

No. 34552-8-II

**COURT OF APPEALS,
DIVISION II
OF STATE OF WASHINGTON**

Susan Sanders,
Appellant,

v.

Joel Anderson and Carol Anderson, husband and wife, and the marital
community comprised thereof,
Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. COUNTER-STATEMENT OF ISSUES

1. Under the Restatement (Second) of Torts § 342, did the trial court properly grant respondents' motion for summary judgment when a "perfectly normal" slip-resistant tile floor does not qualify as an unreasonable risk of harm?
2. Under ER 701, is non-expert testimony that the tile floor was "slick" or "slippery" inadmissible because it is based on scientific, technical, or other specialized knowledge within the scope of ER 702?
3. Whether the trial court properly denied appellant's motion for summary judgment on liability when appellant failed to meet her burden of proof?

II. COUNTER-STATEMENT OF CASE

This case arises from a slip and fall that occurred on August 29, 2001. *CP* 3-5. Appellant, a resident of Arkansas, was a guest at her brother's home on Bainbridge Island. *Id.* Appellant stayed in the Andersons' home for the week preceding the fall. *CP* 25, p. 40, l. 14-17. She then brought this lawsuit against her brother, Joel Anderson and his wife, Carol, alleging negligence. *CP* 3-5.

1. Background

Respondents, Joel and Carol Anderson, have lived at 14591 Komedal Road on Bainbridge Island since October of 1984. *CP* 39, p. 3, l. 22-24. The flooring in the Anderson home consists of carpet and tile. There are two bathrooms in the residence – one main bathroom and one in the master bedroom. The tile floor has been in the home since at least 1984, the year the Andersons moved in. *CP* 44, p. 17, l. 21-25. Appellant

sketched a floor plan of the Anderson home showing the general location of carpet in relation to the tile. *CP* 175. Photographs also depict the inside of the Andersons' home. *CP* 176-179.

2. Mr. Anderson's 1984 Slip Outside The Bedroom

In 1984, shortly after moving in, the Andersons placed rectangular throw rugs over portions of the tile floor in the bedroom hallway. *CP* 217, p. 21, l. 15-20. Ms. Anderson did this because the rugs matched the carpet in her home and so that people could wipe their feet. *Id* at p. 20-21, l. 24-5. Within a year of moving into the home (approximately 22 years ago) Ms. Anderson was washing the throw rugs in the bedroom hallway when Mr. Anderson lost his footing on the tile while wearing his socks. *CP* 218, p. 23, l. 19-24; *CP* 226, pp. 6-7, l. 22-5. He did not fall. *Id*.

This incident occurred in the bedroom hallway and is not the location where the appellant slipped 17 years later. Before appellant's fall in 2001, this is the only evidence of anyone ever slipping in the Anderson home.

3. Appellant's Slip 2001 Slip Outside The Bathroom

The week before appellant arrived the Andersons installed a new door leading to the garage. *CP* 78-80, pp. 16-17, l. 24-3. Ms. Anderson placed a newly purchased rectangular throw rug in front of this door for people to wipe their feet when they entered the home from the garage. *CP*

176. The new garage door was adjacent to the door of the guest bathroom.
Id.

On or around August 22, 2001 appellant arrived at the Andersons' home for a wedding. *CP* 191, p. 42, l. 12-15. Appellant stayed at the Andersons' home until August 29, 2001, the day she was planning to leave. *Id.* at p. 44, l. 1-4. During her stay, appellant used the guest bathroom which was located on the opposite end of the home from her bedroom. *CP* 175. She used this bathroom a few times each day to shower, brush her teeth, etc. *CP* 193-194., pp. 53-54, l. 23-21.

On the morning of August 29, 2001, as she was walking to the bathroom in nylon stockings, appellant slipped and fell on the tile floor outside the bathroom, where the new throw rug had been placed. *CP* 195-196, pp. 61-62, l. 26-6. Ms. Anderson had moved the throw rug temporarily to sweep the floor. *CP* 291, p. 27, l. 13-23. After dressing in her room and returning to the bathroom, appellant noticed Ms. Anderson sweeping the tile floor outside the bathroom. *CP* 195, at p. 58, l. 12-18. In her deposition appellant stated "it's not uncommon for someone to move a rug if they're going to be sweeping. That's a normal occurrence. I move my rugs when I sweep." *CP* 200, p. 80, l. 16-18.

