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No. 69623-8-1

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

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DAVID CHRISTMAN and ROBIN CHRISTMAN, individually,  
and as husband and wife and the marital community comprised  
thereof, individually,

*Appellant(s),*

v.

EASTGATE THEATRE, INC., d/b/a REGAL ENTERTAINMENT  
GROUP, a Washington Corporation; SIERRA CONSTRUCTION  
COMPANY, INC., a Washington Corporation; WAL-MART  
STORES, INC. (Number 2385), a Washington Corporation; and  
HOME ELECTRIC, a Washington Corporation,

*Respondent(s).*

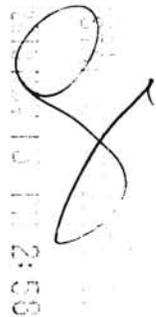
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**RESPONDENT EASTGATE THEATRE, INC., D/B/A REGAL  
ENTERTAINMENT GROUP'S REPLY BRIEF**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	COUNTER TO ASSIGNMENT OF ERRORS .....	1
III.	STATEMENT OF THE CASE .....	2
	A. Construction by Wal-Mart and Sierra Construction Company .....	2
	B. Facts Regarding April 3, 2009 Incident .....	3
IV.	SUMMARY OF ARGUMENT .....	5
V.	LAW AND ARGUMENT .....	6
	A. Summary Judgment Standard.....	6
	B. Mr. Christman Failed To Establish That Regal Cinemas Breached A Duty Of Care And Summary Judgment Was Properly Entered By The Trial Court .....	6
	C. Mr. Christman Failed To Set Forth A Material Issue Of Fact To Establish The Elements Set Forth In Restatement 2nd Of Torts .....	8
	1. Summary Judgment was Properly Granted by the Trial Court as There Was No Evidence of a Dangerous Condition .....	9
	2. Regal Cinemas Had No Actual Or Constructive Notice Of The Existence Of An Unreasonably Dangerous Condition .....	12
	3. Mr. Christman Presented No Evidence That Regal Cinemas Would Expect that Mr. Christman Would Not Discover Or Realize The Alleged Danger, Or Fail To Protect Himself Against It.....	14
	4. Summary Judgment Was Appropriate As The Alleged Danger Was Open And Obvious To Mr. Christman .....	15
VI.	CONCLUSION .....	17

## TABLE OF AUTHORITIES

### Cases

<i>Hitter v. Bellevue School Dist.</i> , 405, 66 Wn. App.391 399, 832 P. 2d 130, rev. den'd, 120 Wn.2d 1013 (1992) .....	7
<i>Hoffstatter v. City of Seattle</i> , 105 Wn. App. 596, 599, 20 P. 3d 1003 (2001).....	7, 9, 10, 11, 14, 16, 17
<i>Huston v. 1st Church of God</i> , 46 Wn. App. 740, 744, 732 P.2d 173, rev. denied, 108 Wn.2d 1018 (1987) .....	8
<i>Lybbert v. Grant County</i> , 141 Wash.2d 29, 34, 1 P. 3d 1124 (2000) .....	6
<i>Messina v. Rhodes Co.</i> , 67 Wn.2d 19, 27, 406 P.2d 312 (1965).....	8
<i>Mucsi v. Graoach Associeates Ltd. Partnership No. 12</i> , 144 Wn. 2d 847, 860, 31 P. 3d 684 (2001).....	15
<i>Tincani v. Inland Empire Zoological Soc.</i> , 124 Wn,2d 121, 127-28, P. 2d 621 (1994) .....	7
<i>Wiltse</i> , 116 Wn. 2d at 459 .....	12
<i>Young v. Key Pharms, Inc.</i> , 112 Wash.2d 216, 226, 770 P.2d 182 (1989).....	6, 7

### Other Authorities

Restatement (Second) of Torts, §343(a) .....	12, 13
Restatement 2nd Of Torts .....	8
Restatement 2nd of Torts §343 .....	9
<i>Restatement 2nd of Torts §343(b)</i> .....	14
Restatement 2nd of Torts §343A(1) .....	15

### Rules

CR 56(3).....	6
CR 56(e).....	6, 13

## I. INTRODUCTION

This appeal involves summary judgment dismissal of a personal injury claim brought by Plaintiff-Appellant David Christman. This court is asked to assess whether summary judgment was properly granted in favor of Defendants-Respondents Eastgate Theatre, Inc., d/b/a Regal Entertainment Group, Wal-Mart Stores, and Sierra Construction. Mr. Christman failed to produce evidence that Regal Cinemas breached its duty of care. Mr. Christman also failed to establish the existence of an unreasonably dangerous condition on the property.

