

69539-8

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NO. 69539-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOLENE LAUWERS, individually,

Appellant,

vs.

REGAL CINEMAS, INC., a Washington corporation, WAL-MART
STORES, INC. (Number 2385), a Washington corporation,

Respondents.

BRIEF OF APPELLANT

JEFFREY H. SADLER
Attorneys for Appellants
SADLER LAW FIRM, P.S.
705 South 9TH Street, Ste 305
Tacoma, WA 98405
Tel: (253) 573-1700

27136

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COURT OF APPEALS
STATE OF WASHINGTON



ORIGINAL

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I. ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

The trial court erred in deciding genuine issues of material fact as to the whether a dangerous condition was on the premise and as to whether the condition was “open and obvious” to the ordinary invitee.

II. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. FACTS OF THE INCIDENT

This case arises from a fall at the Auburn Supermall Regal Cinema on April 2, 2009. Jolene Lauwers and her son, Caelan Lauwers, walked out of the Regal Cinemas in Auburn after viewing a movie. They proceeded out the main doors and started to walk in a direct straight way towards the parking lot. As they proceeded out the doors, they walked across a paved area to a grassy ramp area that lead to the roadway and parking area. CP 80; 81; 102; 103. Directly at the bottom of the grassy slope was the passenger drop off and loading area. *Id.* The grassy slope increased in steepness as it got closer to the sidewalk at the bottom of the slope.

Plaintiff had the case reviewed by human factors expert Dr. Daniel Johnson, Ph.D. CP 83-104. Dr. Johnson reviewed all documents, spoke with the plaintiff, and inspected the scene. *Id.* Dr. Johnson authored a declaration and report. This report was submitted to the Court in response to defendants’ motion for summary judgment. *Id.*

As stated in Dr. Johnson's expert report, there was evidence that the slope had been used by pedestrian traffic in the past. The grass area was

directly in the view of the employees inside the theater, the employees knew, or should have known, that customers were using the grassy slope as a ramp. *Id.* There was no barrier to prevent Ms. Lauwers or others from using the dangerously steep and slippery ramp, nor was there a warning not to use this hazardous walkway. *Id.* He opined that considering all the factors, the entire exiting the movie theatre constituted a hazard. The hazard is not simply focused on the grassy area itself. The area is deceiving to the average and reasonable user and constitutes a dangerous condition. *Id.*

As stated by Dr. Johnson, there are several reasons this grassy ramp creates a hazard. This is despite the fact that an alternate route did exist. There are many reasons a person may take the grass ramp versus go out of their way to the stairs. The obvious first reason is that the grassy ramp was the most direct route to the parking lot.

"There are several reasons a person would take a more convenient route that might be less safe than the more inconvenient route. The person does not appreciate a potential danger for the risk it poses; the person sees others using the more convenient route; the person concludes that the most direct route is not really dangerous because, if it were, that route would not be available." CP 94-95.

As explained in Dr. Johnson's report, this area constituted a dangerous and hazardous condition. Dr. Johnson opined as follows:

1. Ms. Lauwers had no physical condition which contributed to her fall. She was properly dressed.
2. The grassy ramp was two to three times steeper than allowed by building code and safety recommendations. If the ramp had been less steep then this fall, on a more probable than not basis, would have been prevented.
3. The walking surface was not slip resistant as required by safety recommendations. If the surface had been slip resistant then this fell,

on a more probably than not basis, would have been prevented.

4. No handrails were present on this ramp as required by building code. If a handrail had been present then, on a more probable than not basis, Ms. Lauwers would have used it to reduce the chance of a fall.
5. There was no barrier to prevent the unwary person from encountering this hazard. If there had been a barrier then this fall, on a more probable than not basis, would not have occurred.
6. There was no warning that the grassy slope was too steep and too slippery. If there had been such a warning then, on a more probable than not basis, Ms. Lauwers would have used this information to adjust her gait or select an alternate route, and this fall, on a more probable than not basis, would not have occurred.

CP 96.

Further, Ms. Lauwers was asked in deposition about her route of travel that afternoon. She stated at Page 47 (CP 71) as follows:

Q When you exited the theater did you walk down the stairs?

A No.

Q Why?

A Okay. Because the way that the theater is set up, the doors that we came out they were closest to the theater section that we were in, there was – there were no stairs. So the path that everybody leaving the theater took you right out onto the grass where I was walking.

She continued her explanation at page 49, lines 6-15 (CP 72):

Q All right. Why did you decide to walk across the grass area as opposed to using the stairs?

