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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

Case No. 69539-8-1

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
JUL 11 2011

JOLENE LAUWERS, individually,

Appellant,

v.

REGAL CINEMAS, INC., a Washington corporation, WAL-
MART STORES, INC. (Number 2385), a Washington
corporation,

Respondents

BRIEF OF RESPONDENT REGAL CINEMAS, INC.

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	COUNTER TO ASSIGNMENT OF ERRORS	1
III.	STATEMENT OF THE CASE	2
IV.	SUMMARY OF ARGUMENT	3
V.	LAW AND ARGUMENT	4
	A. Summary Judgment Standard	4
	B. Ms. Lauwers Failed To Establish That Regal Cinemas Breached A Duty Of Care And Summary Judgment Was Properly Entered By The Trial Court	5
	C. Ms. Lauwers Failed To Set Forth A Material Issue Of Fact To Establish The Elements Set Forth In Restatement 2nd Of Torts	7
	1. Summary Judgment was Properly Granted by the Trial Court as There Was No Evidence of a Dangerous Condition	8
	2. Regal Cinemas Had No Actual Or Constructive Notice Of The Existence Of An Unreasonably Dangerous Condition.....	11
	3. Ms. Lauwers Presented No Evidence That Regal Cinemas Would Expect that Ms. Lauwers Would Not Discover Or Realize The Alleged Danger, Or Fail To Protect Herself Against It.....	13

4.	Summary Judgment Was Appropriate As The Alleged Danger Was Open And Obvious To Ms. Lauwers.....	14
VI.	CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>Hemmen v. Clark's Rest. Enters</i> , 72 Wash.2d 690, 692, 434 P. 2d 729 (1957)	11, 12
<i>Hitter v. Bellevue School Dist.</i> 405, 66 Wn. App.391 399, 832 P. 2d 130, rev. den'd, 120 Wn.2d 1013 (1992)	5, 6
<i>Hoffstatter v. City of Seattle</i> , 105 Wn. App. 596, 599, 20 P. 3d 1003 (2001)	6, 8, 9, 10, 11, 13, 14, 15, 16
<i>Huston v. 1st Church of God</i> , 46 Wn. App. 740, 744, 732 P.2d 173, rev. denied, 108 Wn.2d 1018 (1987)	6
<i>Iwai</i> , 129 Wash.2d at 95, 915 P.2d 1089	11
<i>Lybbert v. Grant County</i> , 141 Wash.2d 29, 34, 1 P. 3d 1124 (2000)	4
<i>Messina v. Rhodes Co.</i> , 67 Wn.2d 19, 27, 406 P.2d 312 (1965)	6
<i>Mucsi v. Graoach Associates Ltd. Partnership No. 12</i> , 144 Wn. 2d 847, 860, 31 P. 3d 684 (2001)	15
<i>Tincani v. Inland Empire Zoological Soc.</i> , 124 Wn,2d 121, 127-28, P. 2d 621 (1994)	6
<i>Young v. Key Pharms, Inc.</i> , 112 Wash.2d 216, 226, 770 P.2d 182 (1989)	5

Other Authorities

Restatement 2nd of Torts §343	7, 13
Restatement 2nd of Torts §343(a)	12
Restatement 2nd of Torts §343A(1)	15

Rules

CR 56(3)	4
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I. INTRODUCTION

This appeal involves summary judgment dismissal of a personal injury claim brought by Plaintiff-Appellant Jolene Lauwers. This court is asked to assess whether summary judgment was properly granted in favor of Regal Cinemas. On April 2, 2009, Ms. Lauwers safely entered the Regal Cinema Theater by using the stairs and steps which led directly to the theater entrance. However, when Ms. Lauwers exited the theater, she voluntarily chose not to use the steps or concrete ramp, but instead cut across the landscaped grassy strip, and slipped and fell.

II. COUNTER TO ASSIGNMENT OF ERRORS

The issue on appeal is whether the trial court properly granted Regal Cinemas' motion for summary judgment, as Ms. Lauwers failed to present any evidence that Regal Cinemas was negligent, or that Regal breached its duty of care. The trial court determined there was no evidence that the grassy strip created an unreasonably dangerous condition, or that Regal

Cinema had actual or constructive notice that the landscaped strip presented an unreasonable risk of harm. The trial court further assessed that Regal Cinemas would have no reason to anticipate potential harm from pedestrians walking on the grass, or that Ms. Lauwers would fail to pay attention to where she was walking or take due care for her own safety while walking on the grass rather than use the sidewalk.

