CASENOTE: TRIVIAL DEFECT MSJ

LAWATYOURFINGERTIPS ®
BY JAMES GRAFTON RANDALL

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SUMMARY: Plaintiff and appellant Lorna Good appeals from the grant of summary judgment in a premises liability action in which she attempts to recover for injuries she sustained in a fall when her stiletto heel caught in a seam in the cement patio at defendant's winery. We find no error in the trial court's conclusion the alleged dangerous condition presented at most a trivial defect. We therefore affirm the judgment. Plaintiff attorneys were Carpenter and Zuckerman and plaintiff's expert was Brad Avrit. The appellate court upheld the striking of Avrit's declaration as it lacked foundation.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LORNA GOOD, Plaintiff and Appellant, v. OGB PARTNERS, LLC, Defendant and Respondent.	E062751 (Super.Ct.No. MCC1300806) OPINION

APPEAL from the Superior Court of Riverside County. Raquel A. Marquez, Judge. Affirmed.

Carpenter, Zuckerman & Rowley, Gary S. Lewis, John C. Carpenter, and Gregory Coolidge for Plaintiff and Appellant.

Wager Law Offices, Jerome A. Wager, and Arthur H. Skola for Defendant and Respondent.

Plaintiff and appellant Lorna Good appeals from the grant of summary judgment in a premises liability action in which she attempts to recover for injuries she sustained in a fall when her stiletto heel caught in a seam in the cement patio at defendant's winery. We find no error in the trial court's conclusion the alleged dangerous condition presented at most a trivial defect. We therefore affirm the judgment.

I

FACTUAL BACKGROUND

A. *The Incident*

This case arises from Lorna Good's accidental fall at a winery and her resulting injuries. On September 29, 2012, Good attended an outdoor concert at Monte De Oro Winery (Winery), owned by respondent OGB Partners, LLC (OGB). Good arrived at the Winery during daylight hours and observed and walked on the stamped concrete in the patio area where she later fell. Good was familiar with the patio area as she had previously visited the Winery 10 to 12 times in the preceding nine months. The weather was warm, clear, and sunny, and stayed warm and clear throughout the evening. At approximately 10:00 p.m., while standing and watching the performance, Good fell to the ground.

Just before she fell, Good was standing on the stamped concrete portion of the patio at the perimeter of the fountain area, close to a seam (also known as a "control joint") between two sections of the stamped concrete. She was wearing four-inch stiletto heels. She described the circumstances of her fall as follows: "It was stamped or—concrete or the seam in between it. [¶] . . . [¶] The seams in the stamped concrete. [¶] . . . [¶] I was standing where the seams in the stamped concrete were. [¶] . . . [¶] My foot stayed still and was stuck, and I fell awkwardly. It was my body that moved; my foot did not." Good fractured her foot and her wrist in the fall.

B. *OGB's Motion for Summary Judgment*

On June 7, 2013, Good filed suit against OGB for premises liability and general negligence. OGB filed an answer to the complaint, asserting even if there was a defect in the Winery patio, it was trivial.[1] On May 5, 2014, OGB filed a motion for summary judgment. Good filed an opposition on September 9, 2014, and thereafter OGB and Good filed evidentiary objections.

In support of its motion for summary judgment, OGB submitted color photographs of the stamped concrete surface and seam where Good fell, along with the declarations of Ken Zignorski, the Winery's general manager; Dee Johnson, the general contractor who oversaw the construction and installation of the Winery's concrete patio; and Martin Balaban, OGB's retained expert, a civil engineer who conducted a safety analysis after the incident. The witnesses stated in these declarations the stamped concrete area where Good fell had been installed three years earlier; the area was not cracked or raised; and the area contained no broken pieces or jagged edges. The color photographs of the scene confirmed the descriptions of these witnesses. They depict a large area with several smooth, even slabs of stamped concrete. The pictures also show the slabs are separated by thin, easily visible seams. Zignorski declared OGB had not previously received any report of a fall occurring on its patio.

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[1] The original complaint named Vineyards of Galway, LLC as defendant, but Good dismissed her claims against Vineyards on August 13, 2013.

The declarations contained evidence the seam dividing the sections of the stamped concrete closest to where Good fell is a channel less than one-half inch wide and less than one-half inch deep. The declarations state the seams are of the same construction and detail as all the other seams dividing sections of stamped concrete at the Winery. The photographs confirm the seams are thin, but do not speak to their depth.

