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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 32748-5-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

KATHLEEN FEY,

Appellant/Plaintiff,

vs.

**CORPORATION OF GONZAGA UNIVERSITY, a
corporation; STEVEN AND TAMARA MCCOLLUM,
a married couple,**

Defendants/Respondents.

Spokane County No. 2013-02-02745-8

APPELLANT'S REPLY BRIEF

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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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RULES

RAP 10.3. 6

I. OBJECTION TO FORM OF RESPONDENT'S BRIEF

Respondent's brief does not comply with RAP 10.3(b), which requires that the Respondent's brief should conform to RAP 10.3(a) and that it must "answer the brief of the appellant." Respondent's brief ignores Appellant's brief and introduces an alternative organization that has no reference to Appellant's assignments of error. Respondent's failure to adhere to RAP 10.3(b) results in unnecessary confusion and is an attempt to muddy the water on appeal; therefore, Appellant objects.

In an effort to maintain clarity, Appellant will first identify the arguments made by Respondent that answer the assignments of error in Appellant's opening brief, if any, and reply to them; then, Appellant will address Respondent's independent arguments.

II. ARGUMENT

A. The trial court erred when it construed the evidence and all reasonable inferences in the light most favorable to the moving party in order to determine that there was no genuine issue of material fact requiring trial.

Respondent addresses the first two assignments of error together; therefore, Appellant will reply to them together in section B, below.

B. The trial court erred when it concluded that it was entitled to proceed as the trier of fact with respect to a summary judgment motion.

Respondent makes little argument in response to the first two assignments of error other than to make a perfunctory denial. This statement is located on pages 7-8 of Respondent's Brief:

"[Ms. Fey] is critical of what she perceived to be the trial court construing the facts on summary judgment in the light most favorable to the moving party (i.e., Gonzaga) and "evaluat[ing] the evidence as the trier of fact pursuant to a motion for summary judgment." *Id.* at pgs. 6, 20-11. ***Ms. Fey provides no factual support for either of those assertions.*** Her argument seems to be that because the trial court judge found there was no genuine issue of material fact precluding summary judgment existed, the judge somehow misapprehended her role on summary judgment under CR 56. ***In fact, the trial court expressly construed all inferences in Ms. Fey's favor,*** and indicated correctly that if a genuine issue of material fact had existed, the case would be submitted to a jury (CP 217).

Respondent's Brief, pgs. 7-8.

There is little here that requires a reply; however, it is worth noting that, contrary to Respondent's argument, Ms. Fey provided a great deal of factual evidence for both assignments of error. That information is contained on pages 8-9 of the Opening Brief with respect to Argument A, and on pages 10-11 of the Opening Brief with respect to Argument B.

Further, it is also worth noting that the trial court did *not* expressly construe all inferences in Ms. Fey's favor, as argued by Respondent. Rather, the trial court recited the standard for how inferences ought to be construed on page 2 of its opinion, but it did not, at any point, discuss whether it was construing inferences, nor how it did so. (CP 216.)

It is clear from the opinion, however, that the trial court did, in fact, draw inferences from the testimony that is specifically identified on pages 3 and 4 of its opinion. (CP 217-218.) It unquestionably resolved that testimony in favor of the Respondent over the express argument of Ms. Fey objecting to such an interpretation. (CP 61-66.) This is particularly troubling when the meaning of testimony in question is Ms. Fey's own testimony.

Further, the trial court noted that “[w]here competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact.” (CP 216, citing *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn.App. 453, 457-458 (2013).) Here, it is apparent that not only did the trial court fail to construe all evidence and reasonable inferences in the light most favorable to the nonmoving party as required by well-settled law, but even where it could be argued that competing inferences may be drawn from the evidence, the trial court resolved competition, again, *in favor of the moving party*, contrary to the authority recited in the first part of its opinion.

Ms. Fey's theory of the case has consistently been that she did not see the step that caused her fall and that *not seeing* the step was the cause of her fall. Respondent argues that because Ms. Fey answered the deposition question, “So, what do you think caused this accident?” with the answer,

“I have no idea. I didn’t *see* the step. I don’t know,” (*emphasis added*), the only reasonable inference is that Ms. Fey had no memory of what happened *at all*, and, much like in cases where the plaintiff has memory loss or amnesia, no cause of action can possibly be sustained. (This argument will be addressed more fully later in this brief.)

