

NO. 73739-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

(KING County Cause No. 14-2-06880-8 SEA)

JAMES BRUCE

Appellant,

vs.

HOLLAND RESIDENTIAL, LLC, a Washington Corporation; and 3850
KLAHANIE DRIVE SE INVESTORS, LLC, a Delaware Limited
Liability Company

Respondent.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting defendant's motion for summary judgment where plaintiff submitted evidence that established a prima facie case against defendant.
2. The trial court erred when it ruled that the Recreational Use Statute (RCW 4.24.210) eliminated defendants' duties to plaintiff.
3. The trial court erred when it applied the Assumption of Risk doctrine to eliminate defendants' duty to plaintiff.
4. The trial court erred when it ruled that defendants had no duty to invitee based upon "obvious" conditions, where multiple witnesses testified that the conditions were not obvious.
5. The trial court erred when it failed to consider the exception to "obvious" conditions, as found in Restatement 343(A).
6. The trial court erred by applying a highway maintenance case, *Laguna v. Washington State DOT*, to dismiss plaintiff's claims.

7. The trial court erred when it ignored expert testimony that defendant's lack of training, negligent communication, and negligent supervision of maintenance personnel proximately caused injury to plaintiff.

II. ISSUES PRESENTED

1. Whether this Court should reverse and remand the Order of Summary Judgment because the trial court erred in granting defendants' motion for summary judgment where plaintiff submitted evidence that established a prima facie case against defendant. (Assignment of Error 1).
2. Whether the trial court erred when it ruled that the Recreational Use Statute (RCW 4.24.210) eliminated defendants' duties to plaintiff. (Assignment of Error 2).
3. Whether the trial court erred when it applied the Assumption of Risk doctrine to eliminate defendants' duty to plaintiff. (Assignment of Error 3).

4. Whether the trial court erred when it ruled that defendants had no duty to invitee based upon “obvious” conditions, where multiple witnesses testified that the conditions were not obvious.
(Assignment of Error 4).

5. Whether the trial court erred when it failed to consider the exception to “obvious” conditions, as found in Restatement 343(A). (Assignment of Error 5).

6. Whether the trial court erred by applying a highway maintenance case, *Laguna v. Washington State DOT*, to dismiss plaintiff’s claims. (Assignment of Error 6).

7. Whether the trial court erred when it ignored expert testimony that defendant’s lack of training, negligent communication, and negligent supervision of maintenance personnel proximately caused injury to plaintiff. (Assignment of Error 7).

III. STATEMENT OF THE CASE

A. Statement of Facts

The defendants are Holland Residential (Holland) and 3850 Klahanie Dr. Investors, LLC (Klahanie Investors). *CP 293*. Klahanie Investors owns the Summerwalk apartment complex, which is located in Issaquah, Washington. Klahanie Investors hired Holland to perform the day-to-day operations of Summerwalk, including rent collection, unit repairs, and maintenance of all common areas at the property. *Id.*

Summerwalk at Klahanie is a residential apartment complex of 354 units. *CP 329*. The parking lot normally filled to capacity by about 7 p.m. each evening. *CP 302*. Due to lack of parking spaces available in the parking lot, tenants and guests parked on the adjacent public street next to the apartments. *CP 302*.

Tenants and guests who parked on the street walked across a parking lot and over a grassy slope to reach their cars. *CP 303*. The parking lot and grassy area is a “common area” of the Summerwalk apartment complex. *CP 317*. There are no paths, walkways, or designated walking areas over the grassy slope. *CP 304-305*. Similarly, the parking lot has no designated

pedestrian walkways nor does it have any marked pedestrian crosswalks.

Id.

The weekend of January 19th and 20th, 2013 brought consistent freezing temperatures and fog, day and night, to the Issaquah area. *CP 186.* On Saturday the 19th (2 days before the injury at issue) the temperature at Summerwalk was at or below freezing for the full 24-hour period of the day and there was also 100% relative humidity (fog) for the full 24-hour period. *Id.* On Sunday the 20th, the temperature was freezing for approximately 23 out of 24 hours, with 100% relative humidity for the full 24 hour period. *Id.*

The parking lot at Summerwalk was covered with ice from freezing fog and was slippery in the early morning hours of Saturday, January 19th, 2013 and continuing for approximately 23 out of 24 hours on Sunday the 20th, and continued to be ice covered and slick for all of Monday the 21st. *CP at 186.*

Freezing fog is one of the most dangerous types of inclement weather because it creates a thin layer of freezing moisture over the ground surface, which makes the surface extremely dangerous. *CP 196.* Also, a

layer of ice from freezing fog is normally hidden from a pedestrian's view because it is clear ice and difficult to see or appreciate unless a person is specifically looking for it. *CP 196.*

