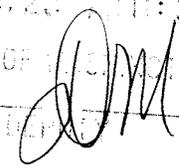


NO. 39562-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
FILED DEC 22 5 11:07
STATE OF WASHINGTON
BY 

MARILYN DENISE SMITH,

Appellant

and

WINTHER PROPERTIES,

ROBERT A. MATTSON, and CATHERINE M. MATTSON,

Respondents.

REPLY BRIEF OF APPELLANT

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REPLY TO RESPONDENT'S BRIEF

- 1. Whether the Respondents knew or should have known that the staircase as a unit was becoming progressively more unstable and hazardous is an issue for a jury to decide.**

Respondents Winther Properties and the Mattson have asked the Court to accept the proposition that because Ms. Smith did not know that the third step from the top of the staircase was loose or unstable before stepping on it, the Respondents could not have known it was unstable either, and therefore had no duty to repair it. (Respondents' Brief, p.15) Ms. Smith did not testify that the third step was *not* loose prior to her fall, only that she did *not notice* that it was loose prior to her fall—and specifically, that it was the first time it had actually moved under her feet. CP 15, 28.

Respondents' argument would have the court transfer the duty of reasonable inspection from Respondents to the invitee, Ms. Smith, where as a matter of law, the duty of reasonable inspection rests with Respondents as landlord, who would be in a better position to inspect the nuts and bolts securing steps in a staircase. *Coleman v. Ernst Home Center, Inc.*, 70 Wn. App. 213, 222, 853 P.2d 473 (1993). Landlords have a much greater duty to inspect than those using their property. *Johnson v. Dye*, 131 Wn. 637, 640, 230 P.625 (1924). Furthermore, Respondents have not denied that the third stair of the staircase was unstable or loose

prior to Ms. Smith's fall, only that it was not unstable enough for them as property managers or landlords to be concerned about. CP 20, 30 Robert Mattson also confirmed that immediately after Ms. Smith's fall he established that the top three steps were in fact unstable. CP 20.

The staircase in question was the only access to Ms. Smith's employer's office on the second floor of the building, and Ms. Smith made clear that lower steps of the staircase in question had been unstable for several months prior to her fall. CP 49–50 The photographs establish that the staircase in question was one unit. CP 51–52 Robert Mattson does not deny that the steps of the staircase—including third step from the top—were unstable prior to Ms. Smith's fall, he only denies that they were not unstable enough for Winther to be concerned about. CP 30, 20

Ms. Smith respectfully submits that, as issues of fact, it is for the jury to decide whether or not the unstable status of the lower steps of the staircase, and the volume of pedestrian traffic using the staircase as a unit to access the upper floor of the building, would have warranted a repair or replacement of the staircase by a reasonable and prudent property owner prior to Ms. Smith's fall. The declarations of Marilyn Smith, CP 49–53, and Robert Mattson, CP 18–21, clearly show there exist material issues of fact as to what Winther knew or should have known about the condition of the staircase prior to Ms. Smith's fall.

2. Liability arising from constructive notice is not restricted to “self-service” businesses.

Respondents argue that a property owner’s constructive knowledge of hazards only applies to “self-service” business operations, not a business office. This is incorrect. It is not that constructive knowledge only applies to owners or operators of “self-service” business operations, the law is that operators of such “self-service” establishments have a duty of reasonable care against any *increased* danger caused by such an operation. The court stated the following in *Coleman*:

In Washington the general rule governing liability for failure to maintain business premises in a reasonably safe condition requires that the plaintiff prove (1) the unsafe condition was caused by the proprietor or its employees, or (2) the proprietor had actual or *constructive knowledge* of the dangerous condition. *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983)

In addition, a proprietor of a *self-service* business operation has a duty to exercise reasonable care against any increased danger that is caused by or due to, the operation of its particular business.

