
NO. 69623-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

DAVID CHRISTMAN and ROBIN CHRISTMAN, individually, and as
husband and wife,

Plaintiffs-Appellants,

vs.

EASTGATE THEATRE, INC. d/b/a REGAL ENTERTAINMENT
GROUP, a Washington corporation; WAL-MART STORES, INC.
(Number 2385), a foreign corporation, et al.

Respondents.

APPELLANTS' OPENING BRIEF

JEFFEY H. SADLER
Attorneys for Appellants
SADLER LAW FIRM, P.S.
705 South 9th Street, Ste 305
Tacoma, WA 98405
Tel: (253) 573-1700

27136

69623-8-1
DAVID CHRISTMAN
ROBIN CHRISTMAN
JEFFEY H. SADLER
SADLER LAW FIRM, P.S.
705 SOUTH 9TH STREET, STE 305
TACOMA, WA 98405
TEL: (253) 573-1700

TABLE OF CONTENTS

I.	Assignments of Error	5
II.	Statement of the Case.....	3
	A. Statement of Facts	3
	1. Facts of the Incident	3
III.	Argument	9
	<u>I.</u> Summary Judgment is inappropriate when genuine Issues of Material Fact Exist and the Credibility of the Witnesses is at Issue.	Error! Bookmark not defined.
	<u>A.</u> It is a Material Fact as to Whether or not the Grassy Slope was a Deceptively dangerous Walkway or Merely picturous Landscaping.	11
	<u>B.</u> It is a Material Question of Fact whether or not the Danger of the Grassy Slope was Obvious	Error! Bookmark not defined.
	<u>C.</u> It is a Material Question of Fact Whether or Not it was Unreasonable for the Plaintiff to use the Grassy Slope as a Means of Egress Rather than the Stairway.	Error! Bookmark not defined.
IV.	Conclusion.....	14

TABLE OF AUTHORITIES

Cases

Washington Cases

<i>Balise v. Underwood</i> , 62 Wn.App. 195, 381 P.2d 966 (1963).....	7, 8
<i>Hoffstatter v. City of Seattle</i> , 105 Wn.App. 598 (2001)	9
<i>Jolly v. Fossum</i> , 59 Wn.2d 20, 24, 365 P.2d 780 (1961).....	7
<i>McConiga v. Riches</i> , 40 Wn.App. 532, 536, 700 P.2d 331 (1985).....	7
<i>Meadows v. Grant's Autobrokers Inc.</i> , 71 Wn.2d 874 (1967)	8
<i>Ohler v. Tacoma General Hosp.</i> , 92 Wn.2d 507, 598 P.2d 1358 (1979).....	7
<i>Powell v. Viking Insurance Company</i> , 44 Wn.App. 495, 503, 722 P.2d 1343 (1986)	8
<i>Preston v. Douglas</i> , 55 Wn.2d 678, 681, 348 P.2d 605 (1960)	7
<i>Spurrell v. Booch</i> , 40 Wn.App. 854, 860, 701 P.2d 29 (1985)	7
<i>Turgren v. King County</i> , 104 Wn.2d 293, 309, 705 P.2d 258 (1985).....	7
<i>Wood v. Seattle</i> , 57 Wn.2d 469, 473, 358 P.3d 140 (1960).....	7
Rules	Page
CR 56(3).....	7

I. ASSIGNMENT OF ERROR

The trial court erred in dismissing the plaintiffs' claim on summary judgment as genuine issues of material fact exist.

I. STATEMENT OF THE CASE

A. Statement of Facts

1. Facts of the Incident

On April 3, 2009, Plaintiff David Christman slipped and fell on a deceptively wet grassy walkway outside of Eastgate Theatre known to the public as Regal Cinemas Stadium 17 located at the Auburn Supermall. CP 115 (Page 11, lines 12-25). The grassy walkway is shown in the photographs attached as Exhibit 1 to the Declaration of Celia M. Rivera. The day before the plaintiff fell, another Regal Cinemas patron also fell on the same wet grassy walkway sustaining serious injuries. CP 118 (Page 25, lines 19-25).

