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COURT OF APPEALS STATE OF WASHINGTON

JOLENE LAUWERS,

Appellant.

v.

REGAL CINEMAS, INC. and WAL-MART STORES, INC.,

Respondents.

BRIEF OF RESPONDENT WAL-MART STORES, INC.

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I. INTRODUCTION

This personal injury case arises from Jolene Lauwers's slip and fall at the Regal Cinemas premises near Wal-Mart in Auburn. Ms. Lauwers, after safely using the paved steps and sidewalk to go into the theater, ignored them on her way out. She chose instead to step off the sidewalk to cut across the grass on her way to her car. Unfortunately, Ms. Lauwers slipped and fell. However, the grass was not an unreasonably dangerous condition. Further, it was reasonable for Wal-Mart to expect that a pedestrian would pay closer attention to surface conditions while crossing a landscaped strip than when walking on a sidewalk. When Wal-Mart moved for summary judgment on these and other bases, Ms. Lauwers failed to raise a genuine issue of material fact, and the trial court granted the motion. Wal-Mart asks this court to affirm the trial court's ruling.

II. COUNTER TO ASSIGNMENTS OF ERROR

The issue on appeal is whether the trial court properly granted summary judgment in Wal-Mart's favor where Ms. Lauwers presented:

- No evidence that the landscaped strip presented an unreasonable risk of harm;
- No evidence, even if the landscaped strip did present an unreasonable risk of harm, that Wal-Mart had actual or constructive notice;

- No evidence that Wal-Mart should expect that pedestrians would not discover or realize the danger, or would fail to protect themselves against it;
- No evidence that she did not know the dangers of leaving the sidewalk and walking across the landscaped strip; and
- No evidence that Wal-Mart should have anticipated potential harm to pedestrians using the landscaped strip.

Wal-Mart believes the trial court's decision granting its motion for summary judgment was proper and should be affirmed on appeal.

III. STATEMENT OF THE CASE

A. Ms. Lauwers safely used the steps and sidewalk on her way into the theater.

On April 2, 2009, Jolene Lauwers went to the Supermall in Auburn. CP 70. Ms. Lauwers parked her car by a restaurant at the mall and had lunch. CP 70. After lunch, she walked over to the movie theater through a parking lot. CP 70. There are four steps up to the theater from the sidewalk alongside the road. CP 42-43. Ms. Christman walked up those steps to the ticketing booth and purchased a ticket. CP 70-71.

B. On her way out of the theater, Ms. Lauwers chose to leave the sidewalk and walked across a landscaped strip not set aside for pedestrian use.

After the movie was over, she exited the theater via a different set of doors at about 2:00 pm. CP 71. She could have returned to the front entrance via the sidewalk and walked back down the stairs on her way back to her car. CP 71-72. Instead, she decided to leave the sidewalk and walk across the grass in a landscaped strip because it was the most direct path from the theater to the car, and five or six people were also cutting across the grass. CP 72. As she was walking, she slipped: her feet went out from under her, and she fell. CP 72.

IV. SUMMARY OF ARGUMENT

A reasonably safe condition is not the same for a landscaped strip adjacent to a sidewalk as it is for the sidewalk. Their purposes are different. The sidewalk at the Regal Cinemas theater is designed for pedestrian use, but the landscaped strip beside the sidewalk is designed for ornamentation. Although a landowner may anticipate pedestrian use of a landscaped strip, it is not a sidewalk and cannot be expected to be maintained in the same condition. The landscaped strip was not unreasonably dangerous.

In this case, Ms. Lauwers used the steps and sidewalk to get to the theater, but walked through the landscaped strip when she left. She

complained the grass that she walked on was wet and slippery. It was reasonable for Wal-Mart to expect that a pedestrian would pay closer attention to surface conditions while crossing the grass than when walking on a sidewalk.

