IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JESSE WANDA HALVERSON, Appellant, v. LOUGHNEY PROPERTIES, INC., a Washington corporation, d/b/a Royal Fork Buffet Respondent.	)	DIVISION ONE No. 62543-8-I UNPUBLISHED OPINION FILED: December 28, 2009

Dwyer, A.C.J. — Jesse Wanda Halverson was injured in the parking lot of the Royal Fork Buffet restaurant in Mt. Vernon, Washington. She sued the restaurant owner for negligence. A jury found in favor of the defendant. Both Halverson's motion for a directed verdict and her motion for a new trial were denied. She contends that there was no evidence upon which the verdict could be based, and, therefore, a directed verdict should have been granted and the trial court abused its discretion in denying a new trial. Because there was substantial evidence supporting the jury's verdict, we affirm.

I

Halverson, born in 1934, is an elderly woman. On July 9, 2003, Halverson met with friends at the Royal Fork. As she left the restaurant after her

meal, she fell off of the handicapped access ramp in the restaurant's parking lot. Halverson suffered several fractures of the bone in her upper right arm and subsequently had surgery on her right shoulder.

The Royal Fork was built in 1991 and is owned by Loughney Properties, Inc.[1] The restaurant's handicapped access ramp protrudes into the parking lot, sloping from the edge of the sidewalk downward toward the parking lot. The ramp does not have hand-railings. It does have white cross-hatching painted on the top of the ramp to indicate where the ramp is located. On either side of the ramp are marked handicapped parking spaces. These spaces are ten feet wide,[2] but the ramp invades both of the parking spaces.

Halverson testified at trial that she believed that she must have slipped off of the steep side of the ramp as she reached for her car door given that she had stepped on the slope and it was very steep. At trial, Loughney's counsel read to Halverson, and questioned her about, portions of her deposition in which she had said that she had not walked down the steep side of the ramp, that she did not know if the steep sides of the ramp had anything to do with causing her fall, that she had not slipped on anything, and that she was "just about to step down to the car door" but found herself suddenly falling.

Halverson testified that she did not realize how steep the slope of the

[1] Loughney Properties, Inc. is a company owned by Matt Loughney and his wife. Both the defendant company and Matt Loughney, as the proprietor of the Royal Fork, will be referred to as "Loughney."

[2] The Americans with Disabilities Act of 1990, which did not come into effect until 1992, requires eight-foot wide parking spaces with a separate aisle-way. The aisle would have been placed where this handicapped access ramp was located.

ramp's side was until she stepped on it to re-enter the car. She explained that she had not paid much attention to the sides of the ramp when she had arrived at the Royal Fork and exited the car. On cross-examination, however, Halverson admitted that when she exited the car she had walked alongside the car toward its rear in order to go around the ramp and then walked up the ramp. When asked why she did not just step on to the ramp immediately after exiting the car, Halverson stated that she had not done so "because then I would have had to have gone up that side."

Two individuals with whom Halverson had eaten lunch—her husband and a female friend—testified at trial. However, neither of them saw Halverson fall. Halverson's friend had walked down the ramp in front of Halverson, but this woman had already entered the car when Halverson fell. Halverson's husband had been in the car's driver's seat talking with someone else and did not see the fall.

Halverson, prior to her fall in 2003, had back problems. In 1992, she underwent surgery for a spinal fusion. Halverson acknowledged that, prior to her fall, she suffered from feet and ankle numbness due to a nerve injury in her back. She testified that she had some difficulty walking "because my legs sometimes go numb in my back," and that her doctor told her to use a cane to assist with walking "because my leg would go numb on me, and I would have to go sit down."

Evidence was submitted at trial that another elderly woman, Shirley Dale, had fallen in the Royal Fork's parking lot in March 2002. Matt Loughney testified that, after this incident was reported to him, he had investigated in an attempt to determine what had happened. He had read his employee's report, which stated that "Shirley Dale fell to the ground by her car parked in a handicapp [sic] spot." He also had examined the parking lot in an attempt to determine where and how Dale's fall had occurred. He could determine only that her fall had occurred near the handicap access ramp. Dale's lawyer sent Loughney a letter in June 2003, more than a year after Dale's fall, suggesting that the ramp was negligently designed, constructed, and maintained and had caused Dale's fall. Loughney had submitted Dale's letter to his insurance company. The insurance company had investigated the incident but did not submit any recommendation to Loughney that the ramp was unsafe or in need of alteration.

