72403-7

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NO. 72403-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Karon Steepy,

Appellant,

v.

Walkin' The Dogs & Pet Services, Inc. d/b/a Bow Wow Fun Towne, a Washington Corporation, and John Doe Company, an entity,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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I. REPLY ARGUMENT

a. The Court routinely allows safety standards as evidence negligence even when not directly intended to bind a defendant. Bow Wow Fun Towne has provided no cogent argument why the International Building Code should be treated differently.

Bow Wow Fun Towne fails to show why the instant case is not analogous to the use of safety standards held applicable in *Martini ex rel. Dussault v. State,* 121 Wn. App. 150, 89 P.3d 250 (2004), which created a question of fact on the issue of negligence. Instead, a narrow reading of International Building Code (IBC) is provided by Bow Wow Fun Towne to assert that it does not apply to Ms. Steepy's case. Such a narrow reading is not supported by firmly established Washington law.

Deviation from safety standards, even if the standard is not directly binding on a defendant, is evidence of negligence. *Vogel v. Alaska S.S. Co.,* 69 Wn.2d 497, 419 P.2d 141 (1966); *Cresap v. Pacific Inland Navigation Co.,* 78 Wn.2d 563, 478 P.2d 223 (1970); *Bayne v. Todd Shipyards Corp.,* 88 Wn.2d 917, 568 P.2d 771 (1977). In *Vogel*, the defendant was not an employer, but was the owner of a ship on which stevedoring work was being done. The plaintiff suffered personal injuries in a fall aboard the defendant's vessel. *Id.* at 498-499. The plaintiff

introduced evidence of safety standards from the Code of Federal Regulations, which provided in pertinent part:

> (a) Weather deck walking and working areas shall be kept reasonably clear of lines, bridles, dunnage and all other loose tripping or stumbling hazards.
>
> (b) Gear or equipment, when not in use, shall be removed from the immediate work areas, or shall be so placed as not to present a hazard. 29 C.F.R. § 1504.91.
>
> (a) All walking and working areas shall be adequately illuminated. 29 C.F.R. § 1504.92.
>
> *Id.* at 499.

The defendant contended that the above cited provisions were inapplicable to ship owners who are not also employers of the longshoremen who are working aboard their ships, based on CFR § 1504.2, which provides, in part:

> (b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

The court rejected the defendant's contentions, and held that the deviations from a safety standard, even when the standard was not adopted

to bind a particular defendant, is evidence of negligence. The regulations merely "give expression to the minimum standards." *Id.* at 503. The Vogel Court cited *Provenza v. American Export Lines, Inc.,* 324 F.2d 660, cert. denied 376 U.S. 952, 11 L. Ed. 2d 971, 84 Sup. Ct. 970 (1963), *Provenza v. American Export Lines, Inc.,* 324 F.2d 660, cert. denied 376 U.S. 952, 11 L. Ed. 2d 971, 84 Sup. Ct. 970 (1963), stating, "the owner's duty does not stem from the regulation, but the regulation may be shown just like other evidence to indicate that a certain practice is safe or unsafe. While such evidence is not conclusive, it is relevant." *Id.* at 502.

Vogel is no aberration and safety standards are broadly utilized. See *Cresap v. Pacific Inland Navigation Co.,* 78 Wn.2d 563, 478 P.2d 223 (1970) (reversing and remanding for new trial when the trial court refused to give a jury instruction regarding the failure to comply with Safety and Health Regulations for Longshoring); See also *Bayne v. Todd Shipyards Corp.,* 88 Wn.2d 917, 568 P.2d 771 (1977) (holding that deviation from a statute that required a safe work place for "workman" was not limited in application solely to employees of the defendant).

Washington State adopted the IBC to promote safety of users of buildings and structures. RCW 19.27.020. Unlike *Vogel*, RCW 19.27.020 is specifically designed for the safety of someone like Ms. Steepy, who was the user of the doorway erected by Bow Wow Fun Towne. Regardless

of the statutes intended applicability, the code provisions cited by Dr. Sloan regarding the widths and thresholds of doorways are not intended to suggest Bow Wow Fun Towne should be cited for violation of the IBC. Rather, use of the IBC was intended to "give expression to the minimum standards" of safety for doorway and thresholds. This evidence is relevant to indicate that the use of the gate as a doorway was unsafe by failing to meet minimum safety standards.

b. Causation is generally an issue of fact for a jury. Bow Wow Fun Towne's application of *Johnson v. Recreational Equipment, Inc.* is misplaced.

Bow Wow Fun Towne relies heavily on a misreading of *Johnson v. Recreational Equipment, Inc.,* 159 Wn. App. 939, 945, 247 P.3d 18 (2011) to assert that the expert opinion of Dr. Sloan was unduly speculative. This assertion is essentially asking the court to extend the analysis of *Johnson* and, in most cases, eliminate the role of the trier of fact on the issue of causation.

