IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANDREA BARTLETT STROM, an individual,	)	**No. 28879-0-III**
Appellant,	)	**Division Three**
v.	)	
RED LION HOTELS CORPORATION, a Washington State Corporation,	)	**UNPUBLISHED OPINION**
Respondent.	)	

Kulik, C.J. — Andrea Strom appeals the superior court's summary judgment dismissal of her premises liability complaint for negligence. We conclude that there are no genuine issues of material fact as to whether Red Lion Hotels Corporation should have known about the injury-causing condition and whether that condition was unreasonably dangerous. Thus, we affirm the trial court's summary judgment in favor of Red Lion Hotels.

FACTS

While hosting a seminar in 2006, Ms. Strom fell and sustained injuries in the café

at the Spokane Red Lion Hotel. The fall occurred when the heel of Ms. Strom's high-heeled shoe caught in a crack in the floor that was covered by a raised portion of carpet. Ms. Strom brought a premises liability action for negligence against Red Lion.

In 2001, new concrete was laid in the hotel's lobby as part of a remodeling project. At the completion of the project, the new concrete floor was covered by a carpet pad and carpet. At some point between the remodel and Ms. Strom's injury, a one-half inch crack formed in this same slab of concrete floor. It is unknown how long the condition existed before Ms. Strom's injury. However, Ms. Strom described the raised-up portion of the carpet as "worn differently" than the areas surrounding it. Clerk's Papers (CP) at 54. Ms. Strom also described the difference in carpet wear as looking like it was produced by repeated vacuuming over the raised portion. The underlying crack in the floor was not discovered until after the injury when Red Lion removed the carpet and carpet pad. Red Lion submitted evidence that it "regularly inspects its premises for hazardous conditions." CP at 20. Before Ms. Strom's injury, the hotel had no actual knowledge of the carpet deviation or the crack that lay beneath. No one else in the five years before this incident had complained of, or been injured by, the condition.

The carpet was highly patterned, which made it difficult to see deviations in floor height. Ms. Strom also stated that, although the defect was "not readily apparent" to a

passerby, she was able to observe it on closer inspection, and it was sufficiently evident from the height at which one would usually operate a vacuum. CP at 53. Red Lion states that the defect was imperceptible to the naked eye, less than the width of a pen, no greater than the deviation where the carpeting ends and tile floor begins, and no greater than if a throw rug had been laid on top of the carpet.

The trial court granted Red Lion's motion for summary judgment and dismissed the complaint. Ms. Strom appeals.

ANALYSIS

When reviewing summary judgment dismissals, appellate courts proceed de novo by engaging in the same inquiry as trial courts. *See Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). "If reasonable minds can differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate." *Id.* at 788.

If the defendant-movant initially shows the absence of any genuine issue, the burden shifts to the plaintiff-nonmovant to show the existence of such a genuine issue. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In this responsive showing, the plaintiff cannot simply rely upon the allegations contained in the pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." CR 56(e). Once those specific facts are set forth, they, and the reasonable inferences that may be drawn from them, must be "considered in the light most favorable to the plaintiff, the nonmoving party." *Young*, 112 Wn.2d at 226. However, if the plaintiff cannot produce evidence to support an essential element of the case, the defendant is entitled to summary judgment as a matter of law. *Id.* at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

To establish a prima facie case of negligence under Washington premises liability, a plaintiff must prove: "(1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause." *Degel*, 129 Wn.2d at 48. The parties' briefs focus primarily on the first element, the existence of a duty.

A property owner's duty of care is determined by the entrant's common law status as an invitee, a licensee, or a trespasser. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). "Generally, a landowner owes . . . the highest

duty to an invitee." *Botka v. In re Estate of Hoerr*, 105 Wn. App. 974, 983, 21 P.3d 723 (2001). Here, the parties agree that Ms. Strom was a business invitee, but dispute whether a duty arose on the part of Red Lion.

A landowner generally owes business invitees a duty to exercise "reasonable care" and "inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'" *Tincani*, 124 Wn.2d at 139 (quoting Restatement (Second) of Torts § 343 cmt. b (1965)). A property owner is liable to invitees for injury-causing conditions 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."

