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FEBRUARY 17, 2015
Court of Appeals
Division III
State of Washington

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 OPENING BRIEF

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

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I. ASSIGNMENTS OF ERROR

The trial court erred when it:

- 1) granted summary judgment in favor of the defendant; and
- 2) denied the plaintiff's motion for reconsideration.

II. ISSUES PRESENTED

- A. Whether the trial court erred when it construed all evidence and 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.
- B. Whether 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.
- C. Whether 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.
- D. Whether the trial court erred when it denied plaintiff's motion for reconsideration based on incorrect recitation of the record.

III. STATEMENT OF THE CASE

On August 28, 2010, Ms. Fey attended the wedding of her granddaughter at the Bozarth Mansion (the "Mansion") in Spokane,

Washington. (CP 4, 156.)

One of the distinctive architectural features of the Mansion is a grand staircase. The stairwell is primarily lit by a large east-facing window, which provides natural light. (CP 5, 212.) The staircase contains two flights of stairs that are separated by two landings, and the two landings are separated from each other by a single step. (CP 5, 212)

Ms. Fey arrived early, at about 3:00 PM, and ascended the staircase so that she could help her granddaughter dress for the ceremony. (CP 211.) Ms. Fey then descended the staircase in order to go outside with the bridal party and have pictures taken. (CP 160, 167, 211.) Ms. Fey then remained outside until the ceremony. (CP 211.)

After the ceremony, between 5:30 PM and 6:00 PM, Ms. Fey ascended the staircase to retrieve her purse. (CP 162, 211.) The staircase was still lit by natural light through the east-facing window, but the sun setting in the west was significantly dimmer than it had been three hours earlier. (CP 212.) The low evening rays cast deceptive shadows on the staircase, making the stairs difficult to see. (CP 5.) As Ms. Fey descended the staircase, she turned right at the landing to continue down the second stairway. (CP 76, 212.) She suddenly felt that her foot was not on a flat surface and reached for a bannister or handrail and found nothing because the handrail stopped at the end of the previous stairway. (CP 212.) Ms.

Fey, who had not noticed the single step between the landings, lost her footing and fell. (CP 212.)

Ms. Fey sustained a substantial ankle injury as a result of her fall and required a lengthy hospital stay and immediate surgery to repair the injured site. (CP 5.) Additionally, she required a follow-up surgical procedure in an effort to aid her recovery. (CP 5.) Ms. Fey has also undergone extensive physical therapy throughout the lengthy recovery process. (CP 5). It is possible Ms. Fey will never walk with 100% capability again. (CP 6.)

On July 10, 2013, Ms. Fey filed a complaint alleging liability for negligence against the Corporation of Gonzaga University (“Gonzaga”) and Steven & Tamara McCollum. (CP 3-9.) Ms. Fey claimed that she had been an invitee guest of Steven and Tamara McCollum at the Mansion, which is owned and operated by Gonzaga, and that she had been injured due to the negligence of the defendants. (CP 3-4.)

On January 24, 2014, Gonzaga took Ms. Fey’s deposition. (CP 101-198.) In that deposition, Ms. Fey provided the following testimony:

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 banister or a stair rail or a wall or anything as you were going over the landing to go down the 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.)

On March 18, 2014, Gonzaga filed a motion for summary judgment. (CP 52.) On May 12, 2014, the trial court granted Gonzaga's motion. (CP 215-219.)

In its written decision, the trial court noted that "[t]he Court can only grant a motion such as this if there appears to be no evidence to support the Plaintiff's claim." (CP 218). Nevertheless, the trial court concluded that "Plaintiff has proven no more than she tripped and fell and sustained certain injuries in consequence thereof," and that "something more must be proved." (CP 217.) The trial court also concluded that Ms. Fey filed her affidavit "in an effort to change her position from the original claim filed," by using the information about the lack of a handrail to introduce a "new theory." (CP 218.) The trial court determined that Ms. Fey failed to provide the "opposing party with notice of the general nature of the plaintiff's claims," even though Ms. Fey had mentioned the lack of a handrail in her deposition. (CP 183.)