Bow Wow Fun Towne accurately recites the facts on which the court relies to find REI's expert's opinion is simply speculation and conjecture, and do not raise a genuine issue of material fact. These facts are as follows: (1) a prior crash with this same bicycle **may have been** a contributing cause of the fracture of the fork, (2) **if** an element of that crash involved the front fork without creating visible damage, **then it**

could be considered an initiating event for the fracture that serves as the basis for this law suit, (3) the bicycle displayed substantial wear and tear, and (4) the bicycle was a high mileage vehicle. *Johnson v. Recreational Equipment, Inc.,* 159 Wn. App. at 556 (emphasis added).

Statements 1 and 2 of REI's expert's declaration are the two statements considered speculative and conjecture. It seems clear why the use of conditionals in that declaration rendered it speculative. Bow Wow Fun Towne is latching on to two words from Dr. Sloan's declaration, "possible instability", to draw comparison to the speculative language. However, this fails to take into account a clear assertion that the use of a gate a doorway with six inch threshold of the gate posed a serious risk to pedestrian safety. CP 117. The Court reads affidavits and declarations submitted by the parties in the light most favorable to the nonmoving party. *In re Ferree*, 71 Wn. App. 35, 44, 856 P.2d 706 (1993). Under this standard, the Court should disregard any speculative language in the Dr. Sloan declaration and consider the declaration in its entirety, which provides clear evidence on the dangerousness of the gate used as a doorway.

Since causation is usually a factual issue for a jury to decide, it is inapposite that Dr. Sloan was not provided the witness statements claiming that Ms. Steepy tripped over the threshold of the gate. The heart

of the matter is whether the finder of fact has sufficient facts that would establish causation. In the light most favorable to Ms. Steepy, a jury would find that the use of this gate as a doorway, with a six inch threshold caused her fall. The finder of fact would be provided evidence from witness statements that claim Ms. Steepy tripped. CP 107, 152-154, 158, 160. The finder of fact would be provided with photographs of the bent gate and threshold, clearly showing the threshold was implicated in Ms. Steepy's fall. CP 64-65. The finder of fact would be provided the expert opinion of Dr. Sloan which states that the dimensions of the gate, meaning the threshold, posed a serious risk to pedestrian safety. CP 117. It is not the expert who determines causation, it is the jury, who must parse through all of the evidence and determine if the plaintiff has satisfied all of the elements of negligence.

c. Unreasonable risk of harm is a factual question to which Ms. Steepy has provided substantial evidence that would allow the trier of fact to conclude that the doorway posed an unreasonable risk.

Negligence is generally a question of fact for the jury, and should be decided as a matter of law only 'in the clearest of cases and when reasonable minds could not have differed in their interpretation' of the facts." The existence of a legal duty is a question of law which an appellate court reviews de novo. "[W]here duty depends on proof of

certain facts that may be disputed, summary judgment is inappropriate. *Millson v. City of Lynden*, 174 Wn. App. 303, 312, 298 P.3d 141 (2013).

In several context, dangerousness has been held to be a factual question to be decided by a jury. See *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 135, 875 P.2d 621 (1994) (holding that whether a natural hazard is open and apparent depends on whether the licensee knew, or had reason to know, the full extent of the risk posed by the condition. . . "That is a question of fact"); *Millson v. City of Lynden,* 174 Wn. App. 303, 313- 314, 298 P.3d 141 (2013) (holding that where there were factual discrepancies whether a sidewalk offset was an open and obvious danger, the plaintiff's knowledge of the dangerousness of the particular sidewalk in question is a genuine issue of material fact); *Sjogren v. Props. of the Pac. N.W.,* 118 Wn. App. 144, 151, 75 P.3d 592 (2003) (holding there was at least an issue of fact as to whether the darkened stairs were an obvious danger when the plaintiff fell on a darkened stairway).

Bow Wow Fun Towne compares Dr. Sloan's statement that the gate posed a serious risk to pedestrian safety to its own interpretation of what poses a serious risk. But does this not bolster the point that these are inherently factual questions? As Bow Wow Fun Towne states, "walking down a steep staircase is a 'serious risk to pedestrian safety" and "bicycles

pose a 'serious risk' to pedestrian safety." These scenarios may be dangerous in the mind of Bow Wow Fun Towne, but reasonable minds could clearly disagree on either of these two points.

