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No. 51366-8-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

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.

OPPOSITION BRIEF OF RESPONDENT BRENT SWIFT

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INTRODUCTION

The issue before this Court regarding the Respondent Brent Swift is narrow: Does a commercial tenant who leased office space in a building with other commercial tenants owe a duty of care with respect to shared common areas? The answer, which has been well settled under Washington law, is “no.”

Mr. Swift subleased one upstairs room at a property located in Olympia, Washington, out of which he ran his acupuncture practice. Other tenants also leased rooms at the property for commercial use. The property’s two floors were connected by a central staircase. That staircase was not part of any subtenant’s leasehold; it was a common area that remained within the possession and control of the landlord.

Following an acupuncture session with Mr. Swift, the Petitioner Rebecca Fowler slipped and fell while descending the staircase, sustaining injury. She claims that Mr. Swift owed her a duty to protect against the staircase’s “condition.” But no such duty was owed and there is no evidence of any defect that caused the injury.

As a useful analogy, a commercial tenant leasing one shop in a shopping mall is certainly not deemed to be the possessor of the mall’s hallways, staircases, escalators, and elevators merely because he leased space on the second floor. Those are common areas, and absent some showing of affirmative control or possession to the detriment and exclusion of the landlord, are outside the scope of any duty owed by the tenant. Such is the case here.

On summary judgment, Ms. Fowler failed to present evidence that Mr. Swift rented anything more than his small upstairs office. Nor could she establish that Mr. Swift possessed the staircase or otherwise exerted control over it to the detriment and exclusion of the landlord. Evidence that Mr. Swift provided some “neighborly maintenance” does not establish possession or control. The unavoidable fact is that this stairway was a common area, not legally Mr. Swift’s responsibility.

The trial court correctly recognized this and granted Mr. Swift’s motion for summary judgment, finding that Ms. Fowler had failed to create an issue of fact on duty. Even assuming all factual matters in favor of Ms. Fowler, that decision is supported by the evidence and entirely consistent with established law. The trial court committed no error, and its ruling should be affirmed.

COUNTER-STATEMENT OF THE CASE

The property at issue was purchased by defendants Scott and Patricia Bergford many years before this incident. It was an early 1900s house that was in a somewhat rundown condition at the time of purchase, so the Bergfords invested in significant renovations. As one example, they hired a contractor to refinish the hardwood flooring throughout the house, including the central staircase connecting the two floors. (CP 86 – 87) Upon completing renovations, the Bergfords rented this property to commercial tenants, including Jessica Jensen who ran a law firm there. (CP 86 – 87, 381 – 88) None of these tenants ever complained or indicated that the staircase posed a hazard. (*Id.*)

Main Lease Was with Ms. Finn, Not Mr. Swift – On December 14, 2012, the Bergfords entered into a written residential lease agreement for the property with Rosanne Finn. The agreement stipulated that the property was to be used solely for residential purposes (although previously it had been rented out to a law firm), and it prohibited Ms. Finn from assigning or subletting without the Bergfords' consent. (CP at 95 – 96)

Ms. Finn violated these conditions from the outset: she began running her astrology business out of the property and rented rooms to Jennifer Nevy and Tamy Puvin, who also operated businesses there. (CP 377 – 379) Ms. Finn moved out in February of 2014, and orally transferred the lease to Ms. Nevy. (CP at 378) Rent continued to be paid on a monthly basis, but the checks were now from Ms. Nevy and other individuals to whom the Bergfords had never leased the property. (e.g., CP at 128) Notwithstanding, the Bergfords cashed these checks and did not raise any concerns or objections under the terms of the original lease. (CP at 422 – 25, 430 – 31) Indeed, Ms. Nevy recalls the Bergfords coming to the property on at least a few occasions, and believes that that they were aware that the property was being used for commercial purposes. (CP at 340 – 341)

Ms. Nevy Subleased to Mr. Swift, Who Paid Rent to Ms. Nevy – Ms. Nevy subleased rooms to various healthcare providers. Brent Swift was one of those subtenants, and he rented a single upstairs room, out of which he ran his acupuncture business. (CP 51 - 52) Mr. Swift paid rent directly to Ms. Nevy. (*Id.*) At the time, he had no knowledge of Ms. Finn, the

Bergfords, or the original lease. (*Id.*) His rent was \$400 per month, but in later months he paid \$430 to help Ms. Nevy cover the cost of a cleaning service, which cleaned the staircase and other common areas of the property.¹ (CP 191) The other subtenants also paid extra to offset that expense. (*Id.*)