A I followed a huge group of people out of the theater, so we just – that was the most direct path and it looked like it had been very well-traveled to get to my vehicle.

Q Any other reasons you decided to use the grass, walk across the grass, as opposed to using the cement walkway and the stairs.

A It was the most direct way to my vehicle and following everybody else.

Reasonable and genuine issues of material fact exist as to the condition of the premise and whether it constituted a dangerous condition. In addition, genuine issues of material fact exist for a jury determination as to whether the condition was open and obvious to the invitee. Therefore, this case should be reversed and remanded for trial on the merits.

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

a. PRELIMINARY PLEADINGS

Jolene Lauwers suffered injury on August 2, 2009. Plaintiffs filed suit on September 2, 2010. CP 1-4. Discovery progressed as normal. On August 31, 2012, Defendant Regal Cinema's moved for Summary Judgment. CP 5-22. Defendant Wal-Mart joined the motion for summary judgment. CP 23-47. On October 12, 2012, the King County Superior Court granted Defendants motion for summary judgment. CP 126-130. On October 19, 2012, Plaintiff moved for reconsideration. CP 134-142. The motion was denied on November 14, 2012. CP 167-8.

III. ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE DANGEROUS CONDITION OF THE PREMISES.

1. THE STANDARD OF REVIEW

The trial court's decision on a motion for summary judgment is reviewed de novo. Summary Judgment should be granted only if the pleadings, affidavits, depositions and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Balise v Underwood*, 62 Wn. 2d 195, 381 P.2d 966 (1963). In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue of material fact exists, and the Court should not resolve any existing factual issue. *McConigav Riches*, 40 Wa App. 532, 700 P.2d 331 (1985); *Balise v Underwood*, *supra*.

The Court should consider the material evidence and all reasonable inferences there from most favorably to the non-moving party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Id*; *Wood v Seattle*, 57 Wn. 2d 469, 358 P.2nd 140 (1960). The object and function of a summary judgment motion is to avoid a useless trial; however, **a trial is not useless but is absolutely necessary where there is a genuine issue as to any material fact.** *Preston v Duncan*, 55 Wn. 2d 678, 348 P.2d 605 (1960); *Jolly v Possum*, 59 Wa. 2d 20, 365 P.2d 780 (1961).

All facts and reasonable inferences must be construed in favor of the non-moving party, the motion should be granted only if from all evidence, reasonable persons could reach only one conclusion. *Turgrenv King County*,

104Wn. 2d 293, 705 P.2nd258 (1985); *Spurrell v Booch*, 40 Wn. App. 854, 701P.2nd29 (1985).

In addition, the Court should not grant summary judgment where there is a question as to the credibility of a witness whose statements are critical to an important issue. *Powell v Viking Insurance Company*, 44 Wn. App. 495, 722 P.2nd 1343 (1986); *Meadows v Grant's Autobrokers Inc.*, 71 Wn2d 874, 431 P.2nd 216 (1967). **Generally, the testimony of a qualified expert witness is sufficient to preclude summary judgment.** The Court should not resolve issues of credibility at a summary judgment hearing, and if such an issue is present, the motions should be denied. *Belise v Underwood, supra*. A trial court may not weigh evidence in arriving at summary judgment:

This rule prevents courts from assuming the function of a jury by weighing the facts as presented in documents prior to trial. *See Palmer v. Waterman S.S. Corp.*, 52 Wn.2d 604. 608-09. 328 P.2d 169 (upholding denial of summary judgment when facts were at issue), cert. denied, 359 U.S. 985 (1958) Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial. *See Graves v. P.J. Taggares Co.*, 94 Wn.2d 298. 302-03. 616 P.2d 1223 (1980) (summary judgment only appropriate when facts are susceptible to only one interpretation).

Babcock v. State, 116 Wn.2d 596; 598-99, 809 P.2d 143 (1991).

Plaintiff has provided ample evidence to demonstrate that there exists numerous issues of material facts. Under the authority set forth herein, the defendants' motions for summary judgment should have been denied.

2. NEGLIGENCE

In premises liability actions, a person's status, based on the common law classifications of persons entering upon real property determines the scope of the duty of care owed the possessor of that property. *Van Dinter v. Kennewick*, 121 Wn.2d 38, 41, 846 P.2d 522 (1993). A business invitee is one who is invited to enter or remain on the premise for the purpose directly or indirectly connected with the owner's business dealings. *Id.* In this case, it is undisputed that the plaintiff was a business invitee on the premise.