Ms. Fey filed a motion for reconsideration on May 22, 2014. (CP

220.) In her memorandum, Ms. Fey argued that she had provided testimony in her affidavit and in her deposition about the poor lighting conditions, and that therefore “the question of whether the landing/stairwell at Bozarth Mansion was a condition creating an unreasonable risk of harm to invitees is an issue of material fact.” (CP 222.) Ms. Fey also noted that her claim was based on the allegation that the stairwell and landing at the Mansion constituted an unsafe condition that caused her to fall and sustain injuries. (CP 224.) She noted that information about the handrail is simply a fact that relates to and describes the unsafe condition. (CP 223.) She argued that the absence of a handrail is not a new claim or a new theory of recovery but rather a piece of evidence that supports her theory – that the poorly lit staircase was an unsafe condition that constituted negligence by Gonzaga. (CP 224)

Despite the fact that Ms. Fey provided the trial court with citation to the plaintiff’s statements about the handrail in her affidavit and in her deposition (both of which had been filed in the record), and despite the trial court’s previous recognition in its written decision on summary judgment that the plaintiff *had* made statements in her affidavit about a handrail, the trial court denied the motion for reconsideration on June 27, 2014, saying: “The Plaintiff has not provided any explanation for this new claim involving the lack of a handrail. More importantly, she has not

provided evidence to support why this claim was not included in any statement made by the Plaintiff herself.” (CP 240.)

IV. SUMMARY OF ARGUMENT

Gonzaga failed to demonstrate the absence of a genuine issue of material fact requiring trial. Because the trial court construed the evidence and inferences in the light most favorable to the moving party and refused to consider evidence properly presented to the court, the trial court erred when it determined that Gonzaga had demonstrated that there was no genuine issue of material fact. Further, because the trial court improperly evaluated the motion for summary judgment as the trier of fact and denied motion for reconsideration on unsupported facts, this Court should reverse the trial court’s order granting summary judgment and remand the case for further proceedings.

V. 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.**

STANDARD OF REVIEW: Summary judgment is proper only if the moving party demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *CR 56(c); State v. Kaiser*, 161 Wn.App. 705, 718, 254 P.3d 850

(2011). A material fact is one upon which the outcome of the litigation depends. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

This Court reviews summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to Ms. Fey, the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is improper, even if the basic facts are not in dispute, if those facts are reasonably subject to conflicting inferences. *Coffel v. Clallam Cy.*, 58 Wash.App. 517, 520, 794 P.2d 513 (1990); *Southside Tabernacle v. Pentecostal Church of God, Pac. Northwest Dist., Inc.*, 32 Wash.App. 814, 821, 650 P.2d 231 (1982). To award summary judgment, the Court must conclude that all reasonable minds could only reach one conclusion. *Riojas v. Grant County P.U.D.*, 117 Wn.App. 694 (2002), *review denied* 151 Wn.2d 1006.

NEGLIGENCE: In an action for negligence, a plaintiff must prove four basic elements: (1) the defendant owed a duty, (2) that the duty was breached, (3) that the plaintiff was injured, and (4) that the injury was proximately caused by the defendant's breach. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash.2d, 121, 127-128 (1994); *Degel v. Majestic Mobile Mano, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The nature of the duty owed by the owner of the property to an individual entering the

property depends on the status of that individual. *Degel* at 49. The parties agreed that Ms. Fey was an invitee onto Gonzaga's property.

A landowner owes invitees an affirmative duty to use ordinary care to keep the premises in reasonably safe condition. *Ertl v. Parks & Recreation Comm'n*, 76 Wash.App. 110, 113 (1994). A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the possessor (a) knows of the condition 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. *Tincani*, 124 Wash. 2d at 138; *Iwai v. State*, 129 Wash.2d 84, 93-94, 915 P.2d 1089 (1996).

Ms. Fey alleged the following: She fell on the single step between the two landings. (CP 5, 212) The flooring on the landing is all the same with nothing to distinguish the single step or warn that the step is there. (CP 212.) The single step was unexpected and she did not notice it. (CP 212.) There was no artificial light. (5-6, 211-212) The low natural light did not provide sufficient lighting. (CP 5, 212.) The low natural light cast deceptive shadows on the staircase. (CP 5.) There was no handrail to catch her fall. (CP 183, 212.) Ms. Fey provided pictures showing the lack

of a handrail. (CP 93-97.) Ms. Fey argued that these factors combined to create an unsafe condition. (CP 223-225.)

