

STATE OF WASHINGTON
COUNTY OF KING
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No. 35580-9-II

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

TERRI WERON,

Appellant,

v.

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

Respondents

BRIEF OF RESPONDENT EQUILON ENTERPRISES, LLC

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I. Statement of the Issues.

1. Did the Trial Court properly determine that there was no duty owed to Plaintiff on the part of Equilon when facts are undisputed that the curb Plaintiff fell from was open and obvious, in good repair, and there is no evidence of any prior accidents?
2. Did the Trial Court properly disregard plaintiff's proposed expert testimony regarding the Uniform Building Code?
3. Did the Trial Court properly rule that Washington law does not impose a duty to warn or paint curbs?

II. Statement of the Case

A. Summary and Procedural History.

On August 1, 2003, Appellant/Plaintiff Terri Weron (Plaintiff) purchased some gasoline and lottery tickets from the store operated by Granite Service, Inc. (Granite).¹ As she left the store, she stumbled off of the curb between the sidewalk near the entrance of the store and the fueling area. Plaintiff complains of injuries resulting from this and brought this lawsuit against both Granite and Equilon Enterprises, LLC, (Equilon), which owned the property on which the store is located.

¹ Weron Deposition, CP 72, Morrow Deposition, CP 79-80.

The store in question was a Shell Gas Station and Food Mart. At the time of the incident in question, the property was leased by Equilon to co-defendant Granite.² Granite operated the station and store located on Equilon's property.

A representative of Equilon periodically inspected the premises to determine that the store met Shell national standards.³ These inspections did not reveal unsafe conditions or conditions that deviated from Shell national standards.⁴ In addition, Mr. Stone, a shareholder of Granite, estimates that over 1.6 million people have entered the store in the past 32 years.⁵ Neither he nor Equilon is aware of anyone ever falling from the curb prior to the incident.⁶

Photographs of the location indicate a layout of curbs, gas pumps, store entrance, and wheelchair access common to those found in other convenience stores.⁷ As indicated in the photographs identified by a representative of Equilon, a curb separates the fueling area from a sidewalk along the store entrance.⁸ The curb is less than six inches high.⁹

² Declaration of Edward L. Stone, filed with Co-defendant's Motion for Summary Judgment. ¶ 5 CP 45.

³ Declaration of Kelly White, ¶2 CP 89.

⁴ Declaration of Kelly White, ¶2 CP 89.

⁵ Declaration of Edward L. Stone. ¶ 7 CP 46

⁶ Declaration of Edward L. Stone CP 45; Declaration of Kelly White ¶3 CP 90.

⁷ Declaration of Kelly White, ¶5 CP 90. Attached as Appendix.

⁸ Declaration of Kelly White, and attached exhibits CP 93-99.

⁹ Declaration of Edward L. Stone, ¶ 4 CP 45.

The sidewalk is over 5 feet wide between the curb and the entrance doors to the store.¹⁰ A wheelchair access ramp abuts the end of the sidewalk to the left as one approaches the entrance door.¹¹ Other than the sidewalk, its curb, and the access ramp to the side, there are no other structures between the entrance doors and the fueling area.

Plaintiff admitted having visited the store before.¹² Plaintiff stated in her deposition that she had used the handicap ramp at the left of the store entrance to enter the store.¹³ However, in a statement made shortly after the incident, she stated that she entered the store by stepping up over the curb.¹⁴ She also stated in deposition that she did not know what she was looking at when she fell.¹⁵

On October 13, 2006, Pierce County Judge Bryan E. Chushcoff granted Equilon's and Granite's Motions for Summary Judgment¹⁶ and denied both defendants' motions to strike the Declaration of Dr. Johnson, Plaintiff's expert.¹⁷ Plaintiff appeals the Orders Granting Summary Judgment.

¹⁰ Declaration of Edward L. Stone. ¶ 4 CP 45.

¹¹ Declaration of Kelly White, and attached exhibits. CP 93

¹² Weron Deposition, CP 65.

¹³ Weron Deposition, CP 68-71.

¹⁴ Weron Statement, CP 107.

¹⁵ Weron Deposition, p. 75, CP 105.

¹⁶ CP 223-225.

¹⁷ CP 213-215.

B. Clarification of Record of Proceedings.

Plaintiff attempts in several places to show that the trial court made findings or observations that are contrary to its ruling. For instance, Plaintiff asserts that the "trial court admitted the curb would have been difficult to see because of the signs on the food mart's glass door."¹⁸ This clearly is contextually wrong. The trial court did not admit anything, but rather pointed out that this was one of Plaintiff's arguments and was looking to counsel to address that issue.¹⁹

Plaintiff also attempts to assert that the trial court made certain findings that contradicted his ruling. For instance, Plaintiff quotes part of a colloquy between the trial court and counsel for Equilon discussing whether plaintiff may have been distracted by either looking for cars or by a decal on the exit door.²⁰ Plaintiff, however, omitted the conclusion of the discussion²¹:

Mr. Trabolsi: In other words, I think what you are doing is, you are creating an issue that is not established by the evidence, because to do that, you have to make a leap of faith that, well, she didn't see it, so we will assume that she didn't see it because you had decals on the window, but that's not what the plaintiff says –

The Court: Right.

