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

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.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Brent Swift and Rosanne Finn's briefs only highlight the errors made by the trial court in dismissing Rebecca Fowler's case on summary judgment. Swift ignores settled common law principles in arguing that he owed no duty of care to his patients in regard to the staircase, the only means of receiving visitors in his office located on the second floor of a residential building. The evidence shows that Swift possessed, maintained, and operated the staircase in question. Swift also ignores the significant issues of fact which should have precluded summary judgment below.

Likewise, Finn raises purely factual challenges to liability. She argues that the stairs were not dangerous despite expert testimony to the contrary, that she assigned her interest in the property despite providing no documentary proof, and that her inaction was not a proximate cause, classic fact questions for the jury to determine. Summary judgment should be reversed as to both Swift and Finn and the case put to a jury.

B. REPLY ON STATEMENT OF THE CASE

Significant issues of fact predominated in this case, and summary judgment should be reversed. Importantly, "the evidence and all reasonable inferences from the facts" must be viewed in light most favorable to Fowler as the non-moving party below. *Ravenscroft v. Wash.*

Water Power Co., 136 Wn.2d 911, 919, 969 P.2d 75 (1998). The key factual disputes which should have precluded summary judgment are discussed in detail below.

C. ARGUMENT

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

As discussed in Fowler’s opening brief, the trial court erred in concluding as a matter of law that Swift owed no duty to Fowler because he was not the landlord or the owner of the staircase where Fowler was injured. 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, 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). That duty includes an affirmative duty to discover dangerous conditions on the premises. *Id.* Importantly, “[t]he possessor need not be the owner of the land” where the injury occurred. *Id.*

Swift fails to distinguish these authorities in any meaningful way. For example, he distinguishes *Jarr*, a case involving a realtor who possessed a property for purposes of an open house, by arguing that Swift “is not a realtor” and *Jarr* is limited to its “peculiar facts.” Swift br. at 13.

Not true, nothing in *Jarr* limits its holding to realtors. It is based on generally applicable, common law premises liability and the *Restatement (Second) of Torts*. 35 Wn. App. at 326-27. The *Restatement* says that all possessors owe a duty to protect their invitees from harm and “to see that the premises are safe for the reception of the visitor.” *Id.* (quoting *Restatement (Second) of Torts* § 343, Comment b) (emphasis added). Here, Swift’s duty extended to the stairs which he possessed, maintained, and controlled for the purposes of receiving visitors in his upstairs office. As discussed below, Fowler presented ample evidence to show that Swift breached that duty to Fowler, his invitee.

Swift also misstates Fowler’s argument in his brief, writing that Fowler believes Swift “was the ‘possessor’ for the entire property (the whole house!)” Swift br. at 6. This is pure hyperbole. This is not a case where Fowler sued a tenant with an upstairs office for an injury that occurred in the backyard. Rather, as discussed in Fowler’s opening brief, the evidence showed that Swift possessed, controlled, and maintained *the staircase* at issue.

Fowler presented ample evidence that Swift possessed the staircase, evidence which must be viewed in the light most favorable to Fowler for summary judgment purposes. He collectively managed the staircase with the other tenants, as evidenced by their agreement to hire a

cleaning person to clean common areas of the house, including the stairs. CP 190-91. After the fall, he again took part in the collective decision to install traction slips and warning signs on the stairs. CP 189.¹

The evidence also showed that Swift exerted control over the premises in other ways, beyond just his office upstairs. For example, the tenants maintained a sign outside the front door of the building which stated that the entire house was a place of healing. CP 196. Guests were instructed to keep quiet throughout the house to respect Swift's acupuncture practice. *Id.* Swift also routinely escorted his business invitees up and down the stairs and did so without his shoes on, thus encouraging his medically fragile patients to traverse the stairs in their stocking feet. CP 196-97.² Swift admits that he watched Fowler remove her shoes at the bottom of the stairs on the day she was injured. Swift br. at 20 n.15. And she placed her shoes in a shoe cubby the tenants maintained at the bottom of the stairs. CP 193. There is no evidence in

¹ As discussed in Fowler's opening brief, these subsequent remedial measures are specifically admissible pursuant to ER 407 to prove "ownership" or "control." Swift argues that these subsequent measures only show his ability to control the stairs "after[]" the injury. Swift br. at 17. Again, this is an impermissible interpretation of the facts on summary judgment. Fowler is entitled to the most favorable view of the facts, including the reasonable inference that Swift could have installed the safety measures before the fall took place, especially where he knew the stairs were out of code yet invited his medically fragile business guests to traverse them.

² Swift chose not to escort Fowler down the stairs on the day she fell, even though he knew her MS caused numbness and lack of strength in her feet, and she informed him she was suffering from anemia and felt very fatigued the day she fell. CP 196.

the record showing that he instructed her to do anything different. This evidence of Swift's power to maintain the stairs and his control over how invitees used the staircase created a material issue of fact over whether he possessed staircase in question.