Gonzaga did not provide any evidence or dispute any of the facts alleged in this case, rather it simply argued based on the inferences made from those facts. (CP 46-50.) In its argument related to summary judgment, Gonzaga acknowledged that Ms. Fey stated in her affidavit that “the step on that landing was simply not visible until it was too late,” and “[t]he step that I did not see was on the landing at the bottom of the main staircase.” (CP 200.) Gonzaga also acknowledged that in her deposition, Ms. Fey responded to the 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.” (CP 201; emphasis added.) Gonzaga argued that these statements should be taken out of context and construed to mean that Ms. Fey doesn't know why she fell and therefore she has no cause of action. (CP 50, 201.)

The trial court agreed, citing the same passages to support the conclusion that there were no issues of material fact in dispute. (CP 218)

Whether there was an unsafe condition is a genuine issue of material fact. Ms. Fey's undisputed testimony is sufficient to support a conclusion that the conditions of the Mansion were unsafe; therefore, there is a genuine issue of material fact for trial. The trial court erred when it construed all evidence and reasonable inferences in favor of Gonzaga.

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.

Pursuant to CR 56(c), the role of the court in considering a motion for summary judgment is to determine if there is “a genuine issue of material fact.” “... it is axiomatic that on a motion for summary judgment, the court has no authority to weigh evidence or testimonial credibility, nor may we do so on appeal.” *No Ka Oi Corp. v National 60 Minutes Tune, Inc.*, 71 Wn.App. 844, 854 n.11, 863 P.2d 79, 84 (1993).

In its written decision on summary judgment, the trial court concluded:

“Once the issue of legal duty is determined, ***it is the function of the trier of fact to decide whether the particular harm should have been anticipated and whether reasonable care was taken to protect against the harm.*** *Tincani*, 124 Wash.2d at 141, *Lettengarver v. Port of Edmonds*, 40 Wash.App. 577, 581 (1985). What a “reasonably safe condition” is depends on the nature of the business conducted and the circumstances surrounding the particular situation. *Brant v. Market Basket Stores, Inc.*, 72 Wash.2d 446 (1967). In order to establish liability, something more than the fact that someone tripped and fell is required. *Brant*, 72 Wash.2d 448. Combined with the slip and fall, a Plaintiff is required to establish either the existence of a dangerous condition or the knowledge that a dangerous condition exists on the part of the owner. *Hooser v. Loyal Order of Moose, Inc.*, 69 Wash.2d 1 (1966). In this case, the Plaintiff has ***proven*** no more than she tripped and fell and sustained certain injuries in consequence thereof. ***Something more must be proved*** to establish that the defendant had permitted a situation dangerous to its invitees to exist.”

(CP 217; emphasis added.)

The trial court erred when it evaluated the evidence as the trier of fact pursuant to a motion for summary judgment.

- 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.**

The trial court refused to consider evidence that there had been no handrail in the landing where Ms. Fey fell. It stated:

"It is alleged in the complaint that Gonzaga University breached its duty by not maintaining adequate lighting in the stairwell to a new theory of both inadequate railings and lighting. The plaintiff attempts to introduce this new theory in her negligence claim although it has not been pled previously."

(CP 218).

According to *Black's Law Dictionary* (Seventh Edition), a "legal theory" is "[t]he principle under which a litigant proceeds, or on which a litigant bases its claims or defenses in a case." *Black's Law Dictionary* 907 (7th Ed. 1999). A 'principle' is something quite different than a 'fact.' The legal theory or principle upon which Ms. Fey's claims are based is 'negligence' pursuant to a 'breach of the duty of care.' The presence or absence of a handrail is a fact that constitutes evidence in support of the legal theory - it is not itself a legal theory. If every additional fact presented in support of a legal theory was viewed as a new legal theory itself, the principles and purposes of discovery and notice

pleading would be entirely undermined, and no case would proceed past the initial pleadings.