Appellant alleges that she was carefully monitoring the floor while maneuvering around Ms. Anderson. In particular she testified:

Q: And you walk around her and the entire time you're walking around her, you're looking at the floor in front of you; is that true?

A: Correct.

Q: All right. And then, when you turned into the hallway, you were also looking at the floor in front of you which would have been the hallway floor?

A: Right.

CP 201, p. 83, l. 5-12.

Immediately before falling appellant was looking at the tile directly outside the bathroom. *Id* at p. 82, l. 10-19. Thus, she was aware there was no throw rug in the area.

4. Appellant's Prior Knowledge Of Tile Flooring

Appellant has walked on tile floor before this accident. *CP* 197, p. 68, l. 12-15. She has also worn pantyhose on tile floor. *Id* at p. 68, l. 16-23. In fact, appellant has worn stockings since high school. *Id* at p. 68, l. 16-23. Appellant was aware that wearing stockings on tile floor, like that found in the Andersons' home, can be slippery. *CP* 200, p. 81, l. 8-13. Furthermore, she intentionally slipped on slick flooring prior to this accident. *CP* 199, pp. 74-75, l. 23-6. When appellant finished the hardwood floor in her home with a high-gloss smooth coating she intentionally ran and slid on the floor for fun. *Id*. Additionally, appellant admits that when she wore certain footwear on the hardwood floor she had to be more careful to keep her footing. *Id* at pp. 73-74, l. 22-18.

5. The Slip-Resistant Tile Floor

Appellant does not allege that there was any defect in the tile floor that she slipped on. Moreover, she does not allege there was anything on the surface of the tile that caused her to slip and fall. *CP* 198, p. 70, l. 6-11. She testified in her deposition:

Q: How about the surface of the tile, is there anything that you believe is abnormal about the surface of the tile?

A: Absolutely, not. It's perfectly normal tile.

Q: Normal tile?

A: Perfectly normal floor tile.

Id (emphasis added).

On October 24, 2005 Alan C. Topinka, PE, CFEI, PI tested the Andersons' tile floor. *CP* 201, ¶3. Mr. Topinka is a mechanical engineer and has extensive experience in slip and fall investigations. *Id* at ¶2. Upon investigation, Mr. Topinka found the Anderson' floor is made of standard tile. *Id* at ¶3. Mr. Topinka tested the slip-resistance index of the tile floor where appellant fell, immediately below the throw rug and outside the guest bathroom. *CP* 231, ¶4. He used an English XI, Variable Incidence Tribometer (VIT) per the ASTM F 1679 method. *CP* 230, ¶3. The generally accepted threshold of a slip resistant floor is one with a slip-resistance index greater than 0.5. *CP* 231, ¶5.

Mr. Topinka tested the floor surface below the throw rug where appellant fell. *Id* at ¶4. He tested two locations in this area, with each

location tested in four directions. *Id.* The average slip resistance index for these measurements was 0.67, with no individual measurement less than 0.62. *Id.* at ¶5. This is well above the generally accepted threshold level for a slip-resistant floor of 0.5. *Id.* Mr. Topinka concluded that appellant slipped and fell on a slip-resistant tile floor surface. *Id.* at ¶6.

The flooring in the Andersons' home has not been altered or changed in anyway since at least 1984. *CP* 327. More importantly, the flooring where appellant slipped and fell had not been altered or changed in anyway from the date she slipped through the date Mr. Topinka tested the floor. *CP* 326. The same throw rug remained in the same position from the date appellant fell through the date of Mr. Topinka's testing. *CP* 327.

Appellant contends the Andersons were negligent for moving the rug and failing to warn her that a condition could arise if the rug was moved. *CP* 199, p. 76-77, l. 25-7. The Andersons still live in this home and have the same tile floor and throw rugs.

III. ARGUMENT

1. Standard of Review

Appellant correctly asserts that the standard of review in this case is de novo. The appellate court engages as the same inquiry as the trial court. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706, 50 P.3d 602

(2002). The trial court granted summary judgment in favor of respondents under CR 56.