## II. COUNTER TO ASSIGNMENT OF ERRORS

The issue on appeal is whether the trial court properly granted Regal Cinemas' motion for summary judgment, as Mr. Christman failed to present any evidence that Regal Cinemas was negligent, or that Regal breached its duty of care. The trial court determined there was no evidence that the grassy strip created an unreasonably dangerous condition. The trial court further assessed that Regal Cinemas would have no reason to anticipate potential harm from pedestrians walking on the grass, or that Mr. Christman would fail to pay attention to where he was walking or take due care for his own safety while walking

on the grass rather than use the stairs and handrail intended for that purpose.

Regal Cinemas maintains that the trial court correctly granted its motion for summary judgment which should be affirmed on appeal.

### **III. STATEMENT OF THE CASE**

#### **A. Construction by Wal-Mart and Sierra Construction Company**

Wal-Mart and Sierra Construction Company entered into a contract agreement to improve the Regal Cinema premises located at the Auburn Supermall. CP 65 Regal Cinemas had previously installed a large, wide concrete landing, with a three step concrete stairway and wheelchair accessible ramp leading to the sidewalk adjacent to the parking lot shared by Regal Cinemas and Wal-Mart. CP 65 Theater patrons parked on either side of the theater prior to the Wal-Mart construction, and theater patrons entered the theater from either one of the two side lots because the area in front of the theater was a dirt lot. CP 119

Wal-Mart improvements included relocating a portion of the drop off area and drive located in front of the Regal Cinema Stairway, CP 65. Wal-Mart also constructed a new parking area located directly in front of the theater, which had previously

been a dirt lot. CP 119-20 Sierra completed the construction requested by Wal-Mart, and the City of Auburn approved the construction on April 2, 2009. CP 65, 37-38

On the date the City approved the construction, a person cut across the landscaped strip rather than using the stairs and slipped on the grass. CP 130 Theatre patrons had not previously cut across the grass prior to the construction and restructure of the parking lot because the parking lots were located on either side of the theatre. CP 119 (Dep. Pg. 27, Lns. 12-13, 22-25, Pg. 28, Lns. 1-9) On April 2, 2009, the day before Mr. Christman fell, a person slipped on the grass, and the theater assistant manager placed yellow caution tape on the sidewalk to warn customers to not walk on the grass. CP 114, 130, 133, 134

**B. Facts Regarding April 3, 2009 Incident**

On April 3, 2009, Mr. Christman parked his vehicle in the parking lot located in front of Regal Cinemas which had just been constructed by Wal-Mart and Sierra Construction. CP 45 Mr. Christman intended to meet someone in the parking lot to purchase a bicycle for his son. CP 44, 48 He parked his car a distance from the theater so his son could try out the bike in the parking lot. CP. 48 (Dep. Pg. 35, Lns. 9-11) Mr. Christman determined to use the cash machine located outside of Regal

Cinema next to the front entrance of the theater to withdraw cash to purchase the bike. CP 45, 48

Stairs and steps are located directly in front of the theater which Mr. Christman could have used to withdraw money from the cash machine. CP 50, 139 However, rather than use the stairs, Mr. Christman elected to exit the sidewalk and cut across the across the grass to his truck located in the parking lot. CP 49 Mr. Christman was counting the money he had withdrawn from the cash machine when he exited the sidewalk and cut across the grass strip. CP 138 When Mr. Christman reached the bottom of the grass strip, he slipped near the sidewalk located near the sidewalk. CP 138 (Dep. P. 26, Lns. 14-21)

Mr. Christman testified that he could have used the stairs to walk to and from his vehicle to withdraw money from the ATM machine, but did not do so. CP 46, 50 (Dep. Pg. 31, Lns. 21-24, Dep. Pg. 43, Lns. 9-21). Mr. Christman acknowledged that it rains often in Washington State, and he was not surprised that the grass was wet at the beginning of April. CP 142 (Dep. Pg. 53, Lns. 11-23) Mr. Christman testified that other than the ground being damp, there was nothing else that contributed or caused his fall. CP 51 (Dep. Pg. 54, Lns. 6-10) Mr. Christman confirmed that he did not step into any holes or slip on any foreign objects when he cut across the grass planting strip. CP 51 (Dep. Pg. 54, Lns. 11-19). He also testified that the slope

looked like any other hill, and the grass strip did not appear steep or dangerous. CP 47

Regal Cinemas, Wal-Mart and Sierra Construction moved for summary judgment which was granted by the trial court, who determined as a matter of law that the grass did not represent an unreasonably dangerous condition. VRP 69, Lns. 16-25; VRP 73, Lns. 18-20; VRP 74, Lns. 6-13

#### **IV. SUMMARY OF ARGUMENT**

At summary judgment it was incumbent that Mr. Christman produce a genuine issue of material fact that the grass strip presented an unreasonably dangerous condition or that Regal Cinemas breached its duty to Mr. Christman. Regal Cinemas had installed a sidewalk, steps, stairs, and handrails for pedestrian use for ingress and egress to the theater. The grass strip located next to the sidewalk was for ornamentation purposes, and landowners are not required to maintain landscaped areas in the same condition as sidewalks, steps, and stairs.