¹⁸ Plaintiff's Brief, p. 8.

¹⁹ RP 9, lines 1-13.

²⁰ Plaintiff's Brief, pp. 8-9.

²¹ RP 19, lines 6-13.

RP 19.

Furthermore, the trial court set out reasons for discounting the distraction issue raised by Plaintiff:

You know, I looked at other cases too. There it is – they say this very well, which is that the only thing that I thought about really is the combination of the banners on the door make it difficult, as I gave counsel difficulty here, with respect to seeing as you go out. Does that make a difference? As I say, I thought about, well, to some extent, we are going to penalize them, I suppose, because they happen to have a clear door. What happens if they had a solid door? We wouldn't necessarily say that was inherently dangerous or risky, and she would face the same step issue.²²

Finally, Plaintiff misstates that the trial court provided no reason for declining to accept Plaintiff's expert's legal conclusion regarding the applicability of the Uniform Building Code.²³ The trial court considered the evidence and the actual text of the UBC section cited and ruled as follows:

The Court: I have read that. I think that you are wrong. I mean, I do. He is talking about an exit. On the outside, this is an entrance.²⁴

The trial court properly determined as a matter of law that the curb that Plaintiff fell off of was open and obvious.²⁵ The trial court noted that the curb was "a curb just like any other. There is

²² RP 27.

²³ Plaintiff's Brief, p. 9.

²⁴ RP 24-25.

²⁵ RP 26.

nothing particularly unusual about it."²⁶ Accordingly, the trial court granted both defendants' motions for summary judgment dismissal.²⁷

III. Argument

A. Plaintiff Has Not Proven That Equilon Owed A Duty To Plaintiff, Was On Notice Of A Hazard That Gave Rise To A Duty, Or Breached Its Duty.

A plaintiff must establish the essential elements of duty, breach, injury, and proximate cause. *Minahan v. Western Wash. Fair Ass'n*, 117 Wn.App. 881, 887, 73 P.3d 1019 (2003). "Since a negligence action will not lie if a defendant owed a plaintiff no duty of care, the primary question is whether a duty of care existed." *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). A "land possessor is not the insurer of all those who may enter or pass by his land." *Hutchins v. 1001 Fourth Avenue*, 116 Wn. 2d 217, 233, 802 P.2d 1360 (1991).

Furthermore, proof of the essential elements require substantial evidence. As stated in *Johnson v. Aluminum Precision Products*:

We never presume negligence; a party alleging negligence bears the burden of proving it by substantial evidence. A scintilla of evidence is insufficient to carry this burden. Substantial evidence is "of a character 'which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.' A verdict cannot be founded on mere theory or speculation."

²⁶ RP 28.

²⁷ RP 29.

Johnson v. Aluminum Precision Products, Inc., 135 Wn.App. 204, 208-209, 143 P.3d 876 (2006)(citations omitted).

Plaintiff fails to present sufficient evidence to establish duty. Instead Plaintiff speculates, without any supporting evidence, that "Ms. Weron may not have been looking at her feet but instead looking around to avoid being hit by a car."²⁸ Plaintiff further merely asserts, without any foundation, evidence, or authority, that "Granite and Equilon should have placed warning signs, including a warning stripe to draw attention to the curb."²⁹

1. A well maintained step that is not obscured will not give rise to liability.

Generally, a landlord owes no duty to protect a tenant or guest from dangers that are open and obvious. *Sjogren v. Properties of Pacific Northwest*, 118 Wash.App. 144, 148-49, 75 P.3d 592 (2003)(citing *Frobig v. Gordon*, 124 Wash.2d 732, 735, 881 P.2d 226 (1994) (landlord liability limited to latent defects)).

"The mere fact that a 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." *Tyler v. Woolworth*, 181 Wash. 125, 127-28, 41 P.2d 1093 (1935)(citation

²⁸ Plaintiff's Brief, p. 10.

²⁹ *Id.*

omitted). Plaintiff has not demonstrated that the curb was not in plain view or that it was in disrepair. Accordingly, under this general principal, her claim was properly dismissed.

2. Plaintiff has not demonstrated facts to justify limited exceptions to the general rule of non-liability.

Washington law, following Restatement (Second) of Torts, section 343A, acknowledges a duty in *limited* circumstances to protect tenants and guests from known or obvious dangers. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash.2d 121, 139, 875 P.2d 621 (1994). However, these circumstances are limited, in the case of business invitees, to an unsafe condition of which the proprietor had "actual notice or constructive notice." *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn.App. 183, 189, 127 P.3d 5 (2006)(citations omitted). Plaintiff has failed to demonstrate that the curb, open and obvious and not at all unusual, was an unsafe condition known to Equilon.

