

No. 35580-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TERRI WERON,

Appellant,

vs.

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

Respondents.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF ARGUMENT

In this negligence action, Ms. Weron has presented evidence to support all four elements of negligence: (1) duty, (2) breach of that duty, (3) proximate cause, and (4) damages. The main issue on appeal is whether the owners of the property, Equilon and Granite, had a duty to its invitee, Ms. Weron. Equilon and Granite owed a duty to Ms. Weron because the curb created an unreasonable risk of harm. Contrary to Equilon and Granite's arguments, the curb was not an open and obvious condition because the curb was unmarked and the fluorescent decals on the glass door obscured Ms. Weron's view. The trial court erred in ruling that the curb did not constitute an unreasonable risk of harm because reasonable minds could differ on the issue of duty.

II. ARGUMENT

A. The trial court erred in granting Equilon and Granite's motion for summary judgment because it failed to follow the principles in *Tyler, Heckman, and Wardhaugh*.

Granite misleads this court when it quotes the *Tyler* court because the rest of the *Tyler* court's analysis reveals that the trial court erred in this case when ruling against Ms. Weron. The rest of the *Tyler* court's analysis discusses two similar cases involving stairs: *Dunn v. Kemp & Herbert*, 36 Wash. 183, 185, 78 P. 782 (1904) (finding no liability when

the “stairway was an ordinary stairway, protected on both sides by railings and tables next thereto.”) and *Emmons v. Charlton & Company*, 63 Wash. 276, 279, 115 P. 163 (1911) (finding liability when the stairway was not lighted and was obscured by tables and wares, and the customer at the time of the falling was pushed by the crowd and stepped aside for a person going in the opposing direction).

In affirming the trial court’s judgment against the business owner, the *Tyler* court found the *Emmons* case instructive. *Tyler v. F.W. Woolworth Company*, 181 Wash. at 129. The *Tyler* court concluded:

The case now before us, it appears to us, falls within the holding in the *Emmons* case, last cited. The respondent, as she attempted to leave the store through the south entrance, without any knowledge of the step, edged her way through the crowd, had no opportunity of seeing or knowing that the step was there. There was no railing in the center of this ramp to separate the patrons entering the store from leaving; neither was there any warning sign. Whether a step or stairway is obscured by lack of light or by a crowd entering the store, which the appellant should have anticipated would occur, the effect is the same.

Tyler v. F.W. Woolworth Company, 181 Wash. at 129.

Contrary to Granite’s assertions, *Tyler* does not stand for the proposition that an unmarked step or curb that is in plain view does not constitute an unreasonable risk of harm. As in *Tyler* and *Emmons*, there was more than just the unmarked step that created an unreasonable risk of harm in this case. Like the business invitees in *Tyler* and *Emmons*, Ms. Weron did not

have an opportunity to notice the step. Ms. Weron entered the food mart by walking up the handicap ramp. CP 147. She could not have noticed the step because it was painted the same gray color as the gray concrete sidewalk and driveway. More importantly, as Ms. Weron was walking out of the food mart, orange fluorescent decals on the glass door obscured her view, much like how the crowd in *Tyler and Emmons* obscured the views of the business invitees.

Similarly, there was more than just a deceptive condition in *Wardhaugh v. Weisfield's, Inc.*, 43 Wn.2d 865, 871-872, 264 P. 2d 870 (1953). In *Wardhaugh*, there was an illusion of flatness *and* the display of merchandise was arranged in a way that would tend to deceive the customers into believing that the floor continued on the same level. *Wardhaugh v. Weisfield's, Inc.*, 43 Wn.2d at 874. The Supreme Court noted (which Granite conveniently omits when quoting the *Wardhaugh* court):

[T]he jury **could have found** that respondent was negligent in arranging a display of merchandise in such a place and way as to attract the attention of customers away from the ramp, and in failing to provide any warning that there was a ramp in the middle of a long and otherwise level aisle. (Emphasis added.)

Wardhaugh v. Weisfield's, Inc., 43 Wn.2d at 872.

Likewise, there was more than just the step that created unreasonable

risk harm in *Heckman v. Sisters of Charity of the House of Providence in the Territory of Washington*, 5 Wn.2d 699, 106 P.2d 593 (1940). In *Heckman*, the business invitee fell off a step down from the sidewalk to the driveway. The Supreme Court found that the step was not properly illuminated. *Heckman v. Sisters of Charity of the House of Providence in The Territory of Washington*, 5 Wn.2d at 708.