It is general knowledge that pedestrians use more care and pay attention when walking on grass as opposed to using the sidewalk, however. Mr. Christman did not do so. The trial court properly ordered dismissal of the claims against Regal Cinemas as a matter of law, as there is no basis for a claim of

breach of duty or assessment of liability under any theory or fact as to Regal Cinemas.

## V. LAW AND ARGUMENT

### A. **Summary Judgment Standard**

The appellate court engages in de novo review of an order for summary judgment, and performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wash.2d 29, 34, 1 P. 3d 1124 (2000). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(3)

A defendant may move for summary judgment on the ground that plaintiff lacks competent evidence to support his claim. *Young v. Key Pharms, Inc.*, 112 Wash.2d 216, 226, 770 P.2d 182 (1989) When a plaintiff fails to introduce evidence to support an essential element of her claim, and no genuine issue of material fact exists, it is proper to dismiss plaintiff's complaint. *Id.* The trial court properly granted summary judgment in favor of Regal Cinemas as Plaintiff did not produce evidence to support the requisite elements of his premises liability claim.

### B. **Mr. Christman Failed To Establish That Regal Cinemas Breached A Duty Of Care And Summary**

### **Judgment Was Properly Entered By The Trial Court**

When the defendant in a negligence action moves for summary judgment challenging the sufficiency of the evidence of an essential element of the plaintiff's claim, to prevail the plaintiff must present sufficient evidence to establish the essential elements of its case. *Young, supra*. See also *Hitter v. Bellevue School Dist.* 405, 66 Wn. App.391 399, 832 P. 2d 130, *rev. den'd*, 120 Wn.2d 1013 (1992). When the plaintiff lacks evidence to support an essential element of his claim, and no genuine issues of material fact exist, the complaint is properly dismissed as a matter of law. *Id.*

In order to maintain a premises liability action, the Plaintiff is required to establish the requisite elements to maintain a negligence claim, which include duty, breach of duty, proximate cause, and damages. *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 599, 20 P. 3d 1003 (2001), *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, P. 2d 621 (1994). The general duty of a landowner to a business invitee is to exercise ordinary care to maintain its premises in a reasonably safe condition. *Messina v. Rhodes Co.*, 67 Wn.2d

19, 27, 406 P.2d 312 (1965) *Huston v. 1st Church of God*, 46 Wn. App. 740, 744, 732 P.2d 173, *rev. denied*, 108 Wn.2d 1018 (1987).

Regal Cinemas does not dispute that Mr. Christman was a business invitee on the date of the incident. However, Mr. Christman failed to set forth evidence that Regal Cinemas breached a duty to Mr. Christman, which is an essential element of plaintiff's claim. VRP 74, Lns. 1-5 Because Mr. Christman failed to present a genuine issue of material fact as to breach of duty, the trial court properly granted Regal Cinemas' summary judgment motion.

**C. Mr. Christman Failed To Set Forth A Material Issue Of Fact To Establish The Elements Set Forth In Restatement 2nd Of Torts**

Regal Cinemas' summary judgment motion maintained that Mr. Christman could not present evidence to meet the Restatement 2nd of Torts standard to establish a premises liability claim, which states as follows:

A possessor of land is subject to liability for physical harm caused by to his (or her) invitees by a condition on the land, if but only if he (she)

(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;

(b) should expect that they will not discovery or realize the danger or will fail to protect themselves against it, and

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

Restatement 2nd of Torts §343 (emphasis added)

Based upon Regal Cinemas' summary judgment motion and lack of evidence presented by Mr. Christman, the trial court's ruling confirmed there was no evidence that the grass strip presented an unreasonable danger to the plaintiff, that Regal Cinemas had actual or constructive notice of the alleged danger, or that Regal Cinemas would have knowledge or reason to know that Plaintiff would fail to take due care while walking on the landscaped grass strip.

