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No. 51366-8-II

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

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REBECCA FOWLER, an individual,

Appellant,

v.

BRENT SWIFT, in his individual capacity;  
ROSANNE FINN, a single individual,

Respondents,

and

SCOTT BERGFORD and PATRICIA BERGFORD, and the marital  
community comprised thereof; JENNIFER NEVY, in her individual  
capacity,

Defendants.

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BRIEF OF APPELLANT

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A. INTRODUCTION

Rebecca Fowler broke her tibia and fibula when she slipped and fell down the stairs that led to acupuncturist Brent Swift's office. The office was located on the second floor of a residential property, which was operated by several business tenants, and the only way to reach it was by climbing the stairs which were not built to code, narrower than normal, and "slippery as ice" when traversed in stocking feet, a practice Swift encouraged his patients to do. Fowler sued for her significant injuries, but the trial court granted summary judgment to Swift. Despite substantial evidence showing that he possessed, maintained, and operated the staircase in question, the trial court determined that Swift owed no duty to Fowler as a matter of law because he was not the landlord and did not own the stairs. This error is contrary to the clear rules of premises liability in Washington that a possessor of property can be liable to invitees for failing to protect them from foreseeable harm.

The trial court also erred in granting summary judgment to Swift's co-defendant, Rosanne Finn, the original lessee of the residential property who began using it for commercial purposes, before inviting other commercial tenants and eventually subleasing the property to them. In doing so, the trial court ignored her clear duty as a sublandlord to protect invitees, like Fowler, from harm.

On both issues the trial court ignored the law and the significant issues of fact that should have precluded summary judgment. These errors warrant reversal by this Court.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its December 1, 2017 order granting summary judgment in favor of Brent Swift.

2. The trial court erred in granting its April 13, 2018 order granting summary judgment in favor of Rosanne Finn.

(2) Issues Related to Assignments of Error

1. Where a health care practitioner exerted control over a staircase on rented premises by his actions for patients accessing his upstairs offices, was there a question of fact as to whether he was a possessor of the premises within the meaning of the *Restatement (Second) of Torts* §§ 343, 343A, so that he owed a duty of care to a patient who fell on the stairs? (Assignments of Error Number 1)

2. Was there a question of fact as to whether that health care practitioner exerted control over the staircase such that the practitioner owed a duty of care to an invitee injured by a fall on the stairs and failed to take any reasonable measures to prevent the fall? (Assignments of Error Number 1)

3. Was there a question of fact as to whether a residential tenant who began operating a commercial business out of a residential property and then sublet the property to other commercial tenants without terminating her lease had a duty to protect business invitees who are injured in the common areas of the premises? (Assignments of Error Numbers 1 and 2)

C. STATEMENT OF THE CASE

On November 19, 2014, Rebecca Fowler fell while descending a flight of stairs in a renovated historic building located at 1516 Fourth Avenue in Olympia that were “slippery as ice” following an acupuncture session with acupuncturist Brent Swift. CP 207. This resulted in serious injury to Fowler. CP 195-97.

Scott Bergford and Patricia Bergford are the owners of the building where the incident occurred; Swift was a lessee of the premises along with several other health care providers: Jennifer Nevy, Jessica Rose, and Rebecca Whitaker. CP 245.

The relationship of the various tenants to the Bergfords was not a picture of clarity. Rosanne Finn leased the premises in 2012 from the Bergfords. *Id.* Despite the fact that her residential lease barred her from conducting any business on the property, Finn began using the building to operate her business, and she began sharing the space with Nevy and Tammy Puvin, who also operated their businesses out of offices on the premises. The three acted collectively regarding building decisions. *Id.*; CP 504. In February 2014, Finn moved out, without terminating her lease, and sublet the premises to Nevy who continued to run her business out of the building. CP 245, 378. Nevy apparently leased offices in the building

to various other health care professionals, including Swift. CP 245.<sup>1</sup> The tenant who occupied the building prior to Finn signing the release was attorney Jessica Jensen who operated her law practice out of the building. *Id.* At no time did Jensen, Finn, Nevy, or Swift use the premises as their residence. *Id.*

Fowler had never been to Swift's office at the 1516 Fourth Avenue premises prior to November 19, 2014. CP 196. Fowler suffers from multiple sclerosis ("MS"). *Id.* She had been Swift's patient for over ten years for the treatment of the MS symptoms, but she had received that treatment at his two prior locations. *Id.* Both locations were ADA-compliant<sup>2</sup> and Swift's spaces had been on the entry floor. CP 198.