Plaintiff is James Bruce, a 72 year-old resident of Sedro-Wooley, Washington. On the morning of January 21st, 2013 James had been an overnight guest of his companion, Mary Humphries. *CP 164.* Mary's apartment was in Building #17. *Id.* James was leaving that Monday morning to play racquetball with his friends and Mary was getting ready to leave for her job as a certified medical assistant. *CP 165.* James left the apartment about 5:20 a.m. and walked out to his car. *CP 174.* The morning was dark, very foggy, and cold. *Id.*

Jim walked to his car from the apartment. *CP 174.* The route to Jim's car was across the parking lot and over the grassy slope in a generally uphill direction. *Id.* Since the fog was very thick, Jim decided to walk back to the apartment to warn Mary about the fog and let her know that she may want to leave early. *Id.*

The route from Jim's car back to the apartment was generally downhill. *CP 205.* To exit the grassy slope, Jim had to step out and down onto the

asphalt parking lot (a drop of about 7.5 inches). *Id.* The asphalt parking lot itself was also sloped downhill. The downhill slope, along with the sloped landing area of the parking lot itself presented an increased danger of losing traction and falling. *CP 205-207.* On his uphill route to the car, Jim had not noticed that freezing fog had covered the parking lot with ice. *CP 268.* As Jim stepped out and down, his front foot slipped forward quickly and Jim fell backward. Mr. Bruce's back hit the edge of the curb and he was seriously injured. *CP 174.*

Holland had no written policies regarding monitoring weather and also had no written policy for any snow/ice safety measures. *CP 295-296.* Defendants' site personnel had no specific training on when deicing safety measures would be necessary. *CP 296-297.* There was no de-icer on the parking lot on the day of plaintiff's injury. *CP 298.*

A groundskeeper employee of Holland testified that the de-icing would only be spread in the "lower parts" of the property where water would or could flow down. *CP 331-332.* He explained that Building 17 (Mary's building) was not in the "lower area" and was not the focus of any de-icing efforts. *CP 332.*

Holland had an ongoing contract for services with an independent snow/ice remediation service called Bison Gardens. *CP 297; 236-238.*

Bison Gardens was contracted to provide application of deicer, including pre-treatment before a snow or ice event. *CP 294.* Maintenance Manager Andy Paterson testified that it was his understanding that Bison should only be called for an “extreme weather event” such as “hurricane, tornado, snow storm, earthquake” *CP 321-322.*

Defendants never called Bison Gardens anytime in the winter of 2012 or 2013 for snow or ice remediation at the complex. *CP at 308.* Also, Defendants’ maintenance personnel were available on call after hours, but no Holland maintenance person was ever called in early for snow or ice measures in January 2013. *CP at 298.*

B. Procedural History

Plaintiff filed this lawsuit in King County, Washington in March, 2014. *CP 1.* Defendant filed its Answer 4/18/2014. *CP 14.* Defendants filed their Motion for Summary Judgment on 5/22/2015. *CP 22.*

On 6/10/2015 plaintiff filed his response and opposition to defendant’s motion, which included affidavits from experts, deposition excerpts, and

an affidavit of plaintiff. *CP 120*. On 5/15/15, defendants filed their reply brief *CP 341*. On 6/18/15, plaintiff filed his sur-reply. *CP 459*.

Following oral argument, the trial court granted defendants' motion for summary judgment and dismissed all claims of plaintiff. *RP 29*.

IV. ARGUMENT

Standard of Review

The standard of review for summary judgment dismissal of a case is *de novo*, with the reviewing court to view the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Summary judgment is appropriate only if the pleadings, depositions, admissions on file, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

1. **The trial court erred in granting defendant's motion for summary judgment where plaintiff submitted evidence that established a prima facie case against defendant.**

Status determines duty

To establish negligence, a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash.2d 43, 48, 914 P.2d 728 (1996). In a premises liability action, 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. *Van Dinter v. Kennewick*, 121 Wash.2d 38, 41, 846 P.2d 522 (1993); *Younce v. Ferguson*, 106 Wash.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).

A residential tenant is an invitee, *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wash 2d, 847, 855, 31 P.3d 684 (2001). So is a tenant's guest. *Charlton v. Day Island Marina, Inc.*, 129 Wash. App. At 790, 732 P.2d 1008 (1987). It is undisputed that Plaintiff was a guest of Mary Humphries and was an invitee under Washington law.

Landowner's Duty to Safely Maintain Common Areas

A landowner has an affirmative duty to maintain common areas in a reasonably safe condition. *Iwai v. State*, 129 Wash.2d 84, 91, 915 P.2d 1089 (1996). “The general rule in the United States is that where an owner divides his premises and rents certain parts to various tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is his duty to exercise reasonable care and maintain these common areas in a safe condition.” *Geise v. Lee*, 84 Wash.2d 866, 868, 529 P.2d 1054 (1975). Landlords have a general duty to keep common areas free from dangerous accumulations of snow and ice. *Id.*

As explained in *Degel*:

[A tenant] “ ‘enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, **but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.**’ ”

--*Degel*, 129 Wash.2d at 53, 914 P.2d 728 (emphasis added).

