

FILED

FEB 20 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 308871

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JERELYN BIORN,

Appellant,

vs.

KENNEWICK SCHOOL DISTRICT NO. 17

Respondent.

BRIEF OF RESPONDENT

BRIAN A. CHRISTENSEN
Attorney for Respondent
Jerry J. Moberg & Associates
451 Diamond Drive
Ephrata, WA 98823
(509)754-2356
WSBA No. 24682

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I. ASSIGNMENTS OF ERROR

- A. DID THE TRIAL COURT ERROR IN DENYING MS. BIORN'S MOTION FOR JUDGMENT AS A MATTER OF LAW?

- A. DID THE TRIAL COURT ERROR IN FAILING GIVE A PROPOSED JURY INSTRUCTION AND THEREFORE DENY APPELLANT AN OPPORTUNITY TO ADEQUATELY ARGUE HER THEORY OF THE CASE?

II. STATEMENT OF THE CASE

Appellant, Jerelyn Biorn was a part time para-educator at Canyon View Elementary School in the Kennewick School District. (RP 111-112) She worked three hours a day and usually reported to work around 10:30 in the morning and was often the last employee to arrive. (RP 113-114, 118) On the day in question, she noticed snow and dressed accordingly. (RP 115-116) When she arrived at work she noticed that the parking lot appeared all white and she did not see any sign of ice. (RP 118; 159) She often cannot find a spot to park in the lot, but managed to do so on this occasion. (RP 158) There are approximately 65-70 staff at the school and most park in the parking lot. (RP 88-89) After getting out of her car she took approximately four steps and slipped and

fell. (RP 118-119) When she fell she cleared some snow off the ice and the ice became visible. (RP 159)

The Kennewick School District has a snow removal policy. (RP 68) The policy states that custodians at the individual schools were responsible for clearing front walkways, entryways and access to portables, i.e. ramps and decks. (RP 68-69) In addition to custodians, the grounds crew would start at 5 a.m. on snow days and help clear walkways to bus zones, sidewalks between entrances, staff parking lots and sidewalks around buildings. (RP 69) Marty Emerson, the lead grounds man clarified that this means that the sidewalks between the entrances and parking lots would be cleared first, and then the parking lots after the sidewalks were taken care of. (RP 69-71) The snow removal process was in two steps. (RP 27-28,69) Staff parking lots were to be taken care of when the crew returned the second time. (RP 28, 34,70) Testimony from a crew member stated that after the first phase was complete, i.e., sidewalks at Canyon View, the crew would go back to Kennewick High School and begin work on the parking lots and

work their way back down the list and finish with Canyon View. (RP 28)¹

The grounds crew consists of several different crews that are assigned a list of different buildings for which they are responsible. (RP 72) However, if it was known that a particular parking lot was icy, it would be dealt with. (RP 72, 77-78) There are areas in the District where snow and ice has been a particular problem, however, Canyon View has not been a problem. (RP 78-79)

Particular problem areas are brought to the attention of the grounds crew by school staff or by the crew members themselves as they travel around and view conditions. (RP 79-80) For instance, Dwain Adams, is the custodian at Canyon View elementary School. (RP 83) He starts work at 7:00 a.m. and his first duty on a snow day is to start clearing sidewalks. (RP 84-85) He states that if there are any issues with ice in the parking lot he would be informed and he does not recall any issues on the day in question prior to Ms. Biorn's fall. (RP 89)

Because of its location and the time it starts, (later than the

¹ Appellant states that the crew didn't get to Canyon View until noon on the day in question, but that reference is clearly referring to the second phase of the process – the crew had been through prior to the incident. (RP 28; Brief of Appellant p. 2)

high schools) Canyon view is last on the list for the grounds crew to clear. (RP 32) The crew that serviced Canyon View served five or six different buildings. (RP 26) Kevin Lucke, a member of the crew that takes care of Canyon View stated that on their first visit to Canyon View they would make sure all the sidewalks were cleared (RP 21) The priority was to make sure all the kids could get in the building. (RP 27)

The matter went before a jury on March 12, 2012. (CP 1-2) At the close of the evidence Ms. Biorn made a motion for Judgment as a Matter of Law. It was denied. The court then instructed the jury on the law. Ms. Biorn proposed three instructions that were not accepted. The jury then returned a verdict for the Defendant. This appeal followed.