The scope of Mr. Swift's sublease solely encompassed the upstairs room; it did not include any other portion of the house, including the central staircase. (CP 51 – 52) Indeed, this staircase qualified as a common area, as it was freely usable by the other subtenants and their invitees. Mr. Swift was not responsible for this staircase. (*Id.*)

Facts Surrounding the Accident – On November 19, 2014, Ms. Fowler presented for an acupuncture appointment with Mr. Swift. (CP 195 – 96) Ms. Fowler, who suffered from multiple sclerosis, had been one of Mr. Swift's clients for several years, but this was her first appointment at this property. (*Id.*) Upon arriving, Ms. Fowler removed her shoes and placed them in a downstairs cubby by the entry door. She kept her socks on. (CP 197) She claims to have believed that the removal of one's shoes upon entry was a policy imposed by Mr. Swift. (CP 196) Yet she never asked Mr. Swift about this, nor did Mr. Swift instruct her to remove her shoes upon entry. (CP at 197 – 98) This, in fact, was not his policy. Mr. Swift did not require his clients to remove their shoes upon entering the premises. (CP 56) He did, however, ask that his clients remove their shoes prior to entering his upstairs office for treatment, and had set up a

¹ Mr. Swift assumed that the cleaning service was hired by Ms. Nevy. (CP at 190 – 91)

designated place immediately next to his upstairs office door for that exact purpose. (*Id.*)

After the appointment was concluded, Ms. Fowler began to descend the stairs in socks, when she slipped and fell on the smooth, hardwood surface. She claims to have sustained injury from this fall. (CP 197)

Lawsuit and Summary Judgment – Ms. Fowler filed suit in Thurston County Superior Court on October 28, 2016, alleging negligence against defendants Mr. Swift (sublessee), Ms. Finn (original tenant), and the Bergfords (owners of the property and original landlords) under a theory of premise liability. (CP 4 – 7) After some discovery, Ms. Nevy was added as a defendant on October 6, 2017. (CP 292)

Mr. Swift filed a motion for summary judgment on July 27, 2017, arguing that he did not have any duty to maintain or protect against any alleged defects associated with the common area staircase. (CP 53 – 63) The Trial Court granted Ms. Fowler’s request for a continuance, affording her additional time to conduct discovery and search for evidence that could create an issue of material fact. But, no such evidence was uncovered.

The Court granted Mr. Swift’s motion on December 1, 2017, dismissing all claims against him with prejudice. (CP 316 – 18) The plaintiff now appeals this ruling.

SUMMARY OF ARGUMENT

The existence of a legal duty is a question of law. Washington law recognizes that a commercial tenant owes a duty of care to invitees to maintain his premises and guard against defects. Ordinarily, however, that duty does not extend beyond the tenant's leased property. Nor does it extend to common areas, which remain within the possession and control of the landlord.

Here, there were several subtenants who had rented office space at the property. Mr. Swift was one such subtenant, and he leased a single upstairs room, out of which he ran his acupuncture business. The scope of Mr. Swift's lease is uncontroverted. It did not encompass any other part of the property, including the central staircase at issue.

Ms. Fowler apparently agrees with this, as she does not argue that Mr. Swift owed a duty with respect to the staircase under traditional principals of landlord/tenant law. Instead, Ms. Fowler argues that Mr. Swift was the "possessor" for the entire property (the whole house!) merely because he leased one upstairs room as office space there. That theory is obviously flawed—each individual business that leases space in an office building does not become a "possessor" of the entire office building. Likewise, each tenant who leased office space at 1516 Fourth Avenue did not become a "possessor" of the entire property.

Moreover, Ms. Fowler presents no evidence that Mr. Swift sought to "control" the staircase, or the downstairs living room, or the front walk and porch. These were all common areas, available for use by all the subtenants. The fact that Mr. Swift and the other subtenants occasionally

paid a little extra in rent to offset the cost of a cleaning service does not rise to the level of control necessary for the imposition of a duty.

In granting defendant Mr. Swift's motion for summary judgment, the trial court correctly recognized that he did not owe a duty with respect to the property's common area staircase. There was no error, and this ruling should be affirmed.

ARGUMENT

A. Standard of review.

The standard for summary judgment is whether there exists a genuine issue of material fact on the record as it stands. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). All inferences must be viewed in a light most favorable to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989). A defendant's motion for summary judgment must be granted if the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 225 (citing *Celotex*, 477 U.S. at 322). "In such a situation, there can be no 'genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Id.* On appeal, an order granting summary judgment is reviewed *de novo*. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080, 1085 (2015).