Accumulated Snow or Ice in Common Areas

An accumulation of snow or ice is analyzed under the general rules of a landowner's duty to invitees. *Maynard v. Sisters of Providence*, 72 Wash.App. 878, 882, 866 P.2d 1272 (1994). This duty extends to the removal of snow and ice and is based upon the tenant's expectation that the premises have been made safe for the tenant's use. *Degel*, 129 Wash.2d at 53, 914 P.2d 728; *Mucsi, supra*, at 857. A landowner must exercise reasonable care in keeping all common areas reasonably safe from hazards likely to cause injury, including snow and ice. *Mucsi, supra*, at 858.

Actual or Constructive Notice Requirement

To prevail, a plaintiff must prove (1) the landowner had actual or constructive notice of the danger, and (2) the landowner failed within a reasonable time to exercise sensible care in alleviating the situation. *Mucsi v. Graoch, supra*, at 859. To prove constructive notice, the plaintiff must prove the specific unsafe condition had “ ‘existed for such time as would have afforded [the landowner] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.’ ” *Mucsi, supra*, at 859; *Iwai*, 129 Wash.2d at 96, 915 P.2d 1089 (quoting *Smith v. Manning's, Inc.*, 13 Wash.2d 573, 580, 126 P.2d 44 (1942)). This notice requirement ensures liability

attaches once the landowners *have become or should have become aware* of a dangerous situation. *Mucsi, supra*, at 859 (emphasis added).

“Ordinarily, it is a question of fact for the jury, whether under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care.” *Morton v. Lee*, 75 Wn.2d 393, 397, 450 P.2d 957 (1969) (quoting *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962)).

Constructive notice to the [defendant] may be inferred from the elapse of time a dangerous condition is permitted to continue when it is long enough to be able to say that [the defendant] ought to have known about the condition. *Holland v. City of Auburn*, 161 Wash. 594, 297 P. 769 [(1931)].

In *Mucsi v. Graoch Associates Ltd. P'ship No. 12*, 144 Wash 2d, 847, 855, 31 P.3d 684 (2001) a former tenant sued landowner alleging it failed to make a side exit of an apartment complex clubhouse safe during icy conditions. The *Mucsi* court explained that Washington case law places the burden on landowners to exercise reasonable care to maintain common areas in a safe condition. *Id.* at 861. The evidence presented in *Mucsi* supported an inference that all of the exits to the clubhouse might be used

by tenants and that the landowner had actual knowledge that accumulations of snow and ice persisted on the walkways from those exits. *Id.*

The *Mucsi* court further noted as follows:

Although in dispute, there is evidence Graoch had two or three days after the snow stopped to take corrective action. Graoch did not, nor does it appear that it intended to, clear the walkways leading from the side exits of the clubhouse. The evidence suggests the maintenance crew at Keeler's Corner had available snow and ice melting granules that went unused on the side exits.

Therefore, when viewed in the light most favorable to Mucsi, as the jury must, *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24, 29, 948 P.2d 816 (1997), there is sufficient evidence to proceed to the jury.

-- Mucsi at 862.

Parking lot ice covered and slick for at least two days prior

As previously noted, plaintiff's injury occurred at approximately 5:20 a.m. on Monday, January 21st, 2013. Plaintiff submitted evidence to the trial court that included a detailed declaration from meteorologist Phil Breuser, who is an experienced meteorologist who works in Issaquah. Mr. Breuser's job requires that he analyzes weather and provides weather forecasts for the Seattle area on a daily basis. Mr. Breuser conducted detailed analysis of weather stations throughout the Seattle area.

Importantly, Mr. Breuser located a weather station just a few miles from Summerwalk. This weather station (Sammamish COOP) recorded reliable temperature and humidity information approximately every 15 minutes on the days leading up to plaintiff's injury. Mr. Breuser explains as follows in his declaration:

In my opinion, on a more probable than not basis and to a reasonable degree of meteorological certainty, the parking lot at Summerwalk was covered with ice from freezing fog and was slippery in the early morning hours of Saturday, January 19th, 2013 and continuing for approximately 23 out of 24 hours on Sunday the 20th, and for all of Monday the 21st.

