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NO. 65533-7

COURT OF APPEALS STATE OF WASHINGTON
DIVISION ONE

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AHMBUR BLUE, a single individual,

Appellant.

v.

MARKEE FOSTER and VERONICA FOSTER, individually and the
marital community comprised thereof, and the CITY OF SEATTLE, a
municipal corporation,

Respondents.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

- A. The standard of review on appeal is de novo and the factual questions regarding Ms. Blue's status on the Fosters' premises and the duty of care they owed her require a reversal of summary judgment.**

This court will review the trial court's decision granting the Fosters' summary judgment de novo, considering all evidence and reasonable inferences in the light most favorable to Ms. Blue. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002); *Merrick v. Sears*, 67 Wn.2d 426, 428, 407 P.2d 960 (1965). **The court cannot grant summary judgment unless there appears to be no substantial evidence to support the claim.** *Id.* The court in *Brant* explained the standard on appeal as follows:

A motion for dismissal admits the truth of plaintiffs' evidence and all inferences favorable to them arising therefrom, and in ruling upon the motion, if the evidence allows more than one reasonable interpretation, the courts must interpret the evidence most strongly against the moving party and most favorably to the opposing party. The court cannot grant the motion unless there appears to be no substantial evidence to support the claim.

Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 446, 433 P.2d 863 (1967).

The Fosters ignore the standard of review before this court, attacking evidence properly meant for a jury while attempting to dismiss this case prematurely. Issues of fact are present both with regards to

Ms. Blue's status on the Fosters' premises on the day of the accident, as well as whether they breached their standard of care.

The facts are that Ms. Blue was an employee and subordinate of Markee Foster at Microsoft. CP 37, 152-53. Ms. Blue had been to the Fosters' residence on prior occasions, all related to her association with Microsoft, and once to care for the Fosters' dog. CP 37-38, 42, 152. Ms. Blue had no choice but to travel up and down the railroad tie stairway to get to their residence, short of climbing a dirt hill. CP 153. While she and Mr. Foster did not agree upon payment for her services at their outset of their negotiations, they did discuss her fee. CP 43, 153. Ms. Blue bargained for the services she provided, did not ultimately decide to be paid at the outset, and Mr. Foster clearly received an economic benefit from her services. CP 43, 153. The Fosters did not need to board the dog due to Ms. Blue's service. CP 43, 153. Ms. Blue received monetary compensation following her services. CP 52, 153.

At the time of summary judgment there was no evidence in the record as to why Mr. Foster compensated Ms. Blue after she cared for his dog, other than speculation on her part regarding that payment. CP 51-52. It was improper on these sharply disputed facts and considering the evidence in the light most favorable to Ms. Blue for the trial court to rule as a matter of law that Ms. Blue was a licensee and that the Fosters did not breach their duty of care owed to her at the time of loss.

This set of facts is not on point with any current Washington case law and the trial court erred by not leaving these factual contentions and issues to a jury.

B. Ms. Blue's declaration was not a flat contradiction and creates an issue of material fact as to whether Mr. Foster and Ms. Blue bargained for services to be performed.

The Fosters characterize Ms. Blue's assignment of error regarding the decision to strike her declaration as a "red herring." Respondents' Brief at 2. But the trial court applied an unduly strict standard. Further, Ms. Blue's declaration adds factual support for her position that the formation of the parties' relationship as well as benefits exchanged for all involved makes Ms. Blue an invitee as a matter of law.

Ms. Blue's declaration clarifies her negotiations with Mr. Foster in the forming of their relationship prior to her agreement to feed his dog, CP 153. Whether Ms. Blue agreed to take money or financial consideration from Mr. Foster or ultimately received that consideration afterwards, does not negate the fact the offer was extended. *Id.*

Ms. Blue's ability to remember circumstances of different conversations with Mr. Foster in which she elaborated on what their agreement was, does not fit into the circumstances appropriate to strike testimony that *Marshall* contemplated. *See Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989).

CR 56(e) specifically requires courts to indulge “in leniency with respect to affidavits presented by the nonmoving party.” *See also Public Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 361, 705 P.2d 1195 (1985). Courts have repeatedly applied *Marshall* to disregard declaration testimony when it is in “flat contradiction” to earlier statements. *See Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967; *rev. denied*, 138 Wn.2d 1002, 984 P.2d 1033 (1999); *Sun Mountain Prods., Inc. v. Pierre*, 84 Wn. App. 608, 618, 929 P.2d 494, *rev. denied*, 132 Wn.2d 1003, 939 P.2d 216 (1997); *Safeco Ins. Co. of Am. v. McGrath*, 63 Wn. App. 170, 175, 817 P.2d 861 (1991), *rev. denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992).

