

NO. 63399-6-I

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

DOROTHY NARRANCE,

Appellant,

vs.

BALL METAL BEVERAGE CONTAINER CORP.,

Respondent.

BRIEF OF RESPONDENT

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I. NATURE OF CASE

King County Superior Court Judge Jay White properly granted defendant/respondent Ball Metal Beverage Container Corporation's ("Ball") motion for summary judgment and dismissed all of the plaintiff/appellant Dorothy Narrance's claims against Ball in this premises liability case. Plaintiff/appellant Dorothy Narrance was injured at about 2 o'clock in the morning on September 5, 2007, when she fell while walking on an ungraded area of natural vegetation at Ball's aluminum can manufacturing plant that was located in Kent, Washington. Why Ms. Narrance decided to walk in an unlit, ungraded area of natural vegetation, when, less than five feet from where she fell, there was over an acre of well-illuminated smooth, asphalt tarmac on which she could have performed her duties as truck driver-employee of Gardner Trucking, Inc. ("Gardner") is something of a mystery. As noted below, Ms. Narrance's explanation leaves a lot to be desired. However, one thing is clear: the superior court properly dismissed Ms. Narrance's negligence claim against Ball, because Ball met its duties as a property owner to invitees under §§ 343 and 343A of the *Restatement (Second) of Torts*. As a matter of law, Ms. Narrance's negligence claim fails under

§ 343(a) because areas of natural vegetation do not “involve[] an unreasonable risk of harm” *Restatement (Second) of Torts* § 343(a).

Her claim also fails under § 343(b) because the danger of encountering small holes and bumps in lawns and grassy areas is, as a matter of law, obvious. Finally, her claim fails under § 343(c) because Ball exercised reasonable care by providing Gardner drivers with a large, smooth, graded, asphalt-paved, illuminated area for performing their duties.

Because the superior court properly applied the law and because there is no genuine issue of material fact that warrants submission of this case to a finder-of-fact, Ball respectfully requests that the Court of Appeals affirm King County Superior Court Judge Jay White’s order granting Ball’s summary judgment motion and dismissing all plaintiff’s claims.

II. ISSUES PRESENTED

A. Did Ms. Narrance present a genuine issue of material fact as to whether the Ball plant involved an unreasonable risk of harm? **No. Areas of natural vegetation such as the grassy field adjacent to the tarmac do not, as a matter of law, present an unreasonable risk of harm.**

B. Did Ms. Narrance present a genuine issue of material fact as to whether Ball should have expected that she would not discover or realize the danger of walking on the vegetation at night, or would fail to protect herself against it? **No. The danger of encountering small holes and bumps in lawns and grassy areas is, as a matter of law, obvious.**

C. Did Ms. Narrance present a genuine issue of material fact as to whether Ball failed to exercise reasonable care to protect her against the danger of walking on the vegetation at night? **No. Ball exercised reasonable care because it provided Gardner drivers with a large, smooth graded, asphalt-paved, illuminated area for performing their duties.**

D. Did Ms. Narrance present a genuine issue of material fact as to whether Ball could be found liable under § 343A of the *Restatement (Second) of Torts*? **No. The area of natural vegetation did not present a danger under § 343 or § 343A, much less an “extreme” one. Ball was entitled to assume that Ms. Narrance would exercise ordinary attention, perception, and intelligence by avoiding the area of natural vegetation. Section 343A also does not apply because Ball provided Ms. Narrance with an unquestionably safe area for her to perform her duties.**

III. STATEMENT OF THE CASE

A. FACTS

1. Background

This is a premises liability case brought by Dorothy Narrance against Ball arising from an incident that occurred on September 5, 2007 at Ball's Kent, Washington aluminum beverage can manufacturing plant, when Ms. Narrance fell while walking on an ungraded area of natural vegetation at the plant. King County Superior Court Judge Jay White dismissed Ms. Narrance's case in its entirety on Ball's motion for summary judgment. CP 116-117.

The appellant, Dorothy Narrance, was and is employed by Gardner Trucking, Inc. ("Gardner") as a driver. CP 6, 27. Gardner was and is a commercial trucking common carrier that transported Ball beverage cans to various breweries, soft drink and other beverage producers in the Pacific Northwest as an independent contractor for Ball. CP 5, 14-15, 22. Ms. Narrance had been making runs to the Ball plant for several years as of September 2007. CP 6, 27.