Appellant, on the other hand, argues that the reasonable inference to be made from her answer is that she cannot identify the specific quality or attribute of the stair that caused her fall. When asked what caused her fall, she responds that she doesn’t know, because she *did not see the step* – the clear implication is that, whatever might be more specifically identified *about* the step, the step was the cause of her fall.

Clearly, the reasonable inference to be made in light of the contents of the complaint, the rest of the deposition from which this statement is taken, and the contents of Ms. Fey’s affidavit, is that Ms. Fey was referencing her inability to provide detail about the step as requested by the question, not confessing to total amnesia with respect to the entire event. Therefore, it is not reasonable to conclude that these various inferences are truly in competition in light of all the evidence presented, but were that to be the conclusion, a jury trial would yet be required and summary judgment was inappropriate.

C. The trial court erred when it refused to consider evidence based on the conclusion that the plaintiff's reference to the absence of a handrail was "a new legal theory" alleged for the first time in response to a motion for summary judgment.

Respondent does not make any specific response to Ms. Fey's arguments regarding this assignment of error other than to reiterate its argument that Ms. Fey is prevented from testifying about the handrail or her recollection of how she experienced her fall because she responded to the deposition question, "So, what do you think caused this accident?" with the answer, "I have no idea. I didn't see the step. I don't know." Respondent cites to *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) for the proposition that: "[w]hen a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."

Even were we to assume that Ms. Fey's testimony is properly interpreted as broadly as Respondent argues, it still does not contradict any previous testimony. It is unclear what deposition testimony was given by Ms. Fey that could prevent her from testifying to the absence of a handrail to assist her in catching herself when she fell. It is also unclear what deposition testimony given by Ms. Fey could prevent her from describing

the floor on which she fell or the physical sensations she experienced when she fell.

Respondent argues most forcefully that Ms. Fey is prevented from testifying that there was no available handrail for her to catch herself because it would have contradicted her deposition testimony; however, Ms. Fey specifically testified in her deposition that there was no handrail or banister:

Q: All right. Can you recall – we’ll take a look at the photos again. When you look at 2-D – and if you remember, fine, if you don’t, fine – were you using anything like a banister or a stair rail or a wall or anything as you were going over the landing to go down the X stairway that day, or were you walking, not relying on a rail or a banister or anything like that?

A. I know that coming down the main stairway I was holding onto the banister. As I recall, when you get to the bottom there’s no banister as you turn the corner.

Q. On the landing?

A. Yes.

(CP 183.)

It remains unexplained how Ms. Fey’s testimony in her affidavit that there was no banister or handrail could possibly contradict her deposition testimony that there was no banister or handrail.

D. The trial court abused its discretion when it denied Ms. Fey's motion for reconsideration based on an incorrect recitation of the record.

Respondent does not acknowledge this assignment of error nor does it respond to it in any fashion; therefore, no reply can reasonably be made. It must be concluded that Respondent concedes this issue.

1. Ms. Fey properly showed that a dangerous condition caused her fall.

Respondent argues on appeal that Ms. Fey did not know what caused her fall and never attributed it to any condition on the property, and therefore, she has not met her burden to show a prima facie case for negligence.

In doing so, Respondent first begins by drawing an analogy between the facts of this case and the facts of *Marshall v. Bally's Pacwest, Inc.*, 94 Wash.App. 372, 972 P.2d 475 (Div. 2, 1999), wherein the plaintiff developed amnesia as a result of her fall and had no memory of the accident. That is clearly not on point. Ms. Fey filed a detailed complaint, she underwent a thorough deposition, and she submitted a comprehensive affidavit to the Court. This is clearly not a reasonable application of logic to the comparison of these cases. Ms. Fey has not lost her memory. Her use of the phrase, "I don't know," (which might, at worst, be described as an incomplete, confusing, or perhaps clumsy answer to a single question

in a comprehensive deposition) is clearly accompanied by a great deal of information explaining her response and confirming Ms. Fey's accurate memory. In fact, Respondent has never, on occasion, disputed any of the facts alleged by Ms. Fey, and it can show no basis for its allegation that her memory is somehow incomplete or inaccurate.