Swift also treated Fowler's sister, Tara Snook. CP 192. Snook had previously been treated by Swift at the 1516 Fourth Avenue location and was scheduled for an appointment on November 19, 2014. *Id.* When she could not keep the appointment, Fowler agreed to take Snook's appointment time. CP 196.

It was customary for all the tenants and their clients to remove their shoes immediately upon entry into the building. CP 193. Snook told

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<sup>1</sup> Swift initially paid \$400.00 per month to lease the office upstairs. CP 248. When the tenants collectively hired a private party to clean the common areas including the steps, Swift shared in the additional expense and his total rent was increased to \$430.00. CP 191.

<sup>2</sup> Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*

Fowler that the procedure upon entering the house was to sit on the bench, remove shoes, and place them in the space provided for them underneath the bench. CP 193. Swift would then come and get Fowler to escort her to his office upstairs. *Id.*

The building at issue has beautiful hardwood floors and stairs that shone with reflected light. *Id.* In order to access Swift's office, Fowler was required to climb stairs in her stocking feet. CP 197. The stairs did not have any slip resistant coating or material on them. *Id.* Fowler was wearing fairly new Merino Wool socks at the time of the appointment. CP 204.

One of the side effects of MS is neuropathy. CP 187. Fowler's feet were often numb, and the loss of circulation required her to wear wool socks for warmth; Swift knew of this problem and had treated Fowler for the numbness in her feet for many years. *Id.* Indeed, Swift has treated several other MS patients. *Id.* He testified in his deposition that common symptoms such patients experienced are pain, neuropathy, loss of motor function and loss of strength. *Id.* He testified that Fowler had loss of feeling in both her feet and hands; neuropathy affected both upper and lower extremities. *Id.*

When Swift came down the stairs with his previous patient, both he and his prior patient were only wearing socks. CP 196-97. No one,

including Swift, informed Fowler she did not need to remove her shoes. CP 197. In fact, as noted *supra*, it had been the practice of all practitioners and their clients to remove their shoes upon entry into the house since Finn leased the premises in 2012.

The steps are narrower than normal and Swift testified he knew this in his deposition. CP 189. They do not meet building code standards. CP 207. Further, the handrail for the stairs meant for use when ascending and descending likewise does not meet code. *Id.* It is more difficult to hold onto. *Id.*

At the November 19, 2014 appointment, Fowler informed Swift that in addition to MS, she was also suffering from anemia and was feeling very fatigued. CP 196.

Swift's office is at the top of multiple flights of stairs. Following Fowler's appointment, Swift did not follow her down the stairs, as he had done for the previous client. CP 197. Fowler was fatigued after the treatment session. *Id.* As she walked down the stairs in her socks, her feet slipped and she fell. *Id.* She broke her fibula and tibia. *Id.* She has incurred more than \$100,000 in medical bills for treatment related to the fall. CP 248. Extensive expert testimony documented the hazard presented by the stairs. CP 199-243.

Swift moved for summary judgment, arguing that he owed no duty

to Fowler because the stairs at issue were not in his possession or control, but rather were part of a common area over which he had no control. CP 53-61. The trial court agreed and granted summary judgment in his favor. CP 607-09. Finn later moved for summary judgment arguing that she owed no duty to maintain the stairway because she did not own the home and assigned her interest in the premises to Swift and the other occupants. CP 366-76. The trial court granted summary judgment in her favor. CP 586-88.<sup>3</sup> Fowler appeals the dismissal of her case.

#### D. SUMMARY OF ARGUMENT

Under Washington law, a premises possessor owes a duty to protect invitees from harm. It is immaterial whether the possessor is a lessor or owner of the property. The trial court erred in concluding otherwise. Importantly, possession of a premises is a question of fact, as is breach of a duty owed. Here, Fowler presented ample evidence to show that Swift possessed, controlled, and maintained the staircase where she fell and that he breached his duty to take reasonable precautions to prevent such a foreseeable accident. Summary judgment was error.

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<sup>3</sup> Fowler entered into tolling agreements with the Bergfords and Nevy, and a stipulation and order of dismissal as to claims against them. Fowler originally sought discretionary review as to the dismissal of her case against Swift, but with dismissal as to Finn as well, her motion became an appeal as of right pursuant to the RAP 2.2. *See* CP 598-99.