Ms. Narrance alleges that Ball was negligent because she fractured her ankle while walking on the ungraded area of natural vegetation adjacent to a large (in excess of an acre), flat, lighted, asphalt-paved tarmac loading area that Ball provided for truck drivers to perform

their duties. CP 5, 9-10. Ball's plant was located near the East Valley Freeway (SR 167) at the 277th Street exit. The plant consisted¹ of several buildings housing administrative offices, storage areas and manufacturing facilities, as well as several loading docks and a very large, paved tarmac area where trucks could access the loading docks, wait while the loading docks were fully occupied or park loaded or empty semi-trailers. CP 6-7, 35, 37, 39, 49, 51. Below is a photograph showing a portion of the expansive asphalt-paved tarmac area in the foreground:



CP 6, 35.

¹ Ball closed the plant permanently in late 2008 and sold it to a recycled metal processing company.

As shown in the photograph above, and the other photographs considered by the superior court and in the record on appeal, just to the east of and adjacent to the asphalt tarmac there is a large area of grasses, small brush and other natural vegetation. CP 6, 7, 35, 37, 45, 49, 51. While the area is not graded (and is not intended to be utilized for either business or recreational purposes), it has a basically level topography. CP 6, 37. It is not accessible from outside the Ball plant property as it is surrounded by the security fence that surrounds the entire Ball facility. However, the area of natural vegetation can be accessed from the tarmac area. CP 6, 35-39. Ms. Narrance recognized the natural state of this area in her deposition when she admitted this area “wasn’t manicured like the front lawn.” CP 6, 29.

Gardner’s semi-trailers (both empty and loaded) would be stored from time-to-time along the eastern edge of the tarmac and adjacent to this area of natural vegetation. The Gardner “yard boss,” Forest McMillan, directed Gardner drivers to park trailers so that the rear wheels touched the extruded asphalt curb at the eastern edge of the tarmac. CP 6, 28-29. Gardner was responsible for moving and parking loaded trailers. CP 5, 22-23. Brian Thiel, the administrative manager of the Kent plant, testified that “it was not Ball Corporation’s responsibility

to direct Gardner where to park their trailers.” CP 5, 24. Mr. Thiel’s testimony is undisputed.

2. Accident Facts

On the night of the accident, Ms. Narrance arrived at the loading area at around 1:45 a.m. CP 6, 30. After parking her truck tractor unit, she went into the Ball office to sign in and receive her “load” information, consisting of a bill of lading, a plastic “seal” security device and other documentation. CP 6, 31-32.

Ms. Narrance found her trailer parked at the eastern edge of the tarmac with its wheels touching the extruded curb. CP 6, 32. She backed up her tractor unit until it connected to the trailer. CP 6, 32. Then, inexplicably, instead of pulling the rig forward a few feet so she could access the back of the trailer while standing on the smooth, level asphalt-paved tarmac, she got out of the cab of the tractor to complete the process of connecting the brake and electrical lines from the tractor unit to the trailer and doing the pre-trip inspections and load verification. CP 6, 32. This process consists of connecting the trailer air-brake hoses, electrical connections, raising the trailer “landing gear,” checking the tires, verifying the load against the bill of lading and “sealing” the trailer doors with a plastic security device that can only be opened by cutting it.

CP 6, 32-33. Because she neglected to pull her rig forward a few feet, the rear wheels of the trailer were still touching the extruded asphalt curb. This necessitated that she walk onto the area of natural vegetation, described above, to access the rear trailer doors. CP 6, 32-33.

Ms. Narrance conceded in her deposition that she could have driven her truck and trailer forward a few feet before doing the pre-trip connections and inspections. She also conceded that had she done that, she would not have had to walk on the area of natural vegetation where she allegedly fell. She testified as follows on those issues:

- Q. What—is there anything that—once you—you hooked up the air hoses and the lights, is there anything that would have prevented you from moving the trailer ten or 15 feet forward into the tarmac?
- A. After I hooked up my lights and my—oh, I haven't raised my landing gear yet.
- Q. Okay. Raise the landing gear and get back in the cab and move the trailer ten or 15 feet forward so the wheels aren't touching the extruded curb. Is there anything that prevented you from doing that?
- A. Well, I hadn't inspected my load yet.
- Q. I understand that, but you could have done that, correct? You could have gotten out of the trailer and gone back and opened the doors and looked at the load, correct?
- A. Not logically, but I could have.

- Q. Okay. Well, that's what you do when you pull away from the loading dock, right?
- A. You have to close your doors.
- Q. Right. So the only difference is the doors are already closed here. You have to go back and open them to inspect the load, correct?
- A. Right.
- Q. Okay. So you could have done that, correct?
- A. I could have.
- Q. Is there any reason why you didn't do that?
- A. Because if you don't have the right load, you're already parked.
- Q. Okay. All right. But that doesn't happen too often, does it?
- A. Not too often, but it happens.
- Q. Okay.
- A. Saves steps.
- Q. Okay. If you had done that, then you would have been able to walk on the asphalt; you wouldn't have had to walk on the grass?
- A. Right. I could have been in someone's way also. There's a lot of reasons that you wouldn't do it.
- Q. Well, let's explore that. I mean, if you had moved that trailer ten or 15 feet forward, would you have obstructed access to these loading docks at all?
- A. Not to the loading docks, no.
- Q. Okay. Possibly if there was some trailers along the east end of the building, you might have obstructed access to those?
- A. Right.