III. ARGUMENT

A. APPELLANT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW AND THE MOTION WAS PROPERLY DENIED.

Appellant argues that she was entitled to judgment as a matter of law, due to the negligence of the Kennewick School District. She is clearly in error. To establish the elements of an action for negligence, the plaintiff must show "(1) the existence of a

duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). Under the standard set by *Restatement (Second) of Torts* § 343, a landowner's duty attaches only if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk...." The phrase "reasonable care" imposes on the landowner the duty "to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.' *Id.* at 93 (quoting *Restatement of (Second) Torts* § 343).

1. Standard of review. A reviewing court reviews a decision on a motion for judgment as a matter of law de novo, applying the same standard as the trial court. *Davis v. Microsoft Corporation*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). Judgment as a matter of law is not appropriate if, after viewing the evidence and reasonable inferences in a light most favorable to the nonmoving party, substantial evidence exists to sustain a verdict for the nonmoving party. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). "An order granting judgment as a matter of

law should be limited to circumstances in which there is no doubt as to the proper verdict." *Id.* at 493, 173 P.3d 273.

2. Appellant's brief fails to show why there is "no doubt" as to all the elements of the claim. Washington law requires a plaintiff to show a landowner had actual or constructive notice of an unsafe condition. *Iwai v. State*, 129 Wn.2d at 96; citing *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994). To prove constructive notice, Plaintiffs carry the burden of showing the specific unsafe condition had existed for such a time as would have afforded the defendant sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger. *Id.*, citing *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983). There is clearly evidence a jury could have relied upon to reach the defense verdict rendered.

The evidence showed that the cause of the injury was black ice underneath an inch or so of snow. The Plaintiff stated that she didn't see any ice and although she was the last of approximately 60-70 staff members to park that morning there is no evidence of any complaints or concerns about the hidden ice prior to her arrival. The evidence also suggests that the custodian and a crew of

workers removing snow and ice already had been over the sidewalks adjacent to the parking lot, driven through the parking lot, and that they had not noticed the icy condition hidden under the snow.

There is no evidence that the district failed to follow its policy of snow removal or that the policy was unreasonable. District personnel had been to the school looking for hazards and making certain that the sidewalks were clear for students and staff to enter the school. Clearing the parking lot was the second step in the process. The evidence shows that the District was in the process of following the policy when the appellant fell. There is no law or standard that says all snow and ice must be immediately removed. A landowner must exercise "reasonable care" in removing snow and ice, therefore, a landowner is not a guarantor of safety to an invitee. *Graoch Associates Limited Partnership # 12*, 144 Wn.2d 847, 860, 31 P.3d 684 (2001). Furthermore, an invitee also has a duty to use reasonable care. *Id.*

It is usually 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. *Coleman v. Ernst Home Center, Inc.*, 70 Wn.App

213, 220, 853 P.2d 473 (1993). In the case at bar, the offending condition probably existed for no more than five or six hours and the District followed its policy in locating and dealing with snow and ice. Unfortunately, the ice was hidden. Several cases where the reviewing court's found a landowner should have known of a dangerous condition and had time to remedy the problem include *Graoch Associates Limited Partnership # 12*, supra, (snow and ice for two or three days), *Leonard v. Pay'n Save Drug Stores*, 75 Wn.App. 445, 880 P.2d 61 (1994) (Snow and ice for four or five days) and *Maynard v. Sisters of Providence*, 72 Wn.App. 878, 866 P.2d 1272 (1994) (snow and ice observed for two days). In the case at bar, the District was in the process of following its snow removal plan and there is no evidence of an unreasonable delay, or evidence the district ignored actual knowledge.

