

NO. 35580-9-11

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TERRI WERON,
Plaintiff/Appellant,

vs.

GRANITE SERVICE, INC., d/b/a HARBOR SHELL, EDWARD L.
STONE, individually and the marital community thereof with JANE
DOE STONE; and DOES 1-5 inclusive,

Defendants/Respondents.

CORRECTED

BRIEF OF RESPONDENTS GRANITE SERVICE, INC., d/b/a
HARBOR SHELL, EDWARD STONE AND JANE DOE STONE

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DIVISION II
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I. COUNTERSTATEMENT OF THE CASE

August 1, 2003, was a dry and sunny day.¹ At approximately 11:00 o'clock a.m., Appellant drove her car to the Shell gas station and food mart in Gig Harbor.² Appellant had been to this gas station several times in the past, as it was only 5-6 minutes from her home.³ After filling her gas tank, Appellant walked into the food mart, using the handicap ramp even though she is not disabled.⁴ As the photographs show, the handicap ramp is parallel to the food mart and adjacent to the curb.⁵ The curb is easily seen by anyone walking toward the food mart, and on the handicap ramp.

Appellant entered the store through one of the two double glass doors, purchased some lottery tickets and paid for her gas.⁶ She then opened the right hand glass door (one of the two doors she entered), and walked out onto the sidewalk, looking at her feet.⁷ The food mart checker watched Appellant walk toward the glass doors with her scratch tickets in hand.⁸ Appellant then walked across the sidewalk without paying attention, failed to see the curb, and fell when she stepped off. Appellant does not know where she was looking when she fell.⁹

¹ CP 66

² CP 66

³ CP 65

⁴ CP. 68, 69

⁵ CP. 48-50; 97-99, Appendix 1-3

⁶ CP 72

⁷ CP 74

⁸ CP 80

⁹ CP 75

The sidewalk Appellant crossed was 5'3" wide from the double doors to the curb. The curb itself was 5-3/4" high.¹⁰

Respondent Edward Stone, has operated this gas station and food mart since 1976, a 30 year period.¹¹ He estimates that during this time, over 1.6 million people have entered the food mart. He is not aware of any of these 1.6 million people falling off this curb.¹²

Respondent Equilon Enterprises, LLC (hereinafter "Equilon") owns the real property where the gas station and food mart are situated.¹³ In November of 2000, Equilon leased this property to respondent Granite Service, Inc. (hereinafter "Granite"). Granite is a lessee of the property, not an owner of it, as Appellant mistakenly asserts.¹⁴ Mr. Stone is a shareholder in Granite, a corporation formed in 1976.¹⁵

Equilon chose the color of the paint, as well as what would be painted on these premises. This includes the color of the curb and the white stripes around the wheelchair access.¹⁶ Granite had no right to alter Equilon's choice of colors, or paint any additional areas of the premises.¹⁷

¹⁰ CP 45

¹¹ CP 45

¹² CP 45-46

¹³ CP 44-45

¹⁴ CP 44-45

¹⁵ CP 44

¹⁶ CP 45

¹⁷ CP 45

1 **Procedural History**

Appellant sued Granite, the Stones and Equilon in Pierce County Superior Court.¹⁸ Granite and the Stones filed for Summary Judgment in which Equilon joined. Appellant filed a response which included the Declaration of Daniel Johnson. The Respondents moved to strike portions of Mr. Johnson's declaration.¹⁹ After oral argument, the court denied the Order to Strike²⁰, but granted Summary Judgment in favor of all Respondents.²¹ Appellant filed a Notice of Appeal.²²

II. ARGUMENT

A. THE APPELLATE COURT MAKES A DE NOVO REVIEW.

Appellant, throughout her brief, has set forth statements made by the trial judge, which Appellant believes are favorable to her position. These statements carry no weight whatsoever, as the court makes its own independent determination of the facts and law without deference to the trial court.²³

¹⁸ CP 1-5

¹⁹ CP 170-180

²⁰ CP 213-216

²¹ CP 217-220

²² CP 221-226

²³ *Redding v. Virginia Mason Medical Ctr.*, 75 Wn.App. 424, 878 P. 2d 453 (1994)

B. RESPONDENTS ARE NOT AN INSURER OF APPELLANT'S SAFETY; APPELLANT MUST ESTABLISH ALL FOUR ELEMENTS OF ACTIONABLE NEGLIGENCE.

An owner of property is not an insurer as to all who may be injured on his property.²⁴ Negligence cannot be inferred simply because Plaintiff fell and hurt himself.²⁵ Instead, Appellant must establish the following four (4) elements for negligence: (1) duty, (2) breach of that duty; (3) proximate cause, and (4) damages.

Appellant was an invitee. Washington has adopted *Restatement (Second) of Torts*, §343,²⁶ which establishes that the duty an invitor owes to an invitee:

§343. Dangerous Conditions Known to or Discoverable by Possessor.

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

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the

²⁴ *Fernandez v. State*, 49 Wn.App. 28, 741 P.2d 1010 (1987).

²⁵ *Grant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967).