Q. Possibly?

A. Right.

Q. If there were trailers there, right?

A. Yes.

Q. Okay. And you don't remember whether there were or there weren't?

A. Oh, there's trailers there.

Q. You think there were trailers there that night?

A. Um-hum.

MR. WILLIAMSON: Say yes.

A. Yes.

Q. Is that why you didn't move your tractor and trailer forward?

A. We don't—well, we just—it's not practice. It's not—it doesn't make sense.

Q. But if you had done that, you wouldn't have had to have walked on the grass?

A. Right. Yeah.

CP 6, 32-33.

In other words, to save a few steps, Ms. Narrance elected to just leave her rig parked in the same place where she connected her tractor unit to the trailer. Ball did not require that she do that. Ms. Narrance decided that it was more expedient not to do her pre-trip “hook-ups” and load verification and sealing process on the safe, well-lighted, flat and level asphalt surface that Ball provided. Instead, she chose to walk on an

area that was not well-lit, was not graded and had natural grasses, small brush and other vegetation growing on it. Her choice to do that on September 5, 2007 was not a good one, and her choice was certainly not Ball's fault.

3. Ms. Narrance Misrepresents Facts

Ball must correct Ms. Narrance's misrepresentation of the facts. First, she states that she "*had* to walk over the ungraded area of vegetation on Ball's premises" in order to inspect the load in her trailer. Appellant's Opening Brief pp. 2 and 5 ("Narrance had to walk over the ungraded area of vegetation . . ."). But there was no evidence presented to the trial court that she "*had*" to walk over the vegetation and, in fact, she conceded in her deposition that she could have avoided walking on the vegetation by simply pulling her truck-trailer combination forward a few feet. CP 6, 32-33.

Ms. Narrance also states that "Ball freely permitted, *indeed required*, its invitee-drivers to cross the grassy area in order to connect tractors to trailers, without restricting or advising them to the contrary." Appellant's Opening Brief p. 12 (emphasis added), p. 4 ("Ball knew that Gardner drivers were constantly *required* to walk out on to the . . . grassy areas . . .") (emphasis added), p. 5 ("Ball either directed, *required*, or

authorized the placement of trailers”) (emphasis added), and p. 28 (“Narrance . . . was injured . . . while walking in an area where Ball . . . *required her* . . . to walk.”) (emphasis added); *see also* CP 74. Ms. Narrance cites to absolutely no evidence in the record before this court for her claim that Ball “required” drivers to walk on the grassy area. The reason for this omission is because there is no evidence that Ball required Gardner drivers (including plaintiff) to use the ungraded area of natural vegetation to perform any of their job duties. In fact, to the extent there is evidence in the record on this point, it leads to exactly the opposite inference: Ball provided the large smooth asphalt-paved tarmac to Gardner drivers to perform their job duties on and preferred that they use it. The Court should, therefore, disregard appellant’s unsubstantiated statements to the contrary that are devoid of evidentiary support in the record. Gardner’s drivers were independent contractors and Ball had no right to direct or control how they loaded or drove their trucks. This has never been challenged by appellant and all of the evidence shows that Ball did not exercise control over the means, manner or method by which Gardner drivers discharged their duties. *See, e.g.*, CP 5, 24.

Under her summary of “undisputed facts” Ms. Narrance states:

The trailer had been parked so that its back protruded out into an ungraded area of vegetation. There is no evidence that the trailer was parked by an employee of Gardner; for purposes of summary judgment *it should be inferred that the trailer was parked there by Ball.*

Appellant’s Opening Brief pp. 4-5 (emphasis added); *see also* p. 31 (“it was Ball that decided where the trucks were to be parked”). The Court should disregard this allegation. First, this “fact” was never presented to the trial court and therefore cannot be considered by the Court of Appeals. RAP 9.12. (“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.”). Second, the only evidence before the trial court was that it was the responsibility of Gardner drivers such as Ms. Narrance to park trailers (and occasionally drivers for the entities A&P Transportation and Tractor and Bridgeport Logistics):

Q. Okay. I understood from yesterday that at least some trailers would be moved and parked along the grass area that we're going to be talking about later by Gardner drivers. Is that your understanding?