The *only* evidence Swift offers to show that he had no control over the stairs is his own self-serving, conclusory declaration that he "did not have any responsibility for any space other than [his] office upstairs." Swift br. at 4 (citing CP 51-52 (Declaration of Brent Swift)). This is insufficient. On summary judgment, a trial court properly "disregard[s] a self-serving declaration that states only conclusions and not facts that would be admissible evidence." *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495 (9th Cir. 2015). Swift's declaration states a legal conclusion, i.e. that he had no duty over the stairs, and is therefore inadmissible. *See McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 762, 344 P.3d 661 (2015) ("The existence of a legal duty is a question of law for the court.").

Because the evidence shows that Swift possessed the staircase and Swift failed to present any admissible evidence to the contrary, summary judgment should be reversed. At the very least, the 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. *See, e.g., Mesa v. Spokane World Exposition*, 18 Wn. App.

609, 613-14, 570 P.2d 157 (1977), *review denied*, 90 Wn.2d 1001 (1978) (reversing summary judgment dismissal because the factual question of whether a person has control over property was for the jury).

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

Summary judgment was also error where Fowler presented evidence that Swift breached his duty to exercise reasonable care to protect her. Swift argues that no breach occurred as a matter of law. Swift br. at 23-25. But this ignores the reality that the breach of a duty owed is a classic question of fact. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Here, a question of fact remains as to whether Swift breached his duty of care to discover and protect his invitees from harm and “to see that the premises are safe for the reception of the visitor.” *Restatement (Second) of Torts* § 343. 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. And Fowler presented unrebutted expert testimony that the accident would never have occurred if Fowler had been instructed to keep her shoes on. CP 207-08.

Swift largely points to conflicting evidence, including the declaration of a former tenant, an attorney who testified that she felt the

stairs were safe. Swift br. at 25. This testimony directly conflicted with that of Fowler's unrebutted expert who opined that the stairs were out-of-code and especially dangerous when traversed in socks, as was Swift's practice. CP 199-243. Again, all the evidence must be weighed in Fowler's favor and to the extent reasonable minds could differ, summary judgment was inappropriate.

The testimony of a former tenant is also irrelevant where Swift owed a particular duty to his medically fragile invitees. 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. Swift tries to handwave this fact by claiming Fowler cites no authority for this argument and by raising irrelevant medical malpractice law. Swift br. at 18-20. In doing so, Swift ignores longstanding rules of premises liability cited in Fowler's opening brief.

According to the *Restatement*:

[An invitee] 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 (citing in Appellant’s br. at 9 n.5) (emphasis added). Here, the “purpose[] of the invitation” was to treat Fowler for her MS. By opening his doors to fragile patients, Swift owed a duty to take extra care to look out for their safety. Yet he failed to take any precautions with regard to the stairs which he knew were out of code, and he encouraged his patients to remove their shoes – an “activit[y]” which “affect[s the premises’] condition” by making the hardwood stairs “slippery as ice.” *Id.*³ This is precisely why medical facilities make great efforts to ensure their premises are safe. But Swift threw caution to the wind and opened his medical practice in a residential home without so much as even a written lease agreement, let alone reasonable precautions to make the premises safe. Because a jury could find that his lack of precaution was a breach of his duty of care, summary judgment should be reversed.

(3) Significant Issues of Fact Should Have Precluded Summary Judgment as to Finn

As discussed in Fowler’s opening brief, a landlord has a concurrent duty to “exercise reasonabl[e] care in keeping all common areas reasonably safe from hazards likely to cause injury.” *Geise v. Lee*, 84

³ Swift’s attempt to downplay the danger of the stairs is not well taken. By arguing that even a child “know[s] the joy...[a]nd fun” of sliding in socks, Swift ignores the symptoms of MS and the fragile and anemic state Fowler was in the day she was injured, a fact which she told Swift before leaving his office. Swift br. at 24 n.17. It also downplays the significant trauma Fowler suffered in the fall, breaking both her tibia and fibula. A child’s mindset in sliding on hardwood floors is simply irrelevant to this case.

Wn.2d 866, 871, 529 P.2d 1054 (1975). 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 tries to escape her liability – despite admitting to Fowler immediately after the fall that she had “every right to sue [her],” CP 487-88 – first by arguing that the stairs were not a known danger. Finn br. at 8-9. This argument misstates well-settled standards of premises liability. Finn owed a duty to inspect for dangerous conditions and take affirmative action to make them safe for invitees “under the circumstances.” *Id.* Despite the stairs being out-of-code and “slippery as ice” when traversed in socks, Finn did nothing to make them safer for medically fragile guests who Finn caused to be invited onto the premises by subleasing the home to medical practitioners like Swift. Under these circumstances, a jury could find that she breached her duty of care, which she admitted herself in the immediate aftermath of the fall. But perhaps most importantly, whether a particular condition presents an open and obvious danger is a question of fact for the jury. *Hines v. Neuner*, 42 Wn.2d 116, 121, 253 P.2d 945 (1953); *Millson v. City of Lynden*, 174 Wn. App. 303, 311, 298

P.3d 141 (2013). By arguing otherwise, Finn only highlights the error of the trial court in granting summary judgment.