A landowner fulfills its duty of care when it inspects for dangerous conditions and performs such repairs, safeguards, or warnings "as may be reasonably necessary for the invitee's protection under the circumstances." *Id.* (quoting *Tincani*, 124 Wn.2d at 139). Summary judgment dismissal is appropriate if the plaintiff cannot provide evidence of actual or constructive notice of the allegedly unsafe condition. *Id.* at 193.

Equilon made routine and regular inspections of the premises.³⁰ Equilon's representative did not observe unsafe conditions.³¹ Because Equilon made reasonable inspections and did not observe an unsafe condition, it follows that no "reasonably necessary" repairs or warnings were required. Accordingly, Equilon met its duty of care as required under *Tincani*.

In addition, Equilon did not have actual or constructive notice of a danger. Although Plaintiff argues that *Frederickson v. Bertolino's Tacoma*, 131 Wn.App. 183, 127 P.3d 5 (2005) does not apply, this argument is based solely upon Plaintiff's argument that there was a violation of the building code.³² As addressed below, this argument is without merit.

In *Bertolino's*, a patron of a coffee shop complained of injuries that resulted from the collapse of an antique chair on which he was sitting. *Bertolino's*, 131 Wn.App at 186. The *Bertolino's* plaintiff argued that the coffee shop owner was liable for his injuries on the basis that the owner knew or should have known of the dangerous condition of the chair. *Id.* 189-190. The plaintiff there argued (1) there was no "system" for

³⁰ Kelly White Declaration, ¶ 2 CP 89.

³¹ Kelly White Declaration, ¶ 2 CP 89.

³² Plaintiff's Brief, p. 17.

inspecting the chairs, and (2) the chairs were not repaired by a trained carpenter (*id.* at 190). The court rejected these arguments.

First, the *Bertolino's* court held that the plaintiff failed to meet his burden of proving that the chair at issue was dangerous. *Id.* at 190. Second, the court held that plaintiff failed to prove that repairs performed by the owner were inadequate or that the owner had done any kind of repair at all to the chair in questions. *Id.* The court held that this was critical because the plaintiff, therefore, had "presented no evidence that Bertolino's had either actual or constructive notice of any problem with the chair." *Id.* at 191.

In addition, the *Bertolino's* plaintiff argued that notice was not necessary because the danger of breaking chairs was reasonably foreseeable. *Id.* The *Bertolino's* court expressly rejected this argument on the basis of the coffee-shop owner's testimony that he had never before had an incident in which a chair had given way. *Id.* at 193.

The rule in *Bertolino's* is dispositive. First, there is no question that Plaintiff here is a business invitee. She was at the store location for the purpose of making purchases.

Second, Plaintiff presents no evidence that Equilon was on notice of an allegedly dangerous condition or that it was required to warn or repair a curb of the type that is common to convenience stores. Equilon,

through its representative, made periodic inspections of the premises and did not observe unsafe conditions. Indeed, there was nothing unusual about the curb/sidewalk layout. Similar layouts are common to convenience stores throughout the region.³³ Under *Bertolino's*, therefore, Equilon did not have actual or constructive notice of a dangerous condition.

Finally, *Bertolino's* establishes as a matter of law that a danger is not reasonably foreseeable if it had never before caused a similar incident. *Id.* at 193. The unrebutted evidence establishes that over a million customers have used the same store entrance as Plaintiff, and that there has never before been a fall such as what Plaintiff alleges.

B. The Trial Court properly determined that the UBC does not apply.

Plaintiff's arguments heavily rely upon an assertion that the Uniform Building Code was violated. This is asserted at least seven times in her brief.³⁴ Each time, Plaintiff repeatedly asks this Court, without any supporting evidence, to presuppose that there was a violation of the UBC. Plaintiff solely relies upon the conclusory opinion of her expert, Dr. Johnson. Because Dr. Johnson asserts a legal conclusion, and because he

³³ White Declaration, ¶ 5, CP 90.

³⁴ Plaintiff's Brief, pp. 6, 7, 9, 16, 17, 18, 20.

misstates the law completely, the trial court properly disregarded his legal conclusions.

Washington law is clear: "(a) determination of the applicable law is within the province of the trial judge, not that of an expert witness." *Hyatt v. Sellen Construction*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985)(citing *State v. O'Connell*, 83 Wn.2d 797, 816, 523 P.2d 872 (1974)). "Conclusions of law stated in an affidavit filed in a summary judgment proceeding are improper and should be disregarded." *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988). *White v. Solaegui*, 62 Wn. App. 632, 815 P.2d 784 (1991). Dr. Johnson's conclusory opinions about whether the UBC was violated were properly disregarded by the trial court.

1. Plaintiff Misrepresents the UBC.

In Plaintiff's Opposition Brief below, Plaintiff attempted to argue that UBC applied by providing a quote that purported to come from the Uniform Building Code.³⁵ The language, however, was *not* from the UBC. In her brief below, Plaintiff stated as follows:

"The UBC, which was adopted by Washington, states in pertinent part:

³⁵ CP 114.