On summary judgment, once the moving party demonstrates that there is no genuine issue of material fact, *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985), then the non-moving party must present evidence that material facts are in dispute. *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). If the non-moving party fails to make such a showing, then the dismissal should be granted. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 148, 787 P.2d 8 (1990). Where “there is a complete failure of proof concerning an essential element of the non-moving party’s case,” all other facts become immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

Facts that set forth no more than the declarant’s understanding of a fact without also including the specific facts upon which the understanding is based are inadmissible. *Marks v. Benson*, 62 Wn.App. 178, 813 P.2d 180 (1991). Conclusory allegations, which are not founded on facts, cannot be considered in a summary judgment motion. *Grimwood v. Puget Sound*, 110 Wn.2d 355, 753 P.2d 517 (1988); *Orion Corporation v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985); *Layne v. Hyde*, 54 Wn.App. 125, 134, 773 P.2d 83 (1989) (general, conclusory statements are insufficient to establish a conspiracy).

Appellant fell on slip-resistant tile floor, this is undisputed because Mr. Topinka's findings are uncontested.

2. The Trial Court Properly Granted Respondents' Motion For Summary Judgment Because A Slip-Resistant Tile Floor Does Not Qualify As An Unreasonable Risk Of Harm

A. Appellant Was A Licensee At The Time Of The Fall

Appellant concedes she was a licensee at the time of this incident.

Washington has adopted the Restatement (Second) of Torts § 342 (1965) to define a landowner's responsibility to a licensees. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 133, 875 P.2d 621 (1994).

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if:

(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) he [or she] 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.

Restatement (Second) of Torts § 342 (emphasis added).

Expounding on this duty Washington courts have consistently held that a landowner is not required to make the property safe for the licensee or to affirmatively seek out and discover hidden dangers. *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975). Put another way,

landowners have no duty to warn of readily apparent dangers. *Thompson v. Katzer*, 86 Wn.App. 280, 285, 936 P.2d 421 (1997).

B. There Must Be An “Unreasonably Dangerous Condition” Before A Duty Arises Under Restatement § 342

Before a duty arises under § 342 appellant must show that the Andersons’ slip-resistant tile floor qualifies as “an unreasonable risk of harm.” *Restatement (Second) of Torts* § 342. No Washington case has held that a perfectly normal floor is an unreasonably dangerous condition. Rather, all Washington premises liability cases applying Restatement § 342 have involved some actual defect in, or a foreign substance on, the surface over which appellant was walking.

i. Objective Testing Verified Appellant Fell On A Slip-Resistant Tile Floor

Mr. Topinka’s objective testing revealed the tile floor that appellant slipped on was slip-resistant. *CP* 231, ¶6. In fact, the slip-resistance index of the floor in this area was 0.67 on average, well above the generally accepted threshold of 0.5. *Id* at ¶5. Additionally, appellant concedes that this is a “perfectly normal tile floor.” *CP* 198, p. 70, l. 6-11. Appellant failed to present anything other than conclusory allegations that the tile was unreasonably dangerous. This was not enough to defeat summary judgment.

ii. Negligence Cannot Be Inferred From An Accident Or Injury

It has long been the law in this state that the mere fact that a person falls does not, of itself, tend to prove that the surface over which he was walking was dangerously unfit for the purpose. *Brant v. Market Basket Stores*, 72 Wn.2d 446, 433 P.2d 863 (1967); *Knopp v. Kemp & Herbert*, 193 Wash. 160, 164-65, 74 P.2d 924 (1938). In *Hanson v. Lincoln First Federal Savings & Loan Association*, 45 Wn.2d 577, 277 P.2d 344 (1954), the Supreme Court stated:

It is not the law that every accident establishes a cause of action warranting recovery by the injured party. Accidents often occur for which no one is to blame. Any verdict to the contrary upon the evidence in this case, necessarily would rest upon the insufficient foundation of speculation and conjecture.

Hanson, 45 Wn.2d at 579.