²⁶ *Kamala v. Space Needle Corporation*, 147 Wn.2d 114, 125, 52 P.3d 472 (2002).

danger, or will fail to protect themselves against it, and

- (c) fails to exercise reasonable care to protect them against the danger.

C. THE CURB AT THE FOOD MART DOES NOT CONSTITUTE AN UNREASONABLE RISK OF HARM AS A MATTER OF LAW.

The initial inquiry is whether the curb created an **unreasonable** risk of harm. Courts throughout the country have overwhelmingly held that unmarked outside curbs, in plain view, do not create an unreasonable risk of harm as a matter of law.²⁷

This general rule is succinctly stated by the Nebraska Supreme Court in *Parker v. Lancaster School Distr.*, *supra*, at p. 757-8:

This court has described “inherently dangerous” in terms of being a special or peculiar risk. Such a risk has been defined as “one that ‘differ[s] from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the

²⁷ *Andrews v. R.W. Hayes Co.*, 998 P.2d 774 (Or.App. 2000); *Glorioso v. Ness*, 83 P.3d 914 (Or.App. 2004); *Safeway v. McCoy*, 376 P.2d 285 (Okla. 1962); *Stanley v. Morgan & Lindsey, Inc.* 203 So.2d 473, (Miss. 1967); *Gorin v. Augustine*, 585 So.2d 1062 (Fla.App. 1992); *Parker v. Lancaster County School Distr.*, 579 N.W. 2d 526 (Nebraska 1998); *Cudney v. Spears*, 84 F.Supp. 856 (U.S.D.C E.D. Michigan 2000); *Schollenberger v. Sears*, 925 F.Supp. 1239 (U.S.D.C Eastern Distr. Michigan 1996); *Maurer v. Oakland County Parks & Recreatl. Dept.*, 537 N.W. 2d 1185 (Michigan 1995); *Frendlich v. Van's Foods of Henderson, Inc.*, 307 S.E. 2d (N.C. App. 1983); *Wilson v. Duncan*, 440 S.E. 2d 550 (Georgia App. 1994); *Hancock v. Middash South Management Co., Inc.*, 634 S.E. 2d 12 (S.C. 2006).

community...’ ” *Kime v. Hobbs*, 252 Neb. 407, 417, 562 N.W.2d 705, 713 (1997). **It has been held that generally stairs, steps and unmarked curbs are not inherently dangerous.** See, *Like v. Pierce*, 326 Ark. 802, 934 S.W.2d 223 (1996) (steps and gravel not inherently dangerous and gravel contained no substance making walkway unreasonably dangerous); *Benaquista v. Municipal Housing Auth.*, 212 A.D.2d 860, 622 N.Y.S.2d 129 (1995) (stairs not considered to be inherently dangerous); *Gorin v. City of Augustine*, 595 So.2d 1062 (Fla. App. 1992) (unmarked curb not inherently dangerous). (Emphasis added).

The case of *Andrews v. R.W. Hayes Co.*, *supra*, is directly on point. In *Andrews*, defendant operated a service station and convenience store. Plaintiff exited the store and fell on a 1-1/2 -2 inch "step-down" as she walked from the concrete walkway to the lower asphalt parking lot. This occurred at mid-day and the weather was dry and clear. Plaintiff sued defendant, alleging he was negligent in maintaining a dangerous condition, violating the Uniform Building Code, and failing it to warn. Plaintiff appealed a summary judgment granted in favor of defendant.

The Appellate Court set forth the issues on appeal as follows on page 503:

Our inquiry reduces to whether, viewing the record most favorably to plaintiff – and excluding plaintiff’s evidence of other similar accidents – a reasonable trier of fact could impose premises liability. So viewed, the record discloses that:

(1) Plaintiff tripped on a 1-1/2" – 2" step-down from a concrete walkway to an asphalt parking lot. (2) The fall occurred around mid-day on a dry summer day. (3) Plaintiff did not discern the step-down and perceived the area as being level. (4) No prior tripping or slipping accidents had occurred at the premises. And (5), at the time of the accident, defendant provided no warning of the step-down. Those facts are legally insufficient to support premises liability against either the defendant property owner or defendant's store operators.

The court determined that there was no unreasonable risk of harm, explaining on page 505:

Here, viewing the evidence most favorably to plaintiff, there was a step-down of 1-1/2" – 2" from a walkway to a parking lot, which, because of an actual or perceived similarity of color, had a "deceptively level appearance." Nothing more. There is no suggestion of inadequate lighting – the accident occurred outside at mid-day in July. There is no suggestion that the surface was slippery – the day was dry. **There is no (admissible) evidence of any prior similar accidents. In sum, there was no unreasonably dangerous condition – and no concomitant duty to warn.** (Emphasis added.)

The case of *Stanley v. Morgan & Lindsey, supra*, is also directly on point. In this case, Plaintiff walked out of the Defendant's store and failed to see a 7-1/2" high curb and fell, injuring herself. Plaintiff testified that she forgot about the curb and could not see it because the sun was shining brightly, the curb was

not painted and that “it looked like one big solid slab of concrete, all along the same level.” The trial court directed a verdict in favor of Defendants, and Plaintiff appealed.