-- CP 186

Dave Westcott is the founder and CEO of SMS, a snow and ice identification and remediation company based in Lynnwood, Washington. Mr. Westcott has extensive experience identifying and remediating dangerous conditions from ice at parking lots and sidewalks for residential and commercial businesses throughout the Seattle area. CP 194. His experience also includes identification and remediation of icy conditions that are the result of freezing fog. *Id.*

Mr. Westcott testified as follows:

Freezing fog is one of the most dangerous types of inclement weather because it creates a thin layer of freezing moisture over the ground surface, which makes the surface extremely dangerous. Also, a layer of ice from freezing fog is normally hidden from the pedestrian's view because it is clear ice and difficult to see or appreciate unless a person is specifically looking for it.

When the air temperature is at or below freezing for an hour or more while fog (100% relative humidity) is present, a dangerous condition exists. When both freezing temperatures and fog are present, parking lots and sidewalks will, on a more probable than not basis, become dangerously slick within about one hour.

Application of deicer would be warranted for all foreseeable pedestrian walking surfaces prior to these conditions occurring or, at a very minimum, within an hour of conditions that have both freezing temperatures and fog.

--CP 197

Plaintiff provided evidence that freezing temperatures and 100% humidity likely caused dangerously icy conditions a full two days before Mr. Bruce's fall. Payroll records of Holland show that Holland employees were on duty both Saturday and Sunday. *CP 249-254*.

In *Maynard v. Sisters of Providence*, 72 Wash. App. 878, 866 P.2d 1272, (1994), plaintiff appealed the trial court's granting of summary judgment in a snow/ice slip and fall case. The plaintiff brought suit against a hospital operator for injuries arising from a fall in an icy parking lot.

Division I reversed the trial court's dismissal, finding that there were genuine issues of fact as to whether there was an unreasonable risk, whether defendant knew or should have known about risk, and whether defendant failed to take any remedial measures, thus precluding summary judgment.

The *Maynard* court explained as follows:

In this case, Everett's weather records show that low temperatures and precipitation had been occurring for the preceding 4 days. A permissible inference would be that Providence could foresee that ice and snow were likely to be present and that what was slush when Maynard arrived could turn to ice. ***At the minimum, the conditions warranted investigation of the parking lots.***

-- *Maynard v. Sisters of Providence*,
72 Wash. App. 878, 883, 866 P.2d
1272, 1275 (1994)(emphasis added).

No "Roadrunner" deicer put down despite its availability on premises

Defendants had at least 30 bags of deicer on the premises, with another 50 bags arriving that winter. *CP 105*. The deicer was a calcium chloride compound known as "Roadrunner". *CP 108*.

Howard Sand was a groundskeeper at Summerwalk in January 2013. *CP 325*. Mr. Sand testified that the decision to put down de-icer was solely the decision of both he and Andy Paterson (maintenance manager). *CP*

327-328. Mr. Sand explained that the de-icing would be spread in the “lower parts” of the property where water would or could flow down. *CP 331-332*. He explained that Building #17 was not in the “lower area” and was not the focus of any de-icing efforts. Importantly, Mr. Sand testified that he never applied de-icer in front of Building #17 anytime in January 2013. *CP 332*.

Defendants had the capability, equipment, and materials to spread Roadrunner on the premises in three different ways: 1) a walk-behind spreader; 2) hand broadcasting, and 3) a hand broadcast spreader. *CP 105*.

Plaintiff provided expert testimony that application of Roadrunner would have likely prevented plaintiff’s injuries as follows:

I am familiar with the Roadrunner brand of deicer. Roadrunner is a mix of Calcium Chloride, Magnesium, and Sodium Chloride. In my opinion, on a more probable than not basis, the application of Roadrunner deicer at Summerwalk would have prevented Mr. Bruce’s fall. Roadrunner does a good job of melting ice from freezing fog.

Deicer products not only melt ice, but are a critical function in providing safe and accessible surfaces for walkways and parking lots. Deicing products come in a variety of bright colors including red, blue, white, yellow, etc. These bright colors on a dark asphalt or concrete provide a high level of safety and visibility for pedestrian precaution, because they

alert a pedestrian about icy conditions. When a pedestrian sees a product spread over a hard surface, they will more often than not avoid the area, or take special precautions in treading carefully.

The application of Roadrunner would likely have made the asphalt parking lot area at Summerwalk safe for Mr. Bruce. It is my further opinion that the failure to apply Roadrunner or other deicer was likely a proximate cause of Mr. Bruce's fall.

- CP 196

Plaintiff's evidence showed that dangerous ice from freezing fog created a dangerous condition for at least two full days before Mr. Bruce fell and further that Holland had employees that were on duty both Saturday and Sunday. Plaintiff submitted eyewitness testimony that no deicer was present outside building 17. Plaintiff presented evidence that there was ample time for Holland employees to identify the icy conditions and apply deicer. Plaintiff's evidence further established that defendants' failure to apply de-icer near the commonly used crossing area outside of building #17 proximately caused injury to plaintiff. The trial court's dismissal on summary judgment was error.