The general duty owed to an invitee is that the owner or occupier of the land owes a duty to exercise reasonable care to keep the premises in a reasonably safe condition. *Musci v. Graoach Associates Ltd*, 144 Wn.2d 847, 860, 31 P.3rd 684 (2001); *Messina v. Rhodes Co.*, 61 Wa2d 19, 27, 406 P.2d 312 (1965). The standard set forth in the Restatement 2nd of Torts 343 guides the Courts evaluation of the duty owed to the plaintiff Section 343 and 343(A) states as follows:

Section 343 - Dangerous Conditions Known to or Discoverable by Possessor.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if but only if, he:

- (a) 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
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Section 343A - Known or Obvious Dangers. (1) 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. (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Thus, a possessor of land has a duty to protect an invitee against even known or obvious dangers where the possessor should anticipate harm to the invitee and should anticipate the invitee will fail to protect themselves. *Kinney v. Space Needle Corp.*, 121 Wn.App. 242, 249-50, 85 P.3d 918 (2004).

In the present case, the entire area in question creates an unreasonable hazard that should have been recognized and remedied by the defendants. Plaintiff's expert, Dr. Johnson, detailed the faults associated with the area. A jury must decide these questions of fact, not the court on motion for summary judgment.

It is not a valid defense to claim the hazard is "open and obvious". First, the plaintiff has no legal obligation to focus her gaze on the ground as she walks. *Smith v. Mannings, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942). In *Baltzelle v. Doces Sixth Avenue, Inc.*, 5 Wn.App. 771, 776, 490 P.2d 1331 (1971), the Court laid out the rules:

However, the plaintiff's basic duty is to exercise reasonable care to avoid self injury. *Costacos v. Spence*, 74 Wn.2d 884, 447 P.2d 704 (1968); see also, *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 412 P.2d 109 (1966). Reasonable care on her part may or may not require that she

look on the ground in front of her as she walks on the entranceway of the store. *See Smith v. Manning's, Inc., supra.* It is settled law that a customer-invitee, when walking in an area where there is no reason to anticipate a hazard, need not keep her eyes glued to the floor; **that the fact that the hazard is observable is not controlling on the issue of contributory negligence because she may assume that the entranceway leading in and from the store is in a reasonably safe condition in the absence of notice to the contrary.** *Smith v. B & I Sales Co., supra; Todd v. Harr, Inc., 69 Wn.2d 166, 417 P.2d 945 (1966); Blasick v. Yakima, 45 Wn.2d 309, 274 P.2d 122 (1954); Simpson v. Doe, 39 Wn.2d 934, 239 P.2d 1051 (1952).* Hence, we cannot say that, as a matter of law, the plaintiff was under a mandatory duty to look at the ground in front of her as she walked. (Emphasis added).

Second, if the hazard is claimed to be “open and obvious”, then the possessor of land has an obligation to remedy the problem. It is not acceptable, under the law, to simply sit back and do nothing about an obvious hazard to your business invitees. This is contrary to all law of this jurisdiction.

Therefore, if “open and obvious” is an issue in the case, it is a factual question for the jury to decide. In addition, the jury must decide what portion of fault, if any, is attributable to Ms. Lauwers for her alleged actions / inactions, not the court at summary judgment.

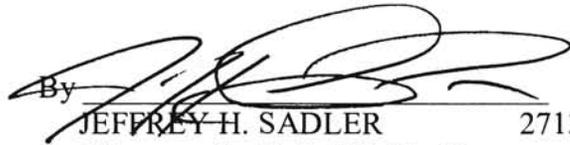
Questions regarding reasonableness of conditions and actions of the parties are questions of fact for the jury to decide. Reasonable minds could differ on the facts and expert opinions in this case.

IV. CONCLUSION

This court should reverse the trial court's order granting summary judgment. The trial court committed error of law in ruling that there were no genuine issues of material fact for a jury to consider. This court should remand the case for determination of the facts on the merits.

DATED this 28 day of May, 2013.

SADLER LAW FIRM, P.S.

By 
JEFFREY H. SADLER 27136
Attorneys for Plaintiffs / Petitioner

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Defendants.

CAUSE NO. 69539-8-1

PROOF OF SERVICE:
BRIEF OF APPELLANT

Attached hereto is proof of service of the Brief of Appellant on both respondents.

DATED this 5th day of June, 2013.

SADLER LAW FIRM, P.S.



Jeffrey H. Sadler, WSBA No. 27136
Attorney for Plaintiff Lauwers

ORIGINAL

SADLER LAW FIRM, P.S.
705 South 9th Street, Suite 305
Tacoma WA 98405
Telephone: 253-573-1700
Facsimile: 253-573-2848



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