The Mississippi Supreme Court upheld the directed verdict. The court reviewed a number of similar cases and then stated on page 477:

From the foregoing we have reached the conclusion that (1) the fact of the sidewalk was 7-1/2” above the parking lot was not such a condition as to cause the owner of the business to reasonably anticipate that one would fall or trip over the curb to the sidewalk, and (2) **the rise or step-off was not inherently dangerous, and was obvious, open and apparent to persons going into the store.** There was no negligence shown by the evidence. (Emphasis added)

Another case on point is *Gorin v. Augustine, supra*. In *Gorin*, plaintiff was walking to a tram from a building, did not see the curb, and fell. The curb and sidewalk were the same color, and Plaintiff contended that Defendants was negligent in not adequately marking the curb. Plaintiff supported her claim with an engineer’s affidavit opining that the lack of yellow painting, or a warning sign created an inherently and unreasonably dangerous condition, and Plaintiff would not have fallen if the curb had been marked. Despite this affidavit, the trial court granted the Defendant’s summary judgment motion, and Plaintiff appealed.

The appellate court upheld the summary judgment dismissal, holding as a matter of law that the unmarked curb did not create an unreasonable risk of harm. The court explained its decision on page 1063:

Some conditions are simply so open and obvious, so common and so ordinarily innocuous, that they can be held as a matter of law to not constitute a hidden dangerous condition. We also agree with the Third District that “to hold that an ordinary sidewalk curb, without more, is inherently dangerous would make every municipality and business establishment the virtual insurer of the safety of every pedestrian.” *Aventura*, at 321. (Emphasis added.)

The *Gorin* court cited as authority the case of *Aventura Mall Venture v. Olson*, 561 So.2d 319 (Fl.App. 1990). In *Aventura*, the plaintiff, an invitee, fell from a 6” sidewalk curb as she was leaving the Mall. Plaintiff sued Defendants, alleging that the unpainted crown of the curb was all Plaintiff could see as she approached the curb from the sidewalk as she left the Mall. As a result, Plaintiff alleged that the sidewalk blended in with the driveway below and provided no warning that a change of elevation was about to occur. At trial, the jury found both Plaintiff and Defendants 50% at fault, and Defendants appealed.

The appellate court reversed. It noted that the condition was not a concealed or hidden danger, and the surrounding conditions such as the lighting did not transform a non-negligent condition into

a negligent one. The court then rejected Plaintiff's contention that the curb should have been painted a contrasting color, stating on page 320:

Olson's allegation that an inherently dangerous condition existed because the color of the curb "crown" blended in with the driveway below and concealed the existence of the step-down is likewise without merit. It is a matter of common knowledge that "the sidewalks and drop-off[s] from such sidewalks to the streets had the same color as the streets in thousands of instances throughout Florida.

In *Maurer v. Oakland County Parks and Recreation Dept.*, *supra*, plaintiff fell on an unmarked cement step as she left a restroom area. Plaintiff alleged that the defendant breached its duty to an invitee by failing to mark the step with a contrasting color, or by failing to warn of the additional step.

The Michigan Supreme Court held that there was nothing unusual in the steps which took the case outside of the general rule of no liability, explaining on pages 616-17:

In summary, because steps are the type of every day occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, **the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "fool proof."** Therefore,

the risk of harm is not unreasonable.
(Emphasis added)

Similarly, in *Cudney v. Spears, supra*, the court sets forth the following general principle:

Simply put, “overriding public policy” limits the scope of an invitor’s duty to exercise reasonable care in protecting his invitees; an invitor is “not the absolute insurer of the safety” of his invitees. For example, a premises owner is under no obligation to protect or warn an invitee of the dangers of falling from ordinary steps, or well-exposed changes in floor levels, or from walking into a concrete post in the entryway of a department store. (Citations omitted)

1. **Washington follows the General Rule that Unmarked Curbs Do Not Create an Unreasonable Risk of Harm.**

In *Tyler v. F.W. Woolworth Co.*,²⁸ the defendant store had three (3) entrances, all utilizing ramps. At two (2) of the entrances, the ramp was flush with the sidewalk while the third had a six (6) to eight (8) inch step off to the sidewalk. The plaintiff entered the store on a ramp without the step off, but exited the building on the ramp with the step off. The plaintiff could not see the step off because the ramp was crowded with customers (as it often was) and fell.

The trial court heard the case without a jury and found for plaintiff. The defendant appealed, but the Supreme Court affirmed.

