Supreme Court No._____

Court of Appeal Cause No. 59348-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PAUL A. GOETSCH,

Respondent,

v.

DAVID ALLEN,

Appellants,

PETITION FOR REVIEW

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TABLE OF CASES AND AUTHORITIES

Washington Cases

Rules

Other

I. IDENTITY OF MOVING PARTY

David Allen, the defendant in the trial court and the respondent in the Court of Appeals, asks this Court to grant the petition for review of the Court of Appeals decision identified in part II.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its decision on September 10, 2024. (A copy of the unpublished opinion is attached as Appendix A.) Oral argument was not permitted by the Court of Appeals.

III. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals decision to broaden the exception to "no duty for an open and obvious condition" exposes every property owner to liability when a contractor is hired to work on their premises, when the contractor is the professional and in a better position to assess dangers. Review is warranted pursuant to RAP 13.4(b)(1).

2. The Court of Appeals decision to construct an inference from facts not in the record goes against public policy and

centuries of jurisprudence. Review is warranted pursuant to RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

A. Overview

This lawsuit attempts to impose liability on a landowner for an injury caused by the Appellant's gain of momentum while walking down a sloping side yard. At all times, the conditions were open and obvious to the Appellant, Mr. Goetsch. The Petioner, Mr. Allen hired Mr. Goetsch to perform electrical work on his property. While doing that work, Mr. Goetsch gained momentum while going down a rounded descent on the side yard of Mr. Allen's property. When Mr. Goetsch tried to slow down, he grabbed a door frame to slow his momentum. He completed the work on the Allen property and didn't seek any treatment for any claimed injuries for one to two months later.

Mr. Goetsch concedes that at all times material, the condition of the "rounded decent" was open and obvious. It is well established, and the Court of Appeals agrees, that a

landowner is not liable for open and obvious conditions on the landowner's premises. There is an exception to this general rule. In order to avail himself of this exception, Appellant needed to establish three elements: (1) that Mr. Allen knew the condition created an unreasonable risk of harm, (2) that Mr. Allen should expect that Mr. Goetsch would not discover the risk or that he would fail to protect himself from the risk, and (3) that Mr. Allen failed to exercise reasonable care to protect Mr. Goetsch from the danger.

On summary judgment, this required Mr. Goetsch to present evidence creating an issue of fact on each one of these elements. He failed to do so. Goetsch failed to present evidence indicating that his only alternative was to either expose himself to the dangerous condition or forgo taking the job. The trial court correctly ruled in favor of Mr. Allen. The Court of Appeals incorrectly inferred that "Allen had reason to expect Goetsch would choose to encounter the presumed danger posed by the hill because Goetsch wanted to finish the job and get paid". The

record does not provide any factual basis to support such an inference.

B. Background of Condition

Mr. Allen retained Mr. Goetsch, an independent third-party electrician, to perform electrical work at his premises. At least one day before the alleged incident, Mr. Goetsch came to the site, walked around, and went down the side yard in question. CP 28, page 15, lines 2-17. Mr. Goetsch traversed the side yard maybe twice before the incident. CP 32- 33, deposition page 33, line 25 – deposition page 34, lines 1-4. Mr. Goetsch described the area as a "rounded decent" and that the area was bare, dry, and not much vegetation. CP 28, page 16, lines 10-12. On the day of the incident, the weather was warm and dry. CP 28, page 14, lines 8-11. And, at all times material, Mr. Goetsch was able to clearly and visibly see the area in question. CP 28, page 17, lines 2-8.

C. Incident

Mr. Goetsch's full description of the event can be found at CP 30, page 24 line 4 – CP 32, page 30, line 6. On that day, Mr. Goetsch was carrying a heavy drill. As per his own words, while going down the rounded decent, Mr. Goetsch testified:

> **Q. Okay. Now why don't you describe for me in your own words what happened on the day of the accident?**
> A. I was carrying my drill. It's a heavy drill. I was carrying both hands. And I was taking – going down the hill, but taking kind of baby steps, you know how you kind of shuffled forward to not -- because you can't take a stride down this hill. And I was taking baby steps down there. And as I got closer I had planned to -- you can see the door stands outward. I was planning on, you know, as I got closer to reach out, grab the door, stopping my descent and pulling myself over towards the opening. Do you want me to go on?