Respondent next references *Mason v. United States*, 2015 WL 541432 (Feb. 10, 2015 W.D. Wash. 2015), a case wherein a woman fell on or near an unmarked metal cover. This case is similarly not on point. The plaintiff in *Mason* did not know what caused her fall and *speculated* that she must have slipped on the metal cover. She *assumed* that was the case because she landed on the metal cover when she fell.

Here, Ms. Fey clearly and repeatedly testifies that it was the stair that caused her fall, and she testifies that she fell on the stair because she did not see it. Ms. Fey can clearly state why she fell on the stair (she did not see it), why she could not see the stair (poor fading natural light), and why she could not catch herself (no handrail or banister). Most importantly, unlike the plaintiff in *Mason*, Ms. Fey *never* speculates or draws conjecture about her fall. At no point did she say that her fall 'must have been' caused by the stair or that she 'assumes' it was caused by the stair. When she is asked for specific details about the stair that she cannot provide, she responds, "I have no idea. I didn't *see* the step. I don't

know.” (Emphasis added.) This is evidence that Ms. Fey, unlike the plaintiff in *Mason*, is not willing to speculate beyond what she actually remembers.

2. Ms. Fey is not required to offer proof that Respondent was actually aware of the dangerous condition.

As Respondent acknowledges in its brief, a plaintiff must establish that the “defendant had, or should have had, knowledge of the dangerous condition in time to warn the plaintiff of the danger.” *Respondent’s Brief*, pg. 11. In this instance, the lighting conditions and the absence of the handrail/bannister are all conditions that were known to the Respondent at the time of the incident. The premises were open for an event, which was being managed by employees. It would indeed be strange for Respondent to claim that its employees were unaware of the lighting or, stranger still, that Respondent had no knowledge as to whether it had installed a handrail. In any case, Ms. Fey is not required to prove that Respondent actually knew the conditions were unsafe if she can show that it should have known the conditions were unsafe. Generally, handrails and banisters are installed as a safety measure because it is easy for any person to fall down stairs. Artificial lighting is also provided inside buildings where there is commonly insufficient natural light, particularly in areas where it is easy to fall, like on a stairwell. It is so obvious as to be

common knowledge that stairs require handrails and sufficient lighting to be safe. Ms. Fey need not prove that Respondent knew that stairs without railings or lighting were unsafe, because if they didn't, they should have. It is obvious.

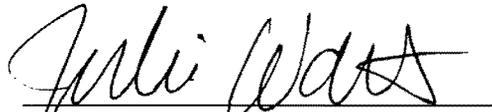
Landlords are responsible for ensuring the safety of premises even when it is apparent that they are unsafe if it is likely that an invitee will encounter the danger anyway. Ms. Fey argued *Sjogren v. Properties of the Pacific Northwest*, 118 Wn.App. 144, 75 P.3d 592 (2003) as authority in her response to Respondent's motion for summary judgment. In *Sjogren*, the injured party visited her daughter's apartment building, which she had previously visited as many as ten times. *Id* at 147. When she started down the stairs, the stairwell was lit by the open door of her daughter's apartment, but when her daughter closed the door, there was no artificial lighting in the darkened stairwell. *Id*. She continued down the stairs and fell. *Id*. On appeal, it was found that summary judgment was inappropriate because a "reasonable juror could conclude that the landlord had reason to expect that under these circumstances... [one] would elect the advantages of continuing down the stairs against the apparent risk of doing so." *Id* at 149. The *Sjogren* court noted that in these circumstances, property owners have a duty to protect guests from known and obvious

dangers if the landlord should anticipate the harm despite the knowledge or obviousness. *Id.*

III. CONCLUSION

Respondent failed to demonstrate the absence of a genuine issue of material fact requiring trial. Because the trial court improperly evaluated the evidence in several critical ways, this Court should reverse the trial court's order granting summary judgment and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 20th day of April, 2015.

A handwritten signature in black ink, appearing to read "Julie C. Watts", written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2015, the undersigned caused a true and correct copy of the foregoing document to be served by the method indicated below to the following parties:

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