²⁸ 181 Wash. 125, 41 P.2d 1093 (1935)

It did so on the basis that the ramp's step off was obscured by the crowd, which prevented the plaintiff from seeing it. However, the court clearly states that if the people had not obscured the step off, then the defendant would not be liable, stating on page 127-8:

The mere fact that a mere step up or down, or a flight of steps up or down, is maintained at the entrance or exit of a building, is no evidence of negligence, if the step is in good repair and in plain view. If the step is properly constructed, but poorly lighted, by reason of this fact one entering the store sustains an injury, recovery may be had. **On the other hand, if the step is properly constructed and well lighted, so that it can be seen by one entering or leaving the store, by the exercise of reasonable care, then there is no liability.** (Emphasis added)

This case stands for the proposition that an unmarked step or curb, which is in plain view, does not constitute an unreasonable risk of harm. In the case at bar, the photographs²⁹ establish that the curb at the food mart, was in plain view and virtually identical to thousands of curbs throughout Washington. This is especially true when viewed at 11:00 o'clock a.m. on a sunny, clear day. This curb is not an unreasonable risk of harm.

²⁹ CP 93-99; CP 48-50, Appendix 1-3

a. **The Three Washington Cases Cited by Appellant Do not Support her Position that the Curb Created an Unreasonable Risk of Harm.**

Appellant cites three Washington cases for the proposition that this unmarked curb created an unreasonable risk of harm.³⁰ The first is *Tyler v. F.W. Woolworth, supra*, which, as pointed out above, supports Respondents' position. The other two cases are factually distinguishable.

Heckman v. Providence, supra, is distinguishable because it involves a curb hidden by darkness. The plaintiff fell as she stepped off a walkway which was approximately 2" higher than the driveway. Plaintiff could not see the difference in elevation because it was dark out, and defendant failed to turn on the light to illuminate the area. It was defendant's failure to turn on the light, which resulted in liability, not the unmarked curb.

Wardhaugh v. Weissfield's, Inc. supra, is distinguishable because it does not involve an unmarked sidewalk curb outside in plain view. Instead, it involves a ramp inside a jewelry store. Appellant cites *Wardhaugh* for the proposition that defendant was liable because the ramp was the same color as the floor. However, the Supreme Court found no merit to this argument, stating on page 811-12:

³⁰ *Tyler v. F.W. Woolworth Co., supra*; *Heckman v. Sister of Charity of House of Providence in the Territory of Washington*, 5 Wn.2d 699 (1940); *Wardhaugh at al v. Weissfield, Inc.*, 43 Wn.2d 865 (1953).

Respondent advances the further argument that actionable negligence cannot be predicated upon the maintenance of deceptive conditions unless there is testimony that Appellant actually looked at the floor where the ramp was located and was deceived into believing that that the floor was level. This argument has reference to the testimony that, at the moment of the accident, appellant was looking at the lamp displayed to her left, and that, prior thereto, she had not noticed the floor.

This contention would have merit if the only claim as to deception was that, because of the condition of the floor itself, an illusion of flatness was created. (Emphasis added.)

2. **The Fact that No Other Person has Fallen in the Past Thirty Years, Establishes that the Risk of Harm was not Unreasonable.**

The undisputed evidence is that Ed Stone has managed this gas station and food mart for the past 30 years, and he is not aware of any other person falling off this curb. He estimates that over 1.6 million people have successfully stepped down off this curb during those 30 years.

3. **Daniel Johnson's Declaration Does not Create a Genuine Issue of Material Fact on Whether this Curb Created an Unreasonable Risk of Harm.**

a. **Most of Dr. Johnson's Declaration Should be Stricken**

An expert's declaration submitted in opposition to a Summary Judgment Motion must be factually based, and will be disregarded

when there is an inadequate factual basis.³¹ An expert will not be permitted to express an opinion that amounts to speculation or conjecture or states a conclusion of law.³²

Appellant submitted the Declaration of Daniel Johnson, Ph.D., in opposition to Respondents' Summary Judgment Motion. As set forth in detail below, most of that declaration should be disregarded.

b. Dr. Johnson's Interpretation of the WAC Must be Disregarded

The court interprets the meaning of a statute or regulation, not an expert witness.³³ In the present case, Dr. Johnson purports to interpret the meaning of the 1991 Uniform Building Code, codified in the Washington Administrative Code 50.20 et seq.³⁴ This is the court's province, and Dr. Johnson's interpretation must be disregarded.

c. Dr. Johnson's Conclusions of Law Must be Disregarded

Throughout his declaration, Dr. Johnson refers to the curb as a "safety hazard."³⁵ This is an impermissible conclusion of law. He

³¹ *Anderson, Hay & Grain Co. v. United Dominion Industries*, 119 Wn.App. 249, 76 P.3d 1205, (2003).

³² *Riccobono v. Pierce County*, 92 Wn.App. 254, 966 P.2d 272 (1988).

³³ *Hyatt v. Sellen Construction*, 40 Wn.App. 893, 899, 700 P.2d 1164 (1985).

³⁴ CP133-135

³⁵ CP129-135

compounds this error by referring to inadmissible hearsay from others who may share his opinion.³⁶ All must be disregarded.

d. Dr. Johnson's Speculation Must be Disregarded

An expert cannot speculate, and in a Summary Judgment Motion, his opinion must be based on facts established in the record.³⁷

In the present case, Dr. Johnson speculates as to how Appellant fell³⁸, what she recalled³⁹, where she was looking⁴⁰, and her physical condition.⁴¹ All is impermissible speculation which must be disregarded.