Ms. Blue was not paid at the outset for her services to the Fosters. CP 43, 153. This does not negate or “clearly contradict” the fact that discussions of payment were had. *See id.* The clarification of Mr. Foster’s and Ms. Blue’s formation of their agreement and the discussions regarding potential payment for services contained in her declaration create a material issue of fact regarding Ms. Blue’s status at the time of her injury. This issue decided by the trial court is dispositive and was made in error.

C. Ms. Blue was an invitee while on the Fosters’ premises and at the time of her injury.

There remain genuine issues of material fact as to Ms. Blue’s status on the day she entered the Fosters’ residence to care for their dog.

Ms. Blue was a business visitor at the Fosters' premises on the day of the accident. She was a visitor "invited to enter or remain on the land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *See Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

Ms. Blue and Mr. Foster bargained for the services she was to provide in watching their pet while they left town. CP 153. Whether payment was actually agreed upon is not dispositive. Mr. Foster requested a service to be performed by Ms. Blue, which she performed for him of value. CP 43, 153. She had an expectation of personal gain in doing a service for a boss and co-worker, and in the end received a benefit. CP 43, 52, 153.

1. There was mutuality of interest and an economic benefit bargained for prior to Ms. Blue's services.

Ms. Blue and Mr. Foster bargained for and set up the terms of their agreement where Ms. Blue was to perform a service for her boss while he was away. CP 43, 153. Ms. Blue was subsequently compensated with value for her services, for reasons not contained in the record at this premature stage of litigation. CP 53, 153.

The Fosters incorrectly state that “Blue’s visit was unrelated to any mutually beneficial business purpose: Blue and Foster did not bargain for payment or other economic benefit...” Respondents’ Brief at 17.

But Washington law provides the following:

An “invitee” is one who is either expressly or impliedly invited onto premises of another for some purpose connected with the business in which owner or occupant is then engaged or which he permits to be conducted on the premises, and to establish such relationship, **there must be some real or supposed mutuality of interest in the subject to which visitor’s business or purpose relates.**

Dotson v. Haddock, 46 Wn.2d 52, 54, 278 P.2d 338 (1955) (emphasis added).

The Fosters consistently claim that there was no agreement for monetary payment at the outset of Ms. Blue and Mr. Foster’s relationship so she did not receive a benefit at law. *See* Respondents’ Brief at 2-4, 12-15. But even a “supposed mutuality of interest” qualifies. *Dotson*, 46 Wn.2d at 54. Ms. Blue bargained for her services, declined payment, but ultimately received it; she went to these premises only to bestow this benefit. CP 53, 153.

A visitor is not an invitee until the business or purpose which they are on the premises of another is of material or pecuniary benefit, either actual or potential **to the owner or occupant of such premises.** *See*

Dotson, 46 Wn.2d at 55 (emphasis added). It is undisputed that Ms. Blue's presence on the Fosters' land was to his actual benefit.

2. The Fosters incorrectly base their contention that Ms. Blue was a licensee at the time of service on cases involving familial favors.

The cases cited by the Fosters to prove their contention that Ms. Blue was a licensee all hinge on considerations by the court of favors done by and for family members. *See Porter v. Ferguson*, 53 Wn.2d 693, 336 P.2d 133 (1959); *Lucas v. Barner*, 56 Wn.2d 136, 351 P.2d 492 (1960); *Thompson v. Katzer*, 86 Wn. App. 280, 936 P.2d 421 (1997). In none of these cases was a discussion of payment ever bargained for or discussed at the outset of the relationship formation, as the party conferring the economic service and benefit was a family member of the receiving party. *Id.*

Case law regarding premises liability makes clear that there are distinctions in regards to a family member's ability to sue another while partaking in regular familial favors. *See id.* At the outset of determining whether an entrant is an invitee or licensee, courts differentiate between family members and others: To determine whether an entrant is an invitee or licensee, courts must "differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either **(a) benefits only the entrant or (b) is**

primarily familial or social.” *Beebe v. Moses*, 113 Wn. App. 464, 467–68, 54 P.3d 188 (2002) (emphasis added).