Second, Finn argues, without any documentary proof, that she owed no duty because she assigned her interest in the property. Finn br. at 9-11. That is a disputed question of fact. The lease agreements at issue in this case 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. However, the undisputed evidence did show that: (1) Finn was the only party with a written lease; (2) Finn began using the premises for business purposes in violation of her written lease; (3) Finn rented the property out to other tenants for business uses; (4) Finn began the practice of having tenants and guests remove their shoes while inside the premises; (5) Finn never took precautions to make the stairs safer despite opening the premises to other tenants and their business invitees for her own commercial gain; (6) Finn never terminated her lease when she moved out; and (7) Finn admitted liability immediately following Fowler's fall. *See* Appellant's br. at 3-4, 17-19. The factual disagreements over whether Finn still had an interest in the property as a lessor should have prevented summary judgment.

Finally, Finn argues that her conduct cannot be considered the proximate cause of Fowler's injuries as a matter of law. She is wrong. In

Washington, proximate cause is (yet again) a question of fact. Proximate cause “is usually a jury question and is generally not susceptible to summary judgment.” *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011) (where the evidence is conflicting, cause in fact is to be resolved by the trier of fact). Here, a reasonable jury could find that Finn’s decision to open the residence to other tenants and their business invitees without taking any reasonable safety precautions contributed to Fowler’s injuries. This occurred less than one year after Finn moved out without ever terminating her lease or executing any written assignment whatsoever.

Moreover, by subleasing the property to other business tenants, several of whom provided medical care to patients, she knew that they would bring medically fragile invitees like Fowler onto the premises. Finn had a duty to inspect for dangers, such as the stairs which were “slippery as ice” in an environment where Finn encouraged invitees to walk in socks, yet she failed to do so. *See, e.g., Geise*, 84 Wn.2d at 871 (landlord owes a duty to keep common areas of mobile home facility free from accumulations of ice and snow). Summary judgment should be reversed, so a jury can properly apportion fault as it sees fit.

(4) Fowler Has a Right to Apportion Fault to Multiple Parties and Argue in the Alternative

Swift is wrong to argue that Fowler's arguments should be discounted for asserting that both Swift and Finn owed her a duty of care as a possessor and landlord respectively. Swift br. at 10 (contending that Fowler's arguments are inconsistent). As discussed in Fowler's opening brief, the fact that Swift and Finn may have an overlapping duty in regard to the staircase is inconsequential for this Court's decision on whether summary judgment should be reversed. Appellant's br. at 17 n.8. 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*, 171 Wn.2d at 611.

Mesa is on point in this regard. There, the Court of Appeals reversed summary judgment dismissal of a case based on an injury that occurred in a staircase used to enter an exit an Expo center. 18 Wn. App. at 611. The evidence showed that at least three parties arguably had control over the staircase, and Division III reversed summary judgment as to all three defendants. *Id.* at 613-14. The court explained that "[t]he fact

that others had control of the premises and did not make them safe for the public...would not preclude [one possessor's] liability.”). That is exactly the case here, where Swift and Finn try to shirk responsibility by pointing the blame elsewhere. Both had a duty to make the stairs safer, and both failed to do so.

Moreover, a litigant is entitled to “argue in the alternative without waiving an argument.” *Cedell v. Farmers Ins. Co. of Wash.*, 157 Wn. App. 267, 276 n.5, 237 P.3d 309, 314 (2010), *aff'd in part, rev'd in part on other grounds*, 176 Wn.2d 686, 295 P.3d 239 (2013). The fact that a jury *may* ultimately decide that only one party is at fault is inconsequential on summary judgment. Just as was the case in *Mesa*, Fowler is entitled to argue that both Swift and Finn breached a duty of care to protect her from the obvious harm presented by the out-of-code stairs traversed by medically fragile patients. Swift’s argument on this point only highlights that summary judgment was inappropriate where a jury should have been allowed to determine the proper apportionment of fault. RCW 4.22.070.

D. CONCLUSION

This Court should reverse the trial court’s orders on summary judgment. Costs on appeal should be awarded to Fowler.

DATED this 6th day of December, 2018.

Respectfully submitted,



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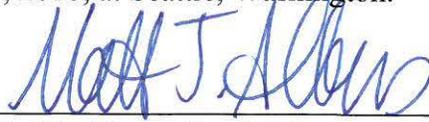
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 26, 2018, at Seattle, Washington.



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