D. EVEN ASSUMING THAT THE CURB CREATES AN UNREASONABLE RISK OF HARM, NO DUTY IS OWED APPELLANT BECAUSE THE CURB WAS OPEN AND OBVIOUS.

Washington has adopted *Restatement (Second) of Torts*, §343A⁴² which provides:

§343A. (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. ...

³⁶ CP129-134

³⁷ *Rothweiler v. Clark County*, 108 Wn.App. 91, 29 P.3d 758 (2001).

³⁸ CP 128

³⁹ CP 128-129

⁴⁰ CP 127-128

⁴¹ CP 135

⁴² *Kamla v. Space Needle Corp.*, supra.

Comment “e” explains this rule further as follows:

In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. **Reasonable care of the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.** (Emphasis added).

In *Cudney v. Sears, supra*, at page 859, the court set forth an excellent discussion of this rule.

When §§ 343 and 343A [of the *Restatement of Torts*] are read together, the rule generated is that if the particular activity or condition creates a risk of harm only because the invitee does not discover the condition, or realize its danger, then the open and obvious danger will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake

reasonable precautions. The issue then becomes the standard of care and is for the jury to decide.

Applying the principle set forth in *Cudney* to the present case, Appellant should have realized that the curb and step off were in front of her. With this information, the curb no longer created an unreasonable risk of harm because Appellant could have easily avoided it. Therefore, the exception does not apply, and Respondents had no duty to warn.

1. **The Curb was Open and Obvious even if the Sidewalk and Driveway were the same Color.**

Appellant contends that the curb created an unreasonable risk of harm, and was not open and obvious because the sidewalk and driveway were the same color. This argument has been uniformly rejected by the courts who have considered it.⁴³

2. **The Curb was Open and Obvious Even Without being Painted Yellow.**

Appellant contends that if the top of the curb had been painted yellow, then the curb would have been easier to see. While this may be true, it does not mean that the curb was not open and obvious

⁴³ *Andrews v. R.W. Hayes Co.*, *supra*; *Novotney v. Burger King Corp.*, *supra*; *Ball v. Dominion Ins. Corp.*, 794 So.2d 271 (Miss.App. 2001); *Hamilton v. Union Oil Co.*, 216 Or. 354, 339 P.2d 440 (1959); *Glorioso v. Ness*, *supra*; *Maurer v. Oakland County Parks and Recreatl. Dept.*, *supra*; *Gorin v. City of Augustine*, *supra*; *Adventura Mall v. Olson*, *supra*; *Stanley v. Morgan & Lindsey, Inc.*, *supra*.

without the yellow paint. The question is whether the curb was open and obvious as it was.

The court in *Novotney v. Burger King*⁴⁴, *supra*, addressed this issue. In *Novotney*, plaintiff fell when she stepped off a sidewalk onto to an incline handicap ramp. Plaintiff sued defendant, alleging that she did not see the ramp, but probably would have if it had been painted yellow or warning signs had been posted. Plaintiff appealed a summary judgment order in defendant's favor.

The appellate court upheld the summary judgment, holding that the ramp was open and obvious regardless of whether it had been painted yellow. On page 474-5, the court explains its reasoning:

A sidewalk, with a handicap access ramp, is for all practical purposes a simple product. Its nature, as well as any dangers presented, is apparent upon casual inspection by an average user with ordinary intelligence. That is, a person can observe in what direction a sidewalk goes, and what incline the sidewalk presents, upon casual inspection. There is no indication in this case that plaintiff could not have determined the existence of a handicap access ramp, or the incline of that ramp, had she inspected the sidewalk in front of her. **The allegations are only that she did not discover the nature of the handicap access ramp and that she would have been more likely to discover the ramp, had warning signs been posted or had the ramp been painted a contrasting color. . .**

⁴⁴ 499 NW 2d 379 (Mich. App. 1993)

However, the analysis whether a danger is open and obvious does not revolve around whether steps could have been taken to make the danger more open or more obvious. Rather, the equation involved is whether the danger, as presented, is open and obvious. The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger? With respect to an inclined handicap access ramp, we conclude that it is. (Emphasis added.)

The curb in the present case was outside in plain view on a clear day. It was open and obvious without any yellow paint or warning signs.

3. The Curb was Open and Obvious even with the Orange Decals on the Glass Doors.

Appellant contends that the curb was not open and obvious because there was an orange decal on the glass door, which purportedly, partially obscured Appellant's view of the outside. However, Appellant never testified that she could not see the curb because of these decals, and it is mere speculation.

Even assuming this to be true, Appellant had a clear view of the sidewalk, curb and driveway as soon as she opened the door. Appellant then had over five feet from the door to the edge of the curb where she easily could have seen the curb and the step off, if she had been looking where she was going.