Regal Cinemas maintains that the trial court correctly granted its motion for summary judgment which should be affirmed on appeal.

III. STATEMENT OF THE CASE

Regal Cinemas operates the theater located at the Super Mall in Auburn, Washington. CP 6. In front of the theater is a large, wide concrete landing, with a three step concrete stairway and wheelchair accessible ramp leading to the sidewalk adjacent to the parking lot shared by Regal Cinemas and Wal-Mart Stores, Inc. CP 6, 16, 17. In between the landing surrounding the theater and the sidewalk adjacent to the parking

lot and abutting the short stairway is landscaped grass. CP 6, 16, 17.

On April 2, 2000 Ms. Lauwers and her son parked in the parking lot, and entered the theater using the concrete stairs leading directly to the theater entrance. CP 70. When Ms. Lauwers exited the theater, rather than use the stairs or concrete ramp which had been installed for that purpose, she cut across the landscaped strip to reach her vehicle and slipped and fell. CP 6, 71-72. Ms. Lauwers admitted that she could have used the stairway instead of cutting across the landscaped grass. CP 11.

IV. SUMMARY OF ARGUMENT

At summary judgment, it was incumbent upon Ms. Lauwers to produce a genuine issue of material fact that Regal Cinemas was negligent or breached its duty to Ms. Lauwers. Regal Cinemas installed a sidewalk, steps, stairs, and handrails for pedestrian use for ingress and egress to the theater. The grass strip located next to the sidewalk was for ornamentation

purposes, and landowners are not required to maintain landscaped areas in the same condition as sidewalks, steps, and stairs.

It is general knowledge that pedestrians use more care and pay attention when walking on grass as opposed to using the sidewalk, however Ms. Lauwers did not do so. The trial court properly ordered dismissal of the claims against Regal Cinemas as a matter of law, as there is no basis for a claim of breach of duty or assessment of liability under any theory or fact as to Regal Cinemas.

V. LAW AND ARGUMENT

A. Summary Judgment Standard

The appellate court engages in de novo review of an order for summary judgment, and performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wash.2d 29, 34, 1 P. 3d 1124 (2000). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(3)

A defendant may move for summary judgment on the ground that plaintiff lacks competent evidence to support her claim. *Young v. Key Pharms, Inc.*, 112 Wash.2d 216, 226, 770 P.2d 182 (1989) When a plaintiff fails to introduce evidence to support an essential element of her claim, and no genuine issue of material fact exists, it is proper to dismiss plaintiff's complaint. *Id* The trial court properly granted summary judgment in favor of Regal Cinemas as Plaintiff did not produce evidence to support the requisite elements of her premises liability claim.

B. Ms. Lauwers Failed To Establish That Regal Cinemas Breached A Duty Of Care And Summary Judgment Was Properly Entered By The Trial Court

When the defendant in a negligence action moves for summary judgment challenging the sufficiency of the evidence of an essential element of the plaintiff's claim, to prevail the plaintiff must present sufficient evidence to establish the essential elements of its case. *Young, supra*. See also *Hitter v. Bellevue School Dist.* 405, 66 Wn. App.391 399, 832 P. 2d 130, *rev. den'd*, 120 Wn.2d 1013 (1992). When the plaintiff lacks

evidence to support an essential element of her claim, and no genuine issues of material fact exist, the complaint is properly dismissed as a matter of law. *Id.*

In order to maintain a premises liability action, the Plaintiff is required to establish the requisite elements to maintain a negligence claim, which include duty, breach of duty, proximate cause, and damages. *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 599, 20 P. 3d 1003 (2001), *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, P. 2d 621 (1994). The general duty of a landowner to a business invitee is to exercise ordinary care to maintain its premises in a reasonably safe condition. *Messina v. Rhodes Co.*, 67 Wn.2d 19, 27, 406 P.2d 312 (1965) *Huston v. 1st Church of God*, 46 Wn. App. 740, 744, 732 P.2d 173, *rev. denied*, 108 Wn.2d 1018 (1987).

Regal Cinemas does not dispute that Ms. Lauwers was a business invitee on the date of the incident. However, Ms. Lauwers failed to set forth evidence that Regal Cinemas breached a duty to Ms. Lauwers, which is an essential element

of plaintiff's claim. Because Ms. Lauwers failed to present a genuine issue of material fact as to breach of duty, the trial court properly granted Regal Cinemas' summary judgment motion.