The trial court also erred in granting summary judgment as to Finn despite evidence showing that she was the sublandlord of the property, and therefore had a duty to protect invitees from the “slippery as ice” staircase. Fowler presented evidence to create a material issue of fact as to her liability, and therefore summary judgment was error. This Court should reverse and allow Fowler her day in court to seek recovery for her significant injuries.

E. ARGUMENT<sup>4</sup>

(1) A Material Issue of Fact Should Have Prevented Summary Judgment Where the Evidence Showed Swift Possessed, Controlled, and/or Maintained the Stairs

The trial court erred in concluding as a matter of law that Swift owed no duty to Fowler because he was not the landlord and did not own the stairs where she fell. Washington law has long recognized that a *possessor* of premises owes a duty of care to invitees to the premises, adopting the provisions of the *Restatement (Second) of Torts* §§ 343,

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<sup>4</sup> On a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to any material fact, and that, as a matter of law, summary judgment is proper. CR 56(c). The court must consider the evidence and all reasonable inferences from the facts in light most favorable to the non-moving party. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 919, 969 P.2d 75 (1998). Summary judgment is proper “only if reasonable persons could reach only one conclusion from all the evidence.” *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 514, 63 P.3d 153 (2002). “If there are genuine issues of material fact, and reasonable persons might reach different conclusions, the motion should be denied.” *Daniels v. Seattle Seahawks*, 92 Wn. App. 576, 968 P.2d 883 (1998), *review denied*, 137 Wn.2d 1016 (1999). This Court reviews orders on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

343A. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980); *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983).<sup>5</sup> That duty includes an affirmative duty to discover dangerous conditions on the premises. *Id.*

As noted in *Jarr*, a premises possessor is not simply an owner, but *anyone* who is in occupation of the premises with the intent to control it. *Id.* at 327. There, a real estate agent – a person who was obviously not the premises owner – conducting an open house was a possessor of the premises for purposes of §§ 343, 343A. *See also, Ford v. Red Lion Inns*, 67 Wn. App. 766, 840 P.2d 198 (1992), *review denied*, 120 Wn.2d 1029 (1993) (hotel made parking area available to plaintiff's employer; the hotel

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<sup>5</sup> The *Restatement* contemplates a broad understanding of who is a possessor of the premises for purposes of the duty of care because a person has invited others to such premises, thereby assuring such invitees that the premises are, in fact, safe:

One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee. The licensee enters with the understanding that he will take the land as the possessor himself uses it. Therefore such a licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor. On the other hand an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

Comment b to § 343.

was liable for plaintiff's fall on icy lot as plaintiff was invitee of hotel). Title to the premises is not dispositive of the question of whether someone is a possessor of the premises. *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 496, 145 P.3d 1196 (2006); *Anderson v. City of Seattle*, 98 Wn. App. 1013, 1999 WL 1054765 (1999), *review denied*, 141 Wn.2d 1014 (2000). Rather, “[l]iability is imposed on the possessor of land and one acting on behalf of the possessor.” *Gildon*, 158 Wn.2d at 457.

In *Gildon*, a cleaner slipped and fell while working on the common walkway inside the Northgate Mall. 158 Wn.2d at 487. The Supreme Court held that a trial court committed reversible error by dismissing the case on the grounds that the plaintiff did not sue the owner of the mall. *Id.* at 497. Rather, the property management company, Simon Property, could be held liable separately from the owners because it “possessed, maintained, and/or operated” the common area of the mall where the fall occurred. *Id.* at 498.

Importantly, the question of whether an entity is a “possessor” is factually-intensive and is for the trier of fact. *Coleman v. Hoffman*, 115 Wn. App. 853, 64 P.3d 65 (2003); *Mesa v. Spokane World Exposition*, 18 Wn. App. 609, 613, 570 P.2d 157 (1977), *review denied*, 90 Wn.2d 1001 (1978). In *Coleman*, this Court held that questions of fact precluded summary judgment as to whether an apartment manager and a mortgagee

exercised sufficient control to be possessors in a premises liability action. This Court found acts like managerial decision making, making repairs, paying bills, collecting rents, and hiring personnel to be relevant to control. *Id.* at 862-63. *See also, Jarr*, 35 Wn. App. at 326 (real estate agent conducting an open house was possessor); *Jordan v. Nationstar Mortgage, LLC*, 185 Wn.2d 876, 888, 374 P.3d 1195 (2016) (lender's entry of property to change locks rendered it a possessor).