(T)here shall be no single riser step in the pathway leading to or from an exit within a building with an occupant load of 10 or more. If there is a change in the elevation of less than 12 inches it must be by ramp."³⁶ (sic).

This language was *not* from the Uniform Building Code, but instead was from Plaintiff's expert's own misstatement and interpretation of the UBC.^{37 38} The actual language of UBC 3301(d) (1991) is set out as follows:

(d) Changes in Elevation. *Within a building,* changes in elevation of less than 12 inches along any exit serving an occupant load of 10 or more shall be by ramps."

UBC Sec. 3301(d) (1991)(emphasis added). CP 169.

The code section Plaintiff cited obviously does not apply to the curb outside the building because it is not "within a building". Plaintiff misstates the plain meaning of the UBC section. Because UBC Sec. 3301(d) has nothing to do with outside curbs, Plaintiff's argument invoking it is without merit.

2. Plaintiff's Expert is not qualified to render an opinion on the UBC.

In addition, Plaintiff's expert has demonstrated no foundation for his expertise in attempting to render an opinion about the Uniform

³⁶ CP 114.

³⁷ Johnson Declaration, ¶ 28, CP 133

³⁸ Equilon and Defendant Granite both moved to strike this declaration on several grounds, including improper legal conclusions, but the motion was denied. CP 170-178, CP 213-215.

Building Code. “(T)he expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise.” *Esparza v. Skyreach Equipment, Inc.*, 103 Wn.App. 916, 924, 15 P.3d 188 (2000)(quoting *State v. Farr Lenzini*, 93 Wash.App. 453, 461, 970 P.2d 313 (1999)).

Nowhere in Dr. Johnson's Declaration in opposition to the defendants' motions for summary judgment does he assert that he is familiar with the UBC, has had experience in interpreting it, or has had any other sort of experience in the building trades. Regardless of his qualifications in ergonomics, Dr. Johnson is not qualified to provide testimony regarding the Uniform Building Code or standards of construction.

Because Dr. Johnson has not established expertise in these fields, his opinions regarding the UBC and construction standards of the sidewalk were properly disregarded by the trial court.

3. Plaintiff has failed to prove the UBC was in effect.

Notwithstanding that Plaintiff's expert has misstated the application of the Uniform Building Code and has opined an improper legal conclusion, Plaintiff has failed to demonstrate that UBC code provision is properly before the Court.

CR 9 (i) requires at a bare minimum the pleading of an ordinance or statute:

In pleading any ordinance of a county, city or town in this state it shall be sufficient to state the title of such ordinance and the date of its passage, whereupon the court shall take judicial notice of the existence of such ordinance and the tenor and effect thereof.

Plaintiff's Complaint contains no reference to the Uniform Building Code at all. The first time Plaintiff presented the issue was in her Opposition to the Defendants' two Motions for Summary Judgment.³⁹

The Washington Court of Appeals has held that, when an alleged building code violation was not pled as required by CR 9(i) and was raised for the first time in opposition to a summary judgment motion, it is not properly before the court. *Gabl v. Alaska Loan & Inv. Co.*, 6 Wn.App 880, 881-882, 496 P.2d 548 (1972).

Furthermore, Plaintiff fails to cite any authority that 1991 UBC referred to in fact was in effect at the time of the incident. Instead, Plaintiff merely refers to her expert's declaration and asks this court to accept his conclusion that the UBC was violated.

Equilon, in direct reply, argued that Plaintiff had failed to demonstrate the UBC was in effect.⁴⁰ Plaintiff did not provide evidence

³⁹ CP 114.

⁴⁰ CP 162.

in response. The trial court therefore properly disregarded Plaintiff's arguments involving the UBC.

Plaintiff also argues, with no citation or evidence at all, that the International Building Code section 1003.5 somehow applies or clarifies prior codes.⁴¹ Plaintiff offers no proof that this code applied anywhere in the State of Washington at the time of Plaintiff's injuries, let alone whether the code applied to the building in question.

Plaintiff's entire argument that a duty was breached because of a code violation is without any support. The trial court properly rejected each of Plaintiff's arguments that relied upon this theory.

C. The Cases Relied Upon By Plaintiff Are Inapplicable.

Plaintiff cites three cases in attempting to establish that Equilon breached a legal duty owed to Plaintiff.⁴² However, all of the cases are easily distinguishable or support Equilon's case.

As indicated above, *Tyler v. Woolworth*, 181 Wash. 125, 41 P.2d 1093 (1935) actually strongly supports the trial court's ruling. *Tyler* involved a claim by a woman who slipped off of a step next to a ramp in front of a store while surrounded by a crowd of people. *Id.* at 127. The court analyzed cases involving falls from steps and observed: "(t)he mere fact that a step up or down, or a flight of steps up or down, is maintained

⁴¹ Plaintiff's Brief, p. 19-20.

