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

Ahmbur Blue, a single individual,	)	No. 65533-7-I
	)	
Appellant,	)	
	)	UNPUBLISHED OPINION
v.	)	
	)	
Markee Foster and VERONICa Foster, individually and the marital community comprised thereof; city of seattle, a municipal corporation,	)	
	)	
Respondents.	)	FILED: December 12, 2011

Schindler, J. — Ahmbur Blue worked in an administrative position and reported directly to Markee Foster. Foster asked Blue to take care of his dog while he was on vacation for a few days. Blue was seriously injured when she fell while walking down the railroad-tie stairs at Foster's house. Blue appeals summary judgment dismissal of her personal injury lawsuit against Foster. Blue contends the trial court erred in ruling that as a matter of law, Blue was a licensee and Foster did not breach the duty of care owed to a licensee. We reverse and remand for trial.

FACTS

Ahmbur Blue began working at Microsoft in 2004. From 2004 to 2007, Blue worked in an administrative position in the sales and marketing department. Markee Foster worked as an account manager in the sales and marketing department, and Blue reported directly to him as supervisor.

In early February 2006, Foster asked Blue to take care of his dog while he and his spouse went on vacation for a week.[1] Blue agreed to take care of the dog. Foster gave Blue a key to the house so she could feed and let the dog out.

After work on February 13, Blue went to feed and walk the dog. Blue parked her car on the street in front of Foster's house. Blue was not carrying anything with her and was wearing running shoes. It was light outside and not raining. There are two sets of stairs that lead to Foster's house. The stairs located next to the sidewalk are made out of railroad ties built into the dirt hill. The six railroad-tie stairs lead to the second set of concrete stairs next to the house. Blue walked up the two flights of stairs, fed the dog, and let the dog run around outside. Less than an hour later, Blue put the dog inside and locked the house. Blue said that it was still light outside when she left.

As Blue was walking down the railroad-tie stairs she fell backwards. Blue said that she was looking down the entire time and did not see anything that would cause her to fall. Blue landed on the left side of her back hitting her left shoulder and her head on the stairs. Blue said that when she tried to get up, she could not move her left arm and was in a great deal of pain. Blue managed to drive to her mother's house before going to the emergency room at Swedish Hospital. The emergency room doctor

[1] At Foster's request, Blue took care of the dog one other time.

put Blue's arm in a sling, prescribed pain medications, and referred her to an orthopedic surgeon.

Blue e-mailed Foster to tell him he had to get someone else to take care of the dog. Foster arranged for Greg Smith to take care of the dog. Foster insisted that Blue meet Smith at the house.

> I was like, I can go, but I can't move my arm. I don't know how helpful I'm going to be. He said, well, just go in and make sure that the dog doesn't bark or whatever at Greg, basically to make sure that Greg was comfortable since the dog didn't know him.

When Foster returned from vacation, he gave Blue $75 in cash, a $100 gift card to a spa, and bath soaps.[2] Foster and his spouse invited Blue to a dinner gathering at their house to thank her for taking care of their dog. Blue said that she was offended by the "extra gifts" and did not want to go to the dinner gathering, but she did not say anything to Foster "because I have a working relationship with him. I need a job." As a result of the fall, Blue suffered injuries to her left shoulder and back.

In February 2009, Blue filed a personal injury lawsuit against Foster.[3] The complaint alleges Foster was negligent in failing to properly maintain the railroad-tie stairs and failing to warn Blue of a dangerous condition.[4] In his answer to the complaint, Foster admits that Blue agreed to take care of his dog while he was away but asserts she agreed to do so as a favor, and denies the other allegations.

Following Blue's deposition, Foster filed a motion for summary judgment. Foster argued that the undisputed testimony from the deposition established that Blue was not

[2] Blue is not sure whether Foster gave her $50 or $75.

[3] The complaint also names Foster's spouse Veronica Foster as a defendant.

