

64851-9

64851-9

NO. 64851-9I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION ONE

WEBERT, CATHERINE,

Appellate,

v.

SEATTLE UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT

William W. Spencer, WSBA #9592
Daira S. Faltens, WSBA #27469
Of Attorneys for Respondent Seattle University
MURRAY, DUNHAM & MURRAY
200 West Thomas, Ste. 350
Post Office Box 9844
Seattle, Washington 98109-0844
Phone: (206) 622-2655
Fax: (206) 684-6924

2010 SEP 15 PM 4:02

COURT OF APPEALS
DIVISION ONE
FILED
3

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

I. INTRODUCTION.....1

II. ISSUE PRESENTED.....1

III. STATEMENT OF THE CASE.....1

 A. PROCEDURAL FACTS.....1

 B. SUBSTANTIVE FACTS.....2

IV. ARGUMENT.....4

 A. APPELLANT’S BRIEF IS NOT SUPPORTED BY
 THE RECORD.....4

 B. THE TRIAL COURT DID NOT ERR IN
 DISMISSING PLAINTIFF’S CASE, SINCE
 PLAINTIFF FAILED TO MEET HER BURDEN OF
 PROVING SEATTLE UNIVERSITY BREACHED A
 DUTY OF CARE TO PLAINTIFF AS AN
 INVITEE.....4

 1. Plaintiff Admitted the Patched Area was Open
 and Obvious.....5

 2. Plaintiff Failed to Prove Each and Every
 Element of Restatement (Second) of §343.....7

 a. The Sidewalk Where Plaintiff Fell Did
 Not Constitute an Unreasonable Risk of
 Harm.....9

b. Even if the Underlying Court Considered the Sidewalk a Dangerous Condition, Defendant Expected Plaintiff Would Discovery or Realize the Danger Herself.....10

c. Defendant Exercised Reasonable Care.11

C. PLAINTIFF CANNOT CREATE A GENUINE ISSUE OF FACT WITH HER OWN DECLARATION.....11

IV. CONCLUSION.....13

CERTIFICATE OF SERVICE.....14

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

Fernandez v. State, 49 Wn. App. 28, 741 P.2d 1010 (1987).....4

Grant v. Market Basket Stores, Inc., 72 Wn.2d 446, 448, 433 P.2d 863 (1967).....4,5

Marshall v. Bally’s Pacwest, Inc., 94 Wash. App. 372, 972 P.2d 475 (Div. 2 1999).....12

McCormick v. Lake Washington School Dist., 99 Wash. App. 107, 992 P.2d 511, 141 Ed. Law Rep. 352 (Div. 1 1999).....11

Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).....5

Robinson v. Avis Rent a Car System, Inc., 106 Wash. App. 104, 22 P.3d 818 (Div. 1 2001).....12

Selvig v. Caryl, 97 Wash. App. 220, 983 P.2d 1141 (Div. 1 1999)..11

State v. Wilson, 75 Wash.2d 329, 450 P.2d 971 (1967).....4

Tincani v. Inland Empire Zoological Society, 124 Wn.2d 121, 875 P.2d 621 (1994).....5

Younce v. Ferguson, 106 Wn.2d 658, 666-67, 724 P.2d 991 (1986)..8

OTHER AUTHORITY

Restatement (Second) of Torts §332.....8

Restatement (Second) of Torts § 343.....7,9

Restatement (Second) of Torts §343A(1).....5,6

TABLE OF AUTHORITIES

OTHER AUTHORITY - CONT'D

W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* §§ 58-61 (5th ed. 1984).....8

I. INTRODUCTION

The trial court did not err in granting Defendant Seattle University's motion for summary judgment, because Seattle University did not breach any duty owed to Plaintiff as an invitee on its campus. Plaintiff admits she saw the patched area of the sidewalk on the day of the accident; her admission proves the area in question she tripped over was open and obvious.

II. ISSUE PRESENTED

Whether the trial court erred in granting summary judgment dismissing Plaintiff's case when there was no genuine issue of material fact as to whether Defendant breached a duty owed to Plaintiff as an invitee on its campus.

III. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

The lawsuit in this case was filed by Plaintiff on May 14, 2008. CP 9-10. The trial court granted Defendant Seattle University's Motion for Summary Judgment on January 5, 2010. CP 145-146.

B. SUBSTANTIVE FACTS

Plaintiff claims that while enrolled as a student at Seattle University, she was walking on campus in May 2005 when she tripped on a defect in a pedestrian walkway and fell. CP 9-10. Plaintiff claims Seattle University was negligent in failing to exercise reasonable care to protect its invitees against the allegedly defective condition on the walkway. CP 9-10.