4. Respondents Had No Reason to Anticipate the Harm, Despite Appellant's Knowledge of the Curb.

Washington has recognized a limited exception to the general rule that an invitor owes no duty to protect or warn an invitee of an open and obvious condition. That is, when the invitor should anticipate the harm despite the invitee's knowledge of the condition.⁴⁵ This exception usually applies when an invitee realizes a potential harm, but proceeds against the known danger because the invitee believes the advantages of doing so outweigh the risk. A good example of this is where an invitee proceeds to walk over ice or snow, which the invitor has failed to remove.⁴⁶ This exception clearly does not apply in this case because Appellant could easily avoid the potential danger by taking a few steps and avoiding the ramp.

This limited exception also applies when the invitor has reason to expect that the invitee's attention may be distracted.⁴⁷ This exception also does not apply in this case. Appellant never testified that she was distracted from seeing the curb by the respondent's displays.

⁴⁵ *Kinney v. Space Needle Corp.*, 121 Wn.App. 242, 85 P.3d 918 (2004); *Morris v. Vagen Bros. Lumber, Inc.*, 130 Wn.App. 243, 125 P.3d 141 (2005).

⁴⁶ *Musci v. Graoch*, 144 Wn.2d 847, 31 P.3rd 684 (2001); *Williamson v. Allied Group*, 117 Wn.App. 451, 72 P.3d 230 (2003).

⁴⁷ See *Wardhaugh v. Weissfield's, Inc.*, *supra*

E. APPELLANT HAS SET FORTH NO EVIDENCE CREATING A GENUINE ISSUE OF MATERIAL FACT THAT GRANITE WAS EQUILON'S AGENT.

Granite moved for summary judgment on the independent grounds that it leased the premises from Equilon, and under the terms of the lease, it could not change the physical condition of the premises, including the color of the paint. It therefore, could not paint the top of the curb yellow, and should not be held liable for failing to do so.

Appellant does not dispute this. Instead, she contends that Granite is liable because it is Equilon's agent.⁴⁸ However, Appellant has presented no evidence of an agency relationship between Granite and Equilon, and therefore, has not created a genuine issue of material fact.⁴⁹ Granite should be dismissed on this basis alone.

F. THIS COURT SHOULD UPHOLD THE DISMISSAL OF THE STONES FROM THIS LAWSUIT.

An officer of a corporation who takes no part in the commission of a tort committed by a corporation, is not personally liable to third parties for that tort.⁵⁰ In the case at bar, the undisputed evidence is that Granite leased the premises from Equilon, and Granite operated the gas station and food mart. Appellant has presented no evidence whatsoever, that the Stones knowingly and

⁴⁸ CP 20 of Appellant's Brief

⁴⁹ CR 56(e)

⁵⁰ *Consulting Overseas Management, Ltd. v. Shtikel*, 105 Wn.App. 80, 18 P.3d 1144 (2001)

actively participated in any tortious conduct, and therefore, they are not personally liable under any circumstances. The claims against them should be dismissed.

G. REQUEST FOR EXPENSES

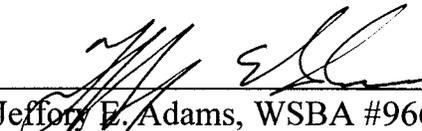
Respondents should be awarded their costs incurred on appeal. RAP 14.2, 18.1.