Pursuant to these authorities, the trial court erred by ruling as a matter of law that *only* the property owner or the landlord could owe a duty to protect invitees who used the stairs. Swift offered little evidence to support this erroneous theory, merely relying on traditional landlord tenant rules, *i.e.* that the landlord is responsible for common areas, not the tenant. CP 255-56. However, the facts of this case remove it from this simplistic analysis. Fowler provided ample evidence to show that a question of fact existed as to whether Swift controlled the staircase.

First, like the property management company in *Gildon*, Fowler presented evidence that Swift and his fellow tenants possessed, maintained, and operated the staircase where the fall occurred. Collectively, they exerted managerial decision-making power over the staircase. For example, Swift stated in his deposition that "we hired" the cleaning person who cleaned the common areas, referring to all the tenants

of the building. CP 190. As noted *supra*, his rent was increased from \$400.00 to \$430.00 per month with the hiring of a cleaning person who would clean the stairs. When asked if his rent ever went up, he answered: “Yes, when we had the cleaning person coming.” CP 191. And after the accident, Swift met with Nevy and the other tenants to implement changes to make the stairway safer. They placed signs at the top of the stairs stating they are narrow and installed slip resistant treads on each step. CP 189.<sup>6</sup> These actions showed that Swift had enough control over the stairs to take basic precautions to protect his patients, and he failed to present *any* evidence to the contrary.

Second, Swift – as a tenant on the second story of the building – was in a special position of control over the staircase because he exerted control over its use. The only access to Swift’s office was by the stairs. Swift’s duty extended to his patient’s ascending and descending the steps that were narrower than building codes required. When Fowler approached the building, on the entry door, there was a strong message given on the prominently placed sign to keep quiet as this was a place of healing. Upon entering there was a bench with an area below it at the foot of the stairs for client’s to remove their shoes. Swift observed Fowler take off her shoes downstairs and then he escorted her upstairs. Swift wore

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<sup>6</sup> Pursuant to ER 407, these subsequent remedial measures are admissible to prove a party’s “ownership” or “control” over the premises in question.

socks when he greeted Fowler at the bottom of the stairs, as did his previous patient as she walked from his office to the bottom of the stairs. This evidence of his control over when and how invitees used the staircase showed that Swift possessed the staircase in question.

Finally, Swift was in a special position to know the dangers of the stairs because he knew that his patients, like Fowler, suffered from medical conditions that heightened the staircase's danger. For example, he knew Fowler had MS, having treated her for the condition the past 10 years, and knew that the symptoms of MS are neuropathy, pain, loss of motor function and loss of strength. Most importantly, Swift was aware the stairs were narrower than normal. He was in the best position to understand the dangerousness of the stairs to his invitees, yet he failed to take any precautions to make them safer, despite being able to do so.

This evidence showed that Swift actually possessed, controlled, and/or maintained the staircase in question. Thus, pursuant to *Jarr*, *Gildon*, *Ford*, *supra*, he had a duty to exercise ordinary care for Fowler's safety. At the very least, this evidence when viewed in the light most favorable to Fowler creates a material issue of fact as to whether Swift had control over the staircase. Summary judgment was inappropriate.

- (2) Fowler Created a Material Issue of Fact as to Whether Swift Breached His Duty to Protect Fowler

The grant of summary judgment also constituted error where Fowler presented evidence that Swift breached his duty to exercise reasonable care to protect her. “The duty owed to an invitee is that of reasonable care for the invitee’s personal safety...and the land possessor must exercise reasonable care with respect to conditions on the premises which impose an unreasonable risk of harm.” *Johnson v. State*, 77 Wn. App. 934, 941, 894 P.2d 1366, *review denied*, 127 Wn.2d 1020 (1995). An occupier of premises must exercise care in maintaining premises in a reasonably safe condition. *Raiford v. City of Hoquiam*, 54 Wn. App. 351, 360, 773 P.2d 861 (1989). Breach of a duty owed is generally a question of fact. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Fowler presented ample evidence to show that Swift breached his duty. He failed to warn or take any precautions to protect his medically fragile patients from the slippery stairs. The reasonable precautions he put in place after the accident – traction strips and warning signs – should have been in place before Fowler’s predictable injury. Fowler presented un rebutted expert testimony that the accident would never have occurred if Fowler had been instructed to keep her shoes on. CP 207-08.