CP 30, Goetsch Deposition, page 24 lines 4- 15.

> **Q. Okay. And you said you were using both hands to carry that. Why were you using both hands?**
> A. To kind of keep the weight of the drill in the center of my body so that it wasn't throwing me to the left or right.
> **Q. Okay. Were you concerned about your speed descending down that hill? Is that why you were saying you were going to grab on to the door once you got to the bottom?**

A. Yes. Yes.

Q. And tell me in your own words what happened then.

A. Well, as I was getting closer my body was starting to not keep up with -- I just -- my baby steps were becoming freakishly a little bit faster. I reached out, grabbed the door intending to stop myself, and my body weight kept going. My arms stretched out. I kind of heard something. And I couldn't -- I couldn't stop my forward momentum, so I had to let go. I threw the drill off to the left of me and at that point I don't remember so much. I think I went into a summersault at that point and ended up on my back 4 or 5 feet below the house there.

Q. Okay. And to back up a little bit here, did Mr. Allen ever tell you these are the kinds of tools that you need to use to complete your work?

A. No.

CP 30, Goetsch Deposition, page 25, lines 18 – page 26, line 19.

Q. Mr. Goetsch, I just want to make sure that I'm understanding the mechanism of how this accident occurred. And you testified earlier -- and, correct me if I'm wrong at any point -- that you were taking baby steps down the hillside and then your momentum sped up to the point that caused you to lose control; is that correct?

A. Starting to. But that's when I reached out and grabbed the door. But couldn't stop myself.

Q. Okay. And this wasn't a situation where the ground underneath you slid away, is that -- I'm

drawing a distinction between the ground sliding versus your momentum just sped up and that caused you to reach out?
A. Yes. Yes.
Q. So it is the momentum?
A. Yes. Yes.

CP 36, Goetsch Deposition, page 48, lines 4-19.

The "rounded descent" was not Mr. Goetsch's only route of access. He could have gone around the house on the other side. CP 28, page 17, lines 10-17.

The appellant makes note that stairs were installed after this event.[1] The stairs were installed as part of the finished landscaping at the end of the project. CP 69, lines 16-25.

V. ARGUMENT

A. Exception to No Duty When Condition Is Open and Obvious Should Not Be Broadened Here

The Supreme Court should accept review of this matter because the Court of Appeals bases its decision on one Division II case (*Mihaila*) with case specific facts in the record that can be

1 This evidence should not be considered as evidence pursuant to ER 407.

distinguished from the matter at hand. The Court of Appeals decision here is based on supposition alone. The Court of Appeals was not permitted to draw an inference without a factual basis in the record such as an affidavit. That affidavit does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Snohomish County v Rugg*, 115 Wn.App. 218, 224, 61 P.3d 1184 (2002). Here, there is no affidavit from Goetsch that he would choose to encounter the danger because he wanted to finish the job and get paid. The Court of Appeals manufactured the idea that Goestch felt this way.

Mr. Goetsch's status as a business invitee is undisputed. Even so, Washington is clear and unambiguous. Landowners have no duty to warn of open and obvious conditions. *Musci v. Graoch Assocs Ltd. P'ship No. 12*, 144 Wn.2d 847, 860 31 P.3d 684 (2001); Restatement (Second) of Torts § 343A(1). In order to avoid summary dismissal, Mr. Goetsch was required to present

evidence creating a genuine issue of material fact on three elements: (1) the landowner knows of a condition that creates an unreasonable risk of harm; (2) should expect the invitees would not discover the danger or would fail to protect themselves from it; and (3) fails to exercise reasonable care to protect invitees against the danger. *Kamla v. Space Needle Corp.*, 147 Wash. 2d 114, 125-26, 52 P.3d 472 (2002). A landowner is not liable for alleged dangers if the danger is known or obvious. *Iwai v. State,* 129 Wash. 2d 84, 94, 915 P.2d 1089 (1996), *citing* Restatement (Second) of Torts § 343A at 218. In this case, Mr. Goetsch failed to present evidence of the threshold element, i.e. dangerous condition. He did not offer any expert testimony or other admissible evidence indicating that the rounded decent is a dangerous condition. For this reason alone, the trial court's dismissal was correct.