V. ARGUMENT

A. **The court reviews an order granting summary judgment de novo.**

Appellate courts review an order on summary judgment de novo and engage in the same inquiry as the trial court. *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 599, 20 P.3d 1003 (2001). In reviewing summary judgment, a court considers the facts and reasonable inferences therefrom in a light most favorable to the nonmoving party. *Id.*

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* When a plaintiff lacks evidence to support an essential element of her claim, no genuine issue of material fact exists, and the complaint is properly dismissed. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

A plaintiff claiming negligence in maintaining premises in a safe condition must demonstrate facts to support all essential elements of her claim: duty, breach, causation, and damages. *Hoffstatter*, 105 Wn. App. at 599. A possessor of land owes a duty to a business invitee to exercise

ordinary care to keep the premises in a reasonably safe condition. *Messina v. Rhodes Co.*, 67 Wn.2d 19, 27, 406 P.2d 312 (1965); *Huston v. 1st Church of God*, 46 Wn. App. 740, 744, 732 P.2d 173, *rev. denied*, 108 Wn.2d 1018 (1987) (quoting *Leek v. Tacoma Baseball Club*, 38 Wn.2d 362, 365-66, 229 P.2d 329 (1951) (emphasis added).

As described above, Ms. Lauwers claims she fell on property occupied by Regal Cinemas, not Wal-Mart. However, for the purposes of its motion, Wal-Mart did not dispute that it had a duty to Regal Cinemas' business invitees. It also did not challenge Ms. Lauwers's status as a business invitee. Instead, Wal-Mart moved for summary judgment on the basis of breach, and Ms. Lauwers failed to bring evidence to demonstrate a genuine issue of material fact existed as to this element.

B. Ms. Lauwers raised no genuine issue of material fact regarding the challenged elements of Restatement (Second) of Torts, § 343.

On summary judgment, Wal-Mart argued that Ms. Lauwers had no evidence to support a claim for premises liability under Restatement (Second) of Torts, § 343, "Dangerous Conditions Known to or Discoverable by Possessor," which provides:

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.

(Emphasis added). The Restatement standard, therefore, limits a defendant's liability to circumstances that fit each of the above elements.

Washington courts have adopted and long used this standard.

Wal-Mart challenged Ms. Lauwers's lack of evidence to support the following elements, which she has the burden of proving at trial:

- Unreasonable risk of harm
- Actual or constructive notice
- Expectation of plaintiff's discovery, knowledge, or self-protection

Neither in response to the motion for summary judgment nor in the motion for reconsideration nor in her brief on appeal has Ms. Lauwers offered evidence to support these elements, as described in more detail below.

1. The court could properly determine as a matter of law that no unreasonably dangerous condition triggered § 343(a).

Wal-Mart took the position in their summary judgment motion that no unreasonably safe condition existed at the site. Wal-Mart relied on

Hoffstatter, supra, a case with similar facts, in which a pedestrian fell when she walked across a landscaped area between the sidewalk and the street curb, also known as a planting strip or parking strip, adjacent to a store. She sued, claiming that the defendants were liable because they failed to maintain the strip in a condition safe for pedestrians: the bricks in the planting strip were uneven and loose. *Id.* at 599. However, the Court of Appeals drew a clear distinction between sidewalks and planting strips:

[A] reasonably safe condition is not the same for a parking strip as it is for a sidewalk because their purposes are different. In contrast to a sidewalk, which is devoted almost exclusively to pedestrian use . . . parking strips frequently are used for beautification, such as grass, shrubbery, trees or other ornamentation. It is certainly true that pedestrian use of parking strips must be anticipated. But they are not sidewalks and cannot be expected to be maintained in the same condition.

In this case, the uneven surface of the bricks was caused by tree roots growing beneath the bricks and dislodging them. It is a common condition in an area set aside for landscaping. Further, the bricks were not hidden, but open and obvious. *It is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk.* We hold that as a matter of law the uneven surface of the bricks was not unreasonably dangerous.

105 Wn. App. at 600 (emphasis added). Because the Court of Appeals held as a matter of law that the condition of the parking strip was not unreasonably dangerous, it also held defendants' actions in failing to

maintain it as they would a sidewalk breached no duty owed to *Hoffstatter*. *Id.* at 602.