70 Wn. App. at 217 (emphasis added).

Furthermore, it is well-established law in the state of Washington that landowner liability due to constructive knowledge of hazards applies to landlord-tenant situations. *Johnson v. Dye*, 131 Wash. at 640. In *Johnson*, a tenant fell from the second step of the rented premises due to a defect in the support of the steps. The court in that case stated:

The theory of respondent in prosecuting this action is that, where a landlord lets premises to a tenant, and agrees to keep the same in reasonable repair, there arises an antecedent duty on his part to make reasonable inspection for obscure or latent defects, or others affecting the safety of the premises for ordinary use; that there is a greater duty of inspection upon a landlord than there is on the tenant, and, where a landlord can, by ordinary diligence, discover the defect which causes the injury, it is his duty to correct the same, and he is held to have knowledge of what a reasonable inspection on his part would have disclosed; that where there is a breach of this duty on the part of the landlord if the tenant, using ordinary care, and not knowing of the danger, is injured by reason of the defect, the tenant is entitled to recover from the landlord for such damages as may be sustained.

The above theory of the case is sustained by our decisions in the following cases: *Howard v. Washington Water Power Co.*, 75 Wash. 255, 134 P. 927, 52 L.R.A. (N.S.) 578 [1913] ...

Id. at 638 (emphasis added).

The Declaration of Marilyn Smith that the lower steps of the same staircase had been loose for a period of a month prior to her fall, CP 49, and the Declaration of Robert Mattson, CP 20, that immediately after Ms. Smith's fall he discovered that three of the top stairs were loose, establishes the existence of material issues of fact as to the deterioration of the staircase, and Respondent's constructive knowledge of the deterioration.

3. The Respondents had actual knowledge of the unstable condition of the staircase.

Respondents' constructive knowledge is independent of the claim of Respondent Robert Mattson's of actual knowledge of the condition of

the staircase as reflected by his declaration in which he claimed to have used the staircase “almost” daily. CP 20 Note that Mr. Mattson was careful *not to state that he actually inspected* the stairs, only that he had used them by walking on them. *Id.* Furthermore, he did not deny the stairs of the staircase were loose prior to the Plaintiff’s fall. *Id.*

Respondents should have known that the staircase was deteriorating because other steps were loose for a period of a month prior to Ms. Smith’s fall. CP 49 Certainly a material issue of fact exists as to whether it was foreseeable that other steps would be loose on the same self-contained staircase. CP 51–52

As stated in Ms. Smith’s opening brief, p. 12, whether or not they actually inspected the stairs prior to Ms. Smith’s fall, and whether they would have discovered the loose top three stairs had they inspected, discovered and repaired the lower loose stairs, are “reasonable inspection issues” and are questions for the jury. *Mesher v. Osborne*, 75 Wash. 439, 451, 134 P. 1092 (1913). All reasonable inferences from the evidence must be resolved against the moving party. *Caldwell v. Yellow Cab Service, Inc.*, 2 Wn. App. 588, 592, 469 P.2d 218 (1970); *Dickinson v. Edwards*, 105 Wn. 2d 457, 466, 716 P.2d 814 (1986).

In the case at hand Ms. Smith’s Declaration that other stairs had been loose for a period of a month prior to her fall, the fact that Mr.

Mattson in his declaration did not state that he actually inspected the stair prior to Ms. Smith's fall, the fact that in his declaration, Robert Mattson did not deny that the stairs were loose prior to the Plaintiff's fall, the fact that Mr. Mattson found the stairs to be in fact loose after Ms. Smith's fall had to be tightened, and had completely replaced the following weekend, imply that the staircase was deteriorating and also imply a breach of the Respondents' duty to exercise reasonable care to inspect, discover the condition and protect the invitee. Accordingly, there exist material issues of fact, making summary judgment inappropriate.

4. The Respondents have waived any objection to evidence of remedial safety measures being considered by the Court on summary judgment.

Winther placed in the record the Declaration of Respondent Robert A. Mattson, CP 18–21, which confirmed that Mr. Mattson discovered immediately after Ms. Smith's fall that not just one, but three of the top stairs were loose; that Mr. Mattson used a socket wrench to tighten the screws on the steps; and that Mr. Mattson replaced the entire flight of steps the following weekend. CP 20 Winther contends that Mr. Mattson's maintenance and replacement of the stairs are remedial safety measures, and as such are inadmissible to prove negligence, and therefore create no material issue of fact in this case. Respondent's Brief, p. 19.