⁴² Plaintiff's Brief, p. 12.

at the entrance or exit of a building is no evidence of negligence, if the step is in good repair and in plain view." *Id.* at 127-28. It further observed that "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." *Id.* at 128.

The *Tyler* court held for the plaintiff solely because the plaintiff could not see the step because she was surrounded by a crowd (attracted by the defendant store), that kept her from seeing the step. *Id.* at 129. The court stated that because of the crowd, the plaintiff in that case "had no opportunity of seeing or knowing that the step was there." *Id.* It expressly distinguished the case from a case in which a step could be visible under adequate light. *Id.* (distinguishing *Hollenbaek v. Clemmer*, 66 Wash. 565, 119 P. 1114).

Therefore, *Tyler* is inapplicable to this case because there is no evidence that Plaintiff did not have an opportunity to see the step when entering or exiting the store. The step was over five feet from the door entrance.⁴³ There were no crowds or other objects to obscure it once the door was open. Plaintiff admits the incident occurred during daylight hours.⁴⁴

⁴³ Declaration of Edward L. Stone, ¶ 4, CP 45.

⁴⁴ Declaration of Terri Weron ¶ 2 CP 147.

Plaintiff also cites *Wardhaugh v. Weisfield's*, 43 Wn.2d 865, 264 P.2d 879 (1953), where the plaintiff had fallen on an aisle ramp within the store while being distracted by display items on the side. *Id.* at 872. The display items were on shelves that did not follow the slope of the ramp. *Id.* at 867-68. The court found that the combination of the shelves not following the ramp and the unchanged floor material created a "deceptive condition" that supported a finding of negligence. *Id.* at 873-74.

Wardhaugh is distinguishable because it involved a ramp located inside a building, surrounded by distracting displays that tended to cause a person to look away from the ramp. The present case involves a curb step located five feet from an exit door, in plain view, not surrounded by display items or other objects that would distract a person's view. The photos attached to the Declaration of Kelly White reveal that there are no objects next to or in front of the curb after one exits the store. Other than a sign on the *inside* of the door, Plaintiff presents no evidence of such an obstruction or distraction.

Finally, Plaintiff cites *Heckman v. Sisters of Charity*, 5 Wn. 2d 699, 106 P.2d 593 (1940), a case that is not at all applicable because it was decided on the basis of inadequate lighting of a step at night. *Id.* at 708. The court, following the *Tyler* rule above, stated that the plaintiff could recover because the step down was "not adequately illuminated so that one

lawfully using such premises would be unaware of such condition. . . ."

Id. at 708.

In the present case, the incident occurred at approximately 11:00 a.m. during daylight.⁴⁵ Plaintiff makes no claim that inadequate light was a factor in her fall.

D. Plaintiff's allegations about what Equilon "should have done" are mere assertions of duty without foundation.

Plaintiff has not produced any authority to support her claim that Equilon breached a legal duty owed to her. Instead, Plaintiff suggests three things Equilon should have done to prevent the incident: "(1) eliminate the single riser step as required by the UBC; (2) place a warning stripe to the top surface of the step; or (3) place a ramp at the pathway."⁴⁶ Leaving aside the first item, because it is not required by the UBC, Plaintiff's assertions about what should have been done are either unsupported by authority or are supported by speculative conclusions by their expert.

Plaintiff also asserts in Issues Pertaining to Assignments of Error Nos. 5 and 7 that both defendants breached a duty to Plaintiff because the

⁴⁵ Declaration of Terri Weron, ¶ 2. CP 147.

⁴⁶ Plaintiff's Brief, p. 7.

curb was painted gray.⁴⁷ This is an odd assertion considering that

Plaintiff's own expert testified as follows:

Before Ms. Weron entered the store she would have seen the single riser step. When approached from the lower level it is quite obvious due to the vertical face of the riser being of a color that contrasts with the grey concrete.⁴⁸

(emphasis added).

Plaintiff, therefore, has no evidentiary basis to assert that the color of the step breached a duty of care.

Furthermore, Plaintiff cites no authority that establishes a duty to install a ramp. Instead, Plaintiff relies upon the declaration of their expert, Dr. Johnson, in an attempt to establish this duty.⁴⁹

As stated above, an expert opinion is insufficient to establish duty as a matter of law. *Hyatt v. Sellen Construction*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985) Expert opinions also must "be based on the facts of the case and will be disregarded entirely where the factual basis for the opinion is found to be inadequate." *Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 135, 741 P.2d 584 (1987)(citing *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1940); *Theonnes v. Hazen*, 37 Wn. App. 644, 681 P.2d 1284 (1984)). In a summary judgment motion, an expert must back up his opinion with

⁴⁷ Plaintiff's Brief, p. 2.

⁴⁸ CP 128, ¶13.

⁴⁹ Plaintiff's Brief, p. 7.

specific facts. *Id.*, *United States v. Various Slot Machs.*, 658 F.2d 697, 700 (9th Cir. 1981)).