The Court of Appeals' observations apply to this case, and the rulings should as well. The landscaped strip at issue here is similar to the area between the curb and sidewalk in *Hoffstatter*, most notably in that it abuts a sidewalk and was not intended for pedestrian use. Ms. Lauwers suggests Wal-Mart should have installed handrails in the grass and complied with building codes as to slope maximums. Since Wal-Mart provided a sidewalk and staircase (with handrails) for pedestrians, one cannot conclude Wal-Mart intended the grass to be used as a sidewalk. Essentially, Ms. Lauwers posits the grass was dangerous precisely *because* it was not maintained as a sidewalk. This is directly contrary to *Hoffstatter*, where the Court of Appeals stated that *even though* defendants should anticipate *some* pedestrian use of landscaped areas adjacent to the sidewalks, they need not maintain them in the same condition. 105 Wn. App. at 600. Ms. Lauwers did not even attempt to acknowledge or distinguish *Hoffstatter* below or in this court.

A reasonably safe condition for the grassy area at issue in this case is not the same as for the sidewalk Ms. Lauwers used without incident on her way into the theater. The grassy area provides beautification and ornamentation on the premises. It is not a sidewalk, and Ms. Lauwers

cannot expect it to be maintained as one. Although Ms. Lauwers alleged the grass was wet and on a slope, both are common conditions in the Northwest in an area set aside for landscaping. The condition was open and obvious. Wal-Mart could reasonably expect a pedestrian to pay closer attention to surface conditions while crossing the grassy area than when walking on a sidewalk.

In *Hoffstetter*, the Court of Appeals determined *as a matter of law* that the condition of the ground was not unreasonably dangerous—even though admittedly the bricks were uneven and loose. Therefore, the trial court’s order dismissing this case could appropriately have been based *solely* on a finding that the grassy area outside the theater was not an unreasonably dangerous condition, and, therefore, Wal-Mart had not breached a duty to Ms. Lauwers. The order should be affirmed.

2. Ms. Lauwers offered no evidence of actual or constructive notice of an unreasonably dangerous condition under § 343(a).

Wal-Mart challenged Ms. Lauwers’s ability to produce evidence to support the actual or constructive notice element. She cannot make her case if she cannot show that Wal-Mart had notice of an unreasonably dangerous condition. *Frederickson v. Bertolino’s*, 131 Wn. App. 183, 189-90, 127 P.2d 5 (2005); Restatement (Second) of Torts § 343(a). In response, Ms. Lauwers set forth zero evidence to show actual or

constructive notice. She also dedicated no part of her briefing to this threshold requirement. Yet now Ms. Lauwers claims the court erred in granting summary judgment because of an unspecified fact issue about notice.

Frequently, a party might try to show that similar occurrences in the past put a defendant on notice of an unreasonably dangerous condition. In this case, Ms. Lauwers offered no such evidence. There is a simple explanation for that: there is none to offer.

Ms. Lauwers's attorney and her expert could only hypothesize that employees of the theater could see patrons walking on the grass. However, there are several reasons that *this cannot raise a genuine issue of material fact* to survive summary judgment. First, the court decides summary judgment based on affidavits made on personal knowledge, not hypothesis. CR 56(e). A witness must be competent to testify to the matters stated in an affidavit. *Id.* Ms. Lauwers's expert has no firsthand knowledge that the employees could see patrons walking on the grass. He was just speculating.

Second, Ms. Lauwers provided no *evidence*—no documents, no testimony—that theater employees could, in fact, see the patrons. If it were true, such evidence should have been available. Discovery had been

going on for some time in the case before summary judgment motions were filed.

Third, attorney argument is not evidence.