As a preliminary matter, petitioner Ms. Fowler misleadingly represents that the trial court “rul[ed] as a matter of law that *only* the property owner or the landlord could owe a duty to protect invitees who used the stairs.” (Pet. Br. at 11) But the trial court made no such overarching ruling. Rather, the court ruled that Ms. Fowler had failed to present sufficient evidence to create an issue of fact on whether Mr. Swift owed a duty with respect to the staircase, which was not part of his leasehold. In the Court’s own words: “Based upon the way the tenant situation was described with Mr. Swift renting the one room in this home, I don’t see the duty, and so I am going to grant summary judgment.” (RP [12/1/2017] at 27)

The trial court was careful and deliberate in reaching this decision—granting Ms. Fowler a continuance to afford her every opportunity to search for relevant evidence in discovery; holding two separate oral arguments; and even taking a lunch break to re-review one of the cases on which Ms. Fowler relied before issuing its final ruling.² (*Id.* at 26 – 27) No error was made, and summary judgment in favor of Mr. Swift should be affirmed.

B. Traditional tenets of property law place the staircase outside the scope of any duty owed by Mr. Swift.

The uncontroverted evidence shows that Mr. Swift rented only one upstairs room, and that his leasehold did not include any other part of the

² Indeed, at the outset of the second oral argument on December 1, 2017, the court even took the opportunity to inform the parties, on the record, that it had re-reviewed all of the briefing and materials, stating as follows: “And so I just wanted to let the parties know, I am familiar with the briefing, I’ve looked at the case law, and I’m ready to hear your argument.” (RP [12/1/2017] at 5:16 – 19)

building, including the staircase at issue. (CP 51 – 52.) Ms. Fowler has not contested these facts on appeal.

“The general rule in the United States is that where an owner divides his premises and rents certain parts to various tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is *his duty* to exercise reasonable care and maintain these common areas in a safe condition.” *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054, 1056 (1975) (emphasis added). The tenant, in contrast, has no duty to maintain common areas as these are not part of the tenant’s leasehold. *Id.* Indeed, when using common areas, a tenant or subtenant is considered to be an invitee of the landlord—the same designation as a guest. *See Mucsi v. Graoch Assocs. Ltd. P’ship No. 12*, 144 Wn.2d 847, 855, 31 P.3d 684, 687 (2001). The duty a landlord owes with respect to common areas applies to both commercial and residential leases. *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 601, 564 P.2d 1137, 1142 (1977) (in a commercial lease, landlord had a duty to repair parts of property he had retained control over); WPI 130.02.³

Manifestly, the staircase here qualifies as a common area. By the time of the incident: (1) the property at 1516 Fourth Avenue had been renovated by the Bergfords, including a hardwood staircase for many years without incident;⁴ (2) the property had been leased to various tenants, lastly to Ms. Finn;⁵ (3) the leasehold had been subdivided by Ms.

³ See also W. Stoebeck & J. Weaver, *Landlord liability—Nonresidential tenancies*, 16A Wash. Prac., Tort Law And Practice § 18:13 (4th ed.).

⁴ (CP 86 – 87)

⁵ (CP 95 – 96)

Finn for various tenants, including Ms. Nevy, for their commercial use;⁶ (4) Ms. Nevy had taken over as the payor of the lease after Ms. Finn moved out;⁷ and (5) Ms. Nevy had subleased rooms to other tenants, including Mr. Swift, for commercial use.⁸ The staircase was not leased to any sublessee—it was a common area in the building that was freely useable by all tenants and their invitees. Accordingly, Mr. Swift did not owe the plaintiff any duty with respect to the staircase. That duty belonged exclusively to the landlord under the general rule. *See Geise*, 84 Wn.2d at 868.

Based on her briefing, Ms. Fowler has apparently taken the position that Ms. Finn was the landlord, as she had entered into the written residential lease with the Bergfords for the entire property, and was the original sublessor who subdivided the property and leased rooms out to specific tenants. Ms. Fowler claims that, as landlord, Ms. Finn was responsible for the building’s common areas, including the staircase. Thus, with that argument, Ms. Fowler should logically agree that Mr. Swift had no duty as to the staircase.⁹

Although Ms. Fowler claims (without any supporting legal citation) that Ms. Finn and Mr. Swift may have “overlapping duties”¹⁰ with respect to the staircase, there is no Washington case where a tenant that rented **just one room** was found to share duplicative duties with the

⁶ (CP 378)

⁷ (CP 378)

⁸ (CP 51 – 52)

⁹ Mr. Swift does not take any position on Ms. Fowler’s case against Ms. Finn, but the Court should recognize that Ms. Fowler’s arguments against Ms. Finn are inherently inconstant with those against Mr. Swift.

