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NO. 66677-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Filed
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COURT OF APPEALS
DIVISION ONE
SEP 30 2011

FRANCESCA GIUSTI,

Appellant,

v.

CSK AUTO, INC., an Arizona Corporation doing business in Washington
as SCHUCK'S AUTO SUPPLY, and KEY BANK NATIONAL
ASSOCIATION, a bank incorporated in the District of Columbia,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant has provided adequate grounds for reversal. Respondents are owners of the business that has been located on the property at issue since at least 1950s. CP 200, 205. The building was constructed in 1951, fifty-five years prior to Appellant Francesca Giusti's fall and injuries. CP 32. Respondents have never provided any information about when the ramp that caused Ms. Giusti's fall and injuries was constructed. The *only* information that was provided by Respondents was that the ramp was there by 1979. CP 205. Respondents now have a new position which is unsupported by any evidence, that this ramp was constructed at the same time of the building was erected in 1951. *See Respondent's Brief at pg. 1.*

It was and continues to be Appellant's position that the Seattle Building Codes are relevant and instructive to the jury as to what the standards were within the jurisdiction of the City of Seattle. Both of Appellant's experts, Joellen Gill and Tom Baird contented that even if the ramp was built in the 1951, it violated the code then, and then violated all subsequent codes to date. Tom Baird even had a vintage copy of the 1950 City of Seattle Building Code. CP 46-47.

With the only information that the ramp had been present by 1979, Appellant had no idea which Seattle Building Codes would be relevant. It

was Appellant's contention when it responded to Respondent's motion for Summary Judgment that it did not matter which version of the Seattle Building Code was in effect during the life of the building, for ramp's cross cuts violated all of them. CP 47, 57.

At trial, when arguing the Motion in Limine No. 6, the court was already aware of previous violations of the Seattle Building Code from the materials presented for the Summary Judgment hearing just a few weeks prior. CP 13-206. However, because it was unknown which version would apply, the court ruled that none would be allowed to be presented to the jury. TP 14. It was clear that if the court would not allow any evidence of the specific building code violations, then it would not grant a jury instruction regarding same. TP 15-16.

Throughout the 1960 and 1970s, the Seattle Building code was based on the Uniform Building Code (UBC) though the City of Seattle did not formally adopt it. Nonetheless, a visit to the City of Seattle Archives will produce multiple versions of the Uniform Building Code for any given year, all during the period of this building existence or from the 1950s forward. It was not until 1998 that the City of Seattle adopted most of the Uniform Building Code. City of Seattle Ordinance No. 119079. Certain chapters, such as the Scope and Purpose were not adopted by the City of Seattle. TP 5-7.

Respondents argue and cite the adoption by the State of Washington in 1998 of the Uniform Building Code in 1998. Respondent's Brief at P. 10. Appellant never referred or argued the Washington State version of the Building Code because the City of the Seattle has had its own building code throughout the twentieth century and through present day.

Unlike the Uniform Building Code and other codes adopted in other jurisdictions, it was a long time the stated purpose of the City of Seattle Building Code was retroactive and was discussed at length in the case of *Faye v. Allied Stores Corp.* 42 Wn.2d 512, 262 P.2d 189 (1953).

Subsequent to *Faye* in 1986, the law changed so that violations of statutes or ordinances were not negligence *per se* but rather evidence of negligence. RCW 5.40.050. *Faye* was refined in *Reuter v. Rhodes Inv. Co.*, 71 Wn.2d 31, 425 P.2d 929 (Wash. 1967) where the court stated "While the violation of a positive ordinance is negligence, such negligence will not render a defendant liable for damages unless such violation proximately contributed to or proximately caused the injury." *Reuter* at 516. Appellant should be allowed to present to the jury the various standards and codes that have been in effect through the life of Respondent's building and ramp.

Respondent rely on the case of *Sorenson v. Western Hotels, Inc.*,

55 Wn.2d 625, 349 P.2d 232 (1960) for the proposition that the codes are not retroactive. However, *Sorenson* concerned the building code of the City of Bellingham, not the Seattle Building Code. *Id.* at 629. The *Sorenson* court compared and contrasted the building codes of the two cities and found that the building code of the City of Bellingham's did not contain the broad and inclusive language of the Scope and Purpose of the Seattle Building Code. *Id.* at 630. If in fact, the ramp was constructed in the 1950s as is now contended by Respondents, though there is no evidence whatsoever, the retroactivity of the building code of the City of Seattle persisted for many years and the ramp at issue was in clearly in violation. Appellant should have been permitted to present to the jury the history of those violations as evidence of negligence.