Fourth—and more pertinent to this case—even if the hypothesis were true, seeing patrons *walking on the grass* is not evidence of actual or constructive notice that *the grass involved an unreasonable risk of harm to patrons*. The standard is not just knowing a condition exists, but also knowing the condition “involves an unreasonable risk of harm.” Restatement (Second) of Torts, § 343(a). Ms. Lauwers did not even attempt to introduce a genuine issue of material fact on this element by introduction of evidence to support it. The court could have appropriately dismissed the claims against Wal-Mart *based on this evidentiary void alone*.

Additionally, undisputed facts conclusively show that Wal-Mart in particular had no actual or constructive knowledge in this instance. Even if Ms. Lauwers had evidence that Regal Cinemas employees could see the patrons on the grass, that cannot help her prove notice to Wal-Mart. Wal-Mart does not have representatives at the site. Wal-Mart did not observe the patrons on the grass.

Without evidence that either defendant had actual or constructive notice of the claimed unreasonably dangerous condition, summary judgment was appropriate.

3. Ms. Lauwers offered no evidence that Wal-Mart should expect she would not discover or realize the claimed danger, or would fail to protect herself against it pursuant to § 343(b).

Wal-Mart challenged Ms. Lauwers's lack of evidence on the second element of § 343 as well. In response, she did not produce any evidence that Wal-Mart should have expected patrons (1) would not discover or realize the claimed unreasonable danger of walking in the grassy area; or (2) would fail to protect themselves against it. Ms. Lauwers argued only that Wal-Mart should have anticipated that pedestrians might walk in the landscaped strip instead of the designated sidewalk. However, that is not enough.

The *Hoffstetter* court acknowledged one might expect pedestrians to walk in places other than the sidewalk—but even so the Court of Appeals held, “*It is reasonable [for premises owners] to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk.*” 105 Wn. App. at 600 (emphasis added). The same expectation is true here: even if Wal-Mart can be deemed to anticipate some patrons would choose to

leave the sidewalk, they can reasonably expect such patrons would know or discover the danger, if any, of abandoning a sidewalk designated for pedestrians in favor of a landscaped strip—and would protect themselves against that danger. Ms. Lauwers failed to support this element, and summary judgment was appropriate on it alone.

C. Plaintiff raised no genuine issue of material fact regarding the elements of Restatement (Second) of Torts, § 343A.

The Restatement further immunizes a defendant from liability to business invitees in § 343A(1), “Known or Obvious Dangers,” which states:

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). Ms. Lauwers failed to present sufficient evidence to raise a genuine issue of material fact that Wal-Mart should anticipate harm.

1. Ms. Lauwers offered no evidence to controvert Wal-Mart’s argument under § 343A(1) that she knew or should have known the dangers of leaving the sidewalk and walking across the grassy strip.

Wal-Mart by no means concedes that the grass constituted an unreasonably dangerous condition. However, Wal-Mart took the position

in its motion for summary judgment that Ms. Lauwers, who successfully used the sidewalk and stairs alongside the grass where she later fell, knew or should have known the risk of danger potentially involved in the activity of walking on the landscaped strip. It was obvious to her. Ms. Lauwers testified that, despite knowing the sidewalk and steps were there—and despite using them without incident just 2 or 3 hours earlier—she chose to leave the sidewalk and walk across the grass because five or six other people were doing it, and it was the most direct route to her car. Ms. Lauwers brought no evidence to suggest that the danger of possibly slipping and/or falling on a grassy slope was not known or obvious to her.

2. Ms. Lauwers offered no evidence that Wal-Mart should have anticipated harm under § 343A(1), caused when she left the sidewalk and walked across the landscaped strip.

In response to the summary judgment motion, Ms. Lauwers had to proffer evidence that Wal-Mart should have anticipated harm even if she knew of the danger or it was obvious. All Ms. Lauwers could say in support of this element is that Wal-Mart should have known patrons would walk on the grass if it were more convenient for them. CP 94-95. Ms. Lauwers moved for reconsideration on the same basis. CP 137.