¹⁰ (Pet’r. Br. at FN 8)

landlord over the building's common areas. It is also curious and dubious that Ms. Fowler relies on traditional principles of landlord/tenant law (including the *Geise* case cited above) in her position against Ms. Finn, but rejects the applicability of those same principles in her position against Mr. Swift.

Mr. Swift leased a single upstairs room—nothing more. (CP 51 – 52) That alone, defines the scope of his duties under general principles of property law. And that duty did not extend to the common area staircase.

C. Mr. Swift was not the “possessor” of the staircase.

Mr. Swift was not a “possessor” of the staircase and there is no evidence of “intent to control it” under the Restatement (Second) Torts § 343. Washington has adopted that section of the Restatement, which provides as follows:

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

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

See Jarr v. Seeco Const. Co., 35 Wn. App. 324, 326, 666 P.2d 392, 394 (1983) (applying Restatement (Second) Torts § 343). A possessor of land is:

- (a) a person who is in occupation of the land with intent to control it or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 655, 869 P.2d 1014, 1017 (1994) (citing Restatement (Second) of Torts § 328E (1965)).

At its core, Ms. Fowler’s argument is that Mr. Swift was the possessor (with the requisite “intent to control) of the entire property, including the staircase, merely because he leased one upstairs room as office space. That argument is, of course, faulty—each individual business that leases space in a mall, for example, does not become a “possessor” of the entire mall. *See e.g. Ingersoll*, 123 Wn.2d at 655 (holding that not even a maintenance company hired by a shopping mall was a possessor of the mall’s common areas). Nor were the subtenants under Ms. Finn and Ms. Nevy “possessors” of the entire property at 1516 Fourth Avenue merely because they leased rooms in the building. There is no written lease that states this. There is no witness who says such an oral sublease was made. And the law does not support Ms. Fowler’s position.

On that note, the case law on which Ms. Fowler relies is, indeed, inapposite. She first cites to *Jarr*, 35 Wn. App. 324. There, a prospective purchaser was injured when visiting a condominium that was under construction and sued the realtor and construction company. *Id.* at 326. The trial court dismissed the realtor on summary judgment, but the Court of Appeals reversed, finding that an issue of fact existed as to whether or not the relator was the legal “possessor” of the property at the relevant

time. *Id.* at 329 – 30. In support of this decision, the Court specifically pointed to a discovery response from the construction company, which stated that “on the day of the accident [realtor] was in complete charge of the open house and had the responsibility to control prospective purchaser viewing the property and [relator] was in control of the site and building as they related to the showing of certain units.” *Id.* at 329.

Mr. Swift, however, is not a realtor. And neither the Bergfords nor Ms. Finn/Ms. Nevy ever gave him control over the entire house for any purpose, such as to stage and sale the property. Nor is there any evidence that he had exclusive control over the property on the date in question, or had any specific responsibility with respect to the staircase. *Jarr* is a case with peculiar facts. Those facts are not even close to being reflected here.

Ms. Fowler next relies on *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 145 P.3d 1196 (2006). There, a cleaner hired by a pretzel shop at a mall slipped and injured herself while cleaning one of the mall’s common areas. *Id.* at 477. The trial court dismissed the case because the plaintiff had only sued the property management company and not the owner of the mall. *Id.* at 490 – 92. The Supreme Court reversed on the grounds that the property management company, which had an ownership interest in the mall, could be held separately liable if it was found that it legally possessed the mall. *Id.* at 497, FN 4.

Again, *Gildon* is nothing like the present case. Mr. Swift’s acupuncture clinic is not a functional equivalent to the property management company with an ownership interest in the entire mall (or house). Indeed, if anything, his clinic and office sublease is most like the

pretzel shop, which the plaintiff in *Gildon* did not sue, of course, and did not allege to be the “possessor” of the mall’s common areas.

Ms. Fowler’s reliance on *Miniken v. Carr*, 71 Wn.2d 325, 428 P.2d 716 (1967), is also misplaced. In, *Miniken*, an attorney’s client brought suit for injuries he sustained when he fell down a flight of poorly marked stairs at the attorney’s office. *Miniken*, 71 Wn. 2d at 325-26. Our Supreme Court upheld the verdict for the plaintiff, finding that the defendant attorney owed a duty to warn his client of the danger. *Id.* at 330-331. But *Miniken* is not analogous because the defendant attorney was undisputedly responsible for the entire house, including the staircase, where the fall occurred. *Id.* at 325-26. Indeed, the attorney was the only possessor of the entire building, which was solely dedicated to his law practice. *Id.* at 326.