Each party called an expert witness to testify as to whether the ramp complied with certain building and safety standards and whether it was safe according to general architectural and engineering principles. Halverson called Jeffrey Harris, who is a professional architect. Loughney called Vern Goodwin, who is a professional engineer.

With respect to whether the ramp complied with building and safety standards, the two experts disagreed about whether the ramp complied with the 1988 Uniform Building Code (UBC),[3] which was in effect at the time the

[3] Washington adopted the UBC by reference as the state building code. Former RCW

restaurant was built. Harris testified that the ramp did not comply with the UBC because the sides of the ramp were too steep. Harris believed that the UBC's provisions regarding the steepness of ramps applied both to the ramp's walkway and to the ramp's sides. In contrast, Goodwin testified that the ramp was in compliance with the applicable version of the UBC. Goodwin opined that the steepness requirements contained in the 1988 UBC applied only to that section of the ramp on which people were to walk and that the 1988 UBC did not contain any requirements regarding the steepness of the sides of the ramp.

Harris and Goodwin also disagreed as to whether the ramp complied with the requirements of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101—12213. Harris explained that, with regard to public accommodations constructed prior to the ADA's effective date, building owners are required to remove architectural barriers to access that effectively discriminate against individuals with disabilities when such removal is readily achievable. See 42 U.S.C. § 12182. Harris opined that the ramp constituted a barrier under the ADA because it presented a hazard to individuals with disabilities due to both the steepness of its sides and its protrusion into the parking area, which prevented individuals from safely exiting vehicles. Harris testified that a brochure provided by the United States Department of Justice[4] contained a hypothetical example

19.27.031 (1991). The 1988 UBC was subsequently amended and was then replaced by the International Building Code (IBC). In 2003, Washington adopted the IBC as the state building code. RCW 19.27.031.

[4] The brochure was a 1996 ADA technical assistance update by the United States Department of Justice related to readily achievable barrier removal and van accessible parking spaces.

demonstrating that removal of a barrier similar to that presented by the ramp would be readily achievable.[5]

On the other hand, Goodwin testified that the ramp did not constitute a barrier under the ADA because the ramp provided access to the restaurant. Goodwin disputed that the brochure's example was similar to the Royal Fork's situation, explaining that the brochure's example involved a regular sidewalk that required a person to step up onto the curb in order to access the building entrance, whereas the Royal Fork provided an access ramp.

The two experts also disagreed as to whether the ramp was safe according to general architectural and engineering principles. Harris testified that he believed the ramp was unsafe and had to be removed. In contrast, Goodwin testified that the ramp, at the time of Halverson's fall, did not constitute an unsafe condition for people using it. While Goodwin agreed that either a curb-cut ramp or a ramp painted on the sides to warn of its steepness would be safer than the existing ramp, he emphasized that such alternative designs were merely measures to enhance the ramp's current level of safety because "there's better ways to do everything."

In addition, Goodwin suggested that the steepness of the ramp's sides would not have caused Halverson's fall. He testified that when someone wearing rubber-soled tennis shoes walked on the ramp's asphalt surface in dry

[5] Harris testified that because it would be relatively inexpensive to replace the ramp (a few thousand dollars), its removal was readily achievable.

weather there was created a high co-efficiency of friction between that individual's shoes and the asphalt. Thus, even with the steepness of the ramp's side, it was unlikely that anyone wearing rubber-soled tennis shoes would slip. Halverson confirmed in her testimony that she was wearing rubber-soled tennis shoes at the time of her fall.

Loughney testified that the building was designed by an architect and built by a contractor. He testified that it had passed required inspections and received all necessary permits. He also testified that the only incidents of anyone being injured in the restaurant's parking lot in its 12 years of operation were the two incidents discussed at trial: Halverson's and Dale's. Additionally, the Royal Fork had received no complaints about the ramp from anyone else.

Loughney also testified that he had relied on the knowledge and expertise of the insurance company investigators and government inspectors and that none of them had ever suggested to him that the ramp was unsafe. When asked by Halverson's lawyer if he had not corrected the ramp after Dale's fall because he thought that liability for any accidents caused by the ramp would be covered by insurance, Loughney testified:

> No, no. That's the ramp that I've had since I built the building, and I knew when it went in it was in accordance with everyone's requirements. And I just didn't have common sense, I guess, to revisit that issue. I took it to mean in the absence of anything against that that it was still appropriate.

