannot raise a genuine issue of material fact that Foster breached his duty because Blue knew of any risk presented by the railroad ties, which were known, open, obvious, and apparent.³ Blue testified that she was descending the ties in daylight, that there were no obstructions on the stairs, and that she was looking down at the ties when she fell. CP 44-45, 59. She successfully navigated the railroad ties, not only previous to her February 13, 2006 visit to Foster's property, but also less than an hour before her fall, giving her full notice of the ties. *See, e.g., Seiber v.*

³ The Declarations of Gregory Ken Williams ("Williams") and Rick Witte ("Witte") do not create an issue of fact. Williams' vague and conclusory declaration states that the ties are unsafe because the area is dark at night and not well lit. CP 305. Blue fell during the day and could see where she was walking. Williams' and Witte's declarations state that the ties are uneven. CP 305, CP 335. Blue saw or should have seen that the ties were uneven as she was looking down navigating the ties. Witte states that there was no handrail. CP 336. The lack of a handrail was equally open and obvious.

Poulsbo Marine Ctr., Inc., 136 Wn. App. 731, 740, 150 P.3d 633 (2007) (any risk created by placing merchandise by stairs was open, obvious, and known, as plaintiff ascended the stairs to get to the merchandise and was therefore on notice of the stairs).

Miniken v. Carr, 71 Wn.2d 325, 428 P.2d 718 (1967), cited by Blue, in inapposite. In that case, the court held that a landowner or occupier may owe a duty to warn of “concealed, dangerous conditions of which the occupier has knowledge, and of which the licensee does not know.” *Id.* at 328. The plaintiff in *Miniken* fell down stairs when she opened a door and entered a dark room, thinking that she was walking into the restroom when she was instead walking into the basement. *Id.* at 326.

Here, however, there was no dangerous condition known to Foster that was not equally obvious to Blue. The condition of the railroad ties was neither concealed nor obscured. When Blue fell, it was light outside, she was watching where she was walking, and there were no obstructions on the stairs. To the extent that the railroad ties posed a “dangerous condition,” it was patently so, and therefore obvious and avoidable. *See, e.g., Thompson*, 86 Wn. App. at 289 (“every reasonable person would have expected Thompson to discover that there was snow and ice” in the driveway); *Howard v. Horn*, 61 Wn. App. 520, 523, 810 P.2d 1387 (1991) (absence of handrail and uneven concrete in defendant’s walkway were

“clearly observable” and thus patent). As the trial court aptly and correctly concluded, “[s]ometimes a fall is just a fall, and I think this is one of those times.” RP 40 (emphasis added).

V. CONCLUSION

The trial court properly held that Blue is a licensee as a matter of law. The trial court also properly held that Foster did not breach any duty to Blue as a matter of law.

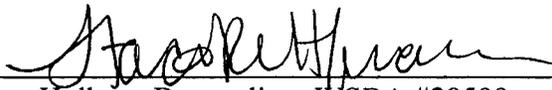
Even if Blue’s declaration is considered, the undisputed evidence remains that there was no promise or expectation of any payment or other economic benefit to Blue. Blue unequivocally took care of Foster’s dog as a gratuitous favor. Blue’s argument that she has created a genuine issue of material fact as to invitee status is unsupported by and contrary to Washington law.

Blue’s argument that she created an issue of fact as to breach of duty is equally unconvincing. The railroad ties were known, open, obvious, and apparent to Blue at the time that she fell.

This Court should affirm the trial court’s order granting summary judgment in favor of Foster and dismissing Blue’s lawsuit.

Respectfully submitted this 19th day of November, 2010.

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CERTIFICATE OF SERVICE

I, Laura Criss, hereby certify that on the 19th day of November, 2010, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

August G. Cifelli
Amy F. Miller
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- U.S. Mail, postage prepaid
 Hand Delivered via Messenger
 Overnight Courier
 Facsimile

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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 19th day of November, 2010, at Seattle, Washington.



Laura Criss