This case is analogous to *Miniken v. Carr*, 71 Wn.2d 325, 428 P.2d 716 (1967). There, a client of an attorney fell down basement stairs where

there were two doors, one leading to the restroom and the other to the basement. Both doors were identical, and there were no signs or labels on the doors. *Id.* at 329-30. The Court rejected the attorney's notion that the business invitation did not extend to that bathroom, given the totality of the circumstances. *Id.* at 329-30. The Supreme Court held that the attorney had a duty to the client, even if the client was considered a licensee, to protect the client from such a known danger. *Id.* at 329.<sup>7</sup>

Here, the totality of the circumstances show that Swift breached his duty to protect Fowler from the danger of the stairs. Not only did Swift fail to warn Fowler about the stairs, but he actively encouraged her to traverse the stairs in her stocking feet, despite her medical condition. This gave Fowler an assurance that it was safe to do so. CP 208. A person who gives an assurance of safety must exercise reasonable care in doing so. *Alston v. Blythe*, 88 Wn. App. 26, 36, 943 P.2d 692 (1997) (determining that a driver who waved a pedestrian to cross in front of his vehicle had a duty to use reasonable care to ensure the pedestrian's

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<sup>7</sup> As discussed *supra*, had the injured party in *Miniken* been considered an invitee, as there is no doubt Fowler was in this case, the defendant would have owed a higher duty to discover dangerous conditions and anticipate when invitees may not realize or protect themselves against the danger posed by the condition. *Restatement (Second) of Torts* § 343. Here, Fowler should have anticipated that medically fragile clients traversing out-of-code and "slippery as ice" stairs in their socks could slip and fall. Yet he utterly failed to take any precautions to warn or install any safety measures before Fowler fell.

safety). Here, Fowler presented evidence to show that Swift breached this duty as well.

In sum, material issues of fact supported a claim for liability against Swift for breaching his duty to protect his business invitee from danger. Summary judgment was error, and reversal is warranted.

(3) Summary Judgment as to Finn Was Error Where the Facts Showed that She Was a Sublandlord with a Duty to Ensure the Safety of the Common Areas of the Premises

The trial court also erred in granting summary judgment to Finn. First, to the extent the court relied on its misguided belief that only the owner of the property could be liable, it erred. The record is unclear as to why the trial court granted summary judgment as to Finn. The court made no written or oral findings. The court seemed to hint that its ruling was, at least, partially based on its ruling as to Swift:

Well, I appreciate both parties' arguments and the briefing, and it's certainly an interesting case. The court has looked at this issue before as it involved Mr. Swift and the court granted summary judgment. [Fowler's attorney] is correct that under the standards, which the parties are well aware of and were arguing, that the court has to look at the evidence in a light most favorable to Ms. Fowler and draw all reasonable inferences in Ms. Fowler's favor. The court, though, still going through the arguments in this case is satisfied that summary judgment should be granted.

RP (4/13/18) at 14. As discussed *supra*, the court's mistaken application of the law on premises liability should not have been the basis for summary judgment as to any party.

Additionally, Finn owed a concurrent duty as the sublessor of the property to maintain the common areas in a reasonably safe condition.<sup>8</sup> It is undisputed that Finn leased the property, began using it for commercial purposes in violation of her residential lease, and then orally subleased and/or assigned her interest to other commercial tenants approximately seven months before Fowler's injury.<sup>9</sup> Though she moved out, Finn never produced any evidence to show that she terminated her lease or that she assigned it to any other person until after Fowler was injured. CP 486. Fowler even presented evidence that Finn admitted liability shortly after the fall and admitted that Fowler had "every right to sue [her]." CP 487-88. As a sublessor with an active lease on the property, she had a duty to keep the common areas safe for her subtenants.

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<sup>8</sup> The fact that Swift and Finn may have an overlapping duty in regard to the staircase is inconsequential to this court's decision on whether summary judgment should be reversed. The comparative fault of another party does not relieve any single defendant from liability. RCW 4.22.070; *Travis v. Bohannon*, 128 Wn. App. 231, 242, 115 P.3d 342 (2005) (citing *State v. Jacobsen*, 74 Wn.2d 36, 37, 442 P.2d 629 (1968)). Rather, the jury must evaluate proximate cause and apportion comparative fault to multiple parties. RCW 4.22.070; *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011). Both Finn and Swift had the ability and duty to make the stairs safer, and both failed to do so.