A. There was a yard, yes, that was utilized primarily by Gardner to store or drop trailers, that's correct.

Q. Okay. What about if a trailer were loaded at the dock but then moved to another part of the yard to be picked up later, who would move that loaded trailer?

A. That would be Gardner.

* * *

Q. What if a trailer gets loaded up at the dock and then moved to another part of the yard to be picked up by an A & P Transportation and Tractor, who would have moved that trailer?

A. Most likely that would have been Gardner.

Q. Do you know if A & P or Bridgeport Logistics drivers ever moved trailers in the yard?

A. It's possible that they could have.

Q. But was there?

A. That was—it's not my understanding that that was their normal MO.

Q. Was there some understanding, written or otherwise, that it was Gardner's responsibility to move trailers, whether the trailers were going to eventually be moved by an employee of Gardner versus another trucking company?

A. It's my understanding, from the initial discussions with Gardner, in terms of the business that they—that Gardner—we assumed that they—I shouldn't say we assumed—we viewed them as our sole source carrier. And in that sole source responsibility, included shunting or shuttling trucks to and from areas of the yard to the doors, the dock doors.

CP 22 (Deposition of Brian Thiel, the administrative manager of the Kent plant). Appellant presents *no* evidence for her assertion that Ball may have parked the trailer that she was inspecting when she fell. While the Court must view the facts in a light favorable to the non-moving party, the Court is not required to *invent* facts in favor of the non-moving party.

Appellant mentions in passing that the hole she fell in was “created when conduit was installed to the light pole near where she fell.” Appellant’s Opening Brief p. 4. The only evidence cited in support of this statement is a portion of appellant’s deposition testimony where she concedes that the basis for this speculation is that she “laid there and thought about it and looked at it for 45 minutes.” CP 100. The Court should disregard Ms. Narrance’s allegation, just as the trial court did, because “[a]ffidavits submitted in support of, or in response to a motion for summary judgment must set forth such facts as would be admissible in evidence, must be made on personal knowledge, and must affirmatively show that the affiant is competent to testify as to his or her averments.” *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002). Moreover, the Court “will not review an issue that was addressed by an inadequate argument or that is given only passing

treatment.” *Timson v. Pierce County Fire Dist. No. 15*, 136 Wn. App. 376, 385, 149 P.3d 427 (2006).

Finally, appellant alleges that the hole she allegedly fell in “was subsequently filled.” This allegation is irrelevant to the issues on appeal, as well as unfounded. Appellant conceded that her opinion that the hole had been filled in after her fall was pure speculation:

Q. Okay. So you think that something that was there when you fell was not there when you took the picture that we marked as Exhibit-5?

A. Yeah, they—I guess that's what I'm saying. It's—because they had put rocks in the hole and some of the dirt, I think, had been moved, but I, you know, can't swear to it.

Q. Okay. Well, I'm asking—do you know that for a fact?

A. No.

Q. Okay. So this is just your supposition?

A. Yes.

Q. Okay. Has anybody from Ball told you that they did that?

A. No.

Q. That they filled the hole in or somehow changed the area where you fell after you fell?

A. No.

Q. Okay. Has anybody at Gardner told you that somebody from Ball indicated that?

A. That somebody from Ball indicated that?

Q. Yes.

A. No.

CP 94.

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). This Court may affirm the trial court on any basis that is supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Once the moving party meets this initial showing, then the inquiry shifts to the party with

the burden of proof at trial, the plaintiff. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). The nonmoving party has the affirmative burden of setting forth “specific facts showing that there is a genuine issue for trial.” *Young*, 112 Wn.2d at 225-226. Furthermore, all assertions by a party must be supported by evidence. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). The evidence and all reasonable inferences therefrom is considered in the light most favorable to the nonmoving party. *Young*, 112 Wn.2d at 225-226. However, bare assertions of contrary fact, speculation, and/or conclusory statements do not adequately raise an issue of fact sufficient to prevent summary judgment. *Grimwood*, 110 Wn.2d at 359-360.

When responding to the moving party’s motion, the nonmoving party cannot rely on the allegations made in its pleadings. “[U]ltimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact.” *Rugg*, 115 Wn. App. at 224. The trial court should grant the motion for summary judgment if the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Young*, 112 Wn.2d at

225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986)).

B. THE SUPERIOR COURT DID NOT ERR IN DISMISSING PLAINTIFF'S CLAIMS BECAUSE PLAINTIFF FAILED TO ESTABLISH ANY ISSUE OF FACT THAT BALL VIOLATED *RESTATEMENT (SECOND) OF TORTS* § 343

The Washington State Supreme Court has adopted § 343 of the *Restatement (Second) of Torts* to define a landowner's duty of care to invitees.² *Iwai v. State*, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). Section 343 states that a landowner is only liable if he or she should know that the condition on the land involves an unreasonable risk of harm, knows that invitees will not realize the danger, and fails to exercise reasonable care to protect against the danger:

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

² There is no dispute that plaintiff was a business invitee while on Ball's premises.