The fact that appellant fell on the Andersons' floor does not make it unreasonably dangerous. Negligence *cannot* be inferred from the mere fact of an accident and injury. *Merrick v. Sears, Roebuck & Co.*, 67 Wn.2d 426, 429, 407 P.2d 960 (1970) (emphasis added). In *Knopp* the Supreme Court held:

Walking, although it becomes automatic by long practice and use, is, after all, a highly complicated process. The body balance is maintained by the co-ordination of many muscles, and their operation is controlled by an intricate system of motor nerves, the failure of any of which for a split second, on account of advancing age or for some other reason, may cause a fall. It is common knowledge that people fall on the best of sidewalks and floors. A fall,

therefore, does not, of itself, tend to prove that the surface over which one is walking is dangerously unfit for the purpose.

Knopp, 193 Wash. 164-165 (emphasis added).

The Andersons did not owe a duty to the appellant because a normal, slip-resistant tile floor is not an unreasonably dangerous condition. If the court accepted appellant's argument it would set new legal precedent by effectively holding that any residence in the State of Washington equipped with slip-resistant tile floor is unreasonably dangerous. This would open the floodgates of litigation by permitting lawsuits against homeowners whenever anyone falls on their property. Moreover, such a ruling would conflict with existing Washington law that holds "negligence cannot be inferred from the mere fact of an accident or injury." see *Merrick v. Sears, Roebuck & Co.*, 67 Wn.2d at 429. The trial court properly granted respondent's motion for summary judgment.

C. Respondents Had No Duty To Warn Appellant

Even if the Court finds a slip-resistant tile floor was an unreasonably dangerous condition, the Andersons did not have a duty to warn appellant about this condition. Washington places a higher standard of care on landowners when dealing with invitees rather than licensees. See *Degel v. Majestic Mobile Home Manor, Inc.*, 129 Wn.2d 43, 49, 914

P.2d 728 (1996). Washington Courts have elaborated on landowners' duty to licensees in finding:

[A] guest is expected to take the premises as the possessor himself uses them, and should 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, or that of the members of his family.

Thompson v. Katzer, 86 Wn.App. at 285.

An occupier of land must warn of an unreasonably dangerous condition, only if he should expect that the licensee will not discover the condition, or upon discovering it, will not perceive the risk arising from it.

Memel, 85 Wn.2d at 689.

i. Slip-Resistant Tile Floor Is An Open and Obvious Condition

Appellant admits that she slipped on a perfectly normal tile floor. CP 198, p. 70, l. 6-11. Washington does not typically impose a duty to warn when a risk is open and obvious. See *Barker v. Skagit Speedway, Inc.*, 119 Wn.App. 807, 82 P.3d 244 (2003). Here, the tile floor was an open and obvious condition that the Andersons could have reasonably expected appellant would discover.

It is undisputed that appellant was surveying the floor while she walked to the bathroom. CP 201, at p. 83, l. 5-12. She was also looking at the floor when she slipped. *Id.* Moreover, appellant had walked across

this floor numerous times in the week preceding her fall. *CP* 193-194, pp. 53-54, l. 23.21. As such the Andersons could reasonably expect appellant would know or discover the fact that tile floors can be slick, especially while wearing nylons.

ii. Appellant Knew Tile Floors Are Slippery While Wearing Nylons

Washington has declined to place liability on a landowner when the injured party had actual knowledge of the condition. *See e.g. Barker*, 119 Wn.App. 807 (Declining to impose a duty to warn of a risk as obvious and well known as the danger that speedway patrons may be hit by a car when they are present while cars are being pushed and loaded onto trailers.).

Appellant knew that wearing stockings on tile floor like that found in the Andersons' home could be slippery. *CP* 200, p. 81, l. 8-13. She has intentionally slipped on slick flooring prior to this accident. *CP* 199, pp. 74-75, l. 23-6. Finally, she admitted that when she wore certain slippers on the hardwood floor she had to be more careful to keep her footing. *Id* at pp. 73-74, l. 22-18.

Appellant knew that tile floors are slippery by nature and that she could slip when wearing only stockings on her feet. Under Restatement §342 the Andersons did not have a duty to warn appellant that a tile floor

can be slippery when wearing nylons. The trial court properly granted respondents' motion for summary judgment.