This is in stark contrast to the present situation. Here, Mr. Swift only rented the small upstairs office, which fact is not contradicted by any evidence. He did not lease the entire building and was not the sole occupant of the property.

Finally, Ms. Fowler cites to *Coleman v. Hoffman*, 115 Wn. App. 853, 64 P.3d 65 (2003), which she claims stands for the proposition that whether an entity is a “possessor” is inherently a question of fact of the jury. Yet the *Coleman* Court actually affirmed the dismissal of one defendant on summary judgment, finding the mere fact that it collected rent to be insufficient to create an issue of fact on possession.¹¹ *Id.* at 861 – 63. Irony aside, and following with the pattern, *Coleman* is nothing like

¹¹ Moreover, both *Coulston* and *Hoffstatter*, *infra*, affirmed summary judgment, finding that the plaintiff had failed to present sufficient evidence to create an issue of fact on possession.

the present case. There, an invitee was injured after falling through defective railing at an apartment building and the chief issue was whether or not mortgagees with property interests in that building qualified as possessors. *Id.* at 856 – 57. Notably, and unlike Ms. Fowler’s claim here, there was no allegation that any of the building’s tenants were possessors of the common areas. *Id.*

None of these cases are factually analogous. And none of them lend support to Ms. Fowler’s novel theory that a subtenant who leased one room at a building is deemed to be a legal possessor of the entire building.

D. The evidence on which Ms. Fowler relies does not create an issue of fact.

Helping to clean the landlord’s property, and thus being a good neighbor, does not create a duty as to the common areas. Contrary to Ms. Fowler’s claim, Mr. Swift and the other subtenants did not collectively exert “managerial decision-making power” over the staircase, to the exclusion of the landlord, merely because they occasionally paid a slightly higher rent for a cleaning service. That is a leap the law does not support in any way.

Indeed, the 2004 case of *Coulson v. Huntsman Packaging Prod. Inc.*, 121 Wn. App. 941, 92 P.3d 278 (2004), is right on point. There, the plaintiff crashed his car into a tree after failing to obey a stop sign. *Id.* at 942 – 43. The plaintiff sued a nearby corporation, claiming that it had failed to maintain the trees at the intersection, which had obstructed the driver’s view of the sign. *Id.* Although the corporation did not own the strip of property where the stop sign was located, the plaintiff argued that

the corporation was its “possessor” because it had been paying a contractor to actively maintain the strip for over a decade. *Id.* 947. The Court of Appeals rejected this argument, finding that the corporation did not become the possessor of the strip merely because it had engaged in “neighborly maintenance.” *Id.* at 948. There was no evidence showing that the corporation had “manifested its intent to control the planting strip” to the detriment and exclusion of the actual owner. *Id.*

Similarly, in *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 20 P.3d 1003 (2001), a pedestrian tripped on uneven bricks in a parking strip, which had become dislodged over time by tree roots. *Id.* at 598. She sued several defendants, including a landlord who owned adjacent property. *Id.* at 599. The Court of Appeals affirmed the dismissal of the landlord on summary judgment, finding the mere fact that he had occasionally replaced a dislodged brick in the parking strip to be insufficient to give rise to a duty of care. *Id.* at 602 – 03.

As in *Coulson* and *Hoffstatter*, Mr. Swift and the other subtenants did not manifest any “intent to control” the staircase and other common areas to the detriment and exclusion of the landlord, merely by helping to pay for their cleaning. Any degree of maintenance Mr. Swift exercised over the staircase is far less than what the *Coulson* Court characterized as “neighborly maintenance,” and certainly not enough to impose any duty on Mr. Swift. *Coulson*, 121 Wn. App. at 948.

Ms. Fowler also argues that Mr. Swift and the other subtenants demonstrated possession over the staircase because, after the incident,

they placed traction strips on the surface of the stairs, along with a cautionary sign.

First and foremost, this is evidence of a subsequent remedial measure and inadmissible under ER 407. “A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.” *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842, 846 (1986). Such remedial evidence would not be offered to show just “control,” as Ms. Fowler claims, but rather would be offered for the improper purpose to show the existence of a preexisting duty and breach thereof. Indeed, Ms. Fowler makes this exact argument on page 14 of her brief: “The reasonable precautions [Mr. Swift] put in place after the accident—traction strips and warning signs—should have been in place before Fowler’s predictable injury.” (Pet’r. Br. at 14.) ER 407 exists to proscribe exactly this type of argument.¹²

Regardless, such evidence is irrelevant as a matter of timing: even taken at face value, these subsequent safety precautions cannot in any way show a manifest intent by the subtenants to control the staircase *at the time of the incident* - - only afterward, if at all. *See Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 406, 725 P.2d 1008, 1015 (1986) (“Traditional reasons for excluding post-accident changes are that such changes are not relevant to alleged tort-feasor’s objective conduct and perception before the accident, but rather to his subjective beliefs which are not pertinent to the

¹² *See Tegland*, § 407.1 Purpose and history of Rule 407, 5A Wash. Prac., Evidence Law and Practice § 407.1 (6th ed.) (discussing the history and purpose of ER 407).

question of negligence and that a policy exists which encourages subsequent repairs.”)