Report of Proceedings (July 16, 2008) at 27.

Loughney testified that, after Halverson's fall, he had paid to have the sides of the ramp painted. Loughney also testified that, after listening to the expert testimony at trial by Harris and Goodwin, he was going to have the ramp removed and have a curb-cut installed for handicap access because he did not "want to go through this again." However, Loughney refused to agree with Halverson's attorney that he was at fault or that the ramp was unreasonably dangerous.

At the close of evidence, Halverson moved for a directed verdict. The trial court denied her motion and proceeded to instruct the jury. One of the jury instructions stated that

> At approximately 2:00 p.m., Mrs. Halverson, her husband, and her friends left the restaurant and began walking to her car. As she was walking down the handicap ramp into the parking lot, Mrs. Halverson fell off the steep side of the ramp, and landed on her right shoulder.

Clerk's Papers (CP) at 12 (Jury Instruction 4).

The jury returned a verdict in favor of Loughney. Halverson then moved for relief from judgment and/or a new trial. The trial court denied her motion. Halverson appeals from that denial.

In designating the record on appeal, Halverson included transcripts of only Loughney's and Goodwin's testimony and Loughney's closing argument. Loughney then moved the trial court to order Halverson to pay for the cost of submitting substantially more of the verbatim report of proceedings, including the

testimony of Halverson, Halverson's husband, Halverson's friend, and Halverson's expert witness. The trial court denied Loughney's motion. Loughney arranged for the opening and closing arguments and the testimony of Halverson, her husband, her friend, and her expert witness to be transcribed and designated for appeal. Loughney cross-appeals from the trial court's denial of his motion.

II

Halverson asserts that the trial court erred by denying her motion for a directed verdict at the close of the evidence. We disagree.

This court reviews de novo a decision to grant or deny a motion for a directed verdict. Schmidt v. Coogan, 162 Wn.2d 488, 491, 173 P.3d 273 (2007); Winkler v. Giddings, 146 Wn. App. 387, 394, 190 P.3d 117 (2008), review denied, 165 Wn.2d 1034 (2009). Motions for a directed verdict were renamed "'motions for judgment as a matter of law'" in 1993.[6] Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting Litho Color, Inc. v. Pac. Employers Ins. Co., 98 Wn. App. 286, 298 n.1, 991 P.2d 638 (1999)). Granting judgment as a matter of law is not appropriate where substantial evidence exists to sustain a verdict for the nonmoving party. Schmidt, 162 Wn.2d at 491 (citing Hizey v. Carpenter, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992)); see also Indus. Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). Indeed, "[a]n order granting judgment as a matter of law should be

[6] As were motions for a judgment notwithstanding the verdict.

limited to circumstances in which there is no doubt as to the proper verdict." Schmidt, 162 Wn.2d at 493. Hence, a directed verdict should be granted only where no evidence or reasonable inferences from the evidence could support a verdict for the nonmoving party. Winkler, 146 Wn. App. at 394 (citing Bertsch v. Brewer, 97 Wn.2d 83, 90, 640 P.2d 711 (1982)).

In ruling on such a motion, the evidence presented and all reasonable inferences reasonably drawn therefrom must be interpreted against the moving party and in the light most favorable to the nonmoving party. Faust v. Albertson, 166 Wn.2d 653, 657, 211 P.3d 400 (2009); Winkler, 146 Wn. App. at 394. The court must defer to the trier of fact on issues involving conflicting testimony, the credibility of the witnesses, and the persuasiveness of the evidence. Thompson v. Hanson, 142 Wn. App. 53, 60, 174 P.3d 120 (2007), aff'd, No. 81311-6, 2009 WL 3384594 (Wash. Oct. 22, 2009). "Where the evidence produced by the nonmoving party produces facts that would allow a reasonable person to find for that party, judgment as a matter of law is inappropriate." Schmidt, 162 Wn.2d at 493.

To establish a negligence claim, a plaintiff must present evidence that shows: 1) a duty owed by the defendant to the plaintiff, 2) a breach of that duty, 3) resulting injury, and 4) a proximate cause between the breach and the injury. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). The scope of the legal duty owed by a business owner to a person

entering the premises depends on that person's status as a trespasser, licensee, or invitee. Fredrickson v. Bertolino's Tacoma, Inc., 131 Wn. App. 183, 188-89, 127 P.3d 5 (2005).