To respond to Good's allegation insufficient lighting in the area was a contributing factor in rendering the location dangerous, OGB also presented evidence the lighting around the fountain illuminated the patio surface and there was a full moon the night Good fell. OGB submitted a photograph of the area near the fountain showing the seams are easily visible at night.

In opposition to the motion for summary judgment, Good submitted photographs along with the declarations of Brad Avrit, a civil engineer she had retained as an expert, and Eris Barillas, a forensic analyst at Avrit's consulting firm. Avrit and Barillas opined the patio area was not sufficiently illuminated and the seam where Good fell was greater than half an inch deep and therefore unsafe and in violation of industry standards. Barillas declared the seam "is well over 1/2″ deep" in the area where Good fell, and agreed with OGB's declarants the seams were less than one-half inch wide. Avrit declared Portland Cement Association's "Concrete Information" is "a widely accepted industry standard" and "shows that 1/2″ is the maximum depth of a control or expansion joint." From this, Avrit opined the seam is a "defect" and "presented a trip and fall hazard for pedestri-

ans acting in a reasonably foreseeable manner." He also declared the Winery could have added a "concrete and mortar mix" to the seams thereby "eliminat[ing] the trip and misstep hazard . . . for less than $20."

Good submitted photographs which also depict an area with large, smooth, even slabs of stamped concrete separated by thin, easily visible seams. Some of the photographs show rulers next to segments of seam, and captions indicate the seams measured at those locations are .39 inches and .47 inches wide and three-eighths of an inch, eleven-sixteenths of an inch, and one and three-fourths inches deep. Though the photographs are dark, the captions appear to be roughly accurate, except for the two photographs (exhs. 96-97) intended to depict a segment of the seam as one and three-fourths inches deep. Those two photographs are very dark and it is impossible to see the ruler or determine where in the Winery patio it was taken.

Good filed objections to OGB's evidence on the basis it lacked foundation. In relevant part, Good objected to Johnson's opinions the patio complied with all applicable construction codes and the seams, including the one where Good fell, were installed to a depth of a half-inch or less. Good also objected to Zignorski's statement the depth of the seam where Good fell was a half-inch or less and the patio lights were on during the concert. OGB, in turn, objected to Avrit's entire declaration on the basis it lacked foundation.

C. *The Trial Court's Ruling*

On October 7, 2014, the trial court held a hearing on the motion and tentatively sustained Good's objections to portions of Johnson's and Zignorski's declarations, but

tentatively found OGB had met its prima facie burden of showing there was no dangerous condition. The court continued the hearing so it could review color photographs the parties had submitted and review OGB's objections to Good's declarations.

On October 27, 2014, the trial court altered its tentative ruling by admitting John-[2]

son's and Zignorski's declarations as to the depth of the seams. The trial court also sustained OGB's objections to Avrit's declaration on the basis it lacked foundation and was speculative. The trial court heard argument on the motion for summary judgment and took the matter under submission. On October 31, 2014, the court granted defendant's motion.

II

DISCUSSION

A. *Standard of Review*

A court may grant summary judgment only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show one or more elements of the plaintiff's cause of action cannot be established or there is a complete defense. (*Id*., subd. (p)(2).) The defendant can satisfy its burden by presenting

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Good objects to the trial court changing its tentative ruling. However, it is well settled a tentative decision is not binding on the trial court and the court can modify such a ruling as it sees fit before entry of judgment. (See *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1284.)

evidence negating an element of the cause of action or evidence the plaintiff does not possess and cannot reasonably expect to obtain to establish an essential element. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) If the defendant meets this burden, the burden shifts to plaintiff to present evidence creating a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court's ruling on a summary judgment motion de novo, liberally construing the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller v. Department of Corrections*, *supra*, 36 Cal.4th at p. 460.) Evidence submitted in support of an opposition to a motion for summary judgment must be admissible. (*Bozzi v. Nordstrom, Inc.*, (2010) 186 Cal.App.4th 755, 761.) "Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion." (*Ibid*.) We review evidentiary rulings in summary judgment proceedings for abuse of discretion. (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.)

B. *Dangerous Condition*

As a premises liability plaintiff, Good was required to prove a dangerous condition existed. (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 (*Stathoulis*).) A property owner's duty of care does not extend to repairing minor defects, even if the property owner has notice of such defect. (*Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 26-27 (*Kasparian*), footnotes omitted.) As a result, a proper-

ty owner can avoid liability by showing the alleged defect is minor and therefore does not constitute a dangerous condition. (*Ibid.*) This "trivial defect doctrine" is not an affirmative defense, but an aspect of duty, which a premises liability plaintiff must plead and prove. (*Ibid*.) The "doctrine 'permits a court to determine "triviality" as a matter of law rather than always submitting the issue to a jury [and] provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property.'" (*Id.* at p. 27.)