2. The trial court erred when it ruled that the Recreational Use Statute (RCW 4.24.210) eliminated defendants' duties to plaintiff.

In its oral ruling, the court stated, *sua sponte*, that defendant had no duty to defendant based upon RCW 4.24.010 and the analysis found in *Jewels v. City of Bellingham*, 183 Wash. 2d 388 (2015). *RP at 29.*

Although neither side argued RCW 4.24.210, the trial court nevertheless applied RCW 4.24.210's definition of "latent" to eliminate all duties of defendants.

RCW 4.24.210 -- An objective inquiry of "latent"

The *Jewels* court interpreted the statutory term "latent" for purposes of the Recreational Use Statute, RCW 4.24.210. That statute aims to encourage landowners to open their lands to the public by modifying the common law duty owed to invitees, licensees, and trespassers. *Jewels, supra*, at 394, *Davis v. State*, 144 Wash.2d 612, 615–16, 30 P.3d 460 (2001).

In relevant part, the statute reads:

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners ... who allow members of the public to use them for the purposes of outdoor recreation ... without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

--RCW 4.24.210

The statute supersedes the common law status categories and defines the legal duty owed to visitors to recreation properties. *Van Scoik v. State, Dept. of Natural Resources*, 149 Wash. App. 328, 203 P.3d 389 (Div. 3 2009); *Davis v. State*, 144 Wash. 2d 612, 30 P.3d 460 (2001) (recreation use statute applied to motorcyclist's claim that State was negligent in failing to maintain recreational area).

The burden is on the landowner to establish that the recreational use statute applies. *Cregan v. Fourth Memorial Church*, 175 Wash. 2d 279, 285 P.3d 860 (2012). To qualify, **the landowner must show** (1) that he held the land open to members of the public; (2) for recreational purposes; and (3) did not charge a fee. *Id.* (*emphasis added*).

Explaining how the term “latent” is to be applied to plaintiffs under the recreational use statute, the *Jewels* court explained as follows:

An injury-causing condition is “latent” if it is “not readily apparent to the recreational user.” *Van Dinter*, 121 Wash.2d at 45, 846 P.2d 522. The condition itself, not the danger it poses, must be latent. The dispositive question is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it. *Tennyson v. Plum Creek Timber Co.*, 73 Wash.App. 550, 555–56, 872 P.2d 524 (1994). In other words, what one “particular user sees or does not see is

immaterial.” *Widman v. Johnson*, 81 Wash.App. 110, 114–15, 912 P.2d 1095 (1996). **This is an objective inquiry.**

-- Jewels at 397.

This statute is to be strictly construed, since it is in derogation of the common law, and because it extends immunities that are generally disfavored. *Matthews v. Elk Pioneer Days*, 64 Wash. App. 433, 824 P.2d 541 (Div. 3 1992).

The Recreational Use Statute simply does not apply to give defendants’ immunity, nor does it operate to modify common law duties between these defendants and plaintiff. The defendant submitted no evidence to establish immunity under the statute and indeed did not even make this argument to the court. The trial court’s conclusion that RCW 4.24.210’s definition of “latent” operated to eliminate these defendants’ common law legal duties was plain error.

3. The trial court erred when it applied the Assumption of Risk doctrine to eliminate defendants’ duty to plaintiff.

In contrast to the *objective* standard found in the Recreational Use Statute, a *subjective* standard is necessarily applied to common law premises cases where the defendant claims the affirmative defense of assumption of risk. The subjective standard is necessarily applied simply because assumption

of risk is based upon a knowing and voluntary decision by a particular person to encounter the risk.

Importantly, defendants' claim of assumption of risk was an affirmative defense. When defendants claimed an affirmative defense, the defendants had the burden of making a prima facie showing of all elements of such affirmative defense.

As explained by defendants' brief to the trial court:

Thus, to establish the defense of primary reasonable assumption of risk, the defendants must show that at the time of his fall, Mr. Bruce (1) had full subjective understanding (2) of the presence and nature of the risk, and (3) voluntarily chose to encounter the risk.”

--CP at 34; (Defendants' brief at page 12), citing *Jessee v. City Council of Dayton*, 173 Wn. App. 410, 414, 293 P.2d 1290 (2013) (quoting *Kirk*, 109 Wn2d at 453.)

Knowledge and voluntariness are questions of fact for the jury, except when reasonable minds could not differ. *See Alston*, 88 Wash.App. at 34, 943 P.2d 692 (consent is question of fact for jury except when reasonable minds could not differ). The plaintiff “must have knowledge of the risk,

appreciate and understand its nature, and voluntarily choose to incur it.”

Kirk, 109 Wash.2d at 453, 746 P.2d 285 (citing w. Page Keeton , § 68 at 487); *Wagenblast v. Odessa School Dist. No. 105-157-166J*, 110 Wash.2d 845, 858, 758 P.2d 968 (1988).