Even if this evidence were considered, it still does not rise to the level of “control” necessary to create an issue of fact. Again, *Coulson* and *Hoffstatter* are instructive. In *Coulson*, the Court held that the company’s regular maintenance of the planting strip was not the type of conduct that “manifested its intent to control the planting strip to the detriment or exclusion” of the owner. *Coulson*, 121 Wn. App. at 948. Likewise, in *Hoffstatter*, the Court held that the landlord’s occasional replacement of dislodged bricks in an adjacent parking strip was not enough to give rise to a duty of care. *Hoffstatter*, 105 Wn. App. at 602

The subsequent remedial measures taken by the tenants here are much the same. It is not as though they hired contractors to make structural modifications to the staircase to the detriment and exclusion of the landlord. They merely placed traction strips and a warning sign.¹³

These are superficial measures that do not demonstrate an intent to control the staircase “to the detriment and exclusion” of the landlord. *Coulson*, 121 Wn. App. at 948. The evidence on which Ms. Fowler relies is far from enough to create an issue of fact sufficient to have defeated Mr. Swift’s motion for summary judgment, and the trial court’s ruling should be affirmed.

E. Ms. Fowler’s theory that Swift owed a duty because he was in a “special position of control” is unsupported by fact and law.

¹³ As discussed in § G *infra*, the stairs were not even defective. The placement of traction strips and a warning sign are the type of gratuitous, reactionary measures that any conscientious person would take when someone fell and hurt themselves.

Ms. Fowler presented no proper evidence below to support any allegation that Mr. Swift’s acupuncture care caused her to fall. Grasping at straws, she now argues that Mr. Swift owed a duty because he was “in a special position of control” due to his status as a healthcare provider.¹⁴ It is a subtle attempt to assert that Mr. Swift somehow knows more about the dangers of wool socks on hardwood floors than his patient does, or that he somehow knows more about how her condition (MS) affects her than she knows herself. This makes no sense, of course, and Ms. Fowler cites to no authority in support of this novel theory. Moreover, Ms. Fowler did not raise any “special relationship” or “medical negligence” claim below. She may not now raise it on appeal.

If such a claim could be brought, it would necessarily be one for medical negligence arising out of Mr. Swift’s duty to Ms. Fowler as a health care provider—the only “special relationship” that he had with her. But Ms. Fowler knows she cannot make out such a claim; that is why she attempts to conflate it with her theory of premise liability. The law prohibits her from doing so.

Any claim arising out healthcare is governed exclusively by RCW 7.70. “This section sweeps broadly,” and encompasses all claims, “whether based on tort, contract, or otherwise.” *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335, 338 (1999). Ms. Fowler never alleged a claim for medical negligence in the Complaint. (CP 4 – 7, 292 – 95) Notwithstanding, to have survived summary judgment on a medical

¹⁴ Ms. Fowler makes very little effort to support this theory with citation to the record and applicable authority, which is, perhaps, telling. Regardless, this theory fails.

negligence claim, Ms. Fowler needed to present competent medical expert testimony establishing the elements of duty, breach, and causation. RCW 7.70.030; *see also McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 77 P.2d 1171 (1989); *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1098 (2001); *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). That would necessarily have required her to produce an acupuncturist expert or other qualified medical expert, to testify that, under the applicable standard of care, Mr. Swift should have taken precautions with the staircase based on Ms. Fowler's symptoms and/or the effect of his treatment.

But Ms. Fowler did not produce any such expert testimony, and, as a consequence, cannot implicate Mr. Swift's role as her healthcare provider in her allegations of fault against him.

