NO. 100960-7

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

COURT OF APPEALS NO. 83183-6-I

JEANETTE STOFLETH, an individual,

Petitioner-Plaintiff,

v.

KRISTINA COSGRAVE and "JAMIE DOE" COSGRAVE, and the marital community comprised thereof; 733 LAKESIDE CONDOMINIUM ASSOCIATION, a non-profit corporation,

Respondents-Defendants.

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733 LAKESIDE CONDOMINIUM ASSOCIATION ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. IDENTITY OF RESPONDENT 1

II. RESPONSE TO PETITIONERS' ISSUES PRESENTED FOR REVIEW 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 1

V. CONCLUSION 8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Boeing Co. v. State, 89 Wn.2d 443, 572 P.2d 8, 11 (1978)4, 5, 7
Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002) 3
Ruff v. King County, 125 Wn.2d 697 (1995)..... 6, 7

I. IDENTITY OF RESPONDENT

Respondent Lakeside Condominium Association, defendant below, asks this Court to decline to accept review of the Court of Appeals Decision.

II. RESPONSE TO PETITIONERS' ISSUES PRESENTED FOR REVIEW

The unpublished decision of the Court of Appeals does not conflict with precedent at any level. The Court of Appeals correctly affirmed summary judgment dismissal because the Lakeside parking garage complied with all applicable building codes at the time of construction and there was no evidence Lakeside was on notice of any relevant unsafe condition.

III. STATEMENT OF THE CASE

The relevant facts of the case are accurately stated in the opinion of the Court of Appeals.

IV. ARGUMENT

At the outset, it is important to note that Petitioner does not claim that the Court of Appeals misstated a legal rule for determining whether a duty is owed to an invitee. Instead,

Petitioner finds fault with the application of a correctly stated rule to the facts of her case. The nature of this alleged error counsels against acceptance of review because the decision is not precedential and does not recite an incorrect rule of law.

Moreover, there is no actual error of any kind the opinion. The Court of Appeals correctly held that Petitioner failed to prove Lakeside knew or should have known of any dangerous condition that resulted in her accident. The court correctly stated the applicable standard for finding a duty as follows:

> An owner of a building has a general duty to provide a safe premises. Fredrickson v. Bertolino's Tacoma, Inc., 131 Wn. App. 183, 189, 127 P.3d 5 (2005). The duty of care the possessor or property owes is based on the common law classification of the person as an invitee, a licensee, or a trespasser. Assuming, without deciding, that Lakeside owed Stofleth the highest duty of care as an invitee, she failed to carry her burden on summary judgment to show that there were disputed issues of material fact. Lakeside is liable to an invitee if Lakeside: knows or by exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to the invitee; should expect that the invitee will not

> discover or realize the condition, or will fail to protect themselves against it; and fails exercise reasonable care to protect the invitee from the danger. Kamla v. Space Needle Corp., 147 Wn.2d 114, 125-26, 52 P.3d 472 (2002) (citing RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW INST. 1965)).

Plaintiff primarily argues that the Court of Appeals should have applied the standard applicable to "open and obvious" dangers discussed in *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002). There, the Court stated

> A landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious nature of the danger. Properly framed, the question in this case is whether Space Needle should have anticipated Kamla's harm, despite the obvious hazard posed by the moving elevators. The trial court dismissed this claim on summary judgment, stating, "the defendant is not liable for plaintiff's failure to avoid an open, obvious potential hazard about which he was aware and warned."

Id. While the Court of Appeals cited *Kamla* for the general standard for business invitees, the specific test in *Kamala* is not directly applicable because it is designed to address a situation

where a danger is open and obvious to everyone and the issue is not whether the landowner knew or should have known of the danger, but instead whether the landowner should have anticipated that people might fail to avoid the danger despite its open and obvious nature. Here, no one contends that the Lakeside garage contained open and obvious dangers. In fact, that is the problem with plaintiff's case. The supposed hazards of the garage are supported only with highly general expert opinion, and not by reference to any code provision or past incidents demonstrating that Lakeside knew or should have known of any danger.