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

Restatement (Second) of Torts § 343 (1965). Because § 343 uses the conjunction “and” to connect subsections (a), (b), and (c), Ms. Narrance must establish that there is an issue of fact as to all three subsections of § 343 in order to avoid summary judgment. The Court only need consider subsection (a) because, as a matter of law, the Ball plant did not “involve[] an unreasonable risk of harm”

Courts have held that grassy areas and fields simply do not present an unreasonable risk of harm. *Monson v. Travelers Property & Cas. Ins. Co.*, 955 So.2d 758, 762 (La. App. 2007) (“It is inherent in grassy areas that are not intended or designed for use as a walkway, that they present minor hazards such as uneven ground or holes which could cause a person to trip and fall. *Such conditions do not amount to defects that present an unreasonable risk of injury to tenants.*”) (emphasis added); *Parsons v. Arrowhead Golf, Inc.*, 874 N.E.2d 993, 997 (Ind. App. 2007) (“Golf is played outside, on grassy and often uneven surfaces. Injuries from stepping on uneven surfaces are an inherent risk of the game.”); 62A Am.Jur.2d *Premises Liability* § 653 (1990) (“The owner of premises has a duty to maintain a lawn or front yard open to invitees in reasonably good condition, but he is not liable to one who

steps in a small hole in the lawn where he had neither actual nor constructive notice of such defect.”); *Wood v. Cambridge Mut. Fire Ins. Co.*, 486 So.2d 1129, 1133 (La. App. 1986) (“Yards usually present minor hazards or conditions which could cause an unobservant and inattentive person to trip and fall. Yards can and usually do have irregularities and minor obstacles such as depressions, drains, faucets, trees, shrubs, and tree roots and are not intended or designed for use as a walkway without observation and care as are sidewalks and designated walkways. Such conditions do not amount to defects that present an *unreasonable risk of injury* to tenants.”) (emphasis added).

While there is no published opinion in Washington on the inherent danger of lawns, grassy areas and fields, the Washington State Court of Appeals has decided a case regarding a “parking strip,” i.e., the “[l]andscaped area between the sidewalk and the street curb also known as a planting strip” and held that this area “was not unreasonably dangerous.” *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 599-601, 20 P.3d 1003 (2001). In *Hoffstatter*, the parking strip was “entirely bricked over and a lone tree grows in its center. Over time, the tree’s roots have dislodged the bricks so that they are now uneven and some are loose.” *Hoffstatter*, 105 Wn. App. at 598-599. The plaintiff, Janice

Hoffstatter, walked across the parking strip, tripped, fell, and sued the landowner, the abutting landowner, and the City of Seattle for negligence. *Hoffstatter*, 105 Wn. App. at 599. The trial court dismissed all of her claims on summary judgment.

The Court of Appeals had to decide if a factual issue existed as to whether the defendants had breached their duty to maintain the parking strip in a “reasonably safe condition.” *Hoffstatter*, 105 Wn. App. at 600. The court held that the uneven surface of the bricks was not unreasonably dangerous:

In this case, the uneven surface of the bricks was caused by tree roots growing beneath the bricks and dislodging them. It is a common condition in an area set aside for landscaping. Further, the bricks were not hidden, but open and obvious. It is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk. *We hold that as a matter of law the uneven surface of the bricks was not unreasonably dangerous.*

Hoffstatter, 105 Wn. App. at 600-601 (emphasis added); *see also Wilson v. City of Seattle*, 146 Wn. App. 737, 742, 194 P.3d 997 (2008) (relying on *Hoffstatter*, court held that “[m]anholes in parking strips are common, and the cover was open and obvious.”). There is little difference between the grassy area where Ms. Narrance fell and the parking strip where Janice Hoffstatter fell. Both areas contained “open and obvious”

hazards due to natural conditions of the land, and both areas were avoidable because they were adjacent to paved surfaces more suitable for walking. *Hoffstatter*, 105 Wn. App. at 601. It was irrelevant in *Hoffstatter* that pedestrian use of the parking strip was foreseeable. *Hoffstatter*, 105 Wn. App. at 600 (“It is certainly true that pedestrian use of parking strips must be anticipated. But they are not sidewalks and cannot be expected to be maintained in the same condition.”).

