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COURT OF APPEALS  
DIVISION III  
SPokane, Washington

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

**No. 32748-5-III**

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KATHLEEN FEY  
Appellant/Plaintiff,

v.

THE CORPORATION OF GONZAGA UNIVERSITY, a corporation  
Respondent/Defendant,

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**RESPONDENT'S BRIEF**

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## **A. INTRODUCTION**

Plaintiff/Appellant Kathleen Fey (“Ms. Fey”) filed a premises liability lawsuit against the Corporation of Gonzaga University (“Gonzaga”) after she fell on a stairwell at the Bozarth Mansion, which is owned by Gonzaga. Ms. Fey does not know what caused her to fall. Her lawsuit was dismissed on summary judgment when she was unable to establish the fundamental elements of a *prima facie* case. That is: (1) that a dangerous condition existed which caused her fall, and (2) that Gonzaga was aware of the allegedly dangerous condition and negligently failed to respond to the same. Ms. Fey argues that the trial court erred when it dismissed her case for failure to show the existence of a dangerous condition which caused her fall. She does not address the second component of her case – Gonzaga’s knowledge of an allegedly dangerous condition and an insufficient response thereto – which was a second basis of the trial court’s decision to grant Gonzaga’s Motion for Summary Judgment.

## **B. RESPONDENT’S STATEMENT OF THE CASE**

### **1. Ms. Fey’s Fall at the Bozarth Mansion.**

On August 28, 2010, Ms. Fey attended her granddaughter Katie McCollum's wedding at the Bozarth Mansion and Retreat Center (“Bozarth Mansion”) (formerly known as the Waikiki Mansion). CP 20-22. Both the ceremony and the reception took place at the Bozarth Mansion. CP 21. On

the day of the wedding, Ms. Fey first entered the Bozarth Mansion for about a half an hour prior to the ceremony. CP 23. She then walked up the steps to the second floor to spend time with her daughter and granddaughter in the bridal room. CP 23. She walked down the same steps to attend the ceremony. CP 24. Immediately after the ceremony the guests went into the entryway of the building. CP 25. Ms. Fey walked back upstairs to retrieve her purse from the bridal room. *Id.* She took the same route that she previously took when she first visited the bridal room. CP 26.

Ms. Fey retrieved her purse from the bridal room and began her descent of the staircase. CP 27. She reached the bottom of the first landing and turned to go down the final set of stairs when she fell. *Id.* At the time of her fall, Ms. Fey was on the landing between the two sets of steps and fell on the landing. CP 31-33. She has "no idea" what caused her to fall. CP 33.

Ms. Fey does not recall seeing anything on the steps that caused her to fall. CP 28. There was no debris or garbage which caused her to trip. *Id.* The stairway and the entire building seemed to be well-maintained. CP 28-29. Nothing caused her to believe that the steps were uneven or irregular, thereby presenting a hazard. CP 29. She had no difficulty seeing where she was going. *Id.* At her deposition, Ms. Fey testified as follows:

Q. When you went up the steps to get your purse, was there any problem with visibility or lighting that you noticed going up to get your purse?

A. It wasn't as bright and sunny, but no.

Q. Coming down the steps and just before you fell, was there any problem with light or visibility that caused you to trip?

A. The only differences was it wasn't as bright and sunny as it was earlier.

Q. But did you have any difficulty seeing where you were going?

A. No.

CP 30.

**2. Procedural Facts.**

Ms. Fey sued Gonzaga as well as Steven and Tamara McCollum – Ms. Fey's daughter and son-in-law. CP 1-9, 38. Ms. Fey's Complaint took issue with the lighting at the Bozarth Mansion:

13. The time of the incident was approximately 6:00 p.m. in late summer. There was limited natural light entering into the stairwell, and there was minimal artificial light provided by the Defendant Gonzaga University.

14. The shadows in the stairwell were incredibly deceptive because of the limited natural and artificial lighting at the time of the incident.

15. As a direct and proximate result of the inadequate lighting and deceptive shadows, Ms. Fey fell, landing at the top step of the second flight of stairs.

*Id.* Ms. Fey alleged she was owed the following duty by Gonzaga:

21. The duty in this instance was to have a well-lit stairwell for those on the premises of the Bozarth Mansion. By relying on natural light at an evening event, rather than artificial lighting, it is reasonable to believe that an individual could misstep and endure an accident causing substantial injury...

*Id.* She identified Gonzaga's alleged breach of the duty:

22. Gonzaga University breached its duty of care owed to Ms. Fey by not maintaining adequate lighting at all times during an event that would stretch into the evening hours. By breaching this duty and creating an atmosphere that allowed for darkened stairwells and areas of the premises, Gonzaga University allowed the opportunity for injury to be heightened and realized.

*Id.* Gonzaga moved for summary judgment. CP 52-53. The basis of the motion was that Ms. Fey could not provide admissible evidence showing that (1) a dangerous condition existed at the Bozarth Mansion, (2) Gonzaga had notice of the allegedly dangerous condition and (3) Gonzaga failed to exercise reasonable care in either warning Ms. Fey of the condition or repairing it. CP 46.