Attached as Exhibits #4, #5 and #6 to the deposition transcript of Plaintiff are photographs of the sidewalk and patched area where Plaintiff claims she tripped and fell on the Seattle University campus. CP 7, CP 11-20. Plaintiff states that in terms of the pavement itself, the photographs depict how the pavement looked on the date of the accident. CP 7, 11-20. She agrees that there was a patch, or area lighter in color, than the rest of the pavement in the area where the incident occurred. CP 7, 11-17.

Plaintiff claims she saw the patched area of the sidewalk on the day of the accident. CP7, CP 11-17. She stated the following in her deposition beginning at Page 13, Line 18:

Q: Now, after you stepped up and you continued walking forward - - now, we are on the day of the accident - - did you see this area of patchwork that is depicted on Exhibits #4, #5 and #6? Did you see that?

A: Yes.

.....

Q: So I assume as you are walking forward you are looking forward and somewhat down to look where you are walking?

A: Sure.

Q: And it was - - not withstanding the shadows, and I understand there were shadows and it was sunny that day and there was brush as you described it, you are still able to see this area on the sidewalk where the patch was?

A: Yes.

CP 7, CP 11-17.

Seattle University has never had knowledge of any reported slip and fall accidents regarding the area where Plaintiff claims she fell on campus. CP 37-38.

IV. ARGUMENT

A. APPELLANT'S BRIEF IS NOT SUPPORTED BY THE RECORD.

Appellant's brief is not supported by the record. RAP 10.3 provides that "reference to the record must be included for each factual statement in a party's brief." In this case, Appellant failed to do so and relies on statements not supported by the record. Evidence not appearing in the record will not be considered when resolving an appeal. *State v. Wilson*, 75 Wash.2d 329, 450 P.2d 971 (1967).

Moreover, Respondent has not responded to Appellant's arguments regarding discovery or trial continuance issues, since those issues are not before this Court on appeal.

B. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S CASE, SINCE PLAINTIFF FAILED TO MEET HER BURDEN OF PROVING DEFENDANT BREACHED A DUTY OF CARE TO PLAINTIFF AS AN INVITEE.

An owner of property is not an insurer as to all who may be injured on his property. *Fernandez v. State*, 49 Wn. App. 28, 741 P.2d 1010 (1987). Negligence cannot be inferred simply because Plaintiff fell and hurt herself. *Grant v. Market Basket Stores, Inc.*,

72 Wn.2d 446, 448, 433 P.2d 863 (1967). Instead, a cause of action for negligence requires the Plaintiff to establish: (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) proximate cause between the breach and injury. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994)(citing *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984)). The trial court may decide issues regarding breach upon a summary judgment motion if reasonable minds can reach only one conclusion. *Id.* In the present case, even if all facts are considered in favor of Plaintiff, the jury could reach only one conclusion. There is no evidence Defendant breached any duty owed to Plaintiff.

1. Plaintiff Admitted the Patched area was Open and Obvious

Defendant had no duty to warn or protect against the patched area of the sidewalk, because the condition was open and obvious per Restatement (Second) of Torts §343A(1). Restatement (Second) of Torts §343A(1) provides:

A possessor of land is not liable to his invitees for physical harm caused to 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.

(Emphasis added.)

Comment e to the Restatement (Second) of Torts §343A

further explains this rule as follows:

In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as whether the advantage to be gained is sufficient to justify him incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

(Emphasis added).

In this case, Plaintiff admits she knew of the alleged condition and the risk involved, if any. Plaintiff testified she was aware of the patched area on the sidewalk. This means that she was paying

attention and saw what was open and obvious and there to be seen. She was aware of it and made the decision to continue to walk down the sidewalk. Under the circumstances, Seattle University did not breach any duty owed to Plaintiff. Therefore, it was proper for the trial court to grant summary judgment dismissing Plaintiff's claims.

2. **Plaintiff Failed to Prove Each and Every Element of Restatement (Second) of § 343.**

Plaintiff failed to prove Seattle University breached a duty to Plaintiff as a business invitee, since she did not meet her burden in proving every single element of Restatement (Second) of Torts § 343:

- (1) [the possessor] 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; and
- (2) [the possessor] should expect that [the invitee] will not discover or realize the danger, or will fail to protect themselves against it; and
- (3) [the possessor] fails to exercise reasonable care to protect them against the danger.

In premises liability cases, a person's status, based on the common law classifications of persons entering upon real property (invitee, licensee, or trespasser), determines the scope of the duty of care owed by the possessor (owner or occupier) of that property. *Younce v. Ferguson*, 106 Wn.2d 658, 666-67, 724 P.2d 991 (1986); *See generally* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* §§ 58-61 (5th ed. 1984). Washington has adopted the Restatement (Second) of Torts to define a landowner's liability to its business invitees.