The court in *Porter*, as relied upon by the Fosters specifically states “there is a presumption that services between members of a family enjoying normal relationships are gratuitous.” *Porter*, 53 Wn.2d at 695. While the court of course did not rule that no family member can be considered an invitee when bargaining for services or undertaking commercial dealings with a relative, the Fosters’ reliance on these cases is not dispositive in light of the facts of this case. *Id.* In *Porter*, there was no payment to the mother ever even contemplated, as is distinguishable from the discussions of payment and compensation for services had between Ms. Blue and Mr. Foster, whether ever materialized. *Id.*

The Restatement of Torts § 330 includes another distinction in specifying the duty owed to a licensee versus an invitee and considerations made for members of family:

The explanation usually given by the courts for the classification of social guests as licensees is that there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety, in any manner in which the possessor does not prepare or take precautions for his own safety, or that of the members of his family.

Younce, 106 Wn.2d at 668-69.

Ms. Blue may have characterized her actions as a “favor,” but this fact does not negate the bargain or supposed and actual benefit conferred on both her and Mr. Foster. CP 43. This is not an instance of familial or social favors being bestowed on one’s close to an entrant as set out by the Fosters.

D. Even if Ms. Blue was a licensee at the time of injury, the Fosters breached their duty of care owed at that time by not warning of the dangers known only to them and not Ms. Blue.

Assuming for argument purposes that Ms. Blue was a licensee, the Fosters’ still owed her a duty of ordinary care in which they breached.

As outlined in the Restatement of Torts § 342 the standard of care is as follows:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

Ms. Blue fulfills each element in the conclusion that the Fosters' are liable for breach of the duty owed to entrants on their land if she is classified as a licensee as a matter of law.

1. The Fosters knew the stairs were dangerous and that they posed a danger to their guests or any person visiting their residence.

There is no disputed evidence in the record that the Fosters had notice of the danger posed by the railroad tie stairs at their residence. Mr. Williams' declaration unequivocally creates a material issue of fact that the Fosters were aware of the dangers the stairs on their property posed to entrants. CP 304-05.

Mr. Williams' declaration clearly provides evidence that the Fosters were on notice of the propensity for falls on the railroad tie stairs outside of their home. *Id.* He and his wife had had trouble traveling these stairs in the past, and specifically told the Fosters of these dangers they experienced. *Id.*

The Fosters cite to *Brant v. Market Basket Stores, Inc.* in their proposition that "something more than a fall must be shown to establish liability against a landowner." *Brant*, 72 Wn.2d 446, 451, 433 P.2d 863 (1967). That case further states that: "evidence that store owner or its employees knew or should have known that a dangerous condition existed is a prerequisite to recovery by plaintiff in a slip and fall case." *Id.* at 451–

52. There is no contradictory evidence in the record to Mr. Witte's expert opinion and declaration thoroughly outlining the defects present in the stairs in question. CP 333-36. Literally no aspect of the stairs meets the proper building code nor is in a construction and engineering standpoint "safe." *Id.*

Ms. Blue not only fell, she fell on stairs with a wide range of concealed defects. *Id.* At any point in the travel down the stairs in question the trip could vastly differ based on varying degrees of rise and run one may experience. *Id.*

Ms. Blue fell for no other reason than the unsafe construction and lack of maintenance or warning on the part of the Fosters to her. CP 42-44, 333-36. The stairs are dangerous and the Fosters had knowledge of those dangers. CP 304-05, 333-36.

2. The Fosters had no reason to expect that Ms. Blue would discover or realize that the stairs were dangerous.

The Fosters' notice of the stairs' dangerous condition came from conversations with at least one guest at the home, Mr. Williams. CP 304-05. It is clear that Ms. Blue had no way of knowing that this conversation had taken place or that there was a propensity for falls on these stairs. Ms. Blue had traversed the stairs in question on the day of the accident and in the past. CP 41-41, 153. This fact does not negate the concealed

dangers of the stairs when these dangers include differing slopes and experiences all across one's potential path. CP 333-36.

3. The Fosters failed to make the stairs safe even after being put on notice that they were dangerous.

There is no evidence in the record that the Fosters did anything following notice by Mr. Williams and any other guests to make the stairs safe or warn Ms. Blue of the potential for injury the stairs posed. The stairs were dangerous at the time of Ms. Blue's fall as well as Mr. Witte's inspection. CP 333-36.

4. Ms. Blue did not know or have reason to know that the stairs were a danger in her travel to and from the Fosters' home.