Whether the use of the gate with a six inch threshold is unreasonably dangerous is no different. Certainly a jury of Ms. Steepy's peers could decide the factual issue in favor of Bow Wow Fun Towne, but the fact that such a scenario exists should not deprive the finder of fact the opportunity to examine all of the facts presented and reasonably conclude that the use of the gate as dangerous. Again, it is not just Dr. Sloan's declaration that would allow a jury to determine that the use of this gate was dangerous. A jury would also be provided with facts regarding Bow Wow Fun Towne's deviation from safety standards, CP 117, the dimensions of the gate threshold, CP 116, portions of deposition transcripts from Ms. Steepy stating the gate closed on her ankle, CP 45, statements from witnesses stating Ms. Steepy tripped, CP 152-154, 158, 160, portions of answers to interrogatories where Bow Wow Fun Towne state that people can go in and out of the x-pen without letting the dogs out[1]. CP 35. Here, facts which may tend to show that the use of the gate posed an unreasonable risk, which is a factual question, is disputed. Summary judgment should be overturned and a jury should decide this

[1] This is a non-exhaustive list of some facts a reasonable jury may consider when determining whether the use of the gate posed an unreasonable risk.

disputed issue. It is for a jury to decide the facts of an occurrence in the presence of conflicting evidence. *Corbaley v. Pierce County*, 192 Wash. 688, 696, 74 P.2d 993 (1937); *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011).

d. The notice requirement has been satisfied by an exception to the rule or requires a determination by the trier of fact whether Bow Wow Fun Towne knew or should have known that the doorway was dangerous.

Bow Wow Fun Towne argues that this case is not analogous to *Tabak v. State,* 73 Wn. App. 691, 870 P.2d 1014 (1994) because in this case there is no evidence, circumstantial or otherwise, that Bow Wow Fun Towne was aware of any dangerous condition caused by the gate used as a doorway. The Court does not need to reach this issue, as Ms. Steepy has articulated a clear exception to this requirement, where plaintiff's duty to establish notice is waived if the landowner creates the hazardous condition. *Iwai v. State*, 129 Wn.2d 84, 102, 915 P.2d 1089 (1996). Bow Wow Fun Towne failed to respond to this exception. As addressed in Appellant's Opening Brief, Bow Wow Fun Towne's creation of the hazardous condition waives Ms. Steepy's duty to establish notice.

If the Court finds that Ms. Steepy does not fall within this exception, notice has still been established. A possessor of land is liable for physical harms if she has actual or constructive notice of a dangerous

condition. Restatement (Second) of Torts § 343. This analysis requires two inquires, (1) did the possessor of land have notice of the condition, and (2) was the condition dangerous. Conflating the two inquires would permit a possessor of land to absolve herself from liability by simply arguing she knew of the condition, but didn't know it was dangerous. This appears to be the argument Bow Wow Fun Towne is asserting.

Bow Wow Fun Towne erected the gate to be used to enclose dogs, and with knowledge that people would go in and out of the doorway it created. CP 35, 185. What additional evidence, circumstantial or otherwise, is required to show that Bow Wow Fun Towne had actual notice of the condition?

Bow Wow Fun Towne may be asserting that it did not know the doorway it created was dangerous. Again, dangerousness is a factual question. See *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 135, 875 P.2d 621 (1994); *Millson v. City of Lynden,* 174 Wn. App. 303, 313- 314, 298 P.3d 141 (2013); *Sjogren v. Props. of the Pac. N.W.,* 118 Wn. App. 144, 151, 75 P.3d 592 (2003). It is a jury who should decide whether the doorway was dangerous. A jury will be provided evidence of the dangerousness through the declaration of Dr. Sloan, CP 112-137, her own deposition testimony, CP 73-81, statements from other factual witnesses, CP 158, 160, answers to interrogatories of Bow Wow Fun

Towne, CP 32-40, the declaration of Mary Mark, owner of Bow Wow Fun Towne, CP 184-186, and deposition testimony of an ex-employee, Coleen Cody. CP 105-110.

In the light most favorable to Ms. Steepy, a jury has substantial evidence to find Bow Wow Fun Towne had actual notice of the dangerous condition. However, these arguments should not be reached because of the clear exception to the notice requirement articulated in *Iwai*, and applicable to Ms. Steepy.

II. CONCLUSION

The Order Granting Summary Judgment for Respondent should be reversed and the case remanded for a jury trial under Ms. Steepy's well plead and well supported theories of action. Appellant Karon Steepy should have her day in court before a jury of her peers.

DATED this 17th day of March, 2015 at Seattle, Washington.

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DECLARATION OF SERVICE OF APPELLANT'S REPLY BRIEF

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DECLARATION OF SERVICE

I, Kirsten Olsen Underwood, hereby state and declare as follows:

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and competent to be a witness in the above action, and not a party thereto; that I effected the service on the 18th day of March, 2015 by delivering via legal messenger service, the original of the following document: Appellant's Reply Brief, to Division One of Court of Appeals; and a true copy of the Appellant's Reply Brief to the following:

1) Joshua Rosen, Sweeney, Heit & Dietzler, 1191 2nd Av. # 500, Seattle, WA 98101; Joshua.rosen@libertymutual.com

I hereby declare under penalty of perjury under the laws of the State of Washington that the above is true to the best of my knowledge and belief.

DATED this 18th day of March, 2015, in Seattle.

Kirsten Olsen Underwood

Kirsten Olsen Underwood
Paralegal to David J. Balint