Discovery is on-going, but to the best of our understanding, construction of the *new* parking lot in front of the theatre was completed before April 2009. Maria Robinett, Eastgate (hereinafter referred to as Regal) Theatre manager testified at her deposition that prior to the installation of the new parking lot in front of the

theatre, all of the Regal Cinemas patrons parked their vehicles either behind the Theatre or on either side of the theatre. No parking lot existed in front of the theatre. What existed was a large vacant dirt lot that was not useable. The lot was a swampy marsh with two huge mountains of dirt that was fenced. CP 120 (Page 30, lines 5-20). Because no parking lot existed in front of the theatre prior to the construction of the parking lot, all of the Regal Cinemas Patrons exclusively used the sidewalks along the side of the theatre leading up to the main doors. Prior to the new parking lot, the theatre manager, Maria Robinett had never even seen anyone in front by the grass. CP 119 (Page 28, lines 5-9). There was no reason for any patron to cross the grassy slope, much less use it as a walkway as the stairs went nowhere. The land in front of the Theatre was a swampy marsh area with two huge mountains of dirt. CP 120 (Page 30, lines 11-19). However, at Walmart's request, a new parking lot in front of the theatre was constructed by Sierra Construction that ultimately changed the flow of pedestrian traffic, changing what appeared to be merely a grassy slope into a frequently used walkway. CP 118-119 (Page 23, lines 10-25; Page 27, lines 7-16).

After the construction of this new parking lot, nearly all of Regal Cinemas patrons began using the parking lot located in front of the theatre as it was the closest and most direct route into the

theatre. CP 119,121 (Page 36, lines 2-7; page 27, lines 7-16). Theatre manager Maria Robinett testified that people using the grassy area became a problem and they believed the slope was dangerous. CP 123 (Page 43, lines 15-25). Maria Robinett observed and was aware that patrons were using the grassy area as a walkway. CP 119 (Page 27, lines 7-16).

In addition to a new parking lot, a new drop-off lane was created in front of the grassy slope, instead of the stairs. Because the grassy slope was a reasonably safe means of ingress and egress, "people would walk through the grass instead of the stairs." CP 120 (Page 32, lines 1-16).

The grassy slope/walkway was deceptively dangerous when wet. It was not obvious that the grassy walkway was wet and water-logged. CP 139, 140 (Page 32, lines 7-14; Page 33, lines 20-24). The day Plaintiff David Christman fell, it had not rained. Plaintiff Christman testified that the ground did not appear wet. CP 138 (Page 26, lines 24-25; Page 27, lines 2-22). The Regal Theatre manager testified that it had not rained that day, and the concrete was not wet. CP 127 (Page 58, lines 4-9). This particular area of the ground doesn't sufficiently absorb water due to the surrounding concrete. CP 117 (Page 19, lines 7-15; Page 20, Lines 2-23). The theatre manager testified that the area my client fell was frequently wet and muddy. CP 127 (Page 58, lines 10-16).

After Mr. Christman fell the entire back of his shirt was wet and muddy. CP 117 (Page 20, lines 21-23). The theatre manager went into the theatre to get paper towels to dry him off. CP 139 (Page 29, 7-10). Mr. Christman's shirt was so wet, he changed into his son's sweatshirt. The fact that the ground was wet and water logged was not obvious. The Plaintiff will testify there were NO warnings. Maria Robinett will testify there were warning signs. CP 130 (Page 72, lines 6-18). A patron would not know the ground was wet, waterlogged and slick until after stepping onto the grass and falling. The ground was so slick, after landing on the ground his back slid down to the edge of the concrete leaving skid marks. CP 117 (Page 21, lines 21-23). Unfortunately for Mr. Christman, he fell after taking two steps onto the wet grassy walkway/slope. CP 142 (Page 55, lines 19-24).

III. LAW AND ARGUMENT

1. Summary Judgment is Inappropriate when Genuine Issues of Material Fact Exist and the Credibility of the Witnesses is at Issue.