Mr. Goetsch and the Court of Appeals failed to address the decision of *McDonald v. Cove to Clover,* 180 Wash. App. 1, 7, 321 P. 3d 259 (2014) citied by Mr. Allen on summary

judgment. In *McDonald,* the plaintiff slipped on wet grass on a slope at a concert venue. *Id.* at 3. The court examined whether wet grass on a slope constituted a dangerous condition and whether the landowner would foresee that an invitee would fail to protect themselves against the obvious danger. *Id.* at 6. The court noted that there is no published Washington decision or elsewhere that wet grass is a dangerous condition. *Id.* Summary dismissal was granted. Likewise, in this case, Mr. Goetsch has failed to present evidence or cite to a Washington case or elsewhere that has held a "rounded descent" was a dangerous condition that a landowner should expect an invitee to fail to protect themselves against. Just as in *McDonald,* summary judgment was appropriate in this case.

Regardless of whether or not the slopping area is a "dangerous condition", at all times material, Mr. Goetsch knew of the condition. He had traversed the same area twice before. He did not trip or slide as a result of any condition on the property. Per his own testimony he gained momentum walking

down the side yard while carrying his heavy drill. There was no evidence presented of any impairment or special needs indicating that Mr. Goetsch was not able to fully appreciate the area he traversed or that Mr. Allen was aware he would traverse that area with a heavy drill altering his balance.

B. In Order to Find an Inference, the Court of Appeals Must Find a Factual Basis in the Record.

The Supreme Court should accept review of this matter because public policy demands the longstanding history of landowner's duty to invitees be maintained. Expanding the exception to the general rule that a landowner owes no duty to invitees for open and obvious conditions, such that virtually all landowners will be liable for contractors injured on their premises, regardless of whether the condition was open and obvious, will have far reaching deleterious consequences. It will flip the obligation for safety from the trained and experienced professional's unfairly to the homeowner.

Washington courts have repeatedly held that a landowner does not owe a duty to protect a tenant or guests from open and obvious dangers. *Frobig v. Gordon,* 124 Wash. 2d 732, 735, 881 P.2d 226 (1994). A landowner "is not the insurer of all those who may enter or pass by his land." *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wash. 2d. 217, 233, 802 P.2d 1360 (1991). In this case, Mr. Goetsch was fully aware of the area in question. It was all open and obvious. There was no evidence presented to the contrary. Additionally, Mr. Goetsch did not present evidence that he would fail to protect himself. In the absence of this evidence, the trial court correctly concluded there were no genuine issues of material fact when it granted summary dismissal.

C. The Record Is Devoid of Any Evidence Warranting Application of *Mihaila.*

The Court of Appeals relies almost entirely on *Mihaila v. Troth,* 21 Wash. App. 2d 227, 505 P.3d 163 (2022) to conclude that Mr. Allen should have expected physical harm to

a professional electrician walking down a slopping yard. For several reasons, *Mihaila* is not applicable.

First, and foremost, in *Mihaila*, there was an admittedly a dangerous rod protruding above the ground. The court specifically focused on the fact that Mihaila "could not eliminate the dangerous condition and would proceed to encounter the grounding rod despite the danger in order to complete the roof job because the advantage – getting paid for the job – outweighed the risk." *Id.* at 236. The court specifically noted that conclusion was based upon Mihaila's declaration that he could not complete the job without encountering the grounding rod in order to get paid for the job. *Id.*

In this case, there is no declaration from Mr. Goetsch indicating he could not have avoided the alleged dangerous condition or that he chose to still encounter the risk because he needed to complete his work and get paid. The record is clear that Goetsch was not trying to complete a job, rather he was just about to start it. Further, Mr. Goetsch admits he could have

gone around the other side of the house and avoided the rounded descent entirely which he did after the incident. As such, the crucial fact question presented in *Mihaila* is not present in this case.