Tincani, 124 Wn.2d at 138 (quoting Restatement, *supra* § 343). However, the duty only arises if and when the first condition is met. *See Iwai v. State*, 129 Wn.2d 84, 93-95, 915 P.2d 1089 (1996).

Here, the fundamental disagreement falls under the first element. In particular, the parties dispute two issues: first, whether Red Lion knew or should have known of the condition that injured Ms. Strom, and, second, whether that injury-causing condition was

unreasonably dangerous.

"[A] landowner's duty attaches only if the landowner 'knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk.'" *Iwai*, 129 Wn.2d at 95 (quoting Restatement, *supra* § 343). This condition is satisfied where the landowner has "actual or constructive knowledge." *Hemmen v. Clark's Rest. Enters.*, 72 Wn.2d 690, 692, 434 P.2d 729 (1967). Constructive knowledge is established where "the condition . . . existed for such a length of time as to afford a sufficient opportunity for [the landowner], in the exercise of reasonable care, to have become aware of the condition." *Id.*

In the present case, Ms. Strom presented no evidence that Red Lion had actual knowledge of either the deviation in carpet height or the underlying crack in the floor. Red Lion asserts it had no knowledge of the condition before Ms. Strom's injury and no one in the five years prior had complained of, or been injured by, the condition that caused damage to Ms. Strom.

The record also contains no evidence that supports that Red Lion had constructive knowledge of the deviation in the floor. Nor does the record suggest—other than Ms. Strom's assertion that the carpet appeared well-vacuumed and worn differently, based on her observations and experience vacuuming—that Red Lion had a sufficient opportunity

to discover the floor deviation.

Exactly how long the condition existed before Ms. Strom's injury is unknown. The defect was situated on an open path through the hotel café; the defect was "not readily apparent"[1] but observable on closer inspection; the carpet was "highly patterned,"[2] making it difficult to see deviations in floor height; and "Red Lion regularly inspects its premises for hazardous conditions."[3]

Landowners generally owe their invitees "an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition." *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41-42, 846 P.2d 522 (1993). What constitutes a reasonably safe condition "'depends upon the nature of the business conducted and the circumstances surrounding the particular situation.'" *Messina v. Rhodes Co.*, 67 Wn.2d 19, 27, 406 P.2d 312 (1965) (quoting *Shumaker v. Charada Inv. Co.*, 183 Wash. 521, 524, 49 P.2d 44 (1935)).

Here, the parties both rely on and dispute the application of *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 20 P.3d 1003 (2001). In *Hoffstatter*, the plaintiff tripped over uneven bricks located around a tree on a parking strip. *Id.* at 598. The court held that the uneven bricks were not unreasonably dangerous. *Id.* at 601. In so holding, the court's

[1] CP at 53.
[2] CP at 53.
[3] CP at 20.

reasoning focused on three main points: (1) it is "a common condition" for tree roots to dislodge pavement on parking strips; (2) "the bricks were not hidden, but open and obvious"; and (3) "[i]t is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk." *Id.*

In *Wilson v. City of Seattle*, the court again held that an injury-causing condition was not unreasonably dangerous. *Wilson v. City of Seattle*, 146 Wn. App. 737, 742, 194 P.3d 997 (2008). There, the plaintiff sustained injuries when she stepped on a manhole cover that flipped up and caused her to fall inside the manhole. *Id.* at 739. The manhole cover was located on a parking strip. *Id*. Applying *Hoffstatter*, the court held that the manhole cover was not unreasonably dangerous, reasoning that: (1) "[m]anholes in parking strips are common"; (2) "the cover was open and obvious," but also known to the plaintiff; and (3) "pedestrians can be expected to pay closer attention while crossing a landscaped parking strip than while walking on a sidewalk." *Id.* at 741-42.

Here, Ms. Strom does not meet her burden to show a genuine issue of material fact that the slight deviation in the carpet created an unreasonable risk of harm.

Thus, considering the evidence in the light most favorable to Ms. Strom, we must affirm the superior court's summary judgment dismissal of Ms. Strom's premises liability complaint for negligence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

_____ _____
Sweeney, J. Korsmo, J.