As in Part IV.B.3, *supra*, Ms. Lauwers stops short of the actual standard. It is not enough to show that Wal-Mart should anticipate that

pedestrians might *use* an area not designated for walking. Instead, she must show that Wal-Mart should have anticipated *the harm* from such use. As the Court of Appeals pointed out in *Hoffstatter*, it is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped strip than when walking on a sidewalk. 105 Wn. App. at 6. In this case, it is reasonable for Wal-Mart to expect that Ms. Lauwers would pay closer attention once she decided to abandon the route that brought her safely into the theater in favor of a route across an area not designated for pedestrian use. Ms. Lauwers gives the court no evidence that defendants had reason to expect anything other than that set forth in *Hoffstatter*.

Ms. Lauwers relies on a case decided thirty years before the *Hoffstatter* case. In the case Ms. Lauwers cites, *Baltzelle v. Doces Sixth Ave., Inc.*, 5 Wn. App. 771, 776, 490 P.2d 1331 (1971), the court set forth the standard for a person “walking in an area where there is no reason to anticipate a hazard.” *Id.* The *Baltzelle* court addresses the standard for plaintiff’s basic duty to exercise reasonable care to avoid self-injury. 5 Wn. App. at 771. Wal-Mart did not move for summary judgment on its affirmative defense of contributory fault, but rather on plaintiff’s claims—on which she has the burden. While the analysis of plaintiff’s duty to take reasonable steps to avoid harm is similar to the analysis of whether

defendant's can expect her to protect herself from harm, they are distinct aspects of a premises liability inquiry. In this case, a person leaving a sidewalk that is designated and maintained for pedestrian use and walking on the grass is *not* walking in an area where there is no reason to anticipate a hazard. *Baltzelle* does not help plaintiff. Without sufficient evidence to raise a genuine issue of material fact on this element, summary judgment was appropriate on this basis alone.

D. Use of expert testimony is not an issue of fact.

Ms. Lauwers appears to assert that offering expert testimony in a summary judgment motion automatically means the court must deny the motion. Br. of Appellant at 9. A trial court decides summary judgment based on "such facts as would be admissible in evidence." CR 56(e). Preliminary questions concerning the qualification of a person to be a witness and the admissibility of evidence is the exclusive province of the court. ER 104(a). The court has discretion to allow an expert to testify, but only if specialized knowledge will assist the trier of fact. ER 702. Wal-Mart argued that expert knowledge was not necessary or useful in this case; ultimately the trial court makes that determination. There is no such thing as a "dispute of material fact" as to whether ER 702 applies; it is purely a question of law. The rules permit the trial court to simply ignore the declaration Ms. Lauwers submitted.

VI. CONCLUSION

In order to support the element of breach in her cause of action against Wal-Mart, Ms. Lauwers had to produce some evidence to raise a genuine issue of material fact in multiple areas, any single one of which is fatal to her case.

She failed to produce evidence that the landscaped strip at issue in this case was an unreasonably dangerous condition. Indeed, courts have held that areas not set aside for pedestrians need not be maintained as sidewalks, *even though some pedestrian use may be anticipated*. Courts have also held that possessors of land can reasonably expect a pedestrian to be more careful if they are walking on an area that is not a sidewalk.

Ms. Lauwers failed to produce evidence that, if the landscaped strip *were* an unreasonably dangerous condition, Wal-Mart had actual or constructive notice of that fact. She also failed to produce any evidence that Wal-Mart should have expected pedestrians would not discover or realize the danger, or would fail to protect themselves against it. Again, in this State, pedestrians who are not walking on the sidewalk may reasonably be expected to be more careful.

Finally, Ms. Lauwers produced no evidence that a condition existed that Wal-Mart should have anticipated could be harmful to pedestrians even though the condition was known or obvious.

Summary judgment was appropriate, given the lack of evidence Ms. Lauwers provided to the trial court. Wal-Mart requests that this court affirm the ruling dismissing Wal-Mart with prejudice.

Respectfully submitted this ~~18~~ day of July, 2013.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on July 1, 2013, I caused service of the foregoing pleading on each and every attorney of record herein:

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