III. CONCLUSION

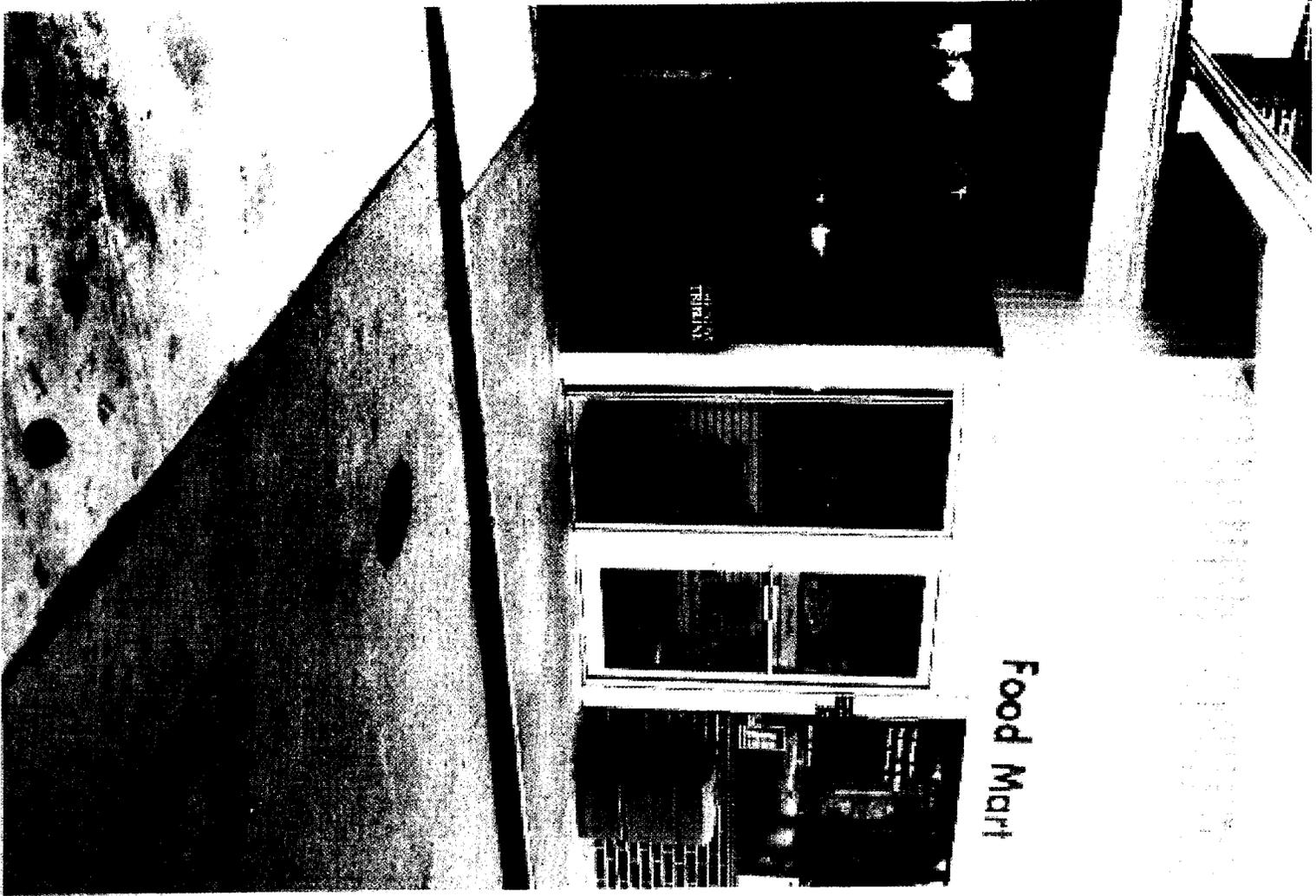
Appellant's claims should be dismissed against these Respondents because the curb was open and obvious, and did not create an unreasonable risk of harm. Moreover, Granite had no right to alter the condition of the curb or mark it in any way, and should not be held liable for its condition. Finally, the Stones should be dismissed in any event, because they have no personal liability.

Respectfully submitted, this 30 day of April, 2007.

MURRAY, DUNHAM & MURRAY

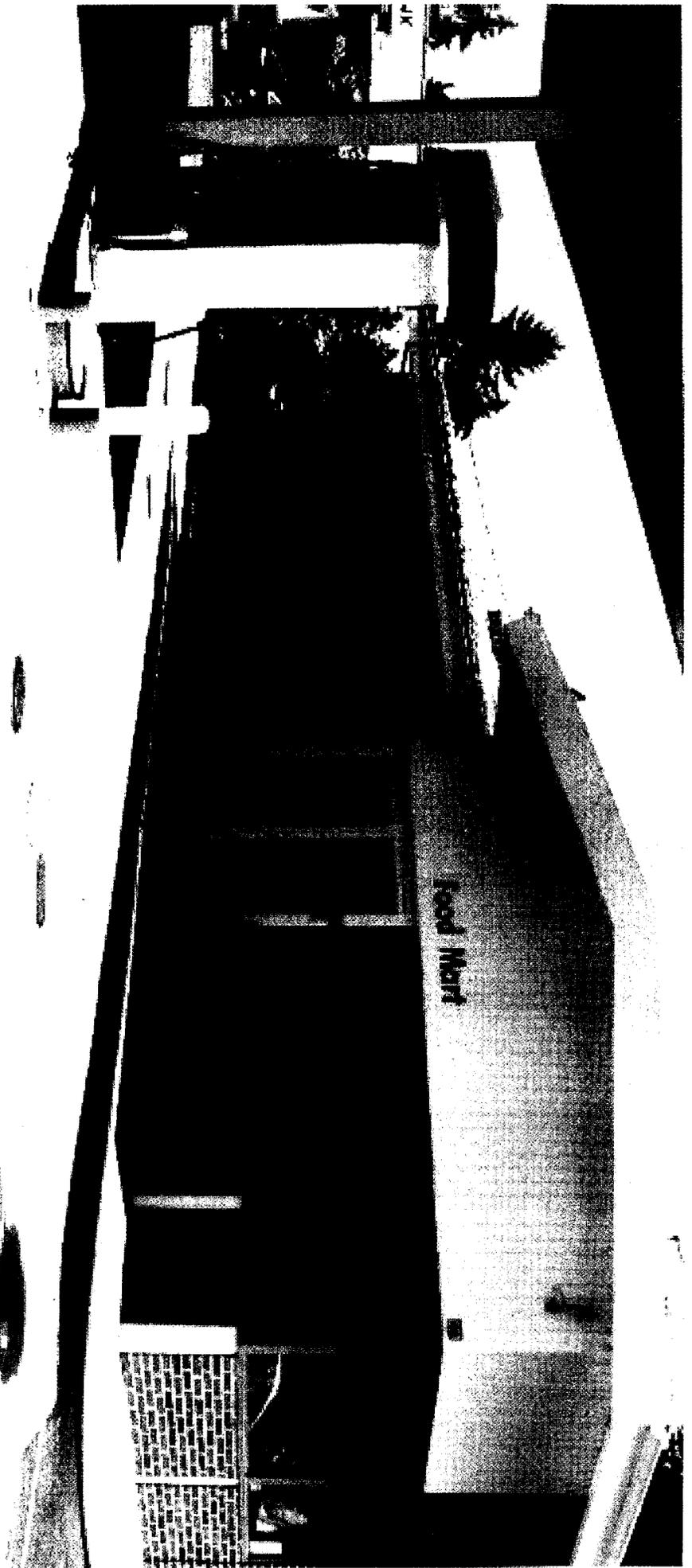
By: 
Jeffrey E. Adams, WSBA #9663
of Attorneys for Respondents
Granite Services, Inc., d/b/a Gig
Harbor Shell and Edward L. Stone