In *Egan v. Cauble*, 92 Wash. App. 372 (Division II -- 1998), the court held summary judgment based on assumption of risk was precluded where an injured person did not subjectively appreciate the specific risk. The *Egan* court (Judge Morgan) also analyzed both *Dorr* and *Alston* as set out below.

In *Dorr v. Big Creek Wood Products, Inc.*, Knecht was logging at a remote site. His friend Dorr, also a logger, came to visit. Before approaching Knecht's position, Dorr looked for “widow-makers”-limbs from felled trees caught high in the branches of standing trees. Failing to see any, he walked toward Knecht. As he walked, he was hit and injured by a falling widow-maker that he had not seen. If he had seen it, realized the danger it posed, and decided to hurry under it, he would have actually and subjectively known all facts that a reasonable person would have known and disclosed (which is the same as to say he would have “appreciated the specific hazard which caused the injury”) and he would also have known

of a reasonable alternative course of action (e.g., remaining where he was, or walking around the area into which the widow-maker might fall). Thus, he would have knowingly and voluntarily assumed the risk. As it was, however, he failed to see the particular widow-maker, and he did not have the kind of subjective knowledge that is a prerequisite to assuming a risk. *Egan v. Cauble*, supra, (citing *Dorr*) at 377. **At most, then, he was contributorily negligent.** *Id.* (emphasis added.)

In *Alston v. Blythe*, Alston wanted to walk from east to west across an arterial with two northbound and two southbound lanes. A truck driven by McVay stopped in the inside southbound lane, and McVay waved her across in front of him. A car in the outside southbound lane did not stop and struck her as she stepped out from in front of the truck. If Alston had seen the oncoming car, realized the danger, and decided to hurry across in front of it instead of waiting for it to pass, she would have known the facts that a reasonable person would have known and disclosed (which is to say she would have appreciated the specific risk), and she would have assumed the risk. As it was, however, she did not know the car was coming, and she did not have the knowledge required by the doctrine of assumption of risk. *Egan v. Cauble*, supra, (citing *Alston*) at 377. **At most, she was contributorily negligent.** *Id.* at 377 (emphasis added).

The *Alston* court explained as follows:

The record in this case contains no evidence that Alston expressly or impliedly consented to relieve either McVay or Blythe of the duty of ordinary care that he owed to her as a matter of law. She merely tried to cross the street in a way that may or may not have involved contributory negligence, depending on whose testimony the jury chooses to believe. The evidence supported an instruction on contributory negligence, but not an instruction on assumption of risk, and Instruction 13 was erroneous.

--*Alston* at 697.

In *Maynard v. Sisters of Providence*, *supra*, Division I explained as follows:

Maynard's digression to try and assist another driver **does not ipso facto relieve Providence of its duty, but is a consideration for a jury in determining comparative negligence.**

A jury must determine whether the defendant was negligent and, if so, the plaintiff's **comparative fault** in light of all the existing circumstances

--*Maynard* at 884 (emphasis added)

At the trial court, defendants failed to offer *any evidence* showing “full subjective understanding” of the “presence and nature of the risk”. Indeed, the testimony on this issue by Mr. Bruce shows that he was not aware of the black ice, much less that he had “full subjective understanding” of the risk presented. Similarly, the defense provided no *evidence* that Mr. Bruce voluntarily *chose* to encounter the risk -- he cannot choose to encounter a risk of which he was not aware. Rather than citing (even once) any evidence supporting their argument on assumption of risk, defendants simply made unsupported arguments of counsel. *CP at 35-36*.

Even assuming that defendants had submitted some specific evidence on assumption of risk to the trial court (which they did not), questions of the knowledge and voluntariness to establish this defense are normally fact questions for the jury. *Alston v. Blythe*, 88 Wn. App. 26, 33-34, 943 P.2d 692 (1997).

Defendants’ alleged that plaintiff was at himself at fault for his injuries. This defense necessarily creates questions that can only be answered by the trier of fact to determine the merit of such allegations and further to allocate **comparative fault** between the parties. The trial court’s dismissal on summary judgment was error.

4. The trial court erred when it ruled that defendants had no duty to invitee based upon “obvious” conditions, where multiple witnesses testified that the conditions were not obvious.

The trial court stated that it found no duty because “the condition at bar was observable, natural, knowable, obvious” *RP at 29*.

Generally, natural conditions are not open and apparent dangers as a matter of law; whether a natural hazard is open and apparent depends on fact questions of whether a person knew or had reason to know of the full extent of the risk posed by the natural condition. *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d 121,135, 875 P.2d 621, 629 Wash. (1994) (Analyzing duties to mere licensees).