In its written decision, the trial court concluded that Gonzaga had not been provided with sufficient notice of the claim that was being made. (CP 218.) Washington is a notice pleading state. A pleading is sufficient when it gives the opposing party fair notice of what the claim is and the ground upon which it rests. *Dewey v. Tacoma School Dist.* 10, 95 Wash.App. 18, 23, 974 P.2d 847 (1999); *Molloy v. Bellevue*, 71 Wash.App. 382, 385, 859 P.2d 613 (1993). Ms. Fey's complaint provided sufficient notice that she intended to claim damages based on her allegations that Gonzaga had maintained an unsafe condition on its property that caused her fall and sustain injuries. It is apparent that Gonzaga was provided sufficient notice of her claims and that the alleged unsafe condition could involve a handrail because it *asked that very question* in Ms. Fey's deposition ("*When you look at 2-D -- and if you remember, fine, if you don't, fine -- were you using anything like banister or a stair rail or a wall or anything as you were going over the landing to go down the stairway that day, or were you walking, not relying on a rail or a banister or anything like that?*"). (CP 183.)

Ms. Fey tripped on a single inconspicuous stair between two landings in a staircase that was not well lit. After she began to fall, there was no

handrail on which she could catch herself. The entirety of those circumstances create an unsafe condition, and simply because some circumstances contributed to her fall and others contributed to her inability to stop her fall does not result in an entirely separate theory of liability.

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

STANDARD OF REVIEW: The denial of a motion for reconsideration is reviewed for abuse of discretion. If the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, the trial court has abused its discretion. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). "A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006), quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003). A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relied on unsupported facts or applied the wrong legal standard. *Mayer* at 684.

Here, the trial court denied the motion for reconsideration, saying:

The Plaintiff, Ms. Fey, has failed to establish any material fact in dispute. Subsequently, Ms. Fey now tries to assert a lack of a handrail as the cause of her fall. ***This was only put forth in her attorney's argument before the Court and was never brought up in the complaint, mentioned in her deposition or put forth in her affidavit.*** It appears the reason this new claim of negligence resulting from a lack of a handrail is put forth only to avoid Summary Judgment.

(CP 240.)

The trial court also stated:

The Plaintiff has not provided any explanation for this new claim involving the lack of a handrail. ***More importantly, she has not provided evidence to support why this claim was not included in any statement made by the Plaintiff herself.***

(CP 240; emphasis added.)

These statements are simply inaccurate. Ms. Fey did include information about the handrail in her deposition. (CP 183.) Ms. Fey did include information about the handrail in her affidavit. (CP 212.) Ms. Fey provided pictures showing the lack of a handrail. (CP 93-97.) Ms. Fey drew the court's attention to these statements in her response to Gonzaga's motion for summary judgment, filed on April 7, 2014. (CP 62.) Ms. Fey drew the court's attention to these statements in her motion for reconsideration, filed on May 22, 2014. (CP 222.) Even more puzzling, the trial court recognized that Ms. Fey had made such statements in its original written decision on summary judgment, and then later denied that

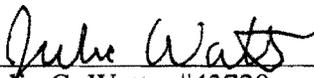
such statements had ever been made as the basis for its denial of the motion for reconsideration.

The trial court abused its discretion when it denied Ms. Fey's motion for reconsideration based on unsupported facts.

VI. CONCLUSION

Gonzaga 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 17th day of February, 2015



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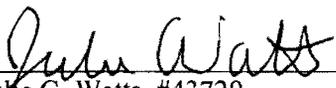
KATHLEEN FEY)	No. 32748-5-III
)	
Appellant, Plaintiff,)	
)	Certificate of Service
v.)	
)	
CORPORATION OF GONZAGA)	
UNIVERSITY, a corporation;)	
STEVEN AND TAMARA)	
MCCOLLUM, a married couple,)	
)	
Defendants/Respondents.)	

On February 17, 2015, a true and correct copy of the below-named document was hand-delivered to the individual listed below at the address listed below:

Appellant's Opening Brief; (Dated and filed February 17, 2015)

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