Ms. Narrance fails to adequately distinguish *Hoffstatter*. Appellant’s Opening Brief pp. 23, 26, 29. The similarities between the vegetation next to the tarmac and the parking strips in *Hoffstatter* are significant, as explained. In fact, the facts of this case present an even more persuasive reason to grant Ball’s summary judgment motion than *Hoffstatter*. In *Hoffstatter*, the parking strip was “entirely bricked over,” arguably making it an inviting surface for a pedestrian, like Ms. Hoffstatter, to walk upon. *Hoffstatter*, 105 Wn. App. at 598. Nevertheless, this Court held that a parking strip “cannot be expected to be maintained in the same condition” as a sidewalk and dislodged, uneven and loose bricks did not make the parking strip unreasonably dangerous. *Hoffstatter*, 105 Wn. App. at 598. Here, the field adjacent to the asphalt-paved tarmac was not covered in bricks or any other surface

that would imply that it was a smooth and level area for walking upon. Even more so than a parking strip, an obviously ungraded field with natural vegetation cannot be expected to be maintained in the same way as a paved surface and the existence of occasional divots, bumps and small holes does not make it unreasonably dangerous.

Plaintiff simply cannot establish any genuine issue of material fact on which a rational trier-of-fact could conclude that Ball's plant presented "an unreasonable risk of harm . . ." under § 343(a). An area of natural vegetation does not, as a matter of law, present an unreasonable risk of harm, as established by the premises liability cases cited above involving grassy areas and the Court of Appeals' decision in *Hoffstatter*. In summary, there was no "unreasonable risk of harm" presented by the area of natural vegetation at Ball's plant, which Ball knew or "should have" known about. Because plaintiff cannot establish any breach of § 343(a), her premises liability claim against Ball fails. Ball respectfully requests that the Court of Appeals affirm the superior court's order granting Ball's motion for summary judgment and dismissing plaintiff's claims.

But plaintiff's claim also fails under § 343(b). Under § 343(b), Ms. Narrance must establish that there is a genuine issue of material fact

as to whether Ball should have expected that she would fail to realize the danger of walking on the ungraded area of natural vegetation at night, or that she would fail to protect herself against it. *Restatement (Second) of Torts* § 343(b). The danger of encountering small holes and bumps in lawns and grassy areas is obvious. As the West Virginia Supreme Court explained, small holes and bumps are typical of grassy areas:

In this Court's view, the overall evidence adduced in this case, even when construed in the light most favorable to the appellant, suggests that she fell as the result of some irregularity of such slight proportions as would ordinarily be recognized to be a normal characteristic of a lawn by any person going upon the lawn.

McDonald v. University of West Virginia Bd. of Trustees, 191 W.Va. 179, 182-183, 444 S.E.2d 57 (W. Va. 1994).

Ms. Narrance herself admitted that the vegetation was even rougher than a typical lawn. CP 6, 29. Additionally, Ball was not responsible for supervising Gardner employees and had no control over where they parked trailers. CP 5, 14-15, 22, 24. Ball cannot be expected to protect employees of an independent contractor against such a prosaic condition. In summary, plaintiff also fails to meet the requirements of § 343(b) because there is no evidence that Ball “should have” expected that plaintiff would fail to recognize that an ungraded area of natural vegetation might not be a completely smooth and level surface. If

plaintiff had wanted to walk on a smooth, level surface, there was about an acre of smooth, level well-lit asphalt less than five feet from where she fell. In any event, there is certainly no reason to reverse the superior court's ruling that plaintiff failed to establish any genuine issue of material fact indicating that Ball "should have" known that plaintiff would not appreciate that an ungraded field of natural vegetation at an aluminum can factory in Kent, Washington might not be a completely smooth and level surface. This was, after all, an untended area of natural vegetation at a can factory, not a putting green.

Finally, Ms. Narrance's claim fails under § 343(c) of the *Restatement (Second) of Torts*. To establish a claim under § 343(c), plaintiff must show that there is an issue of fact about whether Ball failed to "exercise reasonable care" to protect invitees (like Gardner's drivers) from the dangers of walking on the ungraded area of natural vegetation. Unquestionably, Ball exercised reasonable care because it provided Gardner drivers with a large, smooth graded, asphalt-paved, illuminated area for performing their duties. Moreover, land owners are generally not required to warn of natural conditions or make them safe because the danger involved is so obvious and the probability of injury is so small:

With respect to natural conditions, including artificial conditions which simulate nature, the danger of which is

open and apparent to everyone, this court, along with the majority of other courts (and in accord with the Restatement's caveat at page 207), has consistently held that the owner cannot reasonably be required to take affirmative steps to make the condition safe or to warn of its presence or to prevent access to it. In other words, in such cases, we have held that as a matter of law the probability of injury is not great enough to warrant a conclusion that the duty of exercising reasonable care demands such affirmative acts.