Restatement (Second) of Torts §332 defines an invitee as follows:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Plaintiff was a business visitor at the time of the incident; therefore, Plaintiff was an invitee. Restatement (Second) of Torts §343, outlined above, establishes the duty an inviter owes to an invitee. It provides that a possessor of land can only be subject to liability for physical harm caused by a condition on the land if, and only if, all of the elements of Restatement (Second) of Torts 343 are met. In order to find Defendant liable to Plaintiff, all three above elements must have been established by Plaintiff. In the present case, none of the elements can be established.

a. The Sidewalk Where Plaintiff Fell Did Not Constitute an Unreasonable Risk of Harm.

The initial inquiry is whether the sidewalk where Plaintiff was walking when the alleged incident occurred created an unreasonable risk of harm to Seattle University's invitees (i.e. created a dangerous condition). Plaintiff can present no evidence that the sidewalk posed an unreasonable risk of harm to Seattle University's invitees.

Defendant had never been made aware of anyone else tripping on that particular sidewalk on the Seattle University campus. Defendant had never received any notice of any other complaints or

incidents with regard to the sidewalk Plaintiff was walking on at the time of the alleged incident.

Defendant did not believe, nor was there reason to believe, that the sidewalk posed an unreasonable risk of harm to its invitees. As a matter of law, the sidewalk did not create an unreasonable risk of harm. Therefore, the trial court was correct in granting summary judgment to Defendant.

b. Even if the Underlying Court Considered the Sidewalk a Dangerous Condition, Defendant Expected Plaintiff Would Discover or Realize the Danger Herself.

Next, Plaintiff must prove that Defendant should have expected Plaintiff would not discover or realize the alleged danger herself. Even if the trial court somehow considered the sidewalk a dangerous condition, there is no evidence Defendant should have expected Plaintiff would not discover or realize the alleged danger herself. In fact, the evidence is to the contrary. Plaintiff acknowledges she saw the area in question on the sidewalk. Everything about the sidewalk was open and clearly visible to the human eye.

There was no reason Defendant should not have expected Plaintiff would discover or realize the “alleged danger” herself, since it was open and obvious and Plaintiff admitted she saw the area in question.

*c. **Defendant Exercised Reasonable Care.***

For the third element to be present, Plaintiff must prove that Defendant failed to exercise reasonable care to protect its invitees against the alleged danger. In the present case, Defendant had not received any complaints regarding the sidewalk and was not aware of any prior trip and falls in the area. The condition of the sidewalk was open and obvious. There is no evidence tending to show that Defendant failed to exercise reasonable care.

*C. **PLAINTIFF CANNOT CREATE A GENUINE ISSUE OF FACT WITH HER OWN DECLARATION.***

A party cannot create an issue of fact and prevent summary judgment simply by offering two different version of a story by the same person. *McCormick v. Lake Washington School Dist.*, 99 Wash. App. 107, 992 P.2d 511, 141 Ed. Law Rep. 352 (Div. 1 1999); *Selvig v. Caryl*, 97 Wash. App. 220, 983 P.2d 1141 (Div. 1 1999). If

a party has given a deposition and the opposing party moves for summary judgment, the party who gave the deposition cannot create an issue of fact simply by submitting an affidavit contradicting his or her own deposition. *Robinson v. Avis Rent a Car System, Inc.*, 106 Wash. App. 104, 22 P.3d 818 (Div. 1 2001); *Marshall v. Bally's Pacwest, Inc.*, 94 Wash. App. 372, 972 P.2d 475 (Div. 2 1999).

In this case, similar to *Robinson*, Plaintiff was deposed and then submitted a declaration in response to Defendant's Motion for Summary Judgment contradicting her own deposition testimony. 106 Wash. App. 104. Courts in Washington State have held Plaintiff in this case may not use her own declaration to create a genuine issue of fact to contract her earlier deposition testimony. *Id.* Therefore, the court cannot take Plaintiff's declaration as evidence there is a genuine issue of material fact in this case.

//

//

//

V. CONCLUSION

Respondent Seattle University respectfully requests this Court affirm the trial court's order granting Seattle University's Motion for Summary Judgment.

Respectfully submitted this 15th day of September, 2010.

MURRAY, DUNHAM & MURRAY

By: 
William W. Spencer, WSBA #9592
Daira S. Faltens, WSBA #27469
Of Attorneys for Respondent

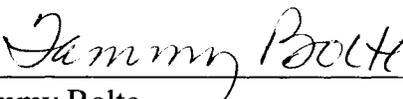
CERTIFICATE OF SERVICE

I, Tammy Bolte, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 15th day of September, 2010, I caused a true and correct copy of Respondent's Opening Brief to be served on the following via messenger:

Clerk of the Court
Court of Appeals, Division II
One Union Square
600 University Street
Seattle, Washington 98101-4170

Plaintiff's Attorney
Mr. J. D. Smith
1700 - 7th Avenue, Ste. 2260
Seattle, WA 98101



Tammy Bolte

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON
2010 SEP 15 PM 4:02