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NO. 69623-8-I

COURT OF APPEALS STATE OF WASHINGTON

DAVID and ROBIN CHRISTMAN,

Appellants.

v.

EASTGATE THEATRE, INC. d/b/a REGAL ENTERTAINMENT
GROUP and WAL-MART STORES, INC. (Number 2385),

Respondents.

BRIEF OF RESPONDENT WAL-MART STORES, INC.

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. COUNTER TO ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	1
A. Construction at Regal Cinemas was completed on April 2, 2009.....	1
B. David Christman fell at the Regal Cinemas premises on April 3, 2009.	2
IV. ARGUMENT	4
A. Standard of Review.....	4
B. Mr. Christman raised no genuine issue of material fact regarding the challenged elements of Restatement (Second) of Torts, § 343.....	6
1. As a matter of law, no unreasonably dangerous condition triggering § 343(a) existed.....	7
2. No evidence of actual or constructive notice of an unreasonably dangerous condition under § 343(a).	10
3. Mr. Christman offered no evidence, necessary under § 343(b), that Wal-Mart should expect patrons would not discover or realize the claimed danger, or would fail to protect themselves against it.....	12
C. Mr. Christman raised no genuine issue of material fact regarding the elements of Restatement (Second) of Torts, § 343A.....	13
1. Mr. Christman offered no evidence to controvert Wal-Mart's claim under § 343A(1)that he knew or should have known the dangers of leaving the sidewalk and walking across the grassy strip.	14
2. Mr. Christman offered no evidence that Wal-Mart should have anticipated harm caused by his leaving the sidewalk and walking across the grassy strip, pursuant to § 343A(1).	14
V. CONCLUSION.....	15

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Cases

<i>Frederickson v. Bertolino's</i> , 131 Wn. App. 183, 127 P.2d 5 (2005)	10
<i>Hoffstatter v. City of Seattle</i> , 105 Wn. App. 596, 20 P.3d 1003 (2001).....	4, 5, 8, 9, 10, 13, 15
<i>Huston v. 1st Church of God</i> , 46 Wn. App. 740, 744, 732 P.2d 173, <i>rev. denied</i> , 108 Wn.2d 1018 (1987)	5
<i>Leek v. Tacoma Baseball Club</i> , 38 Wn.2d 362, 229 P.2d 329 (1951).....	5
<i>Messina v. Rhodes Co.</i> , 67 Wn.2d 19, 406 P.2d 312 (1965)	5
<i>Stimus v. Hagstrom</i> , 88 Wn. App. 286, 944 P.2d 1076 (1997).....	6
<i>Wiltse v. Albertson's Inc.</i> , 116 Wash. 2d 452, 805 P.2d 793 (1991).....	6, 10
<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	5

Rules and Regulations

CR 56(e).....	11
---------------	----

Other Authority

Restatement (Second) of Torts, § 343.....	6
Restatement (Second) of Torts, § 343(a)	7, 10, 12
Restatement (Second) of Torts, § 343(b)	12
Restatement (Second) of Torts, § 343A.....	13
Restatement (Second) of Torts, § 343A(1)	13, 14

I. INTRODUCTION

After plaintiff David Christman brought this personal injury action for premises liability, the defendants Wal-Mart Stores, Sierra Construction, and Regal Cinemas moved for summary judgment, arguing that Mr. Christman could not raise a genuine issue of material fact on one essential element of his cause of action for negligence: breach. Mr. Christman produced no evidence that an unreasonably dangerous condition existed, that Wal-Mart had notice of an unreasonably dangerous condition, or that Wal-Mart should have anticipated the harm. The trial court granted the motions for summary judgment and dismissed the claims. Mr. Christman appealed, but his brief omits important facts and ignores crucial aspects of the legal analysis. Wal-Mart asks that this court affirm the trial court's ruling granting summary judgment.

II. COUNTER TO ASSIGNMENTS OF ERROR

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. Construction at Regal Cinemas was completed on April 2, 2009.