The trial court's decision on a motion for summary judgment is reviewed de novo. Summary judgment should be granted *only if* the pleadings, affidavits, depositions and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

CR 56(3); *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue of material fact exists, and the Court should not resolve any existing factual issues. *McConiga v. Riches*, 40 Wn. App. 532, 536, 700 P.2d 331 (1985); *Balise*, 62 Wn.2d at 199. A material fact is one on which the outcome of litigation depends. *Ohler v. Tacoma General Hosp.*, 92 Wn.2d 507, 598 P.2d 1358 (1979). The Court should consider the material evidence and all reasonable inferences there most favorably to the *non-moving* party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Id.*; *Wood v. Seattle*, 57 Wn.2d 469, 473, 358 P.2d 140 (1960). The object and function of a summary judgment motion is to avoid a useless trial; however, ***a trial is not useless but absolutely necessary where there is a genuine issue as to any material fact.*** *Preston v. Douglas*, 55 Wn.2d 678, 681, 348 P.2d 605 (1960); *Jolly v. Fossum*, 59 Wn.2d 20, 24, 365 P.2d 780 (1961). All facts and reasonable inferences must be construed in favor of the non-moving party; the motion should be granted *only if*, from all evidence, reasonable persons could reach only one conclusion. *Turgren v. King County*, 104 Wn.2d 293, 309, 705 P.2d 258 (1985); *Spurrell v. Booch*, 40 Wn. App. 854, 860, 701 P.2d 29 (1985).

The Court should not grant summary judgment when there is a question as to the credibility of the witness whose statements are critical to an important issue. *Powell v. Viking Insurance Company*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986); *Meadows v. Grant's Autobrokers Inc.*, 71 Wn.2d 874 (1967). The Court should not resolve issues of credibility at summary judgment hearing, and if such an issue is present, the motions should be denied. *Balise*, 62 Wn.2d at 199.

In this case, almost every material fact is hotly contested. The testimony is conflicting whether or not the grassy slope was a commonly used walkway and a safe means of ingress and egress to the theatre. The Plaintiffs will argue that the grassy patch was not mere landscaping used for beautification purposes, but a walkway primarily used as a safe means of ingress and egress to the theatre. The Defendants will argue that the grassy slope was landscaping, and it and was never intended to be used as a walkway.

Testimony is conflicted as to whether the grassy slope was deceptively dangerous or an open and obvious condition. The Plaintiff will argue there were no warnings and the wet grass and ground was deceptively slippery and soggy. Defendant Regal will argue there were warning signs and the condition was deceptive because all grass is wet in Washington.

The Plaintiffs will argue that the grass was deceptively dangerous because it was wet, water-logged and deceptively steep. The Defendants have argued that if the landscaping was steep it was obvious. The Plaintiff's will argue it was not. Plaintiff has provided ample evidence to demonstrate that numerous issues of material fact exist and defendant's motion for summary judgment should be denied.

A. It is a material fact whether or not the grassy slope was a deceptively dangerous walkaway or merely picturesque landscaping.

Here, genuine issues of material fact clearly exist. It is hotly contested whether or not the grassy slope was merely landscaping or a commonly used walkway used as a means of ingress and egress. The manager of the theatre has testified in her deposition that this area was frequently used as a walkway after the installation of a new parking lot. The Plaintiff's expert, Dan Johnson, a human factor's expert, has testified that given the location of the parking lot a reasonable person would use this area as a walkway. Mr. Johnson has testified that this slope was too steep to be considered safe, especially when wet.

Defendant Regal Cinemas has cited *Hoffstatter v. City of Seattle*, 105 wn. App. 596 (2001) to support their position this grassy slope was landscaping similar to parking strips near a

sidewalk. *Hoffstatter* indicated that “[a] sidewalk, which is devoted almost exclusively to pedestrian use is different than parking strips, which frequently contain such objects as power and communication poles, utility meters, and fire hydrants. As in this case, parking strips frequently are used for beautification, such as grass, shrubbery, trees or other ornamentation.”

This grassy slope/walkway was not a parking strip having a *primary* purpose of beautification. There were no power and communication poles, shrubbery, trees and other ornamentation, there was only grass. Patrons reasonably assumed it was a safe means of ingress and egress as Regal Cinemas Manager, Maria Robinett, testified in her deposition. After the new parking lot in front of the theatre was installed, the grassy slope's primary use became a walkway or a means of ingress and egress into the theatre, not beautification. Because the grassy walkway was actually used frequently as a means of ingress and egress to the theatre, Defendant Eastgate/Regal had a duty to ensure this grassy walkway was safe. Regal breached their duty, as this walkway was not safe.

B. It is a material question of fact whether or not the danger of the grassy slope was obvious.

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 (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 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.