As the *Tincani* court explained:

The phrase “open and apparent” assumes knowledge on the part of the licensee. Whether a natural hazard is open and apparent depends on whether the licensee knew, or had reason to know, the full extent of the risk posed by the condition. **That is a question of fact.**

--*Tincani* at 135(emphasis added)

The *Owen* court, held that the issue of whether a roadway was maintained in reasonably safe condition by the landowner was an issue of fact that

precluded summary judgment. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn. 2d 780, 788 (2005). The Court also noted that whether a condition is or is not dangerous is generally a question of fact. Id. at 788.

The *Owen* court further explained as follows:

Questions of fact may be determined as a matter of law “when reasonable minds could reach but one conclusion.” **If reasonable minds can differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate.**

We have noted before that “issues of negligence and proximate cause are generally not susceptible to summary judgment.”

--*Owen v. Burlington Northern and Santa Fe R.R. Co.* at 788(emphasis added).

Plaintiff testified that he was not aware of the black ice as he walked out to his car. *CP at 260*. Plaintiff was aware that the conditions were very foggy and he testified that he decided to return to the apartment to warn Mary about the fog and to let her know that she may want to leave early for work because of the fog. *CP at 260*.

Mr. Westcott testified as follows:

Freezing fog is one of the most dangerous types of inclement weather because it creates a thin layer of freezing moisture over the ground surface, which makes the surface extremely dangerous. **Also, a layer of ice from freezing**

fog is normally hidden from the pedestrian's view because it is clear ice and difficult to see or appreciate unless a person is specifically looking for it.

--*CP at 196* (emphasis added)

Mary Humpries testified as follows:

The ice was clear, so the asphalt was black even though it was covered in ice. The ice was difficult to see, but as I described in my deposition, the area outside my apartment was very slick from this ice.

-- *CP at 165*

To contradict plaintiff's evidence, Defendant submitted a declaration from its own meteorologist that any ice formed was likely a white ice known as "rime" and that this type of rime ice was both opaque and visible. *CP at 405*. Defendants' evidence was in stark contrast to plaintiff's evidence that the conditions created clear, black ice.

The trial court appears to have simply agreed with the defense expert and ruled that the icy conditions were obvious, rather than allowing a jury to weigh plaintiff's evidence and make factual determinations. At minimum, the disputed evidence submitted by the parties presented a jury question regarding alleged "obviousness" of the conditions, particularly when viewed in light most favorable to the nonmoving party.

5. **The trial court erred when it failed to consider the exception to “obvious” conditions, as found in Restatement 343(A).**

Even if the conditions were “obvious”, Restatement 343A has an exception that creates a fact question for the jury as to whether encountering the risk was reasonable.

Section 343A of the Restatement, entitled Known or Obvious Dangers, states in part:

(1) A possessor of land is not liable to his [or her] 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.**

--Iwai v. State, 129 Wash.2d 84, 91, 915 P.2d 1089 (1996), *citing*, *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash.2d 43, ---- - ----, 914 P.2d 728, 731-32 (adopting sections 343 and 343A) (*citing Tincani v. Inland Empire Zoological Soc'y*, 124 Wash.2d 121, 138-39, 875 P.2d 621 (1994)).

The comment to the Restatement explains that such anticipation may be found “where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable person in that position the advantages of doing so would

outweigh the apparent risk.” *Id.*; see also *Tincani*, 124 Wash.2d at 139-40, 875 P.2d 621 (quoting extensively from section 343A, comment f).

An invitee's awareness of a particular dangerous condition does not necessarily preclude landowner liability. *Iwai v. State*, 129 Wash.2d 84, 91, 915 P.2d 1089 (1996).

A common crossing point for tenants and guests.

The parking lot had no designated pedestrian walkways or any marked pedestrian crosswalks. *CP 302-303*. Similarly, there were no paths, walkways, or designated walking areas over the grassy slope. *CP 304-305*; *CP 167-171*; *CP 5-9*. Defendants were aware that tenants and guests parking on the street typically walked across the grassy slope and parking lot to enter and leave the premises. *CP 302-303*.

Detour around the crossing point was unlikely

Plaintiff's expert Rick Gill provided testimony as follows to the trial court:

Summerwalk was aware that people routinely parked on the street outside of building #17 due to limited parking at Summerwalk itself. There is a fence about 200 feet long that serves as a barricade that prevents people from walking down the grassy slope where the fence is located. However, there is also an approximately 400 foot stretch of the grassy slope, right next to the street parking, that has no fence or barricade.

It is natural human behavior to simply walk over the approximately 25 feet of grassy slope to access the apartments, as contrasted with walking 400 feet in one direction, and then backtracking across the parking lot to a destination at the apartments.

In other words, the layout itself induces people to walk across the grassy slope to enter and to leave Summerwalk. The area further induces people to walk across it because it is an obvious common area and dog-walk area, with doggy pick-up bags available at a metal post in that is set in the grass, along with dog area signs.

