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No. 683446

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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DARLENE F. ACOSTA

Plaintiff/Appellant,

v.

DOUGLAS A. HEDGES

Defendant/Respondent.

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***APPELLANT'S BRIEF***

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KING COUNTY SUPERIOR COURT  
CAUSE NO. 112181626  
HONORABLE JUDGE MARY YU

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*Appellate Counsel for Plaintiff/Appellant  
Darlene F. Acosta:*

DAVID A. WILLIAMS, WSBA #12010  
Attorney for Plaintiff  
9 Lake Bellevue Drive, Suite 104  
Bellevue, WA 98005

2012 MAY 17 AM 11:41  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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## INTRODUCTION

The defendant in this slip and fall case moved for summary judgment because “the plaintiff-licensee was aware of the condition of the land at the time of the accident”.

But was the Appellant Darlene Acosta (“Acosta”) aware that the sloped pathway along her former boyfriend Douglas Hedges’ (“Hedges”) driveway, that she was well aware of and took care when traversing, had changed, becoming worn and dangerously slippery due to increased foot traffic? The Trial Court decided so as a matter of law, and dismissed Acosta’s claim for the serious injuries she sustained when her foot slipped from beneath her as she slipped on the slope and fell, breaking her ankle.

Of course Acosta knew that the pathway was sloped, which is why she was always careful when she walked on it. What she didn’t know was that increased “traffic” at Hedges’ home in the period just before the fall had changed the character of the surface, as Hedges himself acknowledged at his deposition:

“It was just with all the travel, with all the people coming and going. Before it was just me, and you just---any normal trail like that it didn’t see that much wear with just me coming and going. And then with everybody coming and going, with her family coming and going for the holidays and stuff, it just kind of beat the trail down, got kind of muddy and slippery, ...” (emphasis added)

Dismissal of the case was improper.

#### ASSIGNMENT OF ERROR

The Court erred in granting Hedges' Motion for Summary Judgment.

Issue: Was there evidence from which a reasonable jury could conclude that Acosta was unaware of the change in the condition of the pathway that led to her fall?

#### STATEMENT OF THE CASE

Acosta and Hedges met in September of 2008 and began dating shortly thereafter. CP 39 Thereafter, Acosta began staying at his home "a couple days out of a week". CP 39

Hedges described himself at deposition as a "hermit". CP 68 His front yard was cluttered and he had parked several cars in his driveway. CP 41 The cars had not been moved for months before the accident.

Indeed, Hedges had received formal notice from the City of Lake Forest that he must take action to remove "junk vehicles". CP 70

The cars didn't leave enough room to walk on the driveway itself to get to Hedges' front door. CP 42, 43 There was a path alongside the driveway that sloped down towards a ditch. Id That was the path Acosta had regularly used when accessing Hedges' front door. CP 44 Exhibit 4 to

Acosta's deposition (CP 54) was a photo of the pathway. It looked like this:



Acosta found the pathway “scary.” CP 49 She always worked it “slow and carefully.” Id When Acosta told Hedges the pathway was “pretty scary”, he told her he liked it that way, because “that way people didn’t come there”. CP 50

Acosta sold her motor home in late 2009 and began staying at Hedges’ home, though she planned on moving out after the holiday season. CP 39, 40

Acosta's son and some of her other family members stayed at Hedges' home for about two weeks around Thanksgiving. CP 40

After Thanksgiving, in early December of 2009, Acosta began alternately staying Hedges' home, and at other places besides his. CP 40

On Christmas Eve, 2009, Acosta and her daughter were to have dinner at Hedges' home. CP 45 Hedges and Acosta got into an argument, so Hedges left and went to his mother's home. Id Acosta and her daughter had dinner, then took the daughter's dog for a walk. CP 46 There was no trouble as they left the home, using the pathway. Id

Acosta was well aware that the ground was sloped and stepped onto the slope "cautiously" as she always did upon return from the walk. CP 49 However, on this occasion her foot slipped down into the ditch and she fell. CP 47

Following the accident, "sometime probably in early January or February", Hedges put gravel down on the pathway in the exact area of Acosta's fall. CP 66, 67 He gave the following testimony:

Q. What was the purpose of the gravel?

A. It was just with all the travel, with all the people coming and going. Before it was just me, and you just—any normal trail like that it didn't see that much wear with just me coming and going. And then with everybody coming and going, with her family coming and going for the holidays and stuff, it just kind of beat the trail down, got kind of muddy and slippery, so I put gravel down." (emphasis added)

Hedges elaborated:

A. It was all the visitors. You know it was just---prior to me meeting her it was just me. Nobody came. I was a hermit. Nobody came to see me.