[4] Blue also filed a claim for damages against the City of Seattle and alleged that the City was negligent by failing to remedy the railroad-tie stairs located in the planting strip in front of the Foster's house.

a business invitee but, rather, a social guest or licensee. Foster asserted that he met the duty of care owed to a licensee and did not have a duty to warn Blue about an "obvious and avoidable" condition. In opposition, Blue argued there were material issues of fact about whether she was a licensee or an invitee and whether Foster breached the duty of care. In support, Blue submitted the declarations of Gregory Williams, construction industry expert Rick Witte, and photographs showing the condition of the railroad-tie stairs.

Williams testified that he has known Foster since 2001, that "on occasion" both he and his spouse had tripped and "lost balance" on the railroad-tie stairs, and that he told Foster the railroad-tie stairs were dangerous. Williams' declaration states, in pertinent part:

> 3. There are a set of railroad tie stairs that connect the street to the sidewalk and then to Mr. Foster's home. These stairs must be used in order to get to the Fosters' home if you park on the street in front of their property.
> 4. In the times that I have visited the Fosters' home, I have tripped and lost balance on the railroad tie stairs leading up to the house that Ms. Blue also was injured because of. My wife has also tripped on occasion. I have had conversations and made comments to Mr. Foster regarding these specific stairs and their hazards.
> 5. The railroad tie stairs are dangerous to walk up and down. The area is very dark at night and not well lit. The stairs are very uneven and present a hazard when attempting to get to Mr. Foster's home.

Witte states that the treads of the railroad-tie stairs are uneven. In his declaration, Witte states, in pertinent part:

> 8. The run of the treads on the stairs in question varies from 17 inches to 26.5 inches and the standards call for a tread of a maximum width (measured from nosing to riser) is 12 inches.
> 9. Elevation in the gravel behind the railroad tie treads (that portion of the tread closest to the riser above) varies as much as two inches. The specifications show a smooth tread with one percent slope

> from front to back, and a uniform depth with no more than 3/8 of an inch in variation.
>
> 10. The rise of the stairs must be from five to seven inches and uniform with no more than 3/8 of an inch difference between risers. The risers on the stairs in question vary from three inches at the sidewalk to ten inches on the first riser up from the curb.
>
> 11. A standard stair set is shown in the standards to be level. The stairs in question are 8 feet wide and slope as much [as] 2 to 3 inches.

Witte concluded:

> 14. There is no aspect of the stairs in question that would not be [a] trip hazard to a user and present a dangerous condition upon the property. The stairs are a trap for the unwary and at any different part of traveling up or down the stairs a visitor would experience a different path with regards to rise, run, landings and tread.
>
> 15. I have reviewed Ms. Blue's deposition transcript and her description of the fall. It is consistent with the dangerous design and construction of the stairs at the Fosters' residence that Ms. Blue would not have accurate knowledge of the technical aspects of her fall.

In her declaration, Blue states that Foster approached her at work to ask if she would feed and care for his dog while he went on vacation for a few days and asked her "how much I charged for my services." Blue states that when she "told him I did not know the costs of dog sitting services," Foster told her that "he would have to find another person to watch the dog or pay to board and place the dog in a kennel if I could not care for him." In paragraph 5 of her declaration, Blue states that she "was paid approximately $75 for watching the Fosters' dog, and given a $100 gift card and a variety of soaps and bath products following the accident and injuries I sustained at the Fosters' residence."

In the reply brief, Foster moved to strike the "portions of the declaration of Ahmbur Blue which contradicts, without explanation, previously given clear deposition testimony."[5] In specific, Foster cites to Blue's statement in paragraph 5 of her

declaration that states she was paid for watching Foster's dog.

The court decided that the declaration directly contradicted Blue's deposition testimony and disregarded the entire declaration. The trial court then ruled that as a matter of law, Blue was a licensee and Foster did not breach the duty to care owed to a licensee because the hazards of the railroad-tie stairs were "known, open, apparent and obvious." Blue appeals the dismissal of her lawsuit.

ANALYSIS

Blue contends the trial court erred in ruling that as a matter of law, she was a licensee and Foster did not breach the duty of care owed to her as a licensee.