Here, the parties stipulated that Halverson was an invitee. An invitee is a business visitor who enters on to land for a purpose related to the business of the landowner. Zenkina v. Sisters of Providence in Wash., Inc., 83 Wn. App. 556, 560-61, 922 P.2d 171 (1996). Washington law governing commercial premises liability follows the principles articulated in the Restatement (2d) of Torts § 343 (1965). Iwai v. State, 129 Wn.2d 84, 93-95, 915 P.2d 1089 (1996); Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 49-50, 914 P.2d 728 (1996). This provides:

> 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.

Restatement (2d) of Torts § 343. The relevant jury instruction given in this case reflected this standard.[7]

[7] The jury instruction stated:

> An owner or operator of a restaurant is liable for any physical injuries to its customers caused by a condition on the premises if the owner or operator of the restaurant:
>
> a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such customers;
>
> b) should expect that they will not discover or realize the danger, or will fail

Halverson asserts that two statements made by witnesses at trial—one by Loughney and one by Goodwin—established Loughney's liability on her negligence claim as a matter of law and that causation was stipulated to in the jury instructions. However, Halverson fails to show that each of the required elements of her claim was established as a matter of law.

First, Halverson had to prove that Loughney knew of the dangerous condition or would have discovered it in the exercise of reasonable care and that he should have realized that it involved an unreasonable risk of harm to his customers. On this question, Loughney testified that he supposed that he "didn't have common sense" to hire someone to advise him about the safety of the ramp after receiving the letter from Dale's lawyer. Halverson asserts that this statement is an admission of Loughney's failure to exercise reasonable care. While Loughney did admit that he failed to use common sense in not taking a particular action, his statement does not establish, as a matter of law, that he entirely failed to exercise reasonable care to discover the unsafe condition of the ramp. It is for the trier of fact to determine whether Loughney failed to exercise reasonable care. Nothing in Loughney's statement required the jury to find that Loughney failed to exercise reasonable care. Pursuant to the standard for granting a directed verdict, all of the evidence presented at trial, and all reasonable inferences drawn therefrom, are interpreted against Halverson and

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to protect themselves against it; and
c) fails to exercise ordinary care to protect them against the danger.
CP at 16 (Jury Instruction 8).

in the light most favorable to Loughney.

Loughney also testified that he submitted Dale's letter to his insurance company and did not receive any information from the insurance company that led him to conclude that the ramp was unsafe or that he should further investigate the ramp's safety. Loughney further testified that he personally inspected the handicap parking stalls and the ramp in an attempt to determine where and how Dale had fallen. Loughney consistently asserted that he did not believe the ramp was unreasonably safe because he relied on experts, such as the original contractor, state WISHA inspectors, and insurance company investigators, and none of these people had ever suggested to him that the ramp was problematic. In addition, in the 12 years the Royal Fork had been in operation only Dale had reported ramp-related injuries prior to Halverson's fall. Thus, there was substantial evidence in the record from which the jury could find that Loughney would not, in the exercise of reasonable care, have realized that the ramp presented an unreasonable risk of harm.

Next, Halverson needed to establish that Loughney should have expected that restaurant patrons would be unable to discover or comprehend the danger presented by the ramp or that they would fail to protect themselves against such danger. Halverson asserts that undisputed evidence introduced at trial established that customers were required to walk on the sloped sides of the ramp in order to enter and exit their vehicles. To the contrary, however,

Halverson herself testified that, upon arriving at the Royal Fork and exiting her car, she walked alongside the ramp to the point at which the slope of the ramp met the parking lot near her car's trunk. She then proceeded up the ramp. She testified that she did not immediately step onto the ramp after exiting her car because she did not want to step up the steep slope. This constitutes evidence in the record from which the jury could find that restaurant patrons could discover, realize, and deal with any danger the ramp posed.

Next, Halverson needed to prove that Loughney failed to exercise reasonable care to protect invitees against the danger posed by the ramp. Photographs submitted at trial show that, at the time of Halverson's fall, white diagonal lines had been painted on the top of the black asphalt ramp in a cross-hatched pattern. This evidence tended to prove that Loughney had designated the space upon which patrons should walk. Thus, from this evidence the jury could have determined that Loughney exercised reasonable care to protect his patrons against any danger posed.