Notably, Appellant's experts, Tom Baird and Joellen Gill inspected and measured the ramp and the curb cut with its un-marked cross-slopes on December 1, 2009. CP 131-32 and CP 121. Both testified via declarations that the slopes violated multiple City of Seattle building codes dating from the 1940 or 50s, as well as safety standards. CP 46, 131-133 and CP 121.

A. Standard of Review

A trial court's decision to exclude evidence will be reversed only where it has abused its discretion. *Kappleman v. Lutz*, 217 P.3d 286, 289

(En Banc 2009); *State v. Lord*, 161 Wash.2d 276, 294, 165 P.3d 1251 (2007). An abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons. *See State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007). If there is ample evidence, such as here, that the violations occurred, then there is sufficient grounds to allow the evidence of City of Seattle Building Codes to be presented to the jury.

B. Summary Judgment

The trial court did not make its decision in a vacuum. It heard Respondent's motion for Summary Judgment in which the Seattle Building Codes were discussed at length by both sides on November 12, 2010. CP 13-206. Just a few weeks later, the Motions in Limine were heard on December 6, 2010. CP 250. The pleadings, arguments with supporting evidence were provided to the court on both occasions. However, it would have been waste of the Court's time and resources to resubmit all the materials that had been argued just a few weeks earlier to court.

C. The Building Codes

Defendant has provided no information or evidence as to when the ramp at issue was constructed. CP 205.

The trial court was presented with various City of Seattle Building Codes as well as the Uniform and International Building Codes and Americans with Disabilities Act during both the motion for summary judgment hearing and during the hearings for Motions in Limine. CP 57-58, 123, 132-133, 320-321 and TP 5-7. In light of the fact that the court would not consider the Seattle Building Code from 1950, and it was unknown when the ramp was constructed, Appellant then turned to the Seattle Building Code that was in effect when she was injured, which was in 2006. TP 4-8. The Seattle Building Code was based on the 2003 International Building Code. CP 431.

It is without question that Respondents are responsible for “pretty much everything to do with the property there.” CP 202. Respondents were in complete control of the premises. Additionally, Respondents even had a designated safety specialist at corporate headquarters for all its stores CP 205-206. Respondents had both the means to know and to act to make the ramp comply with all building codes and safety standards in order to make this store safe for its business invitees like Appellant Francesca Giusti.

D. Americans with Disabilities Act

It is not only the Seattle Building Codes that apply to the ramp at issue, but it is also the codes related to the disabled. Americans with

Disabilities Act (ADA) 42 U.S.C. §§ 12101—12213. Respondent was able to neither state when the ramp was constructed, nor state the purpose of the strange curb cut at the bottom of the ramp. CP 48. Curb cuts are used to aid physically disabled persons' travel and provide accessibility. The regulations pertaining to safety construction under the ADA were touched on during the Motion for Summary Judgment but the focus was primarily on the Seattle Building Code based on the Uniform and International Building Codes. CP 46 -48, 58-59, 131-33; 320-22; TP 5-7.

If the basic reasoning of an argument is made to the trial court, then this Appellate Court can review the issues despite the prior lack of citation to case law. *State Farm Mutual Automobile Insurance Company v. Amirpanahi*, 50 Wn. App. 869, 872, n.1, 751 P.2d 329 (Div. I 1988) review denied, 111 Wn.2d 1012 (1988). Even if Ms. Giusti is presenting a new argument, RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level. *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993) "Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent." *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 622-23, 465 P.2d 657, 661 (1970) The case here is that the obligation by Respondents to business invitees like Appellant Ms. Giusti is very high.

Various statutes, at the state, federal as well as the local level require that Respondents exercise care to maintain in a reasonably safe condition those portions of its premises where an invitee is invited to use. WPI 120.06 , *Zenkina v. Sisters of Providence in Wash., Inc.*, 83 Wn.App. 556, 560-61, 922 P.2d 171 (Div. 1 1996).

E. Plaintiff's Jury Instruction 11 was necessary

1. Standard of Review

Appellant could not argue her theory of liability as they pertained to City of Seattle building codes. Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Bell v. State*, 147 Wash.2d 166, 176, 52 P.3d 503 (2002). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *State v. Williams*, 132 Wash.2d 248, 259-60, 937 P.2d 1052 (1997) citing *State v. Griffin*, 100 Wash.2d 417, 420, 670 P.2d 265 (1983).