We review summary judgment de novo and engage in the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the declarations, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The moving party has the burden of showing the absence of a genuine issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party shows an absence of a genuine issue of material fact, the burden shifts to the nonmoving party " '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, 91 L. Ed. 2d 265 (1986)).

" 'A material fact is one upon which the outcome of the litigation depends.' "

[5] (Emphasis omitted.)

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 861, 93 P.3d 108 (2004) (quoting Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980)). The court must view the facts and all reasonable inferences in the light most favorable to the nonmoving party. Hisle, 151 Wn.2d at 860-61. Questions of credibility are for the trier of fact. Hudesman v. Foley, 73 Wn.2d 880, 886-87, 441 P.2d 532 (1968).

To prevail on a negligence claim, a plaintiff must establish: (1) the existence of a duty, (2) breach of that duty, (3) proximate cause, and (4) resulting injury. Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wn.2d 601, 618, 220 P.3d 1214 (2009). The only question in this case is existence and breach of a duty. In specific, whether Blue was a licensee or invitee, and whether as a matter of law Foster did not breach the duty of care owed Blue.

The legal duty of care owed by a landowner to a person entering the landowner's premises depends on whether the entrant is an invitee, licensee, or trespasser. Iwai v. State, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996) (citing Younce v. Ferguson, 106 Wn.2d 658, 662, 724 P.2d 991 (1986)). There are " 'three levels' " of care owed depending on the entrant's status, with the highest level of care owed to an invitee. Fuentes v. Port of Seattle, 119 Wn. App. 864, 869, 82 P.3d 1175 (2003) (quoting Johnson v. State, 77 Wn. App. 934, 940, 894 P.2d 1366 (1995)). Washington follows the Restatement (Second) of Torts in defining an invitee and licensee and the duty of care owed by the landowner.

As to an invitee, the Restatement (Second) of Torts provides, in pertinent part:

> § 332. Invitee Defined
> (1) An invitee is either a public invitee or a business visitor.
> . . . .

> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.
>
> . . . .
>
> § 343. Dangerous Conditions Known to or Discoverable by Possessor
>
> 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
>
> (c) fails to exercise reasonable care to protect them against the danger.
>
> . . . .
>
> § 343 A. Known or Obvious Dangers
>
> (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 §§ 332, 343, 343A (1965).[6]

As to a licensee, the Restatement (Second) of Torts provides, in pertinent part:

> § 330. Licensee Defined
>
> A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.
>
> . . . .
>
> § 342. Dangerous Conditions Known to Possessor
>
> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to

[6] (Boldface omitted.)

know of the condition and the risk involved.

Restatement (Second) of Torts §§ 330, 342.[7]

When the facts regarding entry onto the landowner's property are undisputed, legal status and the duty owed is a question of law. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). But when the facts as to the status of the entrant are disputed, the question is one for the jury to decide. Beebe v. Moses, 113 Wn. App. 464, 467, 54 P.3d 188 (2002) (citing Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 135-36, 606 P.2d 1214 (1980)).

In deciding the entrant's status as either an invitee or licensee, the goal is to differentiate between:

> (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social.

Thompson v. Katzer, 86 Wn. App. 280, 286, 936 P.2d 421 (1997). Whether the entrant confers an economic benefit on the occupier is an important, but not dispositive, factor. Thompson, 86 Wn. App. at 286. Restatement (Second) of Torts section 332 is "generally interpreted to mean that some economic benefit (though it may be indirect) must be conferred upon the occupier by the visit." Ward v. Thompson, 57 Wn.2d 655, 657, 359 P.2d 143 (1961). In addition, "there must be some real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates." Dotson v. Haddock, 46 Wn.2d 52, 54, 278 P. 2d 338 (1955). Persons volunteering their services may be classified as invitees. See Haugen v. Cent. Lutheran Church, 58 Wn.2d 166, 168-70, 361 P.2d 637 (1961) (church congregation member who volunteered services

[7] (Boldface omitted.)

is invitee).

Preliminarily, we must decide whether the court erred in striking Blue's declaration under Marshall v. AC&S, Inc., 56 Wn. App. 181, 782 P.2d 1107 (1989). In Marshall, we held that a party cannot create a material issue of fact by submitting a self-serving declaration that directly contradicts unequivocal deposition testimony.