Second, Mihaila offered the testimony from a safety expert who opined that the rod sticking 15-16 inches about the ground presented an unreasonably hazardous and dangerous condition. *Id.* at 231. This created a question of fact regarding safety. In this case, there is no safety expert opinion creating any question of fact.

The *Mihaila* decision rests upon a discrete exception to the general rule that a landowner is not liable to an invitee for dangers that are obvious. In order to avail himself of this exception, plaintiff was required to present specific evidence to create a question of fact. He failed to do so. As such, Summary Judgment was appropriate. Nevertheless, the Court of Appeals inferred that "Allen had reason to expect Goetsch would choose to encounter the presumed danger posed by the hill because

Goetsch wanted to finish the job and get paid". *Goetsch v. Allen*, p. 9. Again, the record contains no such facts that would allow this inference to be made. All contractors want to "finish and job and get paid". The Court of Appeals ruling means that virtually all landowners now owe a duty to invitee-contractors even when the condition is open and obvious under all circumstances.

Finally, the slope, hill, or rounded descent was a "natural condition". A licensee's full understanding that a natural condition is dangerous ends any liability of the landowner for the condition. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 134, 875 P.2d 621 (1994). Mr. Goetsch is a competent adult that is charged with the basic understanding of the condition on Mr. Allen's property and had successfully navigated it at least once prior. To the extent the Court finds the condition dangerous it must also conclude the yard was an open and obvious natural condition thereby ending the analysis. In *Mihaila*, the landowner's "protruding grounding rods" were not

part of a natural condition. *Mihaila* at 229. Mr. Allen owed no duty to Mr. Goetsch.

The Court of Appeals acknowledges that Allen had visually observed Goetsch successfully navigate the slope at least once prior and would have no reason to believe that he could not do so again in the future. The record is absent Goetsch complaining of the condition, asking for an alternate route, or informing Allen he would have to take this path with heavy equipment. The record is moreover devoid of evidence that Goetsch did not understand how gravity works.

VI. CONCLUSION

Based on the above arguments and authorities, David Allen respectfully requests this Court grant his Petition for Review and reverse the Court of Appeal's decision.

I certify that this memorandum contains 2,873 words, in compliance with the RAP18.17.

Respectfully submitted this 10th day of October, 2024.

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APPENDIX TO
PETITION FOR REVIEW

Certificate of Service

I, Sonia Chakalo, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the above-referenced action.

2. I hereby certify that I caused to be filed on October 10, 2024, an original Petition for Review (a copy of which is attached) with the Court of Appeals Division I, and a copy of the aforementioned document was also served on:

David P. Horton, WSBA #27123 Kitsap Law Group 3212 NW Byron Street. Ste 101 Silverdale, WA 98383 T: 360/692-6415 F: 360/692-1257 dhorton@kitsaplawgroup.com tracey@kitsaplawgroup.com lisa@kitsaplawgroup.com kelly@kitsaplawgroup.com	**[X] E-Mail** [ ] 1st Class U.S. Mail [ ] Legal Messenger [ ] Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of October, 2024, at Seattle, Washington.

/s/ Sonia Chakalo
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Filed
Washington State
Court of Appeals
Division Two

September 10, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAUL A. GOETSCH, Appellant, v. DAVID ALLEN,[†] Respondent.	No. 59348-3-II UNPUBLISHED OPINION

CHE, J. — Paul Goetsch appeals the trial court's grant of summary judgment in favor of David Allen.

While working as an electrician on Allen's property, Goetsch fell down a steep hill leading to the worksite. Goetsch injured his bicep and sued Allen for negligence. Allen moved for summary judgment on the grounds that the hill was not a dangerous condition. Allen claimed that even if it was a dangerous condition, the hill was open and obvious such that Allen owed no duty of care to Goetsch despite Goetsch's status as an invitee on Allen's property. The trial court granted summary judgment.

On appeal, Goetsch argues there are genuine issues of material fact regarding whether the hill was a dangerous condition and whether Allen owed and breached a duty to Goetsch.

[†] On appeal, the respondent is inaccurately captioned as "Paul" Allen in the parties' briefs.