In response, Ms. Fey submitted an Affidavit in which she stated that when she started to descend the second flight of stairs, she felt her foot was not completely on a flat surface. CP 55. She reached out to stop herself from falling but there was no handrail in her immediate vicinity. *Id.* While she alluded to the lighting, the texture of the floor, and the absence of a handrail, she stopped short of saying that any of these alleged conditions

caused her fall. Gonzaga argued in response that to the extent Ms. Fey's Affidavit could be construed to contradict her deposition testimony, it was insufficient to generate a question of fact. CP 199-204.

The trial court granted Gonzaga's Motion, finding that Ms. Fey "failed to establish that the defendant permitted a dangerous condition to exist or if there was a dangerous condition, the defendant had or should have had knowledge of it in time to have remedied the situation before the Plaintiff was injured or to have warned her of the danger." CP 218. The trial court agreed with Gonzaga's contention that Ms. Fey had, without explanation, contradicted her deposition testimony and altered the contentions made in her Complaint in an attempt to resist summary judgment. CP 218. Ms. Fey moved for reconsideration of the decision. CP 220. Her motion was denied. CP 242-243.

### **C. ARGUMENTS AND AUTHORITIES**

#### **1. Standard of Review.**

On appeal of a summary judgment order, the proper standard of review is *de novo*, and thus, the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 34, 1 P.3d 1124, 1127 (2000). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as

a matter of law.” *Id.* On summary judgment, a “genuine issue” of material fact is one upon which reasonable people may disagree. *Youker v. Douglas County*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). A defendant is permitted to move for summary judgment by pointing out that the plaintiff lacks competent medical evidence to make out a prima facie case of medical malpractice. *Guile v. Ballard Cmty. Hosp.*, 70 Wash. App. 18, 22, 851 P.2d 689, 691-92 (Div.1, 1993).

## 2. **Burdens of Proof.**

“In a negligence action, the plaintiff must prove the existence of a duty, breach of that duty, resulting injury, and proximate cause.” *Charlton v. Toys R Us—Delaware, Inc.*, 158 Wash.App. 906, 246 P.3d 199 (Div.3, 2010), *citing*, *Tincani v. Inland Empire Zoological Soc’y*, 124 Wash.2d 121, 127-128, 875 P.2d 621 (1994). A landowner’s duty of care to persons upon the land is governed by the entrant’s common law status as an invitee, licensee, or trespasser. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 49, 914 P.2d 728, 731 (1996), *citing*, *Tincani*, 124 Wash.2d at 128.

The standard announced by *Iwai v. State*, 129 Wash.2d 84, 915 P.2d 1089 (1996) applies to Ms. Fey’s claims.<sup>1</sup> In *Iwai*, the Supreme Court

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<sup>1</sup> The parties agreed that Ms. Fey could be considered an “invitee” for purposes of Gonzaga’s motion.

recognized that Restatement (Second) of Torts Section 343 contains the “appropriate test for determining landowner liability to invitees.” The *Iwai* court quoted Section 343 as follows:

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

(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.

*Iwai*, 129 Wash. 2d at 93-94.

Ms. Fey does not dispute her burden of proof on summary judgment. *Brief of Appellant*, pg. 8. She 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, 10-11. Ms. Fey provides no factual support for either of these 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).

3. **Ms. Fey Failed to Show that a Dangerous Condition Caused Her Fall.**

“The mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence.” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wash.App. 372, 972 P.2d 475 (Div.2, 1999). “For legal responsibility to attach to negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury.” *Id, citing, Schooley v. Pinch’s Deli Market, Inc.*, 134 Wash.2d 468, 951 P.2d 749 (1998).

In *Bally’s*, the plaintiff was thrown off a treadmill at a health club. The plaintiff could not recall how the fall occurred. The Court recognized: “Without any memory of the accident, [plaintiff] simply offers a theory as to how she sustained her injuries. But a verdict cannot be founded on mere theory or speculation.” *Id. at 379*. Summary judgment was affirmed in favor of the health club. The same principle in *Bally’s* was applied in *Little v. Countrywood Homes, Inc.*, 132 Wash.App. 777, 133 P.3d 944 (Div.1, 2006). The recent case *Mason v. United States*, 2015 WL 541432 (Feb. 10, 2015 W.D. Wash. 2015), in which Washington law was applied, provides additional guidance. In *Mason*, the plaintiff slipped and fell on or near an unmarked metal cover on a sidewalk outside a government building in

Seattle. Summary judgment was granted in favor of the United States Government for failure to establish proximate cause.

The plaintiff in *Mason* claimed that she slipped and fell on the metal cover. However, she testified in her deposition that she could not recall actually slipping. She “described the accident by explaining that, on a day with heavy rain and light wind, she and a colleague left the office and ‘walk[ed] towards the corner to cross the street, and the next thing [she] knew [she was] down on the ground with [her] right foot and leg underneath [her] on a metal plate.” The trial court found that the plaintiff’s testimony was insufficient to establish that a “dangerous condition” existed, and therefore, summary judgment was appropriate.

