102819-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(Court of Appeals No. 85010-5-I)

AMY BIGGS,

Petitioner,

v.

PUGET SOUND ENERGY, INC.,

Respondent,

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is plaintiff Amy Biggs. Ms. Biggs suffered a traumatic and life changing fracture to her leg – the top of her shin bone right below her knee - when she fell down poorly lit and unmarked stairs in the middle of a pedestrian walkway at Snoqualmie Falls Park (the "Park") – which is the subject of this action.

II. CITATION TO COURT OF APPEALS DECISION

Ms. Biggs seeks review of and reversal of the decision of Division One of the Court of Appeals, No. 85010-5-I, in which the Court of Appeals affirmed the summary judgment dismissal of her claims against the defendant. The Court of Appeals decision is attached in Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Whether a member of the public entering an ungated Park after dusk should be deemed a trespasser as a matter of law (rather than a recreational user under RCW

4.24.210) when that individual raises factual issues and reasonable inferences that she had implicit and/or *de facto* permission to enter the Park in order to view the illuminated Snoqualmie Falls from the Park at night.

B. Whether a possessor of land held open to the public (the "Park") that (a) knows the public often comes into the ungated Park after it is purportedly closed; (b) knows of an artificial, latent, and dangerous condition that has previously injured other Park visitors; and (c) fails to exercise reasonable care to warn of the dangerous condition, is responsible and liable to those seriously injured pursuant to the "constant trespasser" exception as set forth in the RESTATEMENT (SECOND) OF TORTS § 335 (1965).

IV. STATEMENT OF THE CASE

A. Introduction

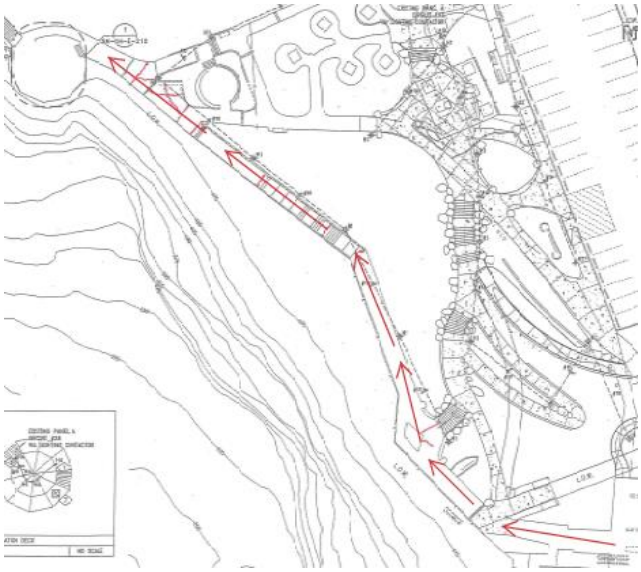
On November 24, 2018, Amy Biggs and her husband were guests of the Salish Lodge & Spa (the "Lodge") in Snoqualmie,

Washington. CP 545. The Lodge property borders and is seamlessly connected to the Snoqualmie Falls Park (the "Park") owned and maintained by Puget Sound Energy ("PSE"). The Park contains a pedestrian pathway that leads to an observation area for the public to view the Snoqualmie Falls, which are illuminated at night.

As the Biggs walked along the pedestrian pathway toward the observation area, Amy Biggs stepped forward onto an area that appeared to be a continuation of the smooth paved walkway she had been traversing. In actuality, it was a first step downward onto a poorly lit stairway with no warning sign. CP 546-547. Stepping into "air" caused Amy Biggs to fall and break her leg causing severe and permanent leg and nerve damage and a lengthy hospitalization. CP 547. Discovery revealed that Ms. Biggs fell in the exact same location and manner where a previous visitor had been injured in a similar way. CP 569-570.

B. The Park features a paved walkway from the Lodge to the observation deck. PSE maintains lights along this path and illuminates the Falls at night, visible from the observation deck.