The Supreme Court in *Tyler*, *Wardhaugh*, and *Heckman* found that the business owners created an unreasonable risk of harm when there was another condition that obstructed the invitees' view of the step. There was a crowd in *Tyler*, the arrangement of merchandise in *Wardhaugh*, and darkness in *Heckman*. Here, there were the fluorescent orange decals that were placed in the glass door that obstructed Ms. Weron's view of the unmarked curb. In following the principles in *Tyler*, *Wardhaugh*, and *Heckman*, this court should find that the trial court erred in granting Equilon and Granite's motion for summary judgment.

B. The trial court erred in granting Equilon and Granite's motion for summary judgment because it heavily relied on out-of-state cases that are distinguishable from the facts of this case.

Andrews v. R.W. Hayes, Co., 166 Ore. App. 494 (Or. App. 2000) is not directly on point. In *Andrews*, the court emphasized that there was "nothing more" than a "deceptively level appearance" of the step-down:

Here, viewing the evidence most favorable 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 as 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.

Andrews v. R.W. Hayes, Co., 166 Ore.App. at 505.

Similarly, there was nothing more than the step or curb in *Aventura Mall Venture v. Olson*, 561 So. 2d 319, 321 (1990) (invitee tripped and fell off the sidewalk curb); *Stanley . Morgan & Lindsey*, 203 So. 2d 473 (1967) (invitee tripped and fell off the sidewalk curb); *Gorin v. City of St. Augustine*, 595 So. 2d 1062 (1992) (invitee tripped and fell when she stepped down from a sidewalk to a roadway; there was no foreign substance or break in the curb; the surface was dry and invitee's view was unobstructed); and *Parker v. Lancaster County School District No. 001*, 254 Neb. 754, 758 (1998) (invitee only claimed that the existence of the step itself or a failure to barricade or mark it caused her injuries).

Cudney v. Sears is also factually distinguishable as it involved an invitee who tripped and fell over the base of a clothing rack. *Cudney v. Sears*, 84 F.Supp. 2d 856, 857 (E.D. Mich. 2000).

Granite and Equilon owed a duty of care to Ms. Weron under the facts in this case. The five-inch high curb created a foreseeable probability of

harm. The curb was located in front of the main entrance to the food mart, where patrons entered and exited. There were also orange fluorescent decals that were placed on the glass door that drew the attention away from the curb. The photographs at CP 142 show that the curb was not open and obvious. The curb can barely be seen because of its gray color that matches the gray concrete sidewalk and driveway. Any invitee exiting the food mart can be distracted by the orange fluorescent decals on the glass door. The invitee may also be distracted by looking for oncoming vehicles while exiting the food mart and crossing the driveway. A reasonable juror could conclude that the unmarked curb was not an open and obvious danger.

Even if the unmarked curb was an open an obvious danger, it should not preclude liability. See *Williamson v. Allied Group*, 117 Wn. App. 451, 72 P.3d 230 (2003). In *Williamson*, the tenant used an alternative route to her apartment and crossed a grassy slope. *Williamson v. Allied Group*, 117 Wn. App. at 461. Certainly, an average user inspecting the slope would determine that the slope was an open and obvious danger. Nevertheless, the court reversed the trial court's order of summary judgment and held that the landlord had a duty to warn or make the obvious condition safe. *Williamson v. Allied Group*, 117 Wn. at 462.

In light of *Williamson*, Granite's reliance on *Novotney v. Burger King*

is misplaced. See *Novotney v. Burger King*, 198 Mich. App. 470 (1993). In discussing whether a danger is open and obvious, the *Novotney* court posed the question, “Would an average user with ordinary intelligence have been able to discovery the danger and the risk presented upon casual inspection?” *Novotney v. Burger King*, 198 Mich. App. at 475. In ruling against the invitee who slipped and fell when she stepped from a sidewalk onto an inclined handicap access ramp, the *Novotney* court reasoned that the handicap access ramp was noticeable because it was an open and obvious danger. *Novotney v. Burger King*, 198 Mich. App. at 475.

In this case, even if an average user inspected the curb and discovered the danger of the curb, it would not preclude Granite and Equilon’s liability. Granite and Equilon still had a duty to warn of or make safe the obvious danger of a curb located right outside the entrance/exit of the food mart.

