

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY

No. 28879-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

ANDREA BARTLETT STROM
Appellants/Plaintiffs,

v.

RED LION HOTELS
Defendants/Respondents

Brief of Appellants

Dustin Deissner
Washington State Bar No. 10784
VAN CAMP & DEISSNER
1707 W. Broadway
Spokane, WA 99201
(509) 326-6935
Attorney for Appellants

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Assignments of Error

Assignment of Error No. 1:

The Court below erred in granting summary judgment and dismissing Plaintiff's complaint.

Issues Pertaining to Assignments of Error

Issue No. 1:

Does evidence of an irregularity in carpet in a commercial, heavily trafficked area, sufficient to catch a woman's heel and cause her to fall, present a question of fact as to an actionable dangerous condition?

Issue No. 2:

Does the fact that such an irregularity bears marks of repeated vacuuming, present a question of fact as to whether it should have been known to the owner?

STATEMENT OF THE CASE:

FACTS

ANDREA STROM was working for Kelly Services hosting a seminar at the RED LION in Spokane. [CP 53] As she was leaving the seminar, talking to a RED LION employee, the high heel of her shoe caught in a crack covered by a loose piece of carpet [CP 53]: STROM fell and was badly injured. [CP 53]

Ms. STROM testifies that in looking at the area where she fell, on close inspection she could see the carpet was raised up slightly [CP 53] over a small crack in the floor beneath. She was wearing high heels as were many other women at the hotel. [CP 53] The defect was not readily apparent to someone walking on the carpet. [CP 53] But from the distance a person would be if they were using a vacuum cleaner the defect was evident. [CP 54] There were wear marks on the carpet, different from the surrounding carpet that looked like they

came from the carpet being vacuumed numerous times over the raised up portion, so it wore differently than the flat section.

[CP 54] She states the flaw was high enough that in her experience, anyone using a hand vacuum and running it over the flaw, would have noticed the irregular carpet. [CP 54]

Photos [CP 26 - 34] show that the carpet is heavily patterned and it is very difficult, even in the photos, to see the raised portion. The Defendant's Risk Management Director testified that the wrinkle in the carpet, while invisible to the naked eye, is less than the width of a pen. [CP 22] She states it was caused by a crack in the underlying concrete, which was about 1/2 inch high. [CP 23]

PROCEDURE

Strom brought this action against the Defendant on 11/4/2008. [CP 1] Defendant moved for summary judgment [CP 8] which the Court granted.[CP 70] A timely appeal was filed. [CP 73]

ARGUMENT

To establish negligence for slip and fall , a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The common law classification of persons entering upon real property determines the scope of the duty of care owed by the owner or occupier of that property. *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847, 854, 31 P.3d 684 (2001). Ms. STROM was clearly a business invitee, hosting a seminar at the hotel.

A landlord has an affirmative obligation to maintain common areas in a reasonably safe condition for a tenant or its guest. *Iwai v. State*, 129 Wn.2d 84, 91, 915 P.2d 1089 (1996). 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 (1975). A tenant is:

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.

Mucsi v. Graoch Assocs. Ltd. P'ship No. 12 at 855.

1. Dangerous Condition

In this case we have a small wrinkle in a carpet, over a crack, just big enough to catch a woman's heel and cause her to fall. Is this a 'dangerous condition' as defined in the case law?

Hoffstatter v. City of Seattle, 105 Wash.App. 596, 600, 20 P.3d 1003 (2001) held that a parking strip containing a tree surrounded by bricks that had buckled was not unreasonably dangerous as a matter of law. But that was because the bricks

were obvious, and their uneven surface, which was caused by tree roots dislodging them, was a common condition in a landscaped area. Further, pedestrians can be expected to pay closer attention while crossing a landscaped parking strip than while walking on a sidewalk. *Hoffstatter*, 105 Wash.App. at 601, 20 P.3d 1003.

Similarly *Wilson v. City of Seattle*, 146 Wn.App. 737, 743, 194 P.3d 997 (2008) involved a pedestrian tripping on a manhole cover: the court held that manholes in parking strips are common, and the cover was open and obvious.

A municipality has a duty to maintain its parking strips in a reasonably safe condition. *Fletcher v. City of Aberdeen*, 54 Wn.2d 174, 177, 338 P.2d 743 (1959). What constitutes a reasonably safe condition on a parking strip is not the same as it is for a sidewalk because a sidewalk's purpose is mainly pedestrian use, while a parking strip frequently contains utility poles and meters, fire hydrants, trees, grass, and other ornamentation. *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 600, 20 P.3d 1003 (2001). The trial court in *Hoffstatter* held that a parking strip containing a tree surrounded by bricks that had buckled was not unreasonably dangerous as a matter of law. This court affirmed. Our opinion in *Hoffstatter* supports the trial

court's ruling granting summary judgment in this case. There, we reasoned that the bricks were obvious, and their uneven surface, which was caused by tree roots dislodging them, was a common condition in a landscaped area. *Hoffstatter*, 105 Wn. App. at 601. Moreover, pedestrians can be expected to pay closer attention while crossing a landscaped parking strip than while walking on a sidewalk. *Hoffstatter*, 105 Wn. App. at 601. Under those circumstances, this court held that the trial court properly granted summary judgment on the issue whether the bricked parking strip was unreasonably dangerous.