Dr. Johnson's declaration does not provide reference to any statutory or legal authority in Washington that imposes the alleged duties. No facts are presented to demonstrate that the treatises or studies he references are followed in Washington. Nor is there any evidence that the general recommendations he cites are even known to a reasonable convenience store owner in Washington.

In addition, Dr. Johnson's declaration fails to connect the relevance of the references cited to the present facts. For instance, he mentions "a report on home safety guidelines".⁵⁰ The present case involves a convenience store, not a home. Because Dr. Johnson's opinions fail to be supported by specific facts applicable to this case, his conclusions regarding duty were properly ignored by the trial court.

IV. Conclusion

The trial court properly dismissed Plaintiff's claims against Equilon, and against Granite, because Plaintiff failed to demonstrate that the defendants owed a legal duty to Plaintiff for a curb that was in good repair, open and obvious, and not obstructed. Plaintiff's failure to demonstrate proof of prior notice of any similar accidents prevents her

⁵⁰ CP 129, ¶16.

from prevailing upon an exception to the general rule of non-liability for an open and obvious curb in good condition.

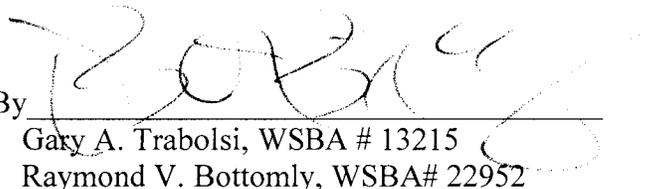
The trial court properly rejected the opinions of Plaintiff's expert. The expert opinion regarding the Uniform Building Code was obviously incorrect, the expert was unqualified to render an opinion on the Code, and the expert opinion was properly ignored as a legal conclusion. Plaintiff's expert opinions also were properly ignored because they lacked foundation in facts and were improper legal conclusions.

For the foregoing reasons, Respondent Equilon Enterprises LLC respectfully requests the Court to affirm the trial court's granting of Equilon's Motion for Summary Judgment.

Request for Costs. Pursuant to RAP 14.2, Equilon also requests an award of its costs.

Respectfully submitted this 23 day of April, 2007.

GARDNER BOND TRABOLSI PLLC

By 

Gary A. Trabolsi, WSBA # 13215
Raymond V. Bottomly, WSBA# 22952
Attorneys for Defendant Equilon Parking, Inc.

APPENDIX

The Honorable Bryan E. Chuschcoff
Date for Hearing: 10/13/06
Time for Hearing: 9:00 a.m.

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

TERRI WERON,

Plaintiff,

v.

GRANITE SERVICE, INC., d/b/a GIG
HARBOR SHELL, EDWARD L. STONE,
individually and the marital community thereof
with JANE DOE STONE; and EQUILON
ENTERPRISES LLC d/b/a SHELL OIL
PRODUCTS US,

Defendants.

No. 04-2-12346-7

DECLARATION OF KELLY WHITE
IN SUPPORT OF EQUILON'S
MOTION FOR SUMMARY
JUDGMENT

Kelly White states as follows:

1. I have been employed by Shell since June of 1999. I am over 18 years old, and make this declaration based upon my personal knowledge.
2. In August of 2003, I worked as an Account Manager for Shell Oil Products US and managed a territory of approximately 55 independent, franchised Shell dealers in the State of WA. On a quarterly basis, I inspected the premises of the Shell Gas Station and Food Mart in Gig Harbor where the Plaintiff complains her injury occurred. I also made sales calls at that location at least once a month. The purpose for these inspections was to determine if the

DECLARATION OF KELLY WHITE IN SUPPORT
OF DEFENDANT EQUILON ENTERPRISES LLC'S
MOTION FOR SUMMARY JUDGMENT AND
JOINDER TO GRANITE'S MOTION - 1

GARDNER BOND TRABOLSI PLLC
ATTORNEYS
2200 SIXTH AVENUE, SUITE 600
SEATTLE, WASHINGTON 98121
TELEPHONE (206) 256-6309
FACSIMILE (206) 256-6318

1 premises met national standards required of Shell stations. None of these inspections revealed
2 unsafe conditions or standards that deviated from the Shell national standards.

3 3. I am unaware of a customer ever falling from the curb while leaving the store.

4 4. Attached hereto as Exhibits 1-4 are photographs which truly and accurately depict the
5 condition of the outside premises and the store entrance as of August 5, 2003.

6 5. Based upon my observations and experience, the curb/sidewalk layout at the Gig
7 Harbor Shell Gas Station and Food Mart is a usual and common condition found at
8 convenience stores and is not one which we would identify as an unsafe or dangerous
9 condition.

10 I certify under penalty of perjury under the laws of the State of Washington that the
11 foregoing is true.

12 Dated this ____ day of September, 2006, at _____, Texas.

13
14 _____
Kelly White

1 premises met national standards required of Shell stations. None of these inspections revealed
2 unsafe conditions or standards that deviated from the Shell national standards.

3 3. I am unaware of a customer ever falling from the curb while leaving the store.

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5 condition of the outside premises and the store entrance as of August 5, 2003.