We hold there are genuine issues of material fact regarding whether the hill constituted a dangerous condition and whether Allen owed Goetsch a duty of care. We reverse the summary judgment order and remand to the trial court for further proceedings consistent with this opinion.

FACTS

Allen hired Goetsch, an electrician, to perform electrical work in the crawl space of a pool house on Allen's property. Allen's pool house is situated on a hill. The door to the crawl space is at the bottom of the hill and is only accessible from the exterior of the pool house.

Goetsch initially visited Allen's property to determine the scope of the job, and Allen led Goetsch down the hill to the crawl space door. According to Goetsch, the hill was steeper than it looked. Goetsch further described the hill as "bare, dry, [and] [without] much vegetation," and that the soil was "a little bit loose on top." Clerk's Papers (CP) at 28, 30. Goetsch recalled that during the initial visit, he and Allen both commented that the hill was difficult to descend. Later, Allen denied having difficulty traversing the hill during that visit and he did not notice Goetsch having any difficulty.

When Goetsch returned to Allen's property to begin working on the electrical system, Goetsch needed to carry a heavy drill down to the crawl space. The drill was heavy enough that Goetsch had to use both hands to carry it as he descended the hill. Goetsch took "baby steps" to maintain a safe speed while descending the hill because, "there was nothing to put [his] feet against." CP at 30.

Due to the steep terrain and added weight of the drill, Goetsch was unable to maintain a safe speed down the hill to the crawlspace. His steps quickened, and he lost control. Goetsch reached for the crawl space door to stop himself, but his "body weight kept going," and he "went

into a summersault . . . and ended up on [his] back about 4 or 5 feet below the [pool] house." CP at 31. Goetsch laid there for a few minutes, got up, and went home after notifying Allen that he could not continue his work unless Allen built steps to the work area. Allen always planned to install stairs into the hill.

Later, Goetsch returned to complete the work and through his own exploration of the property, he learned of an alternative route to the crawl space door. The alternative route was longer, requiring Goetsch to walk around the pool house and across the backyard without descending the hill. Allen did not show Goetsch the alternative path to access the crawl space.

Approximately a month later, Goetsch sought medical attention and learned he tore his bicep.

Goetsch filed a negligence suit against Allen. Goetsch claimed that Allen owed him a duty of care and that Allen breached that duty by failing to exercise reasonable care to protect Goetsch from the danger posed by the hill.

Allen moved for summary judgment. In his motion, Allen argued that the hill was not dangerous, and that even if it were, the condition of the hill was open and obvious. Allen also argues that because the condition of the hill was open and obvious, he did not owe Goetsch a duty of care despite Goetsch's status as an invitee.

In response, Goetsch argued that the hill was dangerous and that he had to encounter the hill to complete the job. Goetsch contended there was a genuine issue of material fact regarding whether Allen should have expected some harm to Goetsch when he encountered the hill.

In his reply, Allen argued that Goetsch failed to present evidence that the hill was dangerous or that Goetsch needed to encounter the danger to complete his work. The trial court granted summary judgment in favor of Allen.

Goetsch appeals.

ANALYSIS

I. SUMMARY JUDGMENT

Goetsch argues there are genuine issues of material fact as to whether the hill constituted a dangerous condition and whether the exception for open and obvious conditions applies. We agree genuine issues of material fact exist that preclude summary judgment.

A. *Standard of Review*

We review a trial court's decision on summary judgment de novo. *Galassi v. Lowe's Home Ctrs, LLC*, 27 Wn. App. 2d 593, 597, 534 P.3d 354 (2023). Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c); *Galassi*, 27 Wn. App. 2d at 597.

A genuine issue of material fact exists where reasonable minds could draw different conclusions on the same factual issue. *Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 768, 508 P.3d 193 (2022), *review granted*, 1 Wn.3d 1001 (2023). We consider the facts and inferences from the facts in the light most favorable to the nonmoving party. *Haley v. Amazon.com Servs., LLC*, 25 Wn. App. 2d 207, 220, 522 P.3d 80 (2022).