Appellant's argue that because an employee of the District saw that there was snow on the ground at seven in the morning, the district had "actual knowledge" of a dangerous condition. (Brief of Appellant p. 13)² Mr. Adams, the school custodian, immediately began snow and ice removal upon arriving at the school at seven

² Appellant also argues that Ms. Lutz "witnessed firsthand" the black ice when she arrived, however, Ms. Lutz arrival was well after the fact and therefore is not particularly relevant as to what was known prior to the fall. (RP 57-58)

a.m.. The notion that all snow and ice should, or could, be immediately removed is not reasonable. It takes some time and the evidence shows that the District was in the process of snow removal. Furthermore, the mere knowledge of the existence of snow and ice is not sufficient to prove a duty was triggered or that liability should automatically attach. See, *Ford v. Red Lion Inns*, 67 Wn.App. 766, 840 P.2d 198 (1992).

There was no evidence that the District had prior knowledge of problems associated with the parking lot in question. Testimony from witnesses stated that the parking lot in question was not a known problem or unreasonably dangerous when it snows. Mr. Marty Emerson, the lead groundskeeper stated that he was unaware of the lot in question posing any particular risks or problems. (RP 78-79)

Kevin Lucke, a member of the crew that removed snow at the school in question stated that there was a time when he thought the Canyon Hills parking lot may have been colder than other parking lots due to shade from a row of trees. (RP 19-20) However, he also said that the trees that created the shade that led to the colder temperatures had been removed at some point. (RP 20) During the testimony of Mollie Lutz, she was shown

photographs, taken the day of the incident, of the parking lot in question, and she pointed out that the trees were absent from the photos indicating that they had been removed prior to the incident. (RP 61-62)

B. THE JURY INSTRUCTIONS WERE ADEQUATE FOR THE PLAINTIFF TO ARGUE HER THEORY OF THE CASE.

1. Standard of Review. Refusal of a trial court to give a specific jury instruction is reviewed for an abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). A trial court abuses its discretion when the instructions (1) do not permit each party to argue its theory of the case, (2) are misleading, and (3) when, read as a whole, do not properly inform the trier of fact of the applicable law. *CF Herring v. Department of Social and Health Services*, 81 Wn.App 1, 22-23, 914 67 (1996). Furthermore, an erroneous instruction does not require reversal unless the misleading instruction presumably affects the outcome of the trial. *Id.* at 23.

2. The instructions given were correct statements of the law and allowed the Appellant to argue the theory of her case. The court gave an instruction that correctly tracked the well established law. Instruction number 7, stated in part,

A person is liable for physical harm caused to public invitees by a condition of the premises if the person:

- 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 public invitees...

(CP 99) This instruction certainly allows a party to argue a condition existed for a long enough time that a landowner should have known. However, in this case, the addition of instruction number 10, should end all discussion of the issue:

An owner of a premises has a duty to correct a temporary unsafe condition of the premises that was not created by the owner and that was not caused by negligence on the part of the owner, if the condition was either brought to the actual attention of the owner or existed for a sufficient length of time and under such circumstances that the owner should have discovered it in the exercise of ordinary care. (emphasis added)

(CP 102; RP 180) These two instructions provide correct statements of law and allow for the “constructive notice” argument.

IV. CONCLUSION

Appellant cannot establish that under the evidence introduced in the trial court, a motion for Judgment as a Matter of Law was warranted. There is evidence that the District was following its snow removal policy at the time of the accident and that they did not have notice of the unsafe condition that caused the injury. Further, the jury instructions given by the court were clearly adequate.

RESPECTFULLY SUBMITTED February 19th, 2013.

JERRY MOBERG & ASSOCIATES



BRIAN A. CHRISTENSEN WSBA No. 24682
Attorney for Respondent
Jerry J. Moberg & Associates
451 Diamond Drive
Ephrata, WA 98823
Telephone: (509)754-2356
Fax: (509)754-4202
bchristensen@canfieldsolutions.com

CERTIFICATE OF SERVICE

I certify that I faxed a copy of the document to which this is affixed and I mailed a copy of the document to which this is affixed by U.S. mail to:

George E. Telquist
Richard D. Whaley
Telquist Ziobro & McMillen
1321 Columbia Park Trail
Richland, WA 99352
Fax: (509)737-9500

DATED this 19th day of February, 2013 at Ephrata, WA.

Tammy Wiersma

Tammy Wiersma, Paralegal