The trivial defect analysis includes two steps. "First, the court reviews evidence regarding the type and size of the defect." (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 567.) For example, the court should consider whether the condition "consists of the mere non-alignment of two horizontal slabs or whether it consists of a jagged and deep hole." (*Kasparian*, *supra*, 156 Cal.App.4th at p. 27.) Second, if the evidence reveals a defect is trivial, the court should consider evidence of factors such as the weather, lighting and visibility conditions, the existence of debris or obstructions, and plaintiff's knowledge of the area, as well as whether the defect has caused other accidents. (*Ibid.*) The fact an alleged defect is plainly visible and has been used by many others without injury may be an indication the defect is trivial. (*Whiting v. National City* (1937) 9 Cal. 2d 163, 166.) "If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the court should deem the defect trivial as a matter

of law and grant judgment for the landowner." (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 568.)

No bright line rule controls whether a condition is dangerous or defective. Each case turns on its own facts. (*Kasparian*, *supra*, 156 Cal.App.4th at p. 28.) In particular, the size of a depression or gap in a walkway may be an important factor, but it is not the sole criterion of dangerousness. (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 567.) If the court determines the parties have presented evidence allowing reasonable minds to differ as to whether the defect is dangerous, the court may not rule the condition is not dangerous as a matter of law. (*Ibid*.) However, where the evidence concerning dangerousness does not lead to the conclusion reasonable minds may differ, it is proper for the court to find the defect was trivial as a matter of law. (*Ibid*.)

In undertaking our analysis, we have assumed, without deciding, the trial court[3] erred in excluding plaintiff's expert witness testimony. In addition, we conclude the trial court did not abuse its discretion in admitting OGB's witnesses' testimony. Johnson was the building contractor who oversaw construction of the stamped concrete patio and Zignorski was the Winery's general manager. Each witness could testify as to his own personal observations, and their work for OGB clearly provided each with the factual foun-

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[3] For this reason, we do not reach Good's contention the trial court abused its discretion in excluding her expert's declaration.

dation for his observations. As a result, we have reviewed and considered all the evidence presented by both parties and construed it in favor of Good.

As the reviewing court applying the de novo standard of review, we "are obligated to examine anew the photographs relied upon by the trial court mindful of the above factors and reach our own independent conclusions." (*Kasparian*, *supra*, 156 Cal.App.4th at p. 25.) The photographs submitted by both parties show a large, flat concrete patio area surrounding a long, raised fountain. Long, even seams run through the patio, breaking it up in to regular concrete rectangles. Close-up photographs of the seams Good submitted show them to be smooth and narrow. According to some of the photographs and the declarations of Good's experts, the seams range in width from .39 inches to .47 inches. Photographs submitted by both parties show the patio does not have cracks, raised areas, broken pieces, or jagged edges. In summary, the patio, which is of recent construction, appears in excellent condition, free of any of the kinds of defects typically complained of in dangerous conditions cases. Our examination of the photographs of the Winery patio and the declarations describing it therefore lead us to conclude no reasonable person would find a dangerous condition.

Nor were there any factors rendering the condition of the seams dangerous to a reasonably careful person. On the contrary, all the factors courts typically consider in deciding whether an alleged defect is trivial favor finding no dangerous condition in this case. The accident occurred on a warm, clear night. The photographs of the area show a flat, clear patio area without debris or obstruction. In addition, Good was very familiar

with the area. She had visited the Winery on 10 to 12 occasions in the previous nine months and had walked on the patio in the daylight in the hours before the accident occurred. Good also testified the area was clear of any debris when she fell.

Good raises only the lighting conditions at the time of the accident as a reason for concluding the surrounding conditions created a danger. Good does not contend there was no lighting in the area of her fall, but rather the lighting was too dim. This argument fails for two reasons. First, OGB submitted a photograph of the area demonstrating the lighting makes the seams easily visible, and the accident occurred on a night further illuminated by a full moon. Second, the photographs show the seams were a consistent design throughout the entire patio area and Good admitted she had been to the Winery on several occasions and had spent time in the area where she fell earlier in the day when the sun was out. It cannot be said Good did not know the location of the seams in the patio area where she was listening to the concert. Good could have avoided the unique risk the seam posed to her by stepping over it, as she undoubtedly did numerous times throughout the day and evening before her accident. In this connection, it is also significant OGB had not previously received any report of a fall occurring on its patio.