> When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

Marshall, 56 Wn. App. at 185[8] (quoting Van T. Junkins & Assocs., Inc. v U.S. Indus., Inc., 736 F.2d 656, 657 (11th Cir. 1984)).

The Marshall rule is a narrow one. Kaplan v. Nw. Mut. Life Ins. Co., 100 Wn. App. 571, 576, 990 P.2d 991 (2000). The declaration must directly contradict "unambiguous sworn testimony." Kaplan, 100 Wn. App. at 576; see also Berry v. Crown Cork & Seal Co., Inc., 103 Wn. App. 312, 322, 14 P.3d 789 (2000) ("While Lede's statements contain potential inconsistencies, they are not necessarily contradictory, and certainly do not rise to the level of clear contradiction necessary to invoke the Marshall rule."); Sun Mountain Prods., Inc. v. Pierre, 84 Wn. App. 608, 618, 929 P.2d 494 (1997) ("An inability to recall a specific event, however, in response to a general question, does not necessarily amount to a contradiction.").

In her deposition, Blue testified that she and Foster were not friends but, rather, "associates" at work and that she reported directly to Foster as her supervisor. Blue said she agreed to take care of Foster's dog but did not recall whether they had a

[8] (Brackets in original) (internal quotation marks omitted).

discussion about whether he was going to pay her.

> A I'm not expecting anything from him.
> Q What was the last part?
> A Nothing.
> Q You weren't expecting anything? Is that what you said?
> A Yeah.
> . . . .
> Q Okay. So the second time, tell me how it came about.
> A He said, hey, I need a favor again. Can you watch the dog?
> Q What was your response?
> A "Yes."
> . . . .
> Q And during the second time, did you have a discussion about whether he was going to pay you or not?
> A Not that I can recall, no.
> Q So were you expecting to be paid?
> A No.
> . . . .
> Q When you were leaving Mr. Foster's house on February 13th of 2006, did you notice any leaves or any other debris covering the railroad tie stairs?
> A No.
> Q Were you able to see the stairs okay as you were descending those stairs?
> A Yes.
> Q Do you still have those green shoes you were wearing that day?
> A Yes.
> Q As you were walking down the stairs that day, where were you looking?
> A Looking down the stairs to navigate down the stairs.
> . . . .
> Q So how did it come about that -- I believe he said he paid you $50 or $75.
> A I don't know.[9]

In her declaration in opposition to summary judgment, Blue states in paragraph 4:

> 4. . . . Mr. Foster approached me at work and asked me if I would feed and care for his dog while he and his wife were out of town. Mr. Foster asked how much I charged for my services. I told him I did not

[9] (Boldface omitted.)

> know the costs of dog sitting services. Mr. Foster stated he would have to find another person to watch the dog or pay to board and place the dog in a kennel if I could not care for him.

Paragraph 4 of Blue's declaration stating that Foster asked her how much she charged and that he would pay a kennel to board the dog if she did not take care of the

dog, does not flatly contradict her deposition testimony. In her deposition, Blue testified that she did not recall the discussion she had with Foster about taking care of the dog. Blue's deposition testimony that she and Foster did not discuss payment and she did not expect payment is not flatly inconsistent with the testimony in her declaration that Foster asked her how much she charged, and that she told him she didn't know the costs of dog sitting. Moreover, while the parties are in dispute about why Foster paid Blue, there is no dispute that he gave her $75 and a $100 gift certificate when he returned. Accordingly, while the statement in paragraph 5 that Foster "paid" her "approximately $75 for feeding the Fosters' dog" appears flatly inconsistent with Blue's deposition testimony, the remainder of the declaration is not. We conclude the trial court erred in striking Blue's declaration.

Blue relies on Beebe to argue there are material issues of fact as to her legal status and duty of care. Foster relies upon Thompson to argue that as a matter of law, Blue is a licensee.