Respondent Sierra Construction Company, Inc. entered into a construction contract with Wal-Mart to perform improvements to the Regal Cinemas premises at the Supermall in Auburn. CP 65. The existing

stairs in front of Regal Cinemas were unchanged. CP 65. A grassy landscaping strip existed near the stairs, alongside the pedestrian walkway. CP 67-69. The improvements included the relocation of a portion of Supermall Drive in front of Regal Cinemas, as well as creation of a drop-off lane in front of and south of the stairway facing Regal Cinemas. CP 65. Additionally, new parking was located near the theater on the other side of Supermall Drive. CP 119-20.

Sierra finished construction, and the work was inspected and approved by the City of Auburn on April 2, 2009. CP 65, 37-38. Before construction, no one crossed the grassy landscaping strip because there was nowhere to go on the other side of it. CP 119. The very day the work was approved, however, someone had left the sidewalk and fallen in the grass. CP 130. Therefore, on April 2, one of the theater managers had strung caution tape along the sidewalk to warn people about leaving the sidewalk. CP 130, 133, 134.

B. David Christman fell at the Regal Cinemas premises on April 3, 2009.

The very next day, on April 3, 2009, Mr. Christman arranged to meet a seller from Craigslist to look at a bicycle for his son. CP 44. They had agreed to meet in the new parking lot near Regal Cinemas in a part of the lot where his son could try out the bicycle. CP 44, 48. Mr. Christman

parked in the lot immediately in front of the theater. CP 45. While he and his sons were waiting for the seller, Mr. Christman noticed a cash machine located on the outside of the Regal Cinemas near the front doors. CP 45, 48. He had not known ahead of time that there is a cash machine near the theater entrance, but it was closer to where they had parked than going into the Supermall. CP 45. He walked over to the cash machine to make a withdrawal. CP 45.

He could have used the stairs to go to and from the cash machine. CP 50, 139. He testified that he did not remember whether he walked across the grass to get *to* the cash machine. CP 138 (dep. p. 26, ll. 7-10). When he walked *from* the cash machine back to his car, he did walk on the grass because the route across the grass was more direct. CP 49. Therefore, Mr. Christman ignored the stairs and left the sidewalk:

I received cash from the machine. I turned around and as I was walking straight back towards the truck, I was counting the money to make sure it gave me the correct amount.

CP 138 (dep. p. 25, ll.2-5). One of his feet slipped out from under him. CP 138 (dep. p. 28, ll.1-3). He fell toward the bottom of the incline near the other sidewalk. CP 138 (dep. p. 26, ll.14-21). There was nothing preventing him from using the sidewalk and stairs near the theater entrance. CP 50, 139.

Mr. Christman testified that the grassy slope “looked like any other hill.” CP 139 (dep. p. 32, ll. 7-11). It did not seem unreasonably steep to him. CP 139 (dep. p. 32, ll. 23-25). There were no holes in the ground. CP 139, 142. There were no foreign objects to trip him. CP 142. It was not uneven. CP 139. The grass was wet, but Mr. Christman admitted that at the beginning of April in Washington, it would not surprise him that the grass was wet. CP 142. In fact, he agreed that it takes awhile for the ground to dry out especially during a cold, wet, rainy month. CP 142.

Nevertheless, Mr. Christman sued Sierra Construction, Regal Cinemas, and Wal-Mart for injuries he sustained. CP 1-3. All three defendants moved for summary judgment, and the trial court granted the motions. CP 334-36, 337-38, 339-40. At oral argument, the trial court ruled that the grass did not represent an unreasonably dangerous condition as a matter of law. VRP 70:5-6.

IV. ARGUMENT

A. Standard of Review

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 his 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 his 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, Mr. Christman claims he 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 Mr. Christman's status as a business invitee. Instead, Wal-Mart moved for summary judgment on the

basis of breach, and Mr. Christman failed to bring evidence to demonstrate a genuine issue of material fact existed as to this element of his claim.

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

On summary judgment, Wal-Mart argued that Mr. Christman 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. *E.g.*, *Wiltse v. Albertson’s Inc.*, 116 Wash. 2d 452, 457, 805 P.2d 793, 795 (1991) *Stimus v. Hagstrom*, 83 Wn. App. 286, 293, 944 P.2d 1076 (1997).