C. The trial court erred in finding that the Uniform Building Code was inapplicable to the exit involved in this case.

Although the trial court ruled that the UBC was inapplicable to the exit in this case, the trial court properly considered the UBC in its ruling on Granite and Equilon’s summary judgment motion. RP 29; CP 217-220.

The trial court considered these pertinent sections:

(d) **Changes in Elevation.** Within a building, changes in elevation of less than

12 inches along any exit serving on occupant load of 10 or more shall be by ramps.

UBC 3301(d); see A-3 to Brief of Appellant.

UBC 3301(b) defines the term "exit":

EXIT is a continuous and unobstructed means of egress to a public way and shall include intervening aisles, doors, doorways, gates, corridors, exterior exit balconies, ramps, stairways, smokeproof enclosures, horizontal exit, exit passageways, exit courts and yards.

See A-2 to Brief of Appellant.

Although the trial court considered these pertinent sections, it ruled that the curb was not within the building therefore ruling that the UBC was inapplicable. However, a careful read of UBC 3301(d) and 3301(b) reveal that these sections do apply to the curb in this case. Ms. Weron was still *within* the gas station building as she exited the food mart. The curb, which was located *within* the gas station building, was at an exit, which is defined by UBC 3301(b) as a means of egress to a public way.

Further, the current version of the Uniform Building Code, now known as the International Building Code, clarified UBC 3301(d) and made it clear that UBC 3301(d) did not apply just to the inside of buildings. CP 197. Ms. Weron requests that this court find that the trial court erred in ruling that the UBC was inapplicable.

Further, Granite and Equilon waive any objection based on CR 9(i) because it did not object to Ms. Weron's failure to plead the UBC at the trial court level. See *Pettit v. Stephen Dwoskin*, 116 Wn. App. 466, 470, 68 P.3d 1088 (2003). In *Pettit*, the respondents claimed that the appellant did not formerly plead or prove the relevancy of the Seattle ordinance, as required by CR 9(i). However, the respondents did not raise the objection at the trial court level. The court noted:

During pretrial motions, Miller argued that the code applied and had been violated; at trial, Miller presented evidence of the content of the Uniform Building Code and argued that Seattle had adopted it. At no time did Respondents object that the Seattle ordinance had not been proved... Any objection Respondents may have had as to Miller's failure to formally plead or prove the contents of the code was waived.

Pettit v. Stephen Dwoskin, 116 Wn. App. at 470.

Like the respondents in *Pettit*, Granite and Equilon never objected that the UBC was not applicable at the time of Ms. Weron's fall. In support of her opposition to the summary judgment motions, Ms. Weron argued that the UBC was applicable in this case and it should be considered to show negligence. In its reply, Granite and Equilon argued that the plain language of UBC 3301(d) was not applicable because the provision applied to changes in elevation *within a building*. Accordingly, the issue of the UBC's applicability is properly before this court.

D. Granite and Equilon failed to file a cross-appeal to the trial court's order denying its Motion to Strike Portions of the Declaration of Daniel Johnson, Ph.D.

RAP 5.2(f) requires parties to file cross appeals within 14 days after service by the trial court clerk of the notice filed by the appellant. *Farnam v. Crista Ministries*, 116 Wn.2d 659, 673, 807 P.2d 830 (1991); see also *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 952 954 P.2d 250 (1998).

In this case, the trial court entered an order denying Granite and Equilon's motions to strike portions of Dr. Johnson's declaration. RP 213. Granite and Equilon failed to file a cross-appeal on the trial court's ruling and assign error to the trial court's order. As a consequence, the issue of whether the trial court erred in denying Granite and Equilon's motions to strike portions of Dr. Johnson's declaration is not properly before this court. Granite's arguments requesting that Dr. Johnson's declaration be stricken should be disregarded. Brief of Granite, p. 11-12.

III. CONCLUSION

The evidence submitted by Ms. Weron, viewed in the light most favorable to her, raises genuine issues of fact as to whether Equilon and Granite had a duty to Ms. Weron, whether the curb created an unreasonable risk of harm, and whether the curb was not an open and

obvious condition. Ms. Weron requests that this court reverse the trial court's order denying Granite and Equilon's summary judgment motions.

DATED this 29th day of May 2007.

Respectfully submitted,

Law Offices of GRANT & ASSOCIATES

A handwritten signature in cursive script, appearing to read "Artis C. Grant, Jr.", written over a horizontal line.

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Certificate of Service

I certify that on the 29th day of May 2007, I caused a true and correct copy of this Reply Brief of Appellant to be served on the following in the manner indicated below:

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