F. Mr. Swift did not gratuitously assume a duty by making an "assurance of safety."

In no way did Mr. Swift gratuitously assume a duty of care by making an "assurance of safety." Even when viewed in a light most favorable to Ms. Fowler, none of the facts she raises¹⁵ show any actual representation or statement by Mr. Swift regarding the staircase. Although Ms. Fowler may have *assumed* that she was supposed to remove her shoes at the bottom of the stairs, that was a conclusion she reached on her own. There is no evidence Mr. Swift instructed her to do so. (CP 195 – 98)

¹⁵ Ms. Fowler points to the followings: (1) when she was approaching the building, she saw a sign "to keep quiet as this was a place of healing"; (2) there was bench by the front door with a place below it shoes; (3) Swift observed her removing her shoes; and (4) Swift greeted her at the bottom of the stairs wearing only socks.

Indeed, he did not; nor did he even require his clients to remove their shoes upon entering the property. (CP 51 – 52) He did, however, require that his clients remove their shoes prior to entering his upstairs office for treatment, and had set up a designated place immediately next to his office door for this exact purpose. (*Id.*) Ms. Fowler could have clarified Mr. Swift’s shoe policy by simply asking, but she did not.

Nonetheless, Ms. Fowler outlandishly claims that these facts demonstrate that Mr. Swift “actively encouraged her to traverse the stairs in her stocking feet,” and that this was tantamount to an assurance of safety under *Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997). But, as the trial court (after taking a lunch break to re-read that case) concluded, *Alston* is inapposite. (RP [12/1/2017] at 26 – 27.)

In that case, the plaintiff wished to cross a street that did not have a clearly marked crosswalk. *Alston*, 88 Wn. App. at 30-21. The driver of an oncoming truck realized the plaintiff’s intent, stopped, and waived her across the street. *Id.* The plaintiff relied on driver’s assurance that it was safe to cross and was hit by a vehicle traveling the opposite direction. *Id.* Although the truck driver did not owe the plaintiff any duty to assist her in safely crossing the street, the plaintiff argued that he had gratuitously assumed such a duty by representing to her that it was safe to cross. *Id.* at 36 – 37. The Court determined that such a duty could exist under the law, as “a person ‘who undertakes, albeit gratuitously, to render aid to or warn

a person in danger is required by our law to exercise reasonable care in his efforts, however commendable.” *Id.* at 36.¹⁶

Unlike the truck driver in *Alston*, who waved the pedestrian across the street, Mr. Swift did not make any affirmative representation, gesture, or statement—Ms. Fowler’s argument of an “assurance of safety” merely because Mr. Swift came down the stairs to greet her in socks, is nonsensical and objectively false.

Indeed, Washington law recognizes that an assurance of safety cannot be implied by silence and inaction. For example, in *Lee v. Willis Enterprises, Inc.*, 194 Wn. App. 394, 377 P.3d 244 (2016), the plaintiff, Lee, and the defendant, Fletcher were attempting to fix a complex commercial fan. *Id.* at 397 – 98. The defendant, Fletcher, decided that the fan may just be jammed and could be fixed by “hitting it.” *Id.* To do so, he picked up a screwdriver, and announced that he would “tap” the fan. *Id.* Lee said nothing in response, but aimed his flashlight at the fan. *Id.* Fletcher then proceeded to “tap” the fan causing an electrical arc blast, resulting in permanent hearing loss for Lee. *Id.* Citing to *Alston*, Fletcher argued, as an affirmative defense, that Lee had impliedly assured him that it was safe to “tap” the fan because he did not voice an objection. *Id.* at 403 – 405. This Court disagreed, **finding that “silence and inaction cannot give rise to an implied assurance of safety.”** *Id.* at 404 (emphasis added). The Court stated as follows:

Lee responds that each case cited by Fletcher involved affirmative conduct where here, Fletcher admitted that Lee did

¹⁶ Mr. Swift neither rendered aid, nor made any warning. This alone defeats the plaintiff’s argument.

not encourage him or affirmatively request the use of the screwdriver in the VFD. Fletcher testified that Lee did not say or do anything aside from continuing to hold the light in response to his suggestion. **Lee argues that there is no authority that holds silence and inaction can give rise to an implied assurance of safety. Lee is correct.** Each cited case involved either the plaintiff's contributory negligence or the reasonableness of the party's express assurance of safety.

Id. (emphasis added)

As in *Lee*, Mr. Swift did not make any affirmative representation or assurance of safety. He did not instruct Ms. Fowler to remove her shoes before coming up the stairs to his office. (CP 196 – 97.) And he did not make any statement or representation about the staircase. (*Id.*) There are no facts to suggest that he gratuitously assumed a duty of care. The trial court properly followed the law on this issue.

G. Assuming *arguendo* that a duty did exist, there was no breach, or even a dangerous condition to warn of.

Even assuming that Mr. Swift owed a duty with respect to the common area staircase (which he did not), Ms. Fowler still cannot demonstrate that any such duty was breached.