In view of these facts, we are not persuaded the conditions surrounding the accident were such as to create a substantial risk of injury to a reasonably careful person. We therefore hold the trial court correctly concluded Good did not meet her burden to raise a triable issue of fact on whether the seams presented a dangerous condition.

Good argues we should focus on the depth of the seam, because it was the feature of the patio which caused her to fall. She claims there is a triable issue of fact about the depth of the seams requiring a trial to determine dangerousness. She acknowledges OGB's witnesses propose to testify the depth of the seams in the vicinity of the fall was no more than half an inch. However, she points out Barillas declared the control joint was "well over 1/2″ inch deep" in the area where she fell, and pictures she submitted show seams with depths varying from three-eighths of an inch to eleven-sixteenths of an inch to one and three-fourths inches. We agree there is a contested issue of fact concerning the depth of the patio seams. However, we conclude the disagreement does not concern a *material* fact, because the depth of the seam creates a danger only in the rare instance a person wearing shoes with very thin heels places the heel into the seam.

Despite Good's contention, the opinion of her expert, Avrit, does not create a triable issue of material fact as to whether the seam is a defect. Avrit opined the seam violates "a widely accepted industry standard" mandating a maximum seam depth of half an inch and is therefore a defect. We agree with the assessment of Avrit's opinion made by our colleagues in the Second Appellate District in *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, where Avrit served as the plaintiff's expert in a sidewalk trip and fall case. The court held there was "no foundation for Avrit's opinion that noncompliance with certain building codes and standards made the crack dangerous" because "Avrit failed to indicate that these codes and standards have been accepted as the proper standard in California for safe sidewalks." (*Id.* at p. 928.) Here, Avrit relied on the Portland

Cement Association's "Concrete Information" for his opinion the seam is a dangerous condition, but he does not state whether the association's standard for control joint depth has been accepted as the proper standard in California for safe walkways. Without foundation for Avrit's opinion the seam is a defect according to industry standards, whether the Winery could have filled in the seam with an inexpensive mortar mix is irrelevant because a property owner is not required to maintain its premises in the perfect or safest condition. (See, e.g., *Kasparian*, *supra*, 156 Cal.App.4th at pp. 26-27.)

Next, Good contends we must conclude the depth of the seam was dangerous as a matter of law because it exceeded one inch. She cites to Barillas's photographs purporting to show at one place in the patio the seam was one and three-fourths inches deep, and she cites to *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 726 (*Fielder*), which states, "[W]hen the size of the depression begins to stretch beyond one inch the courts have been reluctant to find that the defect is not dangerous as a matter of law." Good's reliance on *Fielder* is misplaced. Even if we disregard the poor quality of the photographs and the fact we do not know where in the patio they were taken and assume the seam depth was one and three-fourths inches, *Fielder* involved a different type of defect than the one alleged here. There, the defect was the tripping hazard posed by a height differential between two adjoining slabs of sidewalk. (*Id.* at pp. 721-722.) Here, the surfaces of the adjoining concrete slabs were even and the Winery patio posed no tripping hazard. Good was injured because her footwear created a hazard for walking on any patio with seams, even if maintained in excellent condition. Because this case does not in-

volve the tripping hazard posed by a height differential between adjoining slabs of material, Good's reliance on other height differential cases (e.g., *Kasparian*, *supra*, 156 Cal.App.4th 11; *Stathoulis*, *supra*, 164 Cal.App.4th 559) is similarly unhelpful to her argument.

Good relies most heavily on *Kasparian*, *supra*, 156 Cal.App.4th 11, but her analogy is inapt. There, an 80-year-old woman tripped on a height differential between a recessed drain and the sidewalk, breaking some of her teeth and sustaining a cervical fracture. (*Id.* at pp. 15-16.) The recessed drain in *Kasparian* is very different from the concrete seam at the Winery. The sudden change in elevation created by a recessed drain poses a risk of tripping for every pedestrian, whereas seams running throughout an even concrete patio pose a risk of injury only for people wearing heels thin enough to slip into a seam less than one-half inch wide.

No California court has found a seam between two even concrete slabs to be a dangerous condition or to pose a genuine issue of dangerousness, and for good reason. A seam does not pose a hazard to the typical pedestrian exercising reasonable care if there is no height differential between the slabs of concrete on either side of the seam.

While it is possible and maybe even likely Good's heel slid into the patio seam as she moved while watching the concert, there is no evidence to suggest the seam was a dangerous condition.

III

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

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SLOUGH
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.