C. Ms. Lauwers Failed To Set Forth A Material Issue Of Fact To Establish The Elements Set Forth In Restatement 2nd Of Torts

Regal Cinemas' summary judgment motion maintained that Ms. Lauwers could not present evidence to meet the Restatement 2nd of Torts standard to establish a premises liability claim, which states as follows:

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

(b) should expect that they will not discovery 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.

Restatement 2nd of Torts §343 (emphasis added)

Based upon Regal Cinemas' summary judgment motion and lack of evidence presented by Ms. Lauwers, the trial court's ruling confirmed there was no evidence that the grass strip presented an unreasonable danger to the plaintiff, that Regal Cinemas had actual or constructive notice of the alleged danger, or that Regal Cinemas would have knowledge or reason to know that Plaintiff would fail to take due care while walking on the landscaped grass strip.

1. Summary Judgment was Properly Granted by the Trial Court as There Was No Evidence of a Dangerous Condition

Regal Cinemas' motion for summary judgment established that there can be no breach of duty when there is no evidence than an unreasonably dangerous condition existed on the property. Regal Cinemas cited the case of *Hoffstatter*, in which the Plaintiff alleged that several defendants in control of a landscaped strip between parking spaces were negligent, when the Plaintiff tripped on uneven bricks in the strip and was injured. The Court of Appeals determined that the landscaped

strip was not unreasonably dangerous, and that defendant landowners were not negligent as a matter of law.

The Court of Appeals clearly stated that the standard for sidewalks is very different than the standard for planting strips:

[A] reasonably safe condition is not the same for a parking strip as it is for a sidewalk because their purposes are different. In contrast to a sidewalk, which is devoted almost exclusively to pedestrian use . . . parking strips frequently are used for beautification, such as grass, shrubbery, trees or other ornamentation. It is certainly true that pedestrian use of parking strips must be anticipated. But they are not sidewalks and cannot be expected to be maintained in the same condition.

Hoffstatter, 105 Wn. App. At 600 (emphasis added).

Regal Cinemas provided stairs, steps, and a handrail which was intended for pedestrian use. Regal Cinemas did not intend that the grass strip located directly next to the stairs and steps to be used by pedestrians, because the grass was installed for ornamental purposes, and was not intended to be used as a sidewalk.

The grass strip located next to the stairs is similar to the parking strip referenced in *Hoffstatter*, as both the parking strip

and the grass strip at the theater were installed for beautification and ornamentation of the property. In contrast, sidewalks are installed for walking, and as the Court of Appeals in *Hoffstatter* emphasized, “*although pedestrian use of parking strips must be anticipated, they are not sidewalks and cannot be expected to be maintained in the same condition.*” *Id.*

As stated in the brief submitted by Wal-Mart Stores, Inc. since Regal Cinemas and Wal-Mart provided stairs with a handrail and a sidewalk, Ms. Lauwers cannot conclude that either Regal Cinemas or Wal-Mart intended the grass to be used as a sidewalk. Ms. Lauwers attempts to establish through expert testimony that the grass strip should be maintained in the same condition as a sidewalk, including the installation of handrails. The trial court determined that the expert testimony offered by Ms. Lauwers was not useful or necessary in this case. Instead, the trial court relied on *Hoffstatter* which definitively determined that planting strips are not required to be maintained in the same manner as sidewalks, and as Wal-Mart

pointed out, Ms. Lauwers did not distinguish *Hoffstatter* at the trial court or in her Appellate Brief.

The trial court correctly determined as a matter of law that the grass strip located directly next to the stairs and installed for ornamental purposes was not unreasonably dangerous; and Regal Cinemas did not breach its duty to Ms. Lauwers.

2. Regal Cinemas Had No Actual Or Constructive Notice Of The Existence Of An Unreasonably Dangerous Condition

A landowner's duty attaches only if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk." *Iwai*, 129 Wash.2d at 95, 915 P.2d 1089. This condition is satisfied where the landowner has "actual or constructive knowledge of the condition. *Hemmen v. Clark's Rest. Enters*, 72 Wash.2d 690, 692, 434 P. 2d 729 (1957). Constructive knowledge is established where "the condition...existed for such a length of time as to afford a sufficient opportunity for [the

landowner], in the exercise of reasonable care, to have become aware of the condition." *Id.*

Ms. Lauwers presented no evidence in her brief that Regal Cinemas had actual or constructive notice of an unreasonably dangerous condition or that the grass involved an unreasonable risk of harm as required by Restatement 2nd of Torts §343(a). The trial court properly dismissed the claims against Regal Cinemas because there is no evidence of prior occurrences in this location.