The Lodge abuts the Park, and a contiguous, unobstructed paved pathway leads directly from the Lodge into the Park and to the Falls observation area. CP 545-549. The path of the walkway from the Lodge to the Falls observation area is marked with red arrows on the map below:



The walkway runs from the exit of the Lodge (lower right of the diagram) all the way to the observation deck (the upper left

of the diagram). *Id.* PSE has installed lights along the paved walkway. CP 562. PSE is solely responsible for maintaining these lights. *Id*. At night, the Falls are illuminated by high-powered spotlights located on PSE property. CP 563. Some of the spotlights on the PSE property are maintained by Salish Lodge, and some of them are maintained by PSE. *Id.* They look like this:

CP 566-567. The Falls are illuminated solely at the "request of the Salish Lodge & Spa." CP 563. There are no other reasons PSE illuminates the Falls at night. *Id*. The lights are not required to observe the Falls during daylight hours. The lights make the

Falls visible from the observation deck within the Park after dusk. *Id.*

C. PSE knows visitors come to the Park at night to view the illuminated Falls and takes minimal action to enforce Park closure other than the placement of some poorly visible signs.

PSE contends that the Park is only open from "dawn to dusk." CP 561. However, PSE is aware that visitors to the Falls routinely enter the Park after dusk to view the illuminated Falls at night.:

Q: Do people visit the park after dusk?

A: Based on the evidence we find in the park, yes.

Id.

PSE does "not enforce a closure of the park." CP 561. It places no barriers or other physical restrictions (such as a gate or chain) to impede access to the Park at night. *Id.* It places no placards or sandwich boards in the walkways to indicate the Park is closed. CP 562. PSE makes no announcements that the Park is closing. CP 561. The only thing PSE does to physically

discourage visiting the Park after hours is lock the bathrooms. *Id.* PSE has never had any internal discussions about ways it could close the Park to visitors after dusk. *Id.*

Along the pathway that Amy Biggs and her husband walked on the night of November 24th, PSE has installed at most two small signs indicating the Park is closed at dusk. CP 491-492. This is what the sign at the top of the landing at the top of the stairway looks like at night:

CP 512. This is what the sign at the bottom of the stairway leading to the pathway looks like at night:

CP 512. Neither Amy Biggs nor her husband noticed either of these signs on the night she fell. CP 546, 549. The Biggs both believed the Park to be part of the same property as the Lodge, and they both believed that they had permission to be in the area for the purpose of viewing the Falls from the observation deck by virtue of their status as Lodge guests:

> At the time of this incident, my husband and I thought that the pathway we were on was open to visitors and guests of the Lodge for nighttime viewing of Snoqualmie Falls, which are lit up at night. There were no chains, gates, or other devices in the pathway indicating that the area was supposedly closed.

CP 545-546.

D. In December 2014, another Lodge guest was seriously injured by falling at the same spot as Amy Biggs after dusk. PSE knew about this incident and the fact that poor lighting and marking of the stairs were contributing factors.

On December 15, 2014, Michelle Panizza and her husband were staying at the Salish Lodge and Spa for their daughter's wedding. CP 569-570. After dusk they left the Lodge to walk out toward the observation deck of the Snoqualmie Falls in the Park to view the illuminated falls, although they did not appreciate the Park and Lodge were separate at the time. *Id.*

Ms. Panizza did not see any notices or signs stating the area was closed after dusk (or any other time). CP 570. In fact, one of the reasons her family wanted to walk to the overlook was to see the Falls illuminated at night. *Id.* As Ms. Panizza was walking along the walkway, she and her husband both suddenly fell on a set of unmarked stairs that they did not see, because the stairs were in an area with poor lighting. *Id.* Before they fell, they

"thought the area was just a smooth gradual walkway and did not expect stairs." *Id.* As a result of her fall, Ms. Panizza broke her left ankle, tore her left Achilles tendon, and suffered nerve damage in her left foot. *Id.*

Ms. Panizza submitted a claim form for damages to PSE. CP 570, 573. In that form, Ms. Panizza specifically stated:

> We were walking down the sidewalk when we both fell, to later find out there was [sic] set of stairs that we did not see in the dark due to no lighting.

Id. PSE admits to receiving this claim form. CP 558.

Ms. Panizza hired an attorney who subsequently contacted PSE and sent a letter informing PSE that the fall occurred because the steps were "neither clearly lit nor marked". CP 576 Ms. Panizza and Ms. Bigs fell in the exact same location. CP 571, 579-580. Following