

WESTERMAN V. ERNST

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avel Flower Bed Is Permissible Means of Egress and Known Drop from Pavement May Not Be Obvious

Westerman v. Ernst

Arizona Court of Appeals Div. II

January 24, 2025

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A property owner's liability for harm to persons on the premises often hinges on whether the person was a trespasser or a business guest and, in the latter case, whether the condition was obvious or not. So long as an invited business guest stays in the areas where they are permitted to be, the property owner owes them a higher duty, to protect against unreasonable risks of harm, including those that are not readily apparent. There is generally no liability where the condition is so obvious that the guest can look after herself and needs no further protection. As the Court of Appeals held this week, however, both a person's status and whether a condition is obvious are questions of fact that a court is unlikely to be able to resolve as a matter of law on a motion for summary judgment.

As Rachelle Westerman was leaving a veterinary clinic and about to enter the parking lot, she stepped off a paved walkway into a gravel-filled planter between the parking lot and the walkway. The surface of the gravel was lower than the walkway, and Westerman fell, breaking her ankle. Westerman sued, claiming that she did not notice the difference in elevation between the walkway and the gravel just before she was injured.

The property owners, Ernst and Scheider, moved for summary judgment, which the Superior Court granted. The trial judge concluded that, while Westerman started off as a business guest, she lost that status when she stepped off the walkway into the gravel area and became a trespasser. The trial judge ruled that, because business owners only owe trespassers a duty not to cause intentional harm, Ernst and Scheider were not liable for the accident. The trial judge also concluded, alternatively, that even if Westerman had remained a business guest, the drop from the walkway into the gravel area was obvious and, therefore, not an unreasonably dangerous condition for which Ernst and Scheider could be liable.

On appeal to the Court of Appeals in Division 2, a unanimous panel issued an Opinion reversing on both issues. The panel agreed with Westerman that, because the gravel area was positioned between the walkway and the parking lot, was not blocked off by a fence or dense vegetation, and contained what appeared to be a worn footpath, a jury could find that Westerman reasonably believed she had permission to use the area to access the parking lot. Nevertheless, the panel acknowledged that Ernst and Scheider raised "strong arguments" that Westerman became a trespasser when she stepped from the walkway onto the gravel. The panel made clear that its decision means only that a jury could find for Westerman based on the evidence in her favor, but not that such a finding is inevitable in light of the evidence as a whole.

The panel also reversed the trial court's ruling that the change in elevation between the walkway and the gravel was obvious enough to preclude liability even if Westerman remained a business guest. Based on Westerman's testimony that she did not notice the drop in elevation as she was stepping forward and that it looked to her as if the gravel was the same level as the walkway, along with an expert engineer's opinion that the unmarked drop-off created a risk, the panel determined that a jury could find that the condition was not obvious. The panel noted that photographs showed "a clear change in elevation" between the lot, the gravel, the surrounding curb, and the walkway, as well as Westerman's testimony that she noticed that the walkway was higher than the parking lot on her way into the clinic. However, because the panel was required to view the evidence in Westerman's favor on summary judgment, this evidence did not impact its conclusion.

JSH will continue to monitor whether a petition for review is filed in this matter and whether the pending premises liability case before the Arizona Supreme Court, *Perez v. Circle K*, will address or potentially impact this Opinion.

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Arcangelo S. Cella works closely with JSH trial attorneys to assist with critical motions, and provides guidance from the pleading stage through the trial and post-trial stages in state and federal courts. Arcangelo's practice includes insurance defense and bad faith, medical and legal malpractice, civil rights, governmental liability, product liability, school law, and wrongful death and personal injury.

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