Plaintiff cites *Boeing Co. v. State*, 89 Wn.2d 443, 446, 572 P.2d 8, 11 (1978), where the court found that the State, as an operator of a public roadway, had a duty to implement technology to alert drivers that there was insufficient clearance for the vehicle under an underpass. This was true despite the lack of commercially available technology or evidence that such devices were in common use. *Id.* The court justified its

holding by stating "We acknowledge this [lack of duty] to be the general rule. However, there are extraordinary situations which may call for extraordinary measures in the exercise of reasonable care." *Boeing*, 89 Wn.2d at 447, 572 P.2d at 11–12. The extraordinary circumstances in *Boeing* were the precise circumstances missing here:

> Here, the respondent's evidence showed a past history of frequent accidents in spite of the warning signs posted. It further showed the appellant's awareness of the need for a more effective warning system and that in other similar circumstances governmental bodies had devised warning systems to meet the problem. This evidence was sufficient to take to the jury the question whether the appellant exercised reasonable care under the circumstances.

Boeing, 89 Wn.2d at 448, 572 P.2d at 12. Here, the parking garage had existed fifty years at the time of the accident without a single prior similar incident.

Petitioner appears to argue that prior notice has less relevance to private property owners than it does to public entities. No case plaintiff cites actually states that a different standard applies.

Plaintiff relies upon *Ruff v. King County*, 125 Wn.2d 697 (1995); *Ruff*, too, is distinguishable. In *Ruff*, the Washington Supreme Court affirmed the trial court's summary judgment in favor of King County because the plaintiff failed to present any evidence that the public roadway was inherently dangerous or deceptive. *Id*. at 706-07. The *Ruff* court acknowledged that the record showed the defendant had not violated any applicable standards or codes, and in fact, the plaintiff did not argue that the municipality had violated any statutes. Rather, the case hinged on whether the roadway was inherently dangerous or deceptive. The plaintiff did not present any evidence to show that the roadway was inherently dangerous or deceptive, except to rely upon expert testimony by the plaintiff's transportation engineering expert, who asserted that the roadway was an "unreasonably dangerous condition '[b]ecause all roadways can be hazardous' . . . [and] based this conclusion on what he stated as 'deficiencies relative to the industry standards.'" *Id*. at 706, see also n.5. The court disregarded these opinions by the

plaintiff's expert, stating that it "cannot find negligence based on speculation or conjecture." *Id.*

It is agreed by the parties that Lakeside's parking garage is compliant with the codes that were applicable at the time it was constructed. More importantly, plaintiff has not presented any evidence that Lakeside knew of the alleged dangerous condition prior to the incident. Unlike the plaintiffs in *Ruff* and *Boeing*, Plaintiff has not presented any evidence of complaints or accidents prior to the subject incident.

Petitioner asserts that the Court of Appeals should have allowed Petitioner's expert to create a duty to install various safety enhancements that were neither legally required nor shown by past experience to be necessary. Plaintiff points to no case that has ever allowed an expert to create such a duty after the fact in the absence of concrete evidence that the defendant actually knew or had reason to know of a hazard. In arguing for the sufficiency of Mr. Norris's vague and esoteric opinions, Petitioner claims that a reasonable civil engineer or property

management company should have been aware of a danger but claims that "Plaintiff/Petitioner was a lay person with zero operating knowledge of these potential dangers." The problem of course, is that the Association is simply a collection of lay owners. It is not charged with awareness of subtle design norms as if it were an architect or engineer.

V. CONCLUSION

Because the Court of Appeals correctly recited and applied the appropriate standard for determining the existence of a duty to invitees, its decision conflicts neither with a prior decision of this Court nor with any other decision of the Court of Appeals, respondent respectfully request that this Court deny review.

Pursuant to RAP 18.17(c), I certify that this document contains 1,388 words, excluding the title sheet, the table of contents, the table of authorities, and signature blocks.

RESPECTFULLY SUBMITTED this 30th day of June, 2022.

BETTS, PATTERSON & MINES, P.S.

By:_____
Daniel L. Syhre, WSBA #34158
Attorneys for 733 Lakeside Condominium Association

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 30, 2022, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **733 Lakeside Condominium Association Answer To Petition For Review; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of June, 2022.

Valerie D. Marsh

BETTS, PATTERSON & MINES, P.S.

June 30, 2022 - 1:33 PM

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