No. 313930

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

RAYMOND ROBINSON

Appellant,

v.

U.S. BANCORP

Respondent.

# *REPLY BRIEF OF APPELLANT*

GRANT COUNTY SUPERIOR COURT
CAUSE NO. 112012553
HONORABLE JUDGE EVAN SPERLINE

Appellate Counsel for Plaintiff/Appellant
Raymond Robinson:

DAVID A. WILLIAMS, WSBA #12010
Nine Lake Bellevue Drive, Suite 104
Bellevue, Washington 98005
Telephone: 425-646-7767
Facsimile: 425-646-1011

The thrust of the Bank's position is that the hazard that Robinson encountered was "open and obvious" as a matter of law:

> "The question in this case is whether U.S. Bank *should* have anticipated Mr. Robinson's harm, despite the obvious hazard posed by a 5'8" tall man, in broad daylight, walking directly head-on into a 4'11" landing".
>
> Respondent's Brief, page 4.

But, critically, "4 feet, 11 inches" is the Bank's approximation of the height of the landing. That figure comes from the Declaration of Tina Winter, the Banks' Manager, who said:

> "The approximate clearance under the outside staircase located at the Moses Lake Branch of U.S. Bank where Plaintiff Raymond Robinson claims he attempted to walk under, is 4 feet, 11 inches".
>
> CP 37 (emphasis added).

This is hardly trivial. Robinson testified at deposition that he low-hanging staircase struck him on his forehead. CP 11, 12. Setting aside the question of why exactly, Ms. Winter couldn't (or wouldn't) provide anything more than an approximation of the clearance, the actual question is whether, as a matter of law, it was "open and obvious" to Robinson that the stairway wasn't QUITE high enough for him to walk under.

Furthermore, the uncontroverted evidence is that Mr. Robinson believed that he was walking on a walkway around the building:

> "I just assumed that you could—it was there. The walkway was there, and I just assumed you could walk on around it".
>
> CP 11, 12.

The Bank cites isolated cases where the particular hazard involved was held to be "open and obvious" as a matter of law. But one of those very cases – Kamla v. Space Needle Corp, 147 Wn.2d 114,126, 52 P. 3d 472 (2002) , recognizes the general rule – that whether a hazard is "open and obvious" and whether the land owner should anticipate the harm despite its obviousness are questions of fact.

Here, Robinson started down what he perceived to be a walkway, leading to a staircase that, at his height, he could almost safely walk under. The Bank submitted no evidence, expert or lay, that it was "open and obvious" that in fact he wasn't on a "walkway". Likewise, the Bank submitted no evidence, expert or lay, that it was or should have been "open and obvious" to Robinson that he couldn't quite safely navigate the stairway.

If, as the Bank now says, it "never disputed the feasibility of its ability to place latticework on the staircase before this incident occurred" (Respondent's Brief, p. 12), Robinson agrees that evidence of it actually having done so need not be admitted. But how does this admission not raise an inference of negligence, when the question of negligence always centers around consideration of what feasible measures taken by a defendant would have prevented the accident in question? The Bank does not say.

The Bank's interpretation of Bartlett v. Hantover, 84 Wn.2d 426 (1974) is wide of the mark. Yes, the Court held that evidence of subsequent remedial measures was inadmissible, where the defendant had stipulated to their feasibility. But the Court hardly ruled that the feasibility of a safety measure that could have been taken---but wasn't--- was irrelevant to a Defendant's alleged negligence. In the very language quoted by the Bank in its brief, the Court made this clear:

> "The evidence of actual subsequent remedial alterations which the trial court admitted into evidence had the prejudicial effect of showing by inference that the defendant himself must have believed his prior inaction was negligent because he subsequently altered the premises. The subjective belief of a defendant in a negligence action is not relevant to the issue of his negligence; it is

the objective test which determines whether one has breached his duty of due care to another..."

Bartlett, 84 Wn.2d, 430-431, cited at Respondent's Brief, p. 13-14 (emphasis added).

The "objective test" is always whether the Defendant acted reasonably.

## CONCLUSION

The judgment should be reversed.

DATED this 26 day of Jan, 2013.

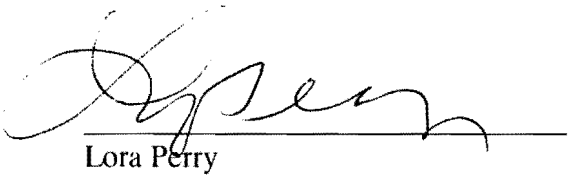
By: _____
David A. Williams, WSBA #12010
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that a copy of the Reply Brief of Appellant, was forwarded for service upon the counsel of record:

| Court of Appeals: | Attorney for Respondent: |
|---|---|
| Washington State Court of Appeals<br>Division III<br>500 North Cedar Street<br>Spokane, WA 99201-1905 | Rodney L. Umberger, Jr.<br>601 Union Street, Suite 4100<br>Seattle, WA 98101-1368 |
| **SENT VIA:**<br><br>[x] US Mail | **SENT VIA:**<br><br>[x] US Mail<br>[x] Fax 206-628-6611 |

DATED this 26th day of June, 2013.



Lora Perry
Paralegal to David A. Williams