The trial court noted the cause of the fall was undisputed - - Ms. Fowler fell because of wearing socks, not because of any defect that required a warning. (*See* RP [12/1/2017] at 10 – 12) The slightly narrow runs of the stairs was not the cause. (*Id.*) Indeed, Ms. Fowler's own human factors expert, Dr. Gary Sloan, attributed the cause of the fall only to wool socks on the wood stairs, which he claims created a condition that was "at least as slippery as ice." (CP 206)

A wood floor, common to all our experience, is not a defect. And, the slipperiness of socks, again common to all our experience from childhood¹⁷ up, is not a defect. This alone should be dispositive, and certainly supports the trial court's decision.

For the sake of being thorough, however, we will take this one step further and assume that the wood paneling of the stairs was unreasonably slippery and defective. Even still, no issue of fact exists because Ms. Fowler cannot demonstrate actual or constructive notice of any dangerous condition. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 189, 127 P.3d 5, 8 (2005) (“Generally, a business owner is liable to an invitee for an unsafe condition on the premises if the condition was ‘caused by the proprietor or his employees, or the proprietor [had] actual or constructive notice of the unsafe condition.’”) (internal citation omitted). There is no evidence in the record that Mr. Swift or anyone else believed that the wooden stairs were dangerous or abnormally slippery.¹⁸ The Bergfords did not have such a belief and none of their tenants at the property ever reported a slip and fall or otherwise voiced complaints about the stairs. (CP 87) Nor did Ms. Finn have any concerns about the stairs. Indeed, she believed that they were “an ordinary set of wooden stairs with no defects or problems” and she “never heard about anyone slipping on

¹⁷ What child does not know the joy of sliding on wood or tile floors in socks? Everyone knows that socks can be slippery. (And fun!)

¹⁸ Although Mr. Swift testified during his deposition that he felt the steps were a little narrower than normal, that, according to Ms. Fowler's human factors expert, was not the but for cause of her fall. (CP 206 – 07) Rather, he claims that it was socks on the wood floor that created the “slippery as ice” condition. (*Id.*) There is no evidence or testimony demonstrating that Mr. Swift believed that wearing socks on the wood stairs was dangerous, or that the wood was abnormal, defective, or unusually slippery in any way.

the stairs while [she] was there or at any time prior to Rebecca Fowler’s accident.” (CP 378) Even Jessica Jensen—an attorney who leased the property before Ms. Finn and operated a law practice there—believed that the stairs were safe, testifying through declaration as follows:

- (1) That she believed the wooden stairs were normal, in “excellent condition” and “perfectly safe”;
- (2) That she and her staff “all walked (and often ran) up and down the stairs many times a day, quite often carrying files or other materials” without difficulty;¹⁹
- (3) And in her five plus years at the property, she never observed anyone experiencing difficulty with the stairs, nor did she receive any complaints about them.

(CP 381 – 88)²⁰

Neither Mr. Swift nor anyone else believed that the stairs were dangerous or defective. And indeed, they were not. The trial court was correct in granting summary judgment.

CONCLUSION

Mr. Swift subleased only one upstairs room at the property. He did not rent the staircase. He did not possess or exert control over the staircase to the detriment and exclusion of the landlord. And he did not gratuitously assume a duty over the staircase by making an “assurance of safety.” The

¹⁹ This included a short statured paralegal, “who typically wore 2” of 3” inch high heels to work.” Ms. Jensen’s declaration states that she observed this person “go up and down the stairs all the time in her high heels, often carrying files and other materials, and to my observation she never experienced any difficulties whatsoever.” (CP 384)

²⁰ The testimony of Ms. Jensen is especially compelling given that she is a disinterested party completely removed from this litigation.

trial Court's decision to grant summary judgment in favor of Mr. Swift was careful, reasoned, and entirely consistent with the law.

There was no error.

DATED this 29th day of October, 2018, at Seattle, Washington.

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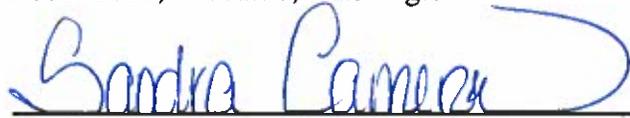
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That on the date signed below, I caused to be served in the manner indicated a true and accurate copy of the foregoing, **OPPOSITION BRIEF OF RESPONDENT**, by the method indicated below and addressed to the following:

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Signed this 29th day of October 2018, at Seattle, Washington.



Sandra Cameron, Legal Assistant for
D. Jeffrey Burnham

JOHNSON GRAFFE KEAY MONIZ & WICK

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