When a party moves for summary judgment, it bears the burden of demonstrating that no genuine issue of material fact exists. *Kosovan v. Omni Ins. Co.*, 19 Wn. App. 2d 668, 679, 496 P.3d 347 (2021). If the moving party does not satisfy its initial burden of proof, summary

judgment should be denied. *Welch v. Brand Insulations, Inc.*, 27 Wn. App. 2d 110, 115, 531 P.3d 265 (2023). If the moving party makes that showing, the burden shifts to the nonmoving party who must "'set forth specific facts evidencing a genuine issue of material fact for trial.'" *Id.* (quoting *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995)).

B. *Genuine Issues of Material Fact Exist Precluding Summary Judgment*

1. *Dangerous Condition*

Goetsch argues there is a genuine issue of material fact as to whether the hill constituted a dangerous condition. Goetsch cites to both his and Allen's difficulty descending the hill and that the general steepness of the hill made it a dangerous condition, which created genuine issues of material fact. We agree with Goetsch.

In premises liability cases, the duty a property owner owes to an entrant depends on the entrant's status as either a trespasser, licensee, or invitee. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 467, 296 P.3d 800 (2013). Generally, a landowner owes invitees a duty of care, which is an affirmative obligation to make the land safe for invitees. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 138, 875 P.2d 621 (1994). A landowner is liable for physical harm to their invitees caused by a dangerous condition on the land only if the landowner:

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

RESTATEMENT (SECOND) OF TORTS § 343. A condition is considered dangerous if it poses an unreasonable risk of harm. *Schwartz v. King County*, 200 Wn.2d 231, 240, 516 P.3d 360 (2022).

Generally, whether a condition is dangerous is a question of fact. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

Here, the parties do not dispute that Goetsch held the status of business invitee while on Allen's property. Goetsch submits that Allen owed him a duty of care because Allen knew the hill was dangerous given that he previously planned to install steps into the hill. It is undisputed that, prior to Goetsch's incident, Allen had planned to install steps into the hill. A reasonable inference based upon these facts is that Allen had knowledge of some risk of harm posed by the hill.[1]

In *Williamson v. Allied Grp., Inc.*, the defendant argued there was no evidence suggesting a hill constituted a dangerous condition. 117 Wn. App. 451, 459, 72 P.3d 230 (2003). Division One of this court held that the plaintiff's testimony describing the hill was sufficient to show a genuine issue of material fact existed so as to preclude summary judgment. *Id.* at 460-61. It reasoned, "A jury could find, from [plaintiff's] testimony in her deposition, that the . . . route was steep, slippery, crumbly, and sufficiently dotted with rocks to cause anxiety and uncertainty in one descending it." *Id.*

Similarly, Goetsch testified that the soil of the hill was "a little bit loose on top," lacked vegetation, and was steep, such that he had to take "baby steps" because "there was nothing to

[1] Under ER 407, a party may not introduce evidence of subsequent remedial measures to prove negligence or culpable conduct. Here, we consider Allen's prior plan to install steps into the hill because it speaks to Allen's knowledge of the condition of the hill prior to Goetsch's incident. We do not consider any remedial action taken *after* the incident. ER 407; *see also Helmbreck v. McPhee*, 15 Wn. App. 2d 41, 55, 476 P.3d 589 (2020) (Generally, remedial measures taken after an event are properly excluded under ER 407).

put [his] feet against." CP at 30, 32. Goetsch also testified that both he and Allen had difficulty making the descent when Goetsch initially surveyed the job.

Taking the facts and reasonable inferences in the light most favorable to Goetsch, reasonable minds could draw different conclusions on the factual issue of whether the hill posed an unreasonable risk of harm and therefore constituted a dangerous condition. This creates a genuine issue of material fact and Allen was not entitled to summary judgment on this issue.

2. *Exception to an Open and Obvious Danger*

Goetsch contends Allen owed him a duty of care despite the obviousness of the hill being a dangerous condition because an exception to the open and obvious rule applies.[2] Specifically, Goetsch maintains Allen should have anticipated that Goetsch would proceed to encounter the hill because the advantages of Goetsch encountering the hill outweighed the apparent risks. Allen argues the hill is an open and obvious danger, so he owes Goetsch no duty of care. We agree with Goetsch.