In addition, even had Halverson established that the ramp posed an unreasonable risk of harm of which Loughney was aware, Halverson also was required to prove that it was the dangerous condition of the ramp that caused her injuries. Halverson asserts that Jury Instruction 4 stipulated that the ramp's steep side was the proximate cause of her fall and that, accordingly, her burden was met as a matter of law.

However, this jury instruction merely states that Halverson fell off of the steep side of the ramp. It does not declare that the steepness of the ramp caused her to fall. Because the parties did not stipulate to proximate cause, causation remained a question of fact reserved to the jury. Evidence was introduced concerning Halverson's difficulty walking. Halverson's deposition testimony revealed that, at that time, she believed that she had not stepped onto the steep side of the ramp, she did not know if the steep side of the ramp caused her fall, and she did not remember slipping. No one testified to seeing her fall. Therefore, conflicting evidence was introduced as to whether defects in the ramp caused Halverson's fall.

Viewed in the light most favorable to Loughney, neither the evidence introduced at trial nor the inferences reasonably drawn therefrom established, as a matter of law, that Halverson proved Loughney's negligence. Substantial evidence was introduced that supports the verdict for Loughney. Accordingly, the trial court did not err by denying the motion for a directed verdict.

III

Halverson next contends that the trial court erred by denying her motion for a new trial. We disagree.

An order denying a motion for a new trial is reviewed for an abuse of discretion. It is an abuse of discretion for a trial court to deny a motion for a new trial "where the verdict is contrary to the evidence." Palmer v. Jensen, 132

Wn.2d 193, 198, 937 P.2d 597 (1997).

CR 59(a)(7) permits a new trial when there is "no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." On appeal, when the proponent of a new trial argues that the verdict was not based upon the evidence, an appellate court looks to the record to determine whether there was introduced sufficient evidence to support the verdict. Palmer, 132 Wn.2d at 197-98. In resolving the question, all of the evidence must be viewed in the light most favorable to the nonmoving party. Sommer v. Dep't of Social & Health Servs., 104 Wn. App. 160, 172, 15 P.3d 664 (2001).

Halverson's contentions on this issue are identical to those that she raised in her argument concerning the order denying her motion for a directed verdict. For the same reasons as given in resolving that question, the trial court did not err in denying the motion for a new trial.

IV

We must also deal with Loughney's cross-appeal. In designating the record on appeal, Halverson ordered transcribed only Loughney's testimony, Goodwin's testimony, and Loughney's closing argument. Loughney asserts that the claims of error raised by Halverson required him to order the transcription of a great deal more of the proceeding, that Halverson should be ordered to reimburse him for the cost of doing so, and that the trial court erred by denying

his motion regarding this relief. We agree.

RAP 9.2(b) provides that "[i]f the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding." RAP 9.2(c) provides that "[i]f a party seeking review arranges for less than all of the verbatim report of proceedings, the party should include in the statement of arrangements a statement of the issues the party intends to present on review."

Although the determination of whether to require a party to supplement the record on appeal is a matter for the trial court's discretion, Jackson v. Wash. State Criminal Justice Training Comm'n, 43 Wn. App. 827, 831, 720 P.2d 457 (1986), "[t]he party seeking review has the burden of perfecting the record so that [the appellate] court has before it all of the evidence relevant to the issue." Allemeier v. Univ. of Wash., 42 Wn. App. 465, 472, 712 P.2d 306 (1985) (citing RAP 9.2(b); State v. Jackson, 36 Wn. App. 510, 516, 676 P.2d 517, aff'd, 102 Wn.2d 689, 689 P.2d 76 (1984)). Where the appellant challenges a verdict as not being supported by the evidence, the appellant must designate *all* evidence relevant to the challenged verdict. RAP 9.2(b).

Halverson did not designate all of the record relevant to the issues raised in her appeal. Nor did she include a statement of the issues that she intended to present on review in any of her three statements of arrangements. Because Halverson was challenging the verdict as not being supported by the evidence,

the entire record presented was necessary for us to determine whether there was substantial evidence introduced at trial in support of the verdict for Loughney. Loughney's motion should have been granted. Thus, we order that Halverson pay the costs of the supplemental verbatim report of proceedings.[8]

Affirmed in part. Reversed and remanded in part.

Dwyer, A.C.J.

We concur:

Lau, J.

Grosse, J.

[8] We are informed that the amount is $1,043.75. On remand, Loughney may apply to the trial court for entry of judgment in this amount.