<sup>9</sup> These agreements were entirely oral. Finn offered no documentary evidence to show that she was no longer the primary lessee in privity of contract with the owners of the property. To the extent there were factual disagreements over whether Finn still had an interest in the property as a lessor, summary judgment was inappropriate.

A landlord has a duty to “exercise reasonab[e] care in keeping all common areas reasonably safe from hazards likely to cause injury.” *Geise v. Lee*, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975) (duty to keep common areas of mobile home facility free from accumulations of ice and snow). This includes a duty to inspect for dangerous conditions, “followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee’s] protection under the circumstances.” *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (quoting *Restatement (Second) of Torts* § 343, comment b).

Finn failed, just as Swift failed, to post any warnings or take any precautions to make the stairs safe for business invitees on the property. She failed to inspect and discover that the stairs and handrail were not to code, and she opened the property to business tenants anyway. Not only did she fail to take any precautions to protect business invitees on the premises, but she actively encouraged the no shoe policy that contributed to Fowler’s injury. Finn admitted that when she began using the property for commercial purposes she began the practice of tenants removing their shoes while on the property. CP 512. This created a culture where tenants and their invitees were encouraged to walk in stocking feet and reassured that it was safe to do so. *See Alston, supra*. She knew that some tenants performed medical services and therefore treated invitees who were

susceptible to slip-and-falls, especially on stairs that were “slippery as ice.” Yet she took no steps to discover dangers or protect such patients. Summary judgment was inappropriate given these facts.

Finn argued below that the stairs were an open and obvious danger, and therefore she had no duty to take any precaution to make them safer. CP 374-76. This is plainly not true. A landlord has a duty to protect invitees “even from known or obvious dangers” if the landlord should foresee that invitees might be harmed. *Tincani*, 124 Wn.2d 139; *see also*, *Restatement (Second) of Torts* § 343A. By subleasing the property to other business tenants, several of whom provided medical care to patients, she knew that they would bring invitees like Fowler onto the premises. Finn had a duty to inspect for dangers, like slippery stairs in an environment where invitees were encouraged to walk in socks. Even if the stairs are an open and obvious danger, she should have foreseen that medically fragile invitees like Fowler could slip down the out-of-code stairs.

Importantly, the question of whether a condition is an open and obvious danger is a question of fact for the jury to decide. *Hines v. Neuner*, 42 Wn.2d 116, 121, 253 P.2d 945 (1953) (reversible error to give instruction that tow rope stretched across crosswalk was open and obvious as a matter of law); *Millson v. City of Lynden*, 174 Wn. App. 303, 311,

298 P.3d 141 (2013) (summary judgment is inappropriate where reasonable minds could differ as to whether an offset in a sidewalk was open and obvious). Thus, to the extent reasonable minds could differ, summary judgment on this issue was entirely inappropriate.

In sum, ample evidence created a material issue of fact as to whether Finn breached her duty as a sublessor to maintain the common areas of the premises in a reasonably safe condition to business invitees like Fowler. Summary judgment was inappropriate as to Finn.

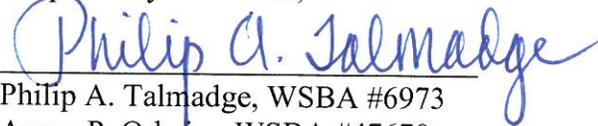
#### F. CONCLUSION

Summary judgment was inappropriate because Swift had a duty of care to Fowler under §§ 343, 343A of the *Restatement* as a possessor of the premises which a trier of fact could find was breached. Swift had a duty to see that his patients could safely access his office. It was reasonably foreseeable that a patient with Fowler's medical conditions combined with narrow steps and the requirement of removing her shoes would slip on the steps that were "slippery as ice." Fowler presented sufficient evidence to defeat summary judgment as to Finn as well. Finn breached her concurrent duty as the sublessor who opened the residential property to business tenants to ensure the common areas were safe.

This Court should grant review and reverse the trial court's orders on summary judgment. Costs on appeal should be awarded to Fowler.

DATED this 27th day of September, 2018.

Respectfully submitted,



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DECLARATION OF SERVICE

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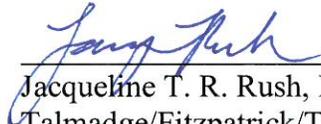
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 27, 2018, at Seattle, Washington.

  
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