Wal-Mart challenged the lack of evidence supporting the following elements Mr. Christman would have the burden of proving at trial:

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

Mr. Christman did not offer evidence to support these elements, as described in more detail below.

1. As a matter of law, no unreasonably dangerous condition triggering § 343(a) existed.

Wal-Mart took the position in its summary judgment motion that no unreasonably safe condition existed at the site. Wal-Mart relied on *Hoffstatter, supra*, a case with similar facts. In that case, defendant maintained a landscaped area between the sidewalk and the street curb, also known as a planting strip or parking strip, adjacent to a store. The planting strip contained bricks that were uneven and loose. A pedestrian fell when she walked across the planting strip. She sued, claiming that the defendants were liable because they failed to maintain the strip in a condition safe for pedestrians. 105 Wn. App. at 599.

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.

Id. 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 grassy strip at issue here is similar to the area between the curb and sidewalk in *Hoffstatter*. Most notably, it abuts a sidewalk and there is no evidence the grass was intended for pedestrian use. In fact, it is undisputed that before the parking lot was completed, pedestrians did not walk across the grass, and construction had only been completed the day before. Nevertheless, Mr. Christman calls the grass a "walkway" throughout his brief and posits the grass was dangerous

precisely because it was not maintained as a sidewalk. This is directly contrary to the rule in *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.

A reasonably safe condition for the grassy area at issue in this case is not the same as for the sidewalk available for Mr. Christman's use. Being located between the theater building and the parking lot did not convert it into a walkway any more than the bricked planting strip was considered a walkway in *Hoffstatter*. The grassy area provides beautification and ornamentation on the premises. It is not a sidewalk, and Mr. Christman cannot expect it to be maintained as one. Although plaintiff alleged the grass was wet and on a slope, both are common conditions in the Northwest in an area set aside for landscaping, as Mr. Christman himself acknowledged. The condition was open and obvious. Under *Hoffstatter*, Wal-Mart could reasonably expect a pedestrian to pay closer attention to surface conditions while crossing the grassy area—especially when it had been cordoned off with caution tape—than when walking on a sidewalk. However, Mr. Christman was counting his cash instead of paying attention.

In *Hoffstatter*, 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, defendants had not breached a duty to plaintiff. The order should be affirmed.

2. No evidence of actual or constructive notice of an unreasonably dangerous condition under § 343(a).

Wal-Mart also challenged Mr. Christman’s ability to produce evidence to support the actual or constructive notice element because he cannot prevail unless he shows that Wal-Mart had notice of a claimed unreasonably dangerous condition. *Wiltse*, 116 Wn. 2d at 459 (“The plaintiff has the burden of proving that the defendant had actual or constructive knowledge of the unsafe condition.”); *Frederickson v. Bertolino’s*, 131 Wn. App. 183, 189-90, 127 P.2d 5 (2005); Restatement (Second) of Torts § 343(a). Mr. Christman set forth zero evidence to show actual or constructive notice of an unreasonably dangerous condition. Indeed, the undisputed evidence is that pedestrians did not walk on the grass before construction was completed a day before Mr. Christman fell.

Mr. Christman's attorney and his expert could only hypothesize that employees of the theater could anticipate patrons might walk on the grass. However, even if Regal Cinemas employees could see the patrons on the grass, that cannot help plaintiff prove notice to Wal-Mart. Wal-Mart is not present on the premises. Wal-Mart did not observe the patrons on the grass. Regal Cinemas' claimed notice is not notice to Wal-Mart.

Moreover, there are several reasons that seeing patrons on the grass cannot form the basis of a genuine issue of material fact to survive summary judgment even as to Regal Cinemas, and even if Regal Cinemas' notice could be imputed to Wal-Mart. 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.* Plaintiff's expert has no firsthand knowledge that the employees could see patrons walking on the grass. He was just speculating.

Second, plaintiff provided no evidence—no documents, no testimony—that theater employees could, in fact, see the patrons before Mr. Christman's fall. If it were true, such evidence should have been available. Discovery had been going on for some time in this case before summary judgment was 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). Mr. Christman 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 absence of notice evidence alone.