APPENDIX



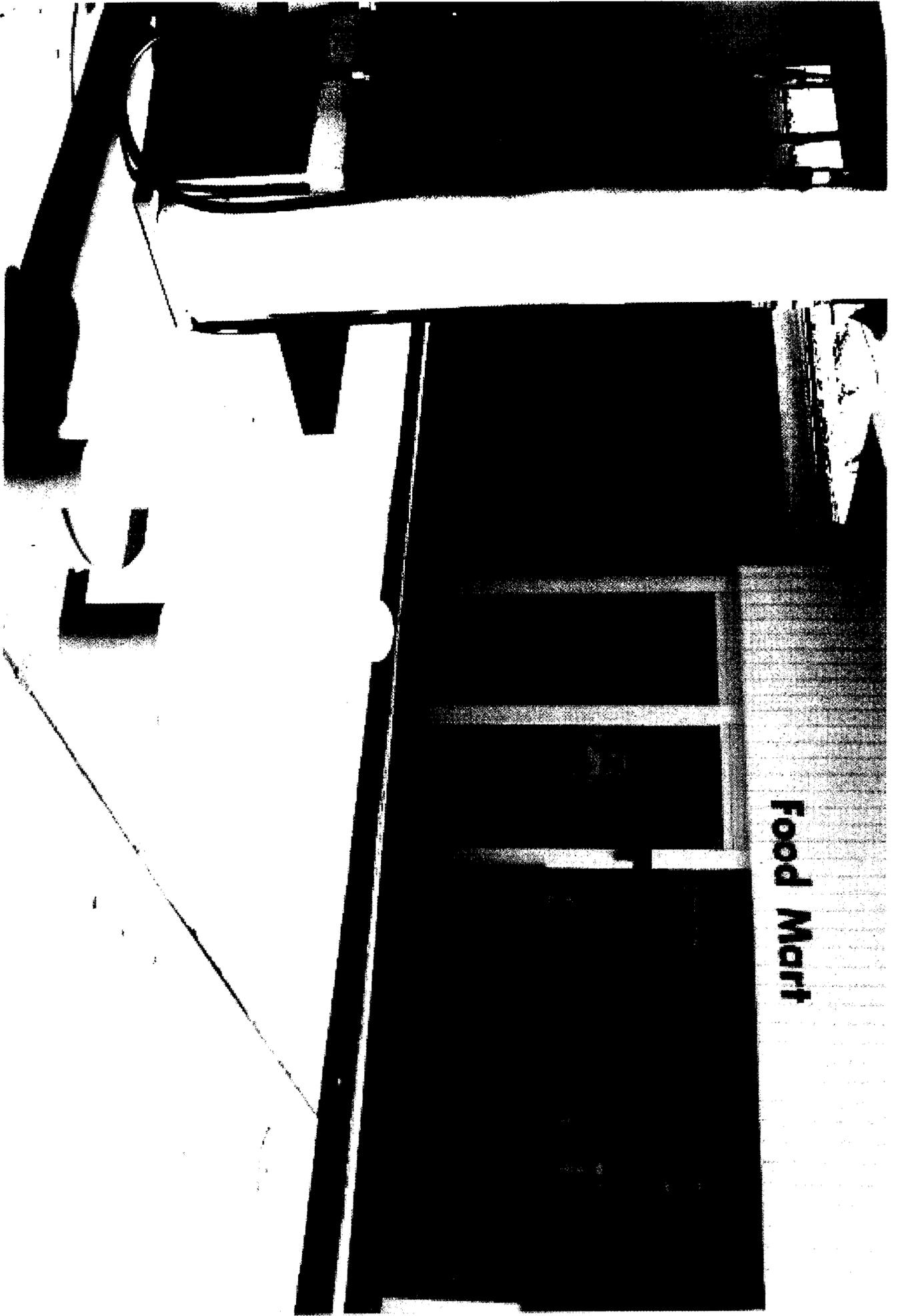
Food Mart

TRIMLINE



Food Mart

Food Mart



CERTIFICATE OF SERVICE

I certify that on the 1st day of May, 2007, I caused a true and correct copy of this Brief of Respondent to be served on the following via legal messenger:

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COUNTY OF TACOMA
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