3. Non-Expert Opinion That The Floor Was "Slippery" Is Inadmissible Under ER 701

Appellant argues there was a material question of fact in this case because Mr. Topinka's objective testing concluded the floor was slip-resistant, while respondents subjectively characterized the floor as "slippery." Respondents, however, are lay witnesses who lack the necessary foundation to determine whether or not the floor was unsafe. Inadmissible evidence cannot support or defeat a summary judgment motion. *Vancova Co. v. Farrell*, 62 Wn.App. 386, 395, 814 P.2d 255 (1991).

Respondents' belief that the floor was slippery is nothing more than subjective opinion and is inadmissible under ER 701 which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

Wash. R. Evid. 701 (emphasis added).

Lay witness opinion testimony that the floor was "slippery" or "slick" is neither helpful nor admissible under ER 701 because it calls for

a legal conclusion. Furthermore, opinion testimony of this nature is not permitted because it is based on “scientific, technical, or other specialized knowledge within the scope of rule 702.” *Wash. R. Evid. 701. see McBroom v. Orner*, 64 Wn.2d 887, 395 P.2d 95 (1964) (witnesses who arrived on the scene after an accident had already occurred were not allowed to state their opinions as to where on the roadway the accident happened); *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 P. 940 (1910) (lay witnesses should not have been allowed to testify that a ridge of earth would not retain water if the height of the water were raised); *Randolph v. Collectramatic, Inc.*, 590 F.2d 844 (10th Cir.1979) (in products liability action, appellant who had been injured by an exploding pressure cooker not allowed to express a lay opinion as to an alleged lack of safety features); *Pierson v. Northern Pacific Railway Co.*, 52 Wash. 595, 100 P. 999 (1909) (lay witness not allowed to express an opinion on the cause of sickness and death of horses).

Mr. Topinka, who qualifies as an expert under ER 702, tested the floor using objective testing measures and concluded it is indeed slip-resistant. CP 231, ¶6. Mr. Topinka’s testing is undisputed – appellant fell on a slip-resistant tile floor. Respondents’ subjective opinion that the floor was slippery is inadmissible under ER 701 and is not enough cannot create

a question of material fact in this case. The trial court properly granted respondents' motion for summary judgment.

4. The Trial Court Properly Denied Appellant's Motion For Summary Judgment

Appellant claims the trial court erred when it failed to grant summary judgment on liability in appellant's favor. At a minimum, there were questions of fact surrounding the appellant's comparative fault, whether a slip-resistant tile floor qualifies as an unreasonable risk of harm, and whether expert testimony is needed to establish an unreasonable risk of harm. These arguments are addressed in the preceding sections and will not be repeated. The trial court did not err in denying appellant's motion for summary judgment on liability.

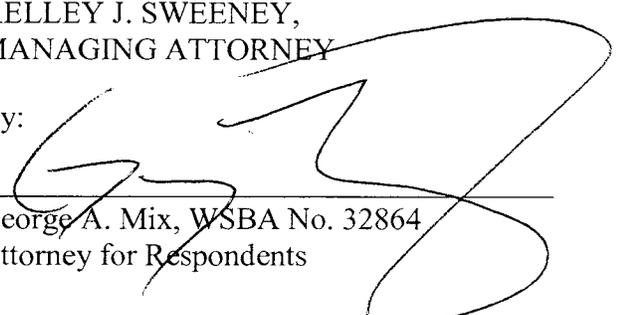
VI. CONCLUSION

The trial court properly granted respondent's motion for summary judgment and this court should affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 20th day of June, 2006.

LAW OFFICES,
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No. 31678-1-II

**COURT OF APPEALS,
DIVISION II
STATE OF WASHINGTON**

Susan Sanders,

Appellant,

v.

Joel Anderson and Carol Anderson,
husband and wife, and the marital
community comprised thereof,

Respondents.

No. 34552-8-II

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the laws of the state of Washington that on this date, the undersigned has caused the foregoing documents to be served upon the counsel of record in the above-captioned lawsuit via the method of service noted below.

DATED this 20th day of June, 2006.



Candice Samuelson

ORIGINAL

DOCUMENTS SERVED

Brief of Respondents

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