2. The Jury was Left to Speculate about the City of Seattle Building Codes.

The jury asked several times about the building codes that were applicable to the ramp at issue. CP 332, 334, 471, 472, and 473. The jury was clearly looking for guidance which they did not receive. Appellant had two arguments that she wanted to present to the jury. 1) The slopes of

the ramps curb cut's violated City of Seattle Building Codes; and 2) further that as this ramp was the primary egress into Respondent's store, it was a continuing danger to the public as it violated all safety standards, as expressed through the local building codes throughout its existence. The violations of the Seattle Building Codes are evidence of negligence, if not negligence *per se*. CP 320. *Reuter v. Rhodes Inv. Co.*, 71 Wn.2d 31, 425 P.2d 929 (Wash. 1967). Appellant's experts did testify that the ramp violated multiple versions of the codes throughout the existence of this ramp during the motions for summary judgment and motions in limine. CP 46-48, 58-59, 131-33;320-22; TP 5-7.

While Respondent is not required to update its buildings to bring them up to code, the continual non-compliance of the Building Code through the decades that the ramp was in existence, is evidence of negligence for it exposed its business invitees to injury. *Pettit v Dwoskin*, 116 Wash.App. 466, 68 P.3d 1088 (Div. 1, 2003); Restatement of the Law 2d, Torts (1965), Section 286 Comments *f.* and *g.* with Illustrations. (Bracketed commentary added). Appellant could not argue this issue either. In fact, the court also disallowed a chart prepared by one of the Appellant's experts how the ramp at issue violated building codes that pertained to ramps and curb cuts the early 1940s to the date of Appellant's injury. CP 221 and 447

F. Appellant Did Not Invite Error

Appellant did not invite error but was prohibited from discussing specific City of Seattle Building codes as they applied to the building and ramp at issue. With the court ordering that all City of Seattle Building Codes could not be presented or argued to the jury, Appellant was left with only the safety guidelines as expressed with industry building codes such as the Uniform Building Code and the International Building Codes. RP 5-6, 14-16; See Appellant's Opening Brief, pg.5-7. Additionally it was not known when the ramp was built. CP 205, RP 11.

The motion in limine regarding building codes was argued over the course of two days. RP 3-18. This followed the hearing for Respondent's Motion for Summary Judgment which was heard just three weeks before in which the code violations were discussed and authority provided to the court. CP 106-107, CP 113-134. Authority was given to the trial court that building codes were evidence of negligence. CP 107 including the case of *Trueax v. Ernst Home Center, Inc.*, 70 Wn.App. 381, 853 P.2d 491 (Div. III 1993) which held that it was reversible error not to give a proposed instruction regarding an applicable building code. *Id. reversed on other grounds.*

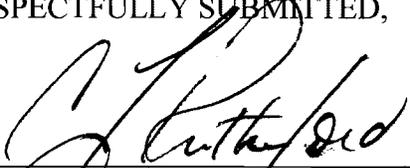
II. Conclusion

Respondent makes many allegations that Appellant has not cited to the record, or did not make sufficient citations to the record. Resp. Brief pg. 3-4. Yet, the examples that they cite are the one paragraph introduction at the very beginning of Appellant's Opening Brief, and the first paragraph on page 4 which is start of the Procedural Facts. The first is a there is for convenience of the court and in fact RAP 10.3(a)(3) states that "[T]he introduction need not contain citations to the record of authority." Any facts contained within that short paragraph are reiterated and cited appropriately in detail in the Facts section of the brief. The second incident of Respondent's complaints is simply a recitation as it is found on the docket. Appellant did in fact site appropriately to the records of the trial court considered, whether be they arguments, pleadings, or declarations. Nonetheless, these complaints do not address the issues that are before this panel, which are that evidence of the Seattle Building Codes, which directly relate to the ramp at issue regardless of when it was constructed, should have been provided to the jury. The jury made several inquiries as to what was the applicable Seattle Building Code. CP 332, 334, 471, 472, and 473. Appellant should have been allowed to present to the jury the various standards and codes that have been in effect through the life of Respondent's building and ramp. Clearly the Seattle Building

Codes were relevant under the Rules of Evidence and probative as to the negligence of Respondent.

DATED this 30th day of September, 2011.

RESPECTFULLY SUBMITTED,



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FRANCESCA GIUSTI, a single
person

Appellant/Plaintiff,
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CSK AUTO, INC., an Arizona
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CERTIFICATE OF SERVICE

COURT
DIVISION ONE
SEP 30 2011

I HEREBY DECLARE under penalty of perjury under the Laws of the State of Washington that on the below date and time, I delivered a copy of the Appellant's Reply Brief on September 30, 2011 to opposing counsel at:

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DATED this 30th day of September, 2011.



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