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

3. **Mr. Christman offered no evidence, necessary under § 343(b), that Wal-Mart should expect patrons would not discover or realize the claimed danger, or would fail to protect themselves against it.**

Wal-Mart challenged Mr. Christman’s lack of evidence on the second element of § 343 as well. In response, Mr. Christman did not produce any evidence that Wal-Mart or Regal Cinemas 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. Mr. Christman argued only that Wal-Mart should have anticipated that pedestrians might use the grassy area 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. The same expectation is true here: even if Wal-Mart can be deemed to anticipate some patrons would choose to leave the sidewalk, it can reasonably expect such patrons would know or discover the danger, if any, of abandoning a sidewalk designated for pedestrians in favor of a grassy area not so designated—and would protect themselves against that danger. Mr. Christman failed to support this element, and summary judgment was appropriate on it alone.

C. Mr. Christman 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). In their motions for summary judgment, defendants challenged the sufficiency of plaintiff's evidence under this rule.

1. **Mr. Christman offered no evidence to controvert Wal-Mart's claim under § 343A(1) that he 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. Even Mr. Christman did not think the slope was too steep. However, Wal-Mart took the position in its motion for summary judgment that Mr. Christman knew or should have known the risk of danger potentially involved in the activity of walking on a grassy slope. It was obvious to him. He himself admitted that with the weather conditions in this area, it is reasonable to expect grass to be wet. Mr. Christman brought no evidence to suggest that the danger of possibly slipping and/or falling on a grassy slope was not known or obvious to him.

2. **Mr. Christman offered no evidence that Wal-Mart should have anticipated harm caused by his leaving the sidewalk and walking across the grassy strip, pursuant to § 343A(1).**

In response to Wal-Mart's summary judgment motion, Mr. Christman had to proffer evidence that Wal-Mart should have

anticipated harm even in the face of Mr. Christman knowing the danger or its being obvious. All Mr. Christman 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.

As in Part IV.B.2, *supra*, plaintiff 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, Mr. Christman 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 Mr. Christman would pay closer attention once he decided to walk on the grass rather than on the sidewalk available to him. Instead, he hurried across the grass, counting his money. Mr. Christman gives the court no evidence that Wal-Mart had reason to expect anything other than that set forth in *Hoffstatter*.

V. CONCLUSION

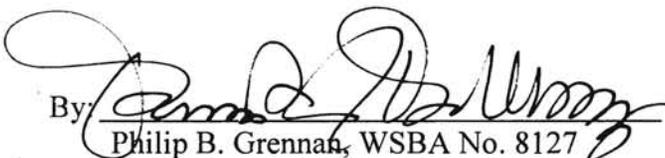
The trial court properly ruled that the grassy area outside the theater was not an unreasonably dangerous condition. Under Washington law, an owner or possessor of land is not required to maintain landscaped

areas in the same way they must maintain a sidewalk. They may reasonably expect that a pedestrian will pay closer attention if he walks off the sidewalk onto the landscaped area. As no unreasonably dangerous condition exists, Mr. Christman's claims were properly dismissed.

Further, Mr. Christman failed to meet his burden in responding to summary judgment. He did not bring evidence that Wal-Mart had actual or constructive notice of an unreasonably dangerous condition, if any. He did not bring evidence Wal-Mart should expect patrons would not discover or realize the claimed danger, or would fail to protect themselves against it. Without evidence to support these essential elements of his claim, summary judgment was proper. Wal-Mart therefore asks this Court to affirm the summary judgment ruling dismissing Mr. Christman's claims against Wal-Mart.

Respectfully submitted this 15th day of October, 2013.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 15, 2013, I caused service of the foregoing pleading on each and every attorney of record herein:

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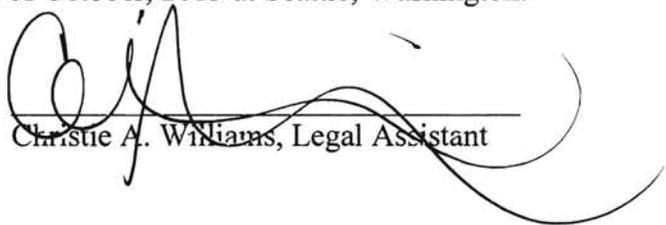
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