Ochampaugh v. City of Seattle, 91 Wn.2d 514, 527, 588 P.2d 1351 (1979). “[A] landowner is not a guarantor of safety—even to an invitee.”

Mucsi v. Graoch Associates Ltd. Partnership No. 12, 144 Wn.2d 847, 860, 31 P.3d 684 (2001).

C. THE SUPERIOR COURT DID NOT ERR IN DISMISSING PLAINTIFF’S CLAIMS BECAUSE PLAINTIFF FAILED TO ESTABLISH ANY ISSUE OF FACT THAT BALL VIOLATED *RESTATEMENT (SECOND) OF TORTS* § 343A

The Washington State Supreme Court has also adopted § 343A of the *Restatement (Second) of Torts*. *Iwai*, 129 Wn.2d at 93. Section 343A states in pertinent part:

(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.

Restatement (Second) of Torts § 343A (1965). This section is to be “read together with” §§ 343(a)-(c) and “limits the liability” stated in §§ 343(a)-(c). *Restatement (Second) of Torts* § 343, comment a. Therefore, the

“danger” referred to in § 343A is the same “danger” referred to in §§ 343(a)–(c). As explained, the Ball plant did not present a “dangerous condition” under §§ 343(a)–(c) and therefore Ms. Narrance cannot use § 343A to impose liability on Ball because § 343A does not expand the liability stated in §§ 343(a)–(c).

Additionally, the comments to § 343A make clear that a defendant may assume that invitees “will not be harmed by known or obvious dangers which are *not extreme*, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. *Restatement (Second) of Torts* § 343A, comment g.³ As explained, the uneven ground or holes typical of natural terrain are not “extreme dangers”, and thus not of the type covered by § 343A. Comment g goes on to state that “[t]his is particularly true where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.” Additionally, “the invitee also has a duty to exercise reasonable care.” *Mucsi*, 144 Wn.2d at 860. Ms. Narrance

³ Although comment g is found in the comments to subsection (2), which concerns invitees on land possessed by public utilities or the government, its reasoning applies to all cases involving § 343A. *See e.g., Carrender v. Fitterer*, 503 Pa. 178, 186, 469 A.2d 120, 124 (1983) (relying on comment g to § 343A in a case not involving land possessed by a public utility or the government; court held that “in light of the number of clear, convenient spaces available, appellee and other invitees would recognize the danger posed by the ice and choose to park in another, ice-free space to avoid it.”).

acknowledged that the massive, paved tarmac was a reasonable, safe alternative to walking on the natural terrain. CP 6, 32-33. Her claim, therefore, fails under § 343A as a matter of law.

D. THE CASES PLAINTIFF RELIES ON ARE DISTINGUISHABLE

None of the cases that Ms. Narrance relies on involve an accident that occurred on natural vegetation (with the exception of *Williamson v. Allied Group, Inc.*, 117 Wn. App. 451, 72 P.3d 230 (2003), which is discussed below). Below is a chart summarizing the cases Ms. Narrance relies upon:

Case (and page number in appellant's brief)	Surface where accident occurred
<i>Ahl v. Stone Southwest, Inc.</i> , 666 So.2d 922, 923-24 (Fla. Dist. Ct. App. 1995) (pp. 24, 29)	Greasy ladder
<i>Burns v. Veterans of Foreign Wars</i> , 231 Neb. 844, 846-47, 438 N.W.2d 485 (1989) (p. 21)	Asphalt covered with ice
<i>Carton v. Missouri Pacific R. Co.</i> , 303 Ark. 568, 571, 798 S.W.2d 674 (Ark. 1990) (pp. 21, 31)	Gravel covered with oil
<i>Creech v. Wildlife and Marine Resources Dep't.</i> , 328 S.C. 24, 27, 491 S.E.2d 571 (1997) (pp. 22, 32)	Fishing dock without a guard rail on one side