Q. Uh-huh. Okay.

A. And then with her coming and going, that's one other extra person. Then her daughter coming and going, that's an extra person. And then her family comes and stays for the holidays, a lot of extra feet coming and going. So I did notice quite a change in the ---you know, in the path." (emphasis added) CP 66

At deposition, Hedges claimed that he didn't notice this change until after the holidays because "it was fairly dry up until then." CP 13  
False. It had been cloudy and rainy eleven consecutive days prior to December 24<sup>th</sup>, 2009. (Appendix I)

Acosta sued Hedges for her injuries. CP 1

Hedges moved for summary judgment on the sole contention that Acosta "was aware of the condition of the land at the time of the accident." CP 6, 17 Specifically, according to Hedges', Acosta was aware that the path was "sloped, narrow, and unpaved". CP 90

The Trial Court granted the Motion and dismissed the case. CP 111-114 Appeal was timely filed. CP 91-96

## ARGUMENT

### Standard of Review/Analysis of the Evidence

Review of Summary Judgment of Dismissal is de novo. Hisle v. Todd Shipyard, 151 Wn2 853, 93 P3 108 (2004)

The evidence and inferences must be considered in the light most favorable to the non-moving party. Jones v. Allstate, 146 Wn2 291, 45 P. 3d 1068 (2002) If reasonable minds could reach different conclusions based on undisputed evidence, the inferences must be drawn most favorably to the non-moving party. Gray v. Pierce County Housing Authority, 123 Wn App. 744, 97 P. 3d 26 (2004)

Circumstantial evidence may defeat summary judgment. Herron v. King Broadcasting, 109 Wn2 514, 746 P2 295 (1987)

### Liability of a Possessor of Land

A possessor of land is liable to his licensee for physical harm caused by a condition on the land if:

- (1) The possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to the licensee, and should expect that they will not discover or realize the danger; and
- (2) The licensee fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved; and

- (3) The licensee does not know or have reason to know of the condition and the risk involved.

Tincani v. Inland Empire Zoological Society, 124 Wn. 2d 121, 133, 128 P. 2d 621 (1994).

#### The “Condition of the Land”

If, as Hedges contended in the Trial Court, the relevant “condition of the land” was, merely, a “sloped, narrow, and unpaved” path, summary judgment was proper. But the Defendant himself acknowledged a change in the surface of the “sloped, narrow and unpaved” pathway, from what Acosta was used to.

A reasonable jury could conclude that it was the change in the condition of the surface of the slope that triggered Acosta’s fall.

Consider:

Hedges himself directly testified that the increased foot traffic over the holidays caused the path to become “muddy and slippery”;

Acosta used the same care that night as she always did, but this time fell.

#### Acosta’s Awareness

As noted, Hedges himself acknowledged a substantial change in the pathway that he remedied shortly after the accident by laying down gravel.

By contrast, even at her deposition Acosta was unaware of this change. She directly testified:

Q. All right. And the condition, did it change in any manner between when you started going to the house in February 2009 until December 2009?

A. Not really. CP 44

If there were some dispute as to whether the pathway had actually changed, this testimony might aid Hedges. However, given Hedges' own admission that there pathway had become "muddy and slippery", there is only one permissible inference: Acosta was unaware of that critical fact.

At Summary Judgment, Hedges cited Thompson v. Katzer, 86 Wn. App. 280, 936 P.2d 421 (1997) for support that Acosta's awareness that the path was "dangerous" defeated her case. But in Thompson the plaintiff admitted that he knew there was snow and ice on the driveway where he fell. That is completely different from this case, where there is no evidence that Acosta knew or should have known of the changed condition.

## CONCLUSION

The case should be reversed for trial.

DATED this 16<sup>th</sup> day of May, 2012.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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David A. Williams, WSBA #12010  
Attorney for Plaintiff  
9 Lake Bellevue Drive, Suite 104  
Bellevue, WA 98005  
(425) 646-7767

# **APPENDIX I**



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## Seattle Climate Data

### December 2009

Monthly Summaries

[Monthly Recap/  
Daily Stats](#)

[Sky Condition](#)

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December's 2009 weather for Seattle brought below normal temperatures, sunshine, clouds, and drier skies after a very warm, mostly cloudy, and wet November. There were eight days in December with sunny sky conditions, eleven days with partly cloudy sky conditions, and twelve days with cloudy sky conditions. The month started off unseasonably cold with record breaking low temperatures, but then turned warmer for the remainder of the month.