--CP at 204

6. The trial court erred by applying a highway maintenance case, *Laguna v. Washington State DOT*, to dismiss plaintiff's claims.

In its oral ruling, the trial court stated it was relying upon “*Laguna v. State*” to dismiss plaintiff’s claims. *RP 29*. In *Laguna*, the issue was whether the State has a duty to predict and prevent ice from forming on the roadways when it has notice of conditions that make ice formation probable. *Laguna v. Washington State Dept. of Transp.*, 146 Wash. App. 260, 192 P.3d 374, (Division I, 2008).

Laguna's claim against the State rested on the contention that the state had a duty to use anti-icing chemicals to prevent the ice from forming. The

Laguna court found that the DOT had no duty to act regarding mere *potentially* icy conditions.

In contrast to *Laguna*, Plaintiff's claims involve **actual** existing conditions, not **potential** conditions as described in *Laguna*. Plaintiff's evidence showed that icy conditions were present at least two days prior to plaintiff's injury. As previously discussed, Plaintiff's evidence showed that dangerous ice from freezing fog created a dangerous condition *for at least two full days before* Mr. Bruce fell and further that Holland maintenance employees were on duty both prior days. There was ample time for defendants to identify the *actual* icy conditions and apply deicer. This is simply not a case of *potentially* icy conditions.

7. **The trial court erred when it ignored expert testimony that defendant's lack of training, negligent communication, and negligent supervision of maintenance personnel proximately caused injury to plaintiff.**

Plaintiff posited additional theories of liability in his case, including negligent training and negligent supervision. Plaintiff provided expert testimony from Steven D. Epcar, a real-estate management expert with over 40 years of management and consulting experience. Mr. Epcar testified as follows:

OPINION #2: There was a negligent lack of training, coordination, and communication between the on-site maintenance team, on-site property manager, and third party deicing vendor (Bison Gardens). This negligence (failure to exercise ordinary care) caused the failure to maintain a safe environment as it related to winter weather conditions.

It was improper for Holland employees to simply leave the premises at the end of their shifts on the 20th and fail to apply de-icer outside of building #17, and further fail to contact or coordinate with Bison Gardens to apply de-icer. These failures to exercise ordinary care were likely a proximate cause of the injuries to Mr. Bruce from the fall.

-- CP 231-232

Mr. Epcar further provided further detailed explanations showing the evidentiary bases for his conclusions, including depositions of defendants, defendants' employee manual and handbook, and defendants' contract for outside snow/ice remediation services. CP 232-233.

Dr. Gill testified as follows:

It is my further opinion that defendants had a deficient safety and risk management program and that this deficient safety and risk management program was a proximate cause of injury to Mr. Bruce. The first component of a safety and risk management program is identification of hazards. Even after the apartments were built and use patterns of tenants and guests were recognized, no steps were taken to identify or correct the dangerous condition of the grassy area and the associated step-down onto the parking lot area.

-- CP 207

It appears from the record that the trial court either 1) failed to consider the evidence establishing plaintiff's additional theories of liability or; 2) the trial considered the evidence, but simply disregarded it without comment.

Plaintiff provided specific expert testimony to establish a prima facie case of negligent training, communication, and/or supervision of maintenance employees. Plaintiff provided further expert testimony establishing that such negligence was a proximate cause of injury to plaintiff. The trial court's dismissal of all claims was error.

V. CONCLUSION

For the above-stated reasons, plaintiff respectfully requests that the summary judgment dismissal of his claims be reversed and that the case be remanded back to the trial court.

DATED this 19th day of November, 2015.

LAW OFFICE OF GRANT A. GEHRMANN



Grant A. Gehrman, WSBA #21867
Attorney for Appellant

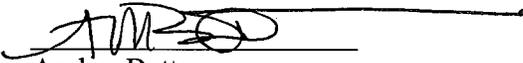
CERTIFICATE OF SERVICE

I certify that on the 19th day of November, 2015, a copy of
OPENING BRIEF OF APPELLANT was sent as stated below:

Ramona Hunter Andrews, Skinner PS 645 Elliott Ave W. #350 Seattle, WA 98119 ramona.hunter@andrews-skinner.com eric.scharf@andrews-skinner.com	<input checked="" type="checkbox"/> via e filing/email <input type="checkbox"/> via hand delivery <input type="checkbox"/> via US Mail <input type="checkbox"/> via Certified Mail <input type="checkbox"/> via fax
Richard D. Johnson Clerk/Administrator WA Court of Appeals Division I One Union Sq. 600 University St Seattle, WA 98101	<input type="checkbox"/> via e filing/email <input type="checkbox"/> via hand delivery <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via Certified Mail <input type="checkbox"/> via fax

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Vancouver, Washington, this 19th day of November, 2015.


Amber Batten