**1. Summary Judgment was Properly Granted by the Trial Court as There Was No Evidence of a Dangerous Condition**

Regal Cinemas' motion for summary judgment established that there can be no breach of duty when there is no evidence than an unreasonably dangerous condition existed on the property. Regal Cinemas cited the case of *Hoffstatter*, in which the Plaintiff alleged that several defendants in control of a landscaped strip between parking spaces were negligent, when

the Plaintiff tripped on uneven bricks in the strip and was injured. The Court of Appeals determined that the landscaped strip was not unreasonably dangerous, and that defendant landowners were not negligent as a matter of law.

The Court of Appeals clearly stated that the standard for sidewalks is very different than the standard for planting strips:

*[A] reasonably safe condition is not the same for a parking strip as it is for a sidewalk because their purposes are different. In contrast to a sidewalk, which is devoted almost exclusively to pedestrian use . . . parking strips frequently are used for beautification, such as grass, shrubbery, trees or other ornamentation. 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.*

*Hoffstatter*, 105 Wn. App. At 600 (emphasis added).

Regal Cinemas provided stairs, steps, and a handrail which was intended for pedestrian use. Regal Cinemas did not intend that the grass strip located directly next to the stairs and steps to be used by pedestrians, because the grass was installed for ornamental purposes, and was not intended to be used as a sidewalk.

The grass strip located next to the stairs is similar to the parking strip referenced in *Hoffstatter*, as both the parking strip and the grass strip at the theater were installed for beautification

and ornamentation of the property. In contrast, sidewalks are installed for walking, and as the Court of Appeals in *Hoffstatter* emphasized, “*although pedestrian use of parking strips must be anticipated, they are not sidewalks and cannot be expected to be maintained in the same condition.*” *Id.*

Regal Cinemas provided stairs with a handrail and a sidewalk to enter and exit the theater premises. Mr. Christman cannot conclude that Regal Cinemas intended the grass to be used as a sidewalk. Mr. Christman attempts to establish through expert testimony that the grass strip should be maintained in the same condition as a sidewalk, including the installation of handrails. The trial court determined that the expert testimony offered by Mr. Christman was not useful or necessary in this case. Instead, the trial court relied on *Hoffstatter* which definitively determined that planting strips are not required to be maintained in the same manner as sidewalks.

The trial court correctly determined as a matter of law that the grass strip located directly next to the stairs and installed for ornamental purposes was not unreasonably dangerous; and Regal Cinemas did not breach its duty to Mr. Christman.

**2. Regal Cinemas Had No Actual Or Constructive Notice Of The Existence Of An Unreasonably Dangerous Condition**

Mr. Christman, as the Plaintiff/Appellant, has the burden to produce evidence that Regal Cinemas had actual or constructive notice of the alleged unreasonably dangerous condition *Wiltse*, 116 Wn. 2d at 459, Restatement (Second) of Torts §343(a). The trial court correctly determined that the grass slope did not constitute an unreasonably dangerous condition as a matter of law. The Court also confirmed that Mr. Christman produced no evidence that Regal Cinema had actual or constructive notice of an unreasonably dangerous condition, because the presence of the grass strip did not present an unreasonable risk of harm.

The grading of the grass landscaping located in front of Regal Cinema was approved by the City of Auburn Public Works Department on April 2, 2009, the day before Mr. Christman fell. More importantly, the trial court properly dismissed the claims against Regal Cinemas because no one had walked across the grass before the construction was completed on April 2, 2013, one day earlier.

Plaintiff has attempted to create an issue of fact by contending theater employees could see patrons walking across the grass. However, as pointed out in Wal-Mart's brief, Mr. Christman did not attach affidavits of persons who have personal knowledge or documentation to support that the theater employees could see patrons walking on the grass. It is necessary to submit supporting materials in the form of an affidavit from a witness who has personal knowledge to identify whether theater employees could see patrons cut across the grass, and Plaintiff's expert and his attorney cannot speculate as to what theatre employees did or did not observe. CR 56(e) .

However, even if employees did see patrons walking on the grass, this is not evidence of actual or constructive notice that the grass strip involved an unreasonable risk of harm to business invitees. The standard set forth in the Restatement is not just having knowledge that a condition may exist, but the condition must present an unreasonable risk of harm. Restatement (Second) of Torts, §343(a). Mr. Christman presented no evidence that the grass strip represented an unreasonable risk of harm, and the court ruled that the grass strip was not an unreasonably dangerous condition as a matter

of law. A complete failure of proof concerning this essential element is fatal to Mr. Christman's case, and summary judgment was appropriately granted by the trial court.