In Beebe, Alton Beebe attended a Tupperware party at his stepdaughter's house. Beebe purchased a water pitcher. As he was leaving, Beebe fell down the stairs and was injured. Beebe, 113 Wn. App. at 466. Beebe filed a personal injury lawsuit against his stepdaughter asserting that he was a business invitee. The stepdaughter argued that Beebe was a licensee because the benefit she received by hosting the party was nominal and incidental to a social occasion. Beebe, 113 Wn. App. at 467. In reversing the trial court's determination that as a matter of law, Beebe was a licensee, we held that the question of whether Beebe's entry "was made for a

business or economic purpose that benefited both him and [the defendant] or whether his entry was primarily familial or social was made for a purpose that only benefited him requires factual resolution by the jury." Beebe, 113 Wn. App. at 468.

In Thompson, Robert Thompson slipped on ice and fell in the driveway of a house owned by Katzer. Because Thompson drove his stepfather's car to the house at the request of his stepfather, Thompson argued he was a business invitee. Thompson, 86 Wn. App. at 282-83. We held that "[b]ecause Thompson did not enter the Katzers' land for any purpose directly or indirectly connected with 'business dealings' between him . . . and the Katzers, he was not a 'business visitor,' and thus not an invitee." Thompson, 86 Wn. App. at 288. While recognizing that "bestowing of an economic benefit is an important factor to consider when deciding whether an entrant is an invitee or licensee, and that one who bestows such benefit may be a business visitor," because Thompson did not agree to bring the car as part of any business dealings, we concluded the stepfather's offer to pay for gas was incidental to entry on the property that was primarily for familial or social reasons, and consequently Thompson was a licensee. Thompson, 86 Wn. App. at 286-88.

This case is more like Beebe than Thompson. Here, there is no dispute that Blue's entry on Foster's property to take care of his dog benefitted him. However, viewing the evidence in the light most favorable to Blue, there are material issues of fact about whether Blue's agreement to take care of Foster's dog was for primarily business or social purposes. Blue testified that Foster is a work associate, not a friend. Foster was her "superior" at work, and Blue's deposition testimony creates the

reasonable inference that she agreed to take care of the dog in order to not jeopardize her job. Blue's declaration also creates a material issue of fact about whether she was paid to take care of Foster's dog. Blue states that Foster asked her how much she charged to take care of the dog and said he would have to pay a kennel if she did not agree to care for his dog. When Foster returned, he gave Blue $75 and gave her a gift certificate for $100. We conclude there are material issues of fact about whether Blue was an invitee or licensee.

We also conclude the trial court erred in ruling as a matter of law that Foster did not breach the duty of care owed to Blue as a licensee. The court ruled that reasonable minds could only conclude the danger in using the railroad-tie stairs was "known, open, apparent and obvious."

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Younce, 106 Wn.2d at 667-68 (emphasis in original) (internal quotation marks omitted) (quoting Memel v. Reimer, 85 Wn.2d 685, 689, 538 P.2d 517 (1975)).

Accordingly, a landowner has no duty to warn licensees about open and apparent dangers. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 135, 875 P.2d 621 (1994). Whether a hazard is "open and apparent depends on whether the licensee knew, or had reason to know, the full extent of the risk posed by the

condition." Tincani, 124 Wn.2d at 135. That determination is presumptively a question of fact. Tincani, 124 Wn.2d at 135. Summary judgment is appropriate only if there is no genuine issue of material fact that a licensee is aware of an obvious danger or a landowner has no knowledge of a hidden risk. Tincani, 124 Wn.2d at 135 n.4.

Here, there are material issues of fact as to whether the stairs are a known dangerous condition. Witte describes the uneven construction of the treads and concludes that there "is no aspect of the stairs in question that would not be [a] trip hazard to a user." Williams testified that the stairs were uneven and dangerous, and he and his spouse had "tripped and lost balance on the railroad tie stairs . . . on occasion." Williams also testified that he talked to Foster more than once about "these specific stairs and their hazards."

We reverse dismissal of Blue's personal injury lawsuit against Foster and remand for trial.

Schindler, J.

WE CONCUR:

Dwyer, C.J.

Cox, J.