Precipitation for the month was only 49 percent of normal at 2.75 inches compared to the normal 5.62 inches. There were sixteen days in December that had precipitation --- thirteen days with measurable precipitation and three days with a trace of precipitation. The maximum 24-hour precipitation total was 0.50 inches on December 14. Precipitation for the year was over an inch above normal at 38.44 inches compared to the normal 37.07 inches.

Temperatures for the month averaged 2.8 degrees below normal --- the mean average temperature was 37.9 degrees compared to the normal 40.7 degrees. The average daily high was 1.8 degrees below normal at 43.7 degrees compared to the normal 45.5 degrees. There were only six days in December that reached a high temperature of 50 degrees or above. The warmest day was December 20 when the temperature reached a high of 57 degrees tying the record set in 1973; the coolest day was December 10 when the temperature reached a low of 16 degrees. Several record low temperatures were set for the month. On December 9 and 10, the record low of 18 and 16 degrees respectively broke the previous record of 21 degrees set in 1972. On December 11, the record low of 21 degrees broke the previous record of 23 degrees set in 1961.



Seattle Ferry

The daily average wind speed for the month was 6.7 mph. The maximum wind peak gust was 36 mph from the southeast on December 26.

#### December 2009 Seattle Daily Weather Stats \*



Seattle Waterfront



Ballard Locks



Shilshole Bay  
Marina

Day	Temperature (F)		Precipitation (Inches)	Sky Condition	Wind Speed (MPH)	
	High	Low			Average	Peak Gust
Tue 12/01	47	35	0.00	Mostly Sunny	10.5	24 N
Wed 12/02	46	33	0.00	Sunny	11.3	21 NE
Thu 12/03	45	30	0.00	Partly Cloudy	3.1	10 N
Fri 12/04	38	30	0.04	Partly Cloudy, Rain	3.0	14 SE
Sat 12/05	42	28	0.00	Partly Cloudy	5.1	24 N
Sun 12/06	35	27	0.00	Partly Cloudy	11.7	28 SE
Mon 12/07	30	23	0.00	Sunny	9.4	22 SE
Tue 12/08	32	21	0.00	Sunny	6.8	16 E
Wed 12/09	32	18	0.00	Sunny	5.1	13 NE
Thu 12/10	36	16	0.00	Sunny	4.2	10 NE
Fri 12/11	38	21	0.00	Partly Cloudy	4.6	12 SE
Sat 12/12	39	23	0.00	Partly Cloudy	5.5	15 NE
Sun 12/13	38	30	Trace	Cloudy, Snow	6.9	25 S
Mon 12/14	42	36	0.50	Cloudy, Rain	6.0	21 E
Tue 12/15	48	38	0.29	Cloudy, Rain	9.3	24 S
Wed 12/16	53	45	0.43	Mostly Cloudy, Rain	12.9	31 S
Thu 12/17	50	43	0.06	Cloudy, Rain	4.6	23 S
Fri 12/18	52	41	0.02	Cloudy, Rain	2.4	14 SE
Sat 12/19	48	44	0.41	Cloudy, Rain	5.0	14 N
Sun 12/20	57	45	0.08	Cloudy, Rain	7.5	23 S
Mon 12/21	52	38	0.55	Mostly Cloudy, Rain	13.9	35 S
Tue 12/22	40	34	0.02	Cloudy, Rain	2.8	20 S
Wed 12/23	43	34	Trace	Mostly Cloudy, Rain	3.3	12 NE
Thu 12/24	43	31	0.00	Partly Cloudy	5.4	13 NE
Fri 12/25	45	30	0.00	Sunny	8.2	17 E
Sat 12/26	53	33	0.00	Sunny	13.8	36 SE
Sun 12/27	44	28	0.00	Partly Cloudy	1.4	16 SE
Mon 12/28	49	35	Trace	Partly Cloudy, Rain	3.7	18 E
Tue 12/29	43	30	0.06	Partly Cloudy, Rain	4.0	20 SE
Wed 12/30	46	36	0.02	Partly Cloudy, Rain	10.3	24 SW
Thu 12/31	49	39	0.27	Cloudy, Rain	5.8	18 SW

\* Seattle Daily Weather Stats are from the  
**National Weather Service**  
Seattle-Tacoma International Airport Station.

Select Month below to view Monthly Recap/Daily Stats for another month.

Select Month

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DATED this 16<sup>th</sup> day of May, 2012.

  
Joanne Lenz  
Paralegal