It is well-established law, however, that if a party fails to object or to bring a motion to strike inadmissible evidence contained in declarations or affidavits, the objection is deemed waived. *Bonneville v. Pierce County*, 148 Wn. App. 500, 508–9, 202 P.3d 309 (2008), *rev. den.*, 166 Wn.2d 1020, 217 P.3d 335 (2009).

A party may object to an affidavit filed in support of a motion for summary judgment if it sets forth facts that would not be admissible in evidence. *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987) (citing *State v. (1972) Dan Evans Campaign Comm.*, 86 Wn.2d 503, 506, 546 P.2d 75 (1976)). If a party fails to object or bring a motion to strike deficiencies in affidavits or other documents in support of a motion for summary judgment, the party waives any defects. *Smith*, 47 Wn. App. at 248 (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); *Greer v. Nw. Nat'l Ins. Co.*, 36 Wn. App. 330, 338, 674 P.2d 1257 (1984)).

Id. The plaintiff in *Bonneville* placed declarations in the Court record as part of their summary judgment motion, and then claimed that the content of the declarations should not be considered by the Court. The Court of Appeals held that any objection to the documents was deemed waived. *Id.*

Accordingly, the Court should consider the information in the Declaration of Robert Mattson that he found the top three steps of the staircase to be loose, and though he tightened them, he had to replace the entire staircase the weekend after Ms. Smith's fall. This information supports the inference that the staircase had been deteriorating prior to Ms. Smith's fall.

5. The Respondents have not established as a matter of law why the Respondent's non-compliance with current standards for handrails is not admissible, and why the issue of the reasonableness of noncompliance should not be decided by a jury.

Respondents argue that Ms. Smith did not raise a material issue of fact that Respondents were negligent for not providing an appropriate handrail along the stairs. Respondents ignore their failure to produce any expert testimony establishing the adequacy of the existing banister. Respondents have nothing but its bald assertion to rebut (1) Marilyn Smith's explanation that she was unable to grasp the wide banister to prevent her fall, CP 50, (2) the photos demonstrating that the banister was too wide to function as a handrail, *id.*, or (3) the handrail construction standards for the building in question, CP 85–86, and the building code provisions for handrails, CP 96.

Furthermore Respondents claim that two cases cited by Ms. Smith, *Dickinson v. Edwards*, 105 Wn. 2d 457, 716 P.2d 814 (1986), and *Pickering v. State of Hawaii*, 57 Haw. 405, 557 P.2d 125 (1976), do not support Ms. Smith's argument that evidence standards for handrails at the time of the accident are admissible. Yet inexplicably, Respondents avoid entirely the compelling holdings in other cases cited by Ms. Smith. Specifically, *Helling v. Carey*, 83 Wn.2d 514, 518–19, 519 P.2d 981 (1974) (tests for glaucoma), *The T. J. Hooper*, 60 F.2d 737, 740 (2nd Cir. 1982) (seaworthiness of an oceangoing barge lacking a ship-to-shore

radio), and *Cramer v. Van Parys*, 7 Wn. App. 584, 500 P.2d 1255 (1972)(expert testimony of building inspector admitted as to code provisions at time of accident regarding handrails)¹, all supporting Ms. Smith's argument that compliance with a standard does not relieve a defendant of liability, and that evidence of a current or higher standard is admissible. In *Texas & P. Ry Co. v. Behymer*, 189 US 468, 470, 235 S. Ct. 622 (1903), a railroad case supporting Ms. Smith's argument, Justice Holmes stated:

What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

Ms. Smith's declaration, CP 50, as well as the standards attached to the Declaration of Gary Preble, CP 86, and the code provisions attached to the Declaration of K. Kyle Theissen, Code Reviser, CP 96, raised material issues of fact as to the reasonableness of the lack of an adequate handrail along the staircase where Ms. Smith fell, and therefore summary judgment is inappropriate.