In response to Gonzaga’s Motion for Summary Judgment, Ms. Fey submitted an Affidavit, which reads, in pertinent part:

As soon as the wedding ceremony was over, and we were ushered out of the area, I went back up to the brides [sic] room to retrieve my purse...I found my purse and proceeded back down stairs to the awaiting reception area...The stair case area was still lit with natural light but not as bright as it had been hours before...When I reached the landing I turned to my right to go [to] the second stair case. It was then that I felt my foot not completely on a flat surface. As I reached for something to grab hold of to keep from falling, but there was nothing. The hand rail had ended at the end of the staircase. The step that I did not see was on the landing at the bottom of the main staircase...I did not fall on the staircase, but on the landing. The flooring on the landing is all the same with nothing to distinguish or to warn anyone that there is a step next to the landing! ...I didn’t trip over

anything....The step on the landing was simply not visible until it was too late.

CP 211-212.

In her Affidavit, Ms. Fey was careful not to directly tie the alleged lack of lighting or any other cause to her failure to negotiate the steps. Instead, she commented on possible issues (“not as bright as it was before”) and left it to her attorney to speculate in legal briefs as to how the fall may have occurred. While her counsel made *arguments* in briefing, surmising what may have caused the fall, Ms. Fey never attributed her fall to any condition. Testimony on the cause of her fall would have contradicted her deposition testimony. The trial court recognized that Ms. Fey’s affidavit, if construed in such a way, would violate the *Marshall* Rule, and thus, could not create a genuine issue of fact precluding summary judgment. *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (“When 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”).

The trial court also rejected Ms. Fey’s other arguments (“the flooring on the landing is all the same,” or absence of a handrail claims) because: (1) they contradicted her Complaint which asserted only the

lighting was to blame for her fall, and (2) she again never claimed that those stair conditions caused her to fall (see above).

4. **Ms. Fey Failed to Offer Any Proof that Gonzaga Was Aware of the Allegedly Dangerous Condition and Failed to Respond Appropriately to the Same.**

In a premises liability case, “[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.” *Charlton*, 158 Wash.App. 906 at 915-916, citing, *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wash.App. 183, 189, 127 P.3d 5 (2005), *Ingersoll v. DeBartolo, Inc.*, 123 Wash.2d 649, 652, 869 P.2d 1014 (1994), review denied, 157 Wash.2d 1026, 142 P.3d 608 (2006). In *Charlton*, this court recognized that it is not incumbent upon the defendant to show that he/she lacked notice of the condition:

Ms. Charlton first argues, incorrectly, that Toys R Us had the initial burden of presenting evidence that it had no actual or constructive knowledge of the hazardous condition; from that she argues that because Toys R Us failed to do so, summary judgment was improper. Br. of Appellant at 10. While Toys R Us had the initial burden of showing the absence of an issue of material fact, it could do so by pointing out the absence of evidence to support Ms. Charlton's case. *Young*, 112 Wash.2d at 225 n. 1, 770 P.2d 182. Toys R Us demonstrated that Ms. Charlton could present no evidence that it knew or should have known of an unsafe accumulation of water beyond the mats. It was incumbent on her to present evidence of actual or constructive notice raising a genuine issue of fact.

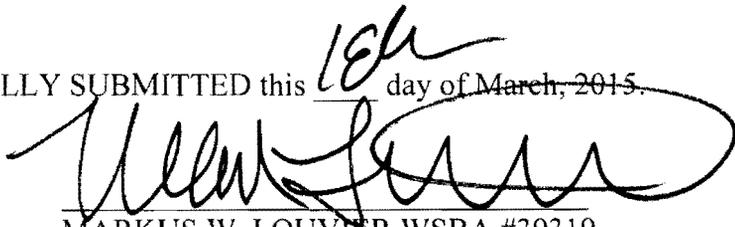
*Charlton*, 158 Wash. App. at 915-16.

Ms. Fey failed to show that Gonzaga knew or should have known of the allegedly dangerous condition which caused her to fall. It follows that she cannot show Gonzaga was in any measure negligent in failing to respond to the dangerous condition.

**D. CONCLUSION**

Ms. Fey failed to satisfy her burden of proof on summary judgment. She remains unsure of what caused her to fall, and cannot identify any knowledge on the part of Gonzaga of a “dangerous condition” which led to her fall, nor any action or inaction by Gonzaga that was in any measure negligent. Accordingly, summary judgment in favor of Gonzaga should be affirmed.

RESPECTFULLY SUBMITTED this 18th day of March, 2015.



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Attorney for Respondent Gonzaga

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 19 day of March, 2015, a true and correct copy of the foregoing *Brief of Respondent*, was served upon the following parties and their counsel of record in the manner indicated below:

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