6 5. Based upon my observations and experience, the curb/sidewalk layout at the Gig
7 Harbor Shell Gas Station and Food Mart is a usual and common condition found at
8 convenience stores and is not one which we would identify as an unsafe or dangerous
9 condition.

10 I certify under penalty of perjury under the laws of the State of Washington that the
11 foregoing is true.

12 Dated this 13th day of September, 2006, at Houston, Texas.

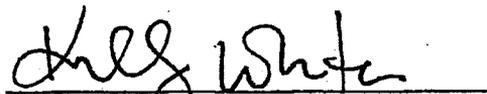
13 
14 Kelly White

EXHIBIT 1

Food Mart

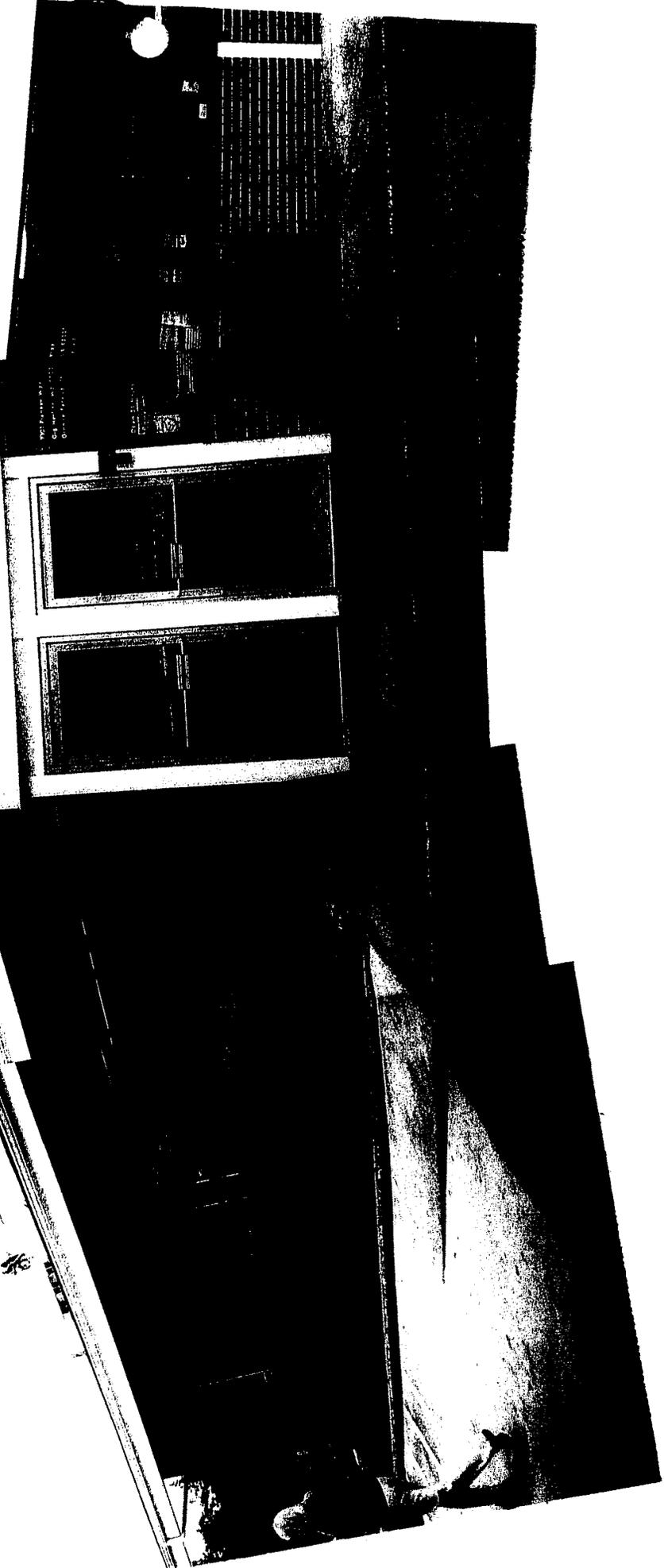


EXHIBIT 2

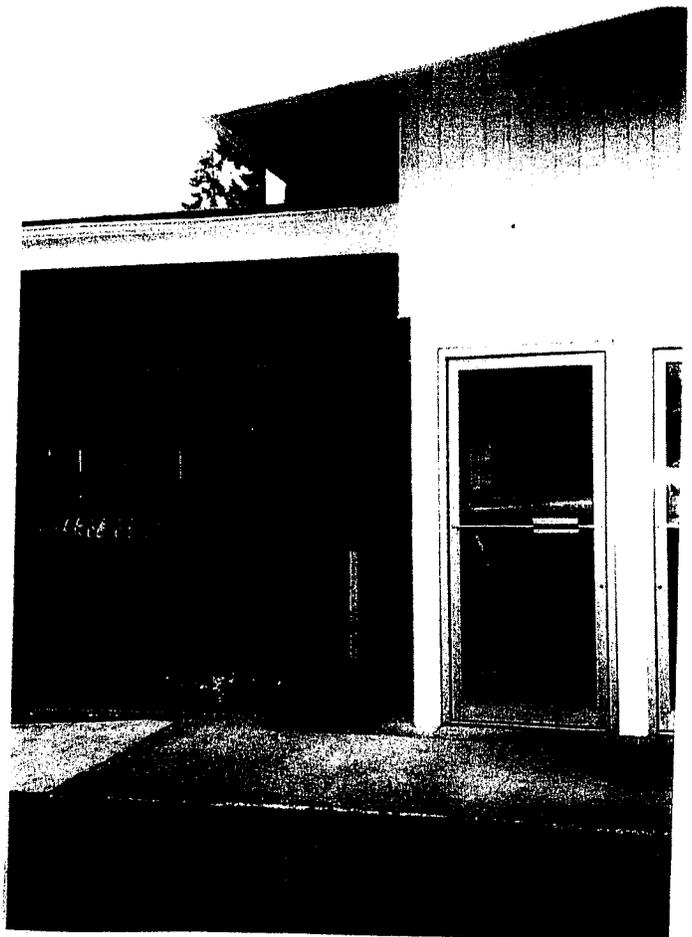
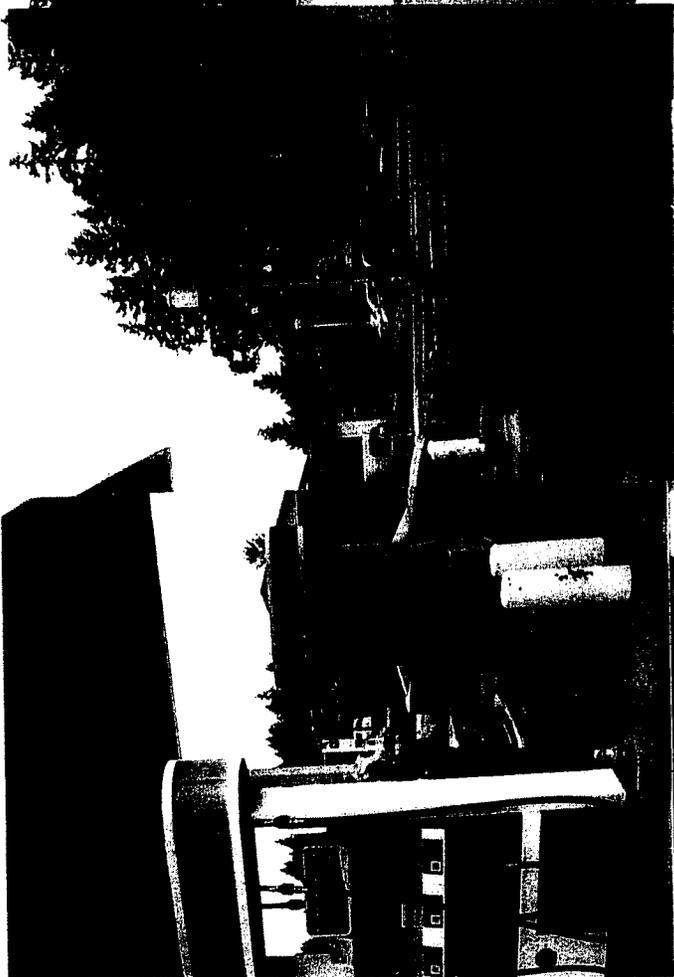


EXHIBIT 3



EXHIBIT 4



No. 35580-9-II

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

TERRI WERON,

Appellant,

v.

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

Respondents

CERTIFICATE OF SERVICE

Gary A. Trabolsi, WSBA No. 13215
Raymond V. Bottomly, WSBA No. 22952
Attorneys for Respondent Equilon Enterprises LLC

GARDNER BOND TRABOLSI PLLC
Denny Building, Suite 600
2200 Sixth Avenue
Seattle, Washington 98121
Telephone: (206) 256-6309
Facsimile: (206) 256-6318

07 APR 25 AM 10:13
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____
DEPUTY

I, Jan Young, certify and declare as follows:

I am over the age of 18 and am otherwise competent to make this declaration.

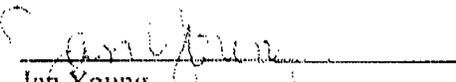
This declaration is made upon personal knowledge setting forth facts I believe to be true.

That on April 24, 2007, I caused to be served via ABC Legal Messenger, true and correct copies of the attached **Brief of Respondent Equilon Enterprises, I.L.C.**, on the following counsel of record:

Artis C. Grant, Jr.
Law Offices of Grant & Associates
The Law Dome
3002 South 47th Street
Tacoma, WA 98409

William Spencer
Murray Dunham & Murray
200 West Thomas Street, Suite 350
Seattle, WA 98119

DATED: April 25, 2007, at Seattle, Washington.



Jan Young
Legal Assistant to Ray V. Bottomly