This material fact is also hotly contested. It was not obvious to Mr. Christman the grassy slope/walkway was wet or that the ground was water logged, making the slope dangerously slick. It had not rained that day. Regal, Eastgate Theatre manager, Maria Robinett, testified that the concrete surrounding the grassy area was DRY. CP 127 (Page 58, lines 4-9). Mr. Christman testified that the ground looked dry, but that he was muddy after he fell and had to be cleaned up. CP 138 (Page 26, lines 23-25; Page 27, lines 2-7). Because it had not rained that day, it would be safe to assume the grass would not be wet, and the ground would be firm enough to walk on. A reasonable person would not realize the grass was wet as it was **not obvious**. Unfortunately for Mr. Christman, the grass was not obviously wet, the ground was not obviously water logged, both of which made this grassy slope/walkway an unreasonable risk of harm.

Defendant Regal Cinemas has alleged that if the grassy slope was dangerous it was openly and obviously dangerous. Clearly it was not obvious, as Mr. Christman has testified that the slope appeared to be like any normal little hill and it not look dangerous. Not all grassy slopes are dangerous. They are dangerous when there is inadequate drainage in place, making the ground water logged and deceptively slick. CP 134 (Page 86, lines 18-25; page 87, lines 1-2); CP 132 (Page 81, lines 9-12). The area was not overtly muddy as it was covered by grass and there was no water pooling and the area was always covered by grass. CP 132 (Page 81, lines 3-16). One could only tell it was slick and water logged after stepping onto the ground. The Plaintiff, David Christman, had no way to anticipate that the grassy slope's drainage was inadequate until after he fell. His sweatshirt was not merely damp, but was entirely soaked after he fell. In fact, the area was so slick that after his feet went up into the ground he left two long muddy streaks and tracks were left on the sidewalk from skidding down the slope. CP 117 (Page 20, lines 2-23).

C. It is a material question of fact whether or not it was unreasonable for the Plaintiff to use the grassy slope as a means of egress rather than the stairway.

Plaintiffs' expert witness, Daniel Johnson, PhD, a human factors expert will testify that Regal Cinemas should have

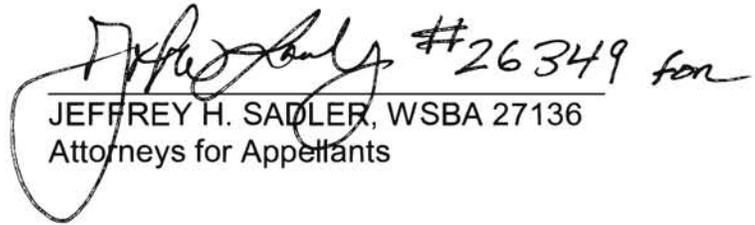
anticipated that the grassy slope would be used as a walkway as a reasonable means of ingress and egress to and from the parking lot in front of the cinemas. Given this reasonable assumption the grassy walkway was not merely landscaping but a walkway that failed to meet the standard of care owed to its customers. Dr. Johnson will testify that the wet grassy slope in front of Regal Cinemas is an unreasonably dangerous condition. CP 144-159. Dr. Johnson further testified that Defendant Eastgate should have known that it would be used as a pedestrian walkway based on the location of the parking. Had Eastgate hired a human factors expert to evaluate their plans to construct the parking lot, this fall would have been avoided, as safeguards would have been in place to prevent use of the slope as a walkway. There is currently purple metal railing in place to prevent customers from using the slope as a walkway. Plaintiff David Christman will testify that Maria told him that railing had been removed recently. CP 124 (Page 47, lines 3-14). The Regal Theatre manager has testified that there was never any railing in place, but she had put up a warning. CP 130 (Page 72, line 7-18). Clearly this alone is a huge question of fact. It is up to a jury to determine whether Plaintiff's expert is credible, to determine the weight to be given to the testimony of Plaintiff's expert and whether it was reasonable for Plaintiff to use this grassy

area as a walkway. Therefore, the trial court should have denied Defendants' Motion for Summary Judgment.

II. CONCLUSION

This court should reverse the trial court's order granting summary judgment.

DATED this 12th day of September, 2013.

 #26349 for
JEFFREY H. SADLER, WSBA 27136
Attorneys for Appellants