Neither case addresses a “nearly invisible’ defect in a carpeted walkway that is sufficient to catch a heel and cause a fall. Such a defect is unreasonably dangerous where large numbers of people are expected to be walking, many wearing heels. This is a question of fact under Restatement (Second) of Torts § 343 (1965)(see *McMann v. Benton County, Angeles Park Communities, Ltd.*, 88 Wn.App. 737, 741, 946 P.2d 1183 (1997)) which states:

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, [the possessor]
(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.

Kinney v. Space Needle Corp., 121 Wn. App. 242, 85 P.3d 918

(2004). There is no 'bright line' for how great a defect is
required. Is 1/4 inch too little or 1/2 inch sufficient? The
answer is that the trier of fact must determine, based on the
circumstances, if the danger is unreasonable.

2. Knowledge

A landlord is generally not liable unless he knows or
should have known of the dangerous condition. *Tincani v.*
Inland Empire Zoological Soc'y, 124 Wash.2d 121, 127-28,
875 P.2d 621 (1994). However, when an unsafe condition is
created by a landowner, the requirement for notice is
inapplicable. *Iwai v. State*, 129 Wn.2d 84 at 102. 131 Wn. App.
183. *Fredrickson v. Bertolino's*, 131 Wn. App. 183, 127 P.3d 5
(2005) states:

¶ 12 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. ... [Emphasis Mine]

¶ 13 Reasonable care requires a landowner 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*, 124 Wn.2d at 139 (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 343, cmt. b). Constructive notice arises where the condition " has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Ingersoll*, 123 Wn.2d at 652 (alteration in original) (quoting *Smith*, 13 Wn.2d at 580).(fn1) Ordinarily, it is a question of fact for the jury whether, under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care.

The record shows that the Hotel should have inspected for this defect. The photos attached to Defendant's materials [CP 26 - 32] and Ms. STROM's description [CP 53] show enough of a flaw in the carpet that it should have been obvious to anyone vacuuming or cleaning the carpet.

A jury could infer that any flaw in a carpeted, apparently

smooth floor poses a tripping hazard when people are walking over the area, their attention diverted by the surrounding activities as is normal in a hotel lobby.

Pat Stapleton, Defendant's Risk Manager, herself states [CP 26] that the lobby was remodeled in 2001 with a new planter installed and work on done on the concrete floor. After Ms. Strom's accident she says the carpet was removed and there was a small crack. However under these circumstances even a small crack is all it takes; guests of the hotel are encouraged to treat the lobby as a safe environment where they do not need to take more than minimal care to avoid tripping hazards. Guests wearing heels are particularly susceptible, and the hotel surely is aware some guests wear heels. Ms. Stapleton says the area is traveled daily by hundreds of people and if the condition had existed for any time, it would have been noticed: but her own testimony, that it was a crack in the concrete, that the carpet over it was irregular by 1/2 inch, demonstrates that the defect

probably was there for some time: a jury could infer that it should have been seen by employees had they been looking for tripping hazards.

Ms. Stapleton suggests the crack could have occurred the day before the accident. However the facts that exist should be given to the jury: the jury can decide if that type of defect, in a concrete floor with carpet installed over it, could have simply come into existence the day before. The existence of this defect is uniquely within the knowledge of the Defendant. In such cases the jury should be entitled to hear the evidence, listen to cross-examination, and decide for themselves if the speaker is telling the truth.

Finally and most important, the area where Ms. STROM tripped is visibly worn differently than the surrounding carpet. Whether from vacuuming or use, such wear takes time and should have been noticed by employees.

The facts and all reasonable inferences from the facts are

construed in favor of the nonmoving parties. This court may not weigh the evidence or determine the truth of the matter.

Snohomish County v. Anderson, 124 Wn.2d 834, 843, 881 P.2d 240 (1994).

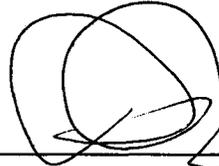
The only question is whether there is a genuine issue for trial, and then only if the court concludes that reasonable persons would reach but one conclusion based upon the facts and reasonable inferences therefrom. But where material facts are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment. *Mich. Nat'l Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438 (1986); *Felsman v. Kessler*, 2 Wn. App. 493, 496-97, 468 P.2d 691 (1970)(where material facts in an affidavit are particularly within the knowledge of the moving party, it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying).

CONCLUSION

For these reasons this Court should conclude that a jury could find the nature of the dangerous condition is such that it should have been seen, and that it was foreseeably dangerous.

Summary judgment should be reversed and the matter remanded for trial.

July 9, 2010

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal stroke at the bottom.

Dustin Deissner #10784

CERTIFICATE OF SERVICE

DUSTIN DEISSNER certifies upon penalty of perjury:

I have on this date served the foregoing document upon
the following parties by the following means:

TO:	BY:
Mark Dean Law Offices of Mark Dean 999 Third Avenue Ste. 2510 Seattle WA 98104	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: 866-604- 3579 <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery

July 11, 2010



A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line extending to the right.