**3. Mr. Christman Presented No Evidence That Regal Cinemas Would Expect that Mr. Christman Would Not Discover Or Realize The Alleged Danger, Or Fail To Protect Himself Against It**

Regal Cinemas' Summary Judgment correctly established that Mr. Christman was required to produce evidence that the claimed dangerous condition was a condition that Regal would "expect that [plaintiff] will not discover or realize the danger or will fail to protect themselves against it. *Restatement 2nd of Torts §343(b)* However, Plaintiff did not produce any such evidence, but only stated that Regal Cinemas should have anticipated that business invitees would walk on the grass instead of the sidewalk.

In *Hoffstatter*, the court acknowledged that tree roots caused the uneven surface of the bricks, which was a common condition in an area set aside for landscaping. The court emphasized that this condition was open and obvious, and "it was reasonable that a pedestrian will pay closer attention to

*surface conditions while crossing a landscaped parking strip than when walking on a sidewalk.” Id.*

Mr. Christman chose to walk across the grass landscaped strip, and it was reasonable for Regal Cinemas to expect that Mr. Christman would pay attention to the surface conditions and proceed with due care when he cut across the lawn rather than use the concrete walkways. Nor was Regal's landscaped strip unreasonably dangerous because it was not maintained as a sidewalk. The trial court was correct in granting Regal Cinemas' summary judgment motion.

#### **4. Summary Judgment Was Appropriate As The Alleged Danger Was Open And Obvious To Mr. Christman**

A landowner is not liable to protect business invitees from known or obvious dangers:

A possessor of land is not liable to his invitees for physical harm caused by 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 2nd of Torts §343A(1)

A landowner is not liable for harm caused by open and obvious dangers. *Mucsi v. Graoach Associates Ltd. Partnership No. 12*, 144 Wn. 2d 847, 860, 31 P. 3d 684 (2001).

Regal Cinemas' summary judgment identified that like the uneven bricks in *Hoffstatter*, the grassy surface where Mr. Christman slipped was in plain sight, and entirely open and obvious to Mr. Christman and theater patrons. As stated above, Mr. Christman failed to present evidence to raise a genuine issue of material fact of the existence of a dangerous condition, or that Regal Cinemas failed to protect Plaintiff from any alleged danger in the landscaping strip that was not hidden and was open and obvious to theater patrons.

Mr. Christman could have used the sidewalk, steps, and stairs to access the ATM machine, but he did not. Mr. Christman could also have used the stairs to return to his vehicle, but instead he voluntarily chose to take a short cut across the landscaped grass to reach his vehicle. He was counting his cash to ensure he had withdrawn \$250.00 and was not paying attention to where he was walking when he slipped and fell.

Mr. Christman should have been aware of the potential risk of walking on grass instead of the stairs and sidewalk. Mr. Christman presented no evidence that the danger of possibly slipping on grass was not known to him, or the fact that when

grass was wet it may be slippery, which is a common condition in the Northwest. Summary Judgment in favor of Regal Cinemas and all defendants was proper.

## VI. CONCLUSION

Plaintiff-Appellant Christman has failed to meet his burden to produce evidence sufficient to raise an issue of material fact, and the trial court's order should be affirmed.

Mr. Christman failed to produce evidence that the landscaped grass strip was an unreasonably dangerous condition. *Hoffstatter* affirmed that planting strips are not required to be maintained in the same condition as sidewalks, and landowners could anticipate that pedestrians would use more caution when walking on a grass surface as opposed to a cement sidewalk. Mr. Christman failed to produce evidence that Regal Cinemas had actual or constructive notice of the existence of an unreasonably dangerous condition. Mr. Christman failed to produce any evidence that Regal Cinemas should have expected that patrons would not discover or realize the alleged danger, or fail to protect themselves against it. Mr. Christman also failed to produce evidence that Regal Cinemas

should have anticipated this was a dangerous condition because it was known or obvious.

There is no evidence provided by Mr. Christman that Regal Cinemas breached its duty of care. Regal provided a wide concrete stairway and a concrete ramp that Mr. Christman elected not to use. Summary judgment was properly entered for Regal Cinemas and all defendants, and the trial court's order should be affirmed.

DATED this 14<sup>th</sup> day of November, 2013.

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## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of:

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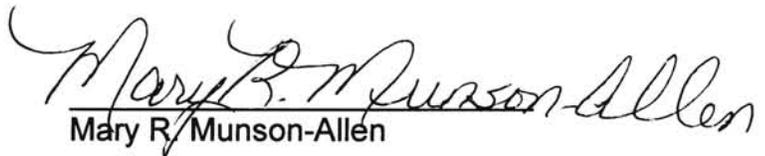
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DATED at Seattle, Washington, this 14<sup>th</sup> day of  
November, 2013.

  
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