Plaintiff has attempted to create an issue of fact by contending theater employees could see patrons walking across the grass. However, as pointed out in Wal-Mart's brief, Ms. Lauwers did not attach affidavits of persons who have personal knowledge or documentation to support that the theater employees could see patrons walking on the grass. Therefore Plaintiff's expert could only speculate that this occurred. However, even if employees did see patrons walking on the grass, this is not actual or constructive notice that the grass strip created an unreasonable risk of harm to business invitees. A

complete failure of proof concerning this essential element is fatal to Ms. Lauwers' case, and summary judgment was appropriately granted by the trial court.

3. Ms. Lauwers Presented No Evidence That Regal Cinemas Would Expect that Ms. Lauwers Would Not Discover Or Realize The Alleged Danger, Or Fail To Protect Herself Against It

Regal Cinemas' Summary Judgment correctly established that Ms. Lauwers was required to produce evidence that the claimed dangerous condition was a condition that Regal would "expect that [plaintiff] will not discover or realize the danger or will fail to protect themselves against it. *Restatement 2nd of Torts §343* However, Plaintiff did not produce any such evidence, but only stated that Regal Cinemas should have anticipated that business invitees would walk on the grass instead of the sidewalk.

In *Hoffstatter*, the court acknowledged that tree roots caused the uneven surface of the bricks, which was a common condition in an area set aside for landscaping. The court emphasized that this condition was open and obvious, and" *it*

was reasonable that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk.” Id.

Ms. Lauwers chose to walk across the grass landscaped strip, and it was reasonable for Regal Cinemas to expect that Ms. Lauwers would pay attention to the surface conditions and proceed with due care when she cut across the lawn rather than use the concrete walkways. Nor was Regal’s landscaped strip unreasonably dangerous because it was not maintained as a sidewalk. The trial court was correct in granting Regal Cinemas’ summary judgment motion.

4. Summary Judgment Was Appropriate As The Alleged Danger Was Open And Obvious To Ms. Lauwers

A landowner is not liable to protect business invitees from known or obvious dangers:

A possessor of land is not liable to his invitees for physical harm caused by them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement 2nd of Torts §343A(1)

A landowner is not liable for harm caused by open and obvious dangers. *Mucsi v. Graoach Associeates Ltd. Partnership No. 12, 144 Wn. 2d 847, 860, 31 P. 3d 684 (2001).*

Regal Cinemas' summary judgment identified that like the uneven bricks in *Hoffstatter*, the grassy surface where Ms. Lauwers slipped was in plain sight, and entirely open and obvious to Ms. Lauwers and theater patrons. As stated above, Ms. Lauwers failed to present evidence to raise a genuine issue of material fact of the existence of a dangerous condition, or that Regal Cinemas failed to protect Plaintiff from any alleged danger in the landscaping strip that was not hidden and was open and obvious to theater patrons.

Ms. Lauwers used the sidewalk, steps, and stairs to enter the theater without incident. Ms. Lauwers voluntarily chose to take a short cut across the landscaped grass to reach her vehicle, and should have been aware of the potential risk of walking on grass instead of the stairs and sidewalk. Ms.

Lauwers presented no evidence that the danger of possibly slipping on grass was not known to her, or the fact that when grass was wet it may be slippery, which is a common condition in the Northwest. Summary Judgment in favor of Regal Cinemas was proper.

VI. CONCLUSION

Plaintiff/Appellant Lauwers has failed to meet her burden to produce evidence sufficient to raise an issue of material fact, and the trial court's order should be affirmed.

Ms. Lauwers failed to produce evidence that the landscaped grass strip was an unreasonably dangerous condition. *Hoffstatter* affirmed that planting strips are not required to be maintained in the same condition as sidewalks, and landowners could anticipate that pedestrians would use more caution when walking on a grass surface as opposed to a cement sidewalk. Ms. Lauwers failed to produce evidence that Regal Cinemas had actual or constructive notice of the existence of an unreasonably dangerous condition. Ms.

Lauwers failed to produce any evidence that Regal Cinemas should have expected that patrons would not discover or realize the alleged danger, or fail to protect themselves against it. Ms. Lauwers also failed to produce evidence that Regal Cinemas should have anticipated this was a dangerous condition because it was known or obvious.

There is no evidence provided by Ms. Lauwers that Regal Cinemas breached its duty of care. Summary judgment was properly entered for Regal Cinemas, and the trial court's order should be affirmed.

Respectfully submitted this 1st day of August, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of:

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