6. **The Respondents have failed to produce a single document to refute the records of the Secretary of the State of Washington, reflecting that neither Robert nor Catherine Mattson were members or managers of Winther Properties LLC at the time of Ms. Smith's fall.**

¹ Appellant's Opening Brief at p. 20 mistakenly placed the words "in the construction field" in the sentence explaining *Cramer*, having apparently copied them accidentally from the prior sentence.

Respondents also submitted nothing to rebut the records of the Secretary of the State, CP 58, which reflected that neither Respondents Robert or Catherine Mattson were members or managers of Respondent Winther Properties, LLC. The Respondents simply argue that Robert and Catherine Matson are protected by operation of RCW 25.15.125 though Respondents admit that neither Robert or Catherine Mattson are members of Winther Properties, LLC., but “trustees of the living trust”. Respondent’s Brief, p. 22. However, the Respondents then proceed to analyze Robert and Catherine’s liability as if they were members of the Winther Properties, LLC, protected by the “corporate veil”. *Id.*, p. 23

The Respondents appear to be arguing—without providing any legal authority—that because the RA and CA Mattson Living Trust is a member of Winther Properties, LLC, Mr. and Mrs. Mattson are personally protected. Because the documents offered by the Appellant from the office of the Secretary of the State of Washington pertaining to the organization Winther Properties, LLC raise a material issue of fact as to the status of Robert and Catherine Mattson and their relationship with Winther Properties, LLC, summary judgment is inappropriate.

CONCLUSION

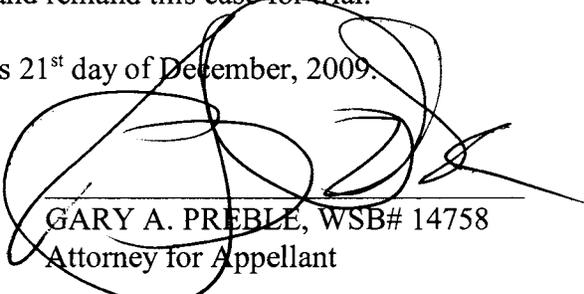
Ms. Smith has established by the declarations which are of record, that material issues of fact exist as to (1) whether the Respondents knew or

should have known that the steps of the staircase were becoming unstable and were in need of repair, (2) whether Respondent Robert Mattson should have been concerned about the steps becoming unstable, (3) whether the Respondent should have replaced the existing banister with appropriate handrails to current standards, and (4) whether Robert and Catherine Mattson, are members or managers of Winther Properties, LLC.

The Respondents have failed to bring to the court's attention any document in the record rebutting the Ms. Smith's evidence in the record which establish the existence of material issues of fact.

For all of the foregoing reasons, Appellant Marilyn Denise Smith respectfully requests that the court reverse the trial court's order granting Respondents summary judgment and remand this case for trial.

Respectfully submitted this 21st day of December, 2009.

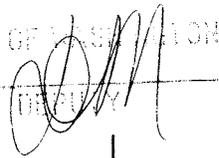


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IN THE COURT OF APPEALS
STATE OF WASHINGTON DIVISION II

COURT OF APPEALS
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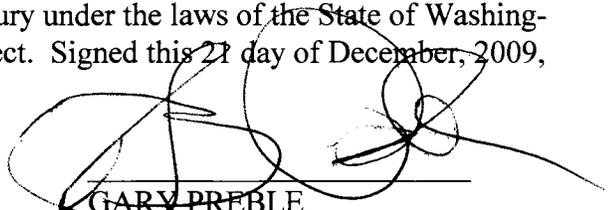
MARILYN D. SMITH, Appellant, v. Winther Properties, LLC, et al., Respondents.	NO. 39562-2-II CERTIFICATE OF MAILING
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CERTIFICATE OF MAILING

The undersigned certifies that on the 2^{1st} day of December, 2009, he caused the Appellant Response Brief to be served on the parties listed below by the methods indicated:

Counsel/Party	Additional Information	Method of Service
Pauline Smetka, Attorney	1001 4 th Avenue, Suite 4200 Seattle, WA 98154 (206) 340-0902 (Fax)	Email, USPS

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed this 21 day of December, 2009, at Olympia, Washington.


GARY PREBLE