Landowners typically have no duty to protect invitees from open and obvious dangers. *Sjogren v. Props. of Pac. Nw., LLC*, 118 Wn. App. 144, 148-49, 75 P.3d 592 (2003). But in limited circumstances, landowners have a duty to protect invitees even from known or obvious dangers. RESTATEMENT (SECOND) OF TORTS § 343A; *see also Mihaila v. Troth*, 21 Wn. App. 2d

[2] Goetsch submits that a genuine issue of material fact exists as to whether the danger posed by the hill was open and obvious because he did not realize the danger until he was halfway down the hill while carrying the drill. Goetsch did not appear to raise this argument below. When reviewing a grant of summary judgment, "the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. *See Johnson v. Lake Cushman Maint. Co.*, 5 Wn. App. 2d 765, 780, 425 P.3d 560 (2018) ("An argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal."). Because Goetsch failed to make the argument at the trial court that the danger was not open and obvious, we decline to address this issue.

227, 233, 505 P.3d 163 (2022). Whether a dangerous condition is open and obvious is a question of fact. *Tincani*, 124 Wn. 2d at 135.

A landowner owes a duty of reasonable care to protect invitees from known or obvious dangers when the possessor has reason to (1) expect that an invitees' attention may be distracted, such that the invitee will not discover what is obvious or will forget what the invitee has discovered, or fail to protect against it, and (2) anticipate that an invitee will choose to encounter the risk because, to a reasonable person in the position of the invitee, the advantages outweigh the apparent risk. *Tincani*, 124 Wn. 2d at 139; *see also Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847, 860, 31 P.3d 684 (2001). In such cases, a duty exists when the landowner "should anticipate the harm despite such knowledge or obviousness." RESTATEMENT (SECOND) OF TORTS § 343A(1). Whether the defendant owes a duty to the plaintiff is a question of law. *Tincani*, 124 Wn. 2d at 128.

Here, the parties did not appear to dispute at the trial court that the hill was an open and obvious danger. Thus, the question becomes whether the landowner, Allen, owed a duty of reasonable care to protect his invitee, Goetsch, from known and obvious dangers.

In *Mihaila*, homeowners hired a contractor to perform roofing work on their property. *Mihaila*, 21 Wn. App. 2d at 230. To perform his job, the contractor had no choice but to encounter a grounding rod that stuck out of the ground, and he subsequently fell off a ladder and impaled himself on the rod. *Id.* at 230. This court inferred that the homeowners had reason to expect the contractor would proceed to encounter the open and obvious danger because to the contractor, the advantages of encountering it and getting paid, outweighed the apparent risks. *Id.* at 236. This court held that summary judgment was inappropriate because a genuine issue of

material fact existed regarding "whether the [homeowners] should have anticipated some harm even though the danger the grounding rod presented was known and obvious." *Id.* at 236-37.

We find *Mihaila* persuasive. Similar to *Mihaila*, when we consider the facts in the light most favorable to Goetsch, we can reasonably infer that Allen had reason to expect Goetsch would choose to encounter the presumed danger posed by the hill because Goetsch wanted to finish the job and get paid. *Id.* at 236. Goetsch believed he had to descend the hill to access the crawl space because Allen did not show or inform Goetsch of any alternative means to access the work space.

Furthermore, like the homeowners in *Mihaila*, Allen had reason to anticipate that to Goetsch the advantages of completing the electrical job and getting paid outweighed the apparent risk of the descending the hill because Allen hired Goetsch for this very job. Thus, we conclude that genuine issues of material fact exist whether Allen should have anticipated some harm to Goetsch even though the hill was a presumed open and obvious danger. Accordingly, Allen was not entitled to summary judgment on this issue.

CONCLUSION

We hold there are genuine issues of material fact regarding whether the hill constituted a dangerous condition and whether Allen owed Goetsch a duty of care.

We reverse the trial court's decision granting summary judgment for Allen and remand to the trial court for proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Lee, J.

Veljacic, A.C.J.

COLE WATHEN LEID HALL P.C.

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