Case (and page number in appellant's brief)	Surface where accident occurred
<i>Countrymark Cooperative v. Hammes</i> , 892 N.E.2d 683, 686 (Ind. App. 2008) (pp. 19, 33)	Ice covered concrete parking lot
<i>Ex parte Kratz</i> , 775 So.2d 801, 803 (Ala. 2000) (p. 11 n.1)	Unmarked, black, ragged speedbump in paved gas station
<i>Hagadorn v. Prudential Ins. Co.</i> , 267 Ga. App. 143, 144, 598 S.E.2d 865 (2004) (pp. 11, 31)	Steeply graded cement
<i>Hefele v. National Super Markets, Inc.</i> , 748 S.W.2d 800, 801-802 (Mo. App. 1988) (p. 23)	Ice covered sidewalk
<i>Iwai v. State</i> , 129 Wn.2d 84, 87, 915 P.2d 1089 (1996) (pp. 7, 9, 14, 15, 16, 17, 18, 19)	Snow or ice on inclined section of parking lot
<i>Johnson v. Short</i> , 213 Or. App. 255, 266, 160 P.3d 1004 (Or. App. 2007) (p. 20)	Steps to a home/business covered in wet moss and algae
<i>Kinney v. Space Needle Corp.</i> , 121 Wn. App. 242, 244-47, 85 P.3d 1004 (2004) (pp. 13, 16, 28)	Wet ladder at the top of the Space Needle
<i>Rawls v. Marsh Supermarket, Inc.</i> , 802 N.E.2d 457, 458 (Ind. Ct. App. 2004) (p. 11)	Narrow sidewalk in front of ATM
<i>Richardson v. Marrell's, Inc.</i> , 539 N.E.2d 485, 486 (Ind.App. 3 Dist. 1989) (pp. 22, 23)	An inch or two of snow in paved restaurant delivery area
<i>Rivers v. Garden Way, Inc.</i> , 231 A.D.2d 50, 51, 660 N.Y.S.2d 893 (1997) (p. 20)	Tractor trailer and loading dock

Case (and page number in appellant's brief)	Surface where accident occurred
<i>Stephens v. Bashas' Inc.</i> , 186 Ariz. 427, 428-29, 924 P.2d 117 (Ariz.App. Div. 1 1996) (p. 20)	Center two-way left turn lane in street adjacent to supermarket
<i>Wallingford v. Kroger Co.</i> , 761 S.W.2d 621, 622 (Ky. App. 1988) (pp. 22, 23)	Ice-covered delivery ramp
<i>Welton v. Lucas</i> , 283 Mont. 202, 203, 940 P.2d 112 (Mont. 1997) (p. 21)	Pipe located on stockroom floor
<i>Woods v. Geifman Food Stores, Inc.</i> , 311 F.2d 711, 711-12 (7th. Cir. 1963) (p. 22)	Icy, inclined concrete

Not only do these cases *not* involve natural vegetation or fields at all similar to where Ms. Narrance fell, they do not involve plaintiffs who risked walking on natural vegetation in the middle of the night when a perfectly safe, flat, well-lit, expansive paved tarmac was immediately available as an alternative.

In all of these cases, the plaintiffs were injured while utilizing surfaces that were specifically provided for the task they were performing at the time of the injury. For example, in *Kinney*, the plaintiff was using the only ladder available to perform her work on top of the Space Needle. *Kinney*, 121 Wn. App. at 245-246. In *Johnson*, the plaintiff slipped on the moss-covered steps that he had to climb in order to deliver a package.

Johnson, 213 Or. App. at 257-258. In *Stephens*, the truck driver had no choice but to park his truck in the middle of the street in order to open the back of his trailer (the key witness for the defendant “did not know where else truckers could park to open their doors and then back up to the loading docks”) and he was injured while walking to the cab. *Stephens*, 186 Ariz. at 429. In contrast, Ms. Narrance decided not to use the tarmac that was provided for her to perform her work, and chose instead to walk on the obviously ungraded adjacent field.

The one case Ms. Narrance cites to with respect to grassy areas, *Williamson v. Allied Group, Inc.*, 117 Wn. App. 451, 72 P.3d 230 (2003), concerned a steep, grassy slope which the court described as “not easily avoidable” because it was the plaintiff’s only pathway to her apartment. *Williamson*, 117 Wn. App. at 454, 461. Here, the vegetation was “easily avoidable” and Ms. Narrance admitted that she could have avoided it by just driving her truck forward a small distance after she connected the trailer to the tractor unit, so she could have stood on the smooth and level well-illuminated asphalt tarmac as opposed to an un-illuminated, ungraded field while doing her pre-trip load inspection. CP 5, 33. *Williamson* highlights what is lacking in Ms. Narrance’s case: an unreasonable risk of harm. There was an unreasonable risk of harm in

Williamson because the steep, grassy slope was the plaintiff's only route to her apartment. Here, there was no such unreasonable risk of harm because Ball provided Gardner drivers with an expansive, paved tarmac as a workspace so that they did not have to walk on the vegetation. Additionally, the *Williamson* court did not consider the question of whether grassy areas are obviously dangerous.

V. CONCLUSION

For the reasons stated above, the Court of Appeals should affirm the superior court's order granting summary judgment and dismissing appellant's negligence claims against Ball.

DATED this 18th day of August, 2009.

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