At the time of the accident, Ms. Blue was a human resources assistant and general manager/coordinator at Microsoft. CP 35-36. Ms. Blue is not an engineer, construction expert, or home builder. *Id.*

The stairs were dangerous as they did not meet building codes and requirements for specifications strictly necessary for safety. CP 333-36. Ms. Blue did not possess the knowledge that the Fosters did regarding the known propensity for falls on the stairs in question. CP 304-05. Ms. Blue did not know that others had fallen on the stairs or had she been given notice as the Fosters had. *Id.*

The Fosters compare the knowledge of expert Rick Witte with more than twenty years in the construction industry, with that of Ms. Blue in claiming that the defects present on the stairs were “open and obvious” precluding recovery by Ms. Blue. *See* Respondents’ Brief at 26. The Fosters state “there was no dangerous condition known to Foster that was not equally obvious to Blue.” *Id.* at 27. This statement is untrue. Ms. Blue did not know about previous falls, about the notice to the Fosters from other guests to their home that the stairs were dangerous, or the later discovered dangers by Mr. Witte.

A construction expert’s recognition of dangers in the stairs after precise measurements and comparisons in the industry and applicable building codes does not equate to an open and obvious danger. Such conditions that are considered by the courts as “open and obvious” and presented by the Fosters include snow and ice, as well as the proximity of stairs to a claimant’s location prior to a fall. *See Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 150 P.3d 633 (2007); *Howard v. Horn*, 61 Wn. App. 520, 810 P.2d 1387 (1991).

Ice and snow, as was the dangerous condition present in *Howard*, are easily distinguishable because they always pose a danger, while that is not the case of stairs that may or may not be to code or maintained by their owners. *See Howard*, 61, Wn. App. at 520. Likewise, *Seiber* involved a

plaintiff that fell down stairs because of their location to a merchandise rack she was looking at. *See Seiber*, 136 Wn. App. at 734. The plaintiff in that action did not allege that the display or the stairs had any defect whatsoever and there was no evidence as to breach of duty by the store owner. *Id.* That is clearly not the situation with the Fosters' uncontrovertibly dangerous stairs present on their property. CP 333-36.

A plaintiff will have no right to be warned of a condition if it is **both** obvious and known. *Seiber*, 136 Wn. App. at 740. Ms. Blue did not recognize the danger of the stairs and traveling them was her only way to perform her agreed upon service to the Fosters and clearly did not know that the stairs did not meet applicable building code and had caused accidents in the past. CP 304-05, 333-36.

Not only did Ms. Blue not discover or recognize the danger, she clearly was not expected to appreciate the dangers the stairs could pose when she had no other option but to climb them on her way to the house. CP 153. A landowner has a duty to a licensee to warn of conditions they have knowledge of, such as the Fosters' with these stairs, if the injured party will "not discover or will fail to appreciate." *Vollendorff v. United States*, 952 F.2d 215, 217 (9th Cir. 1991). Ms. Blue could not appreciate the harm potentially available to her when she had no choice but to use these stairs in her entrance to the Fosters' home. CP 153.

II. CONCLUSION

Discovery at the time of summary judgment was limited. The trial court prematurely struck Ms. Blue's declaration and ruled on her status as a matter of law. The facts surrounding her and Mr. Foster's agreement remain contested, just like their knowledge and intent.

There were clearly negotiations involving what Ms. Blue would receive for her services, even though she ultimately declined payment due to her expectations as an employee in doing services for her boss. Mr. Foster clearly obtained a benefit from Ms. Blue's work, and compensated her at the conclusion of that service. Even in the event that Ms. Blue is considered a licensee, the Fosters were on notice of the danger and propensity of falls on these stairs and failed to make them safe or to warn Ms. Blue. She cannot be held to the standard of an expert in the field of building construction and building code in recognizing dangers with stairs, or be held to have the knowledge the Fosters had regarding other falls on their premise. For the reasons set out here, Ms. Blue's case should

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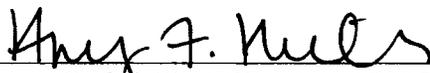
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be returned to the trial court where the extensive questions of fact that remain can be properly weighed by a jury.

Respectfully submitted this 20th day of December, 2010.

LEE SMART, P.S., INC.

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on December 20, 2010, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

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DATED this 20th day of December, 2010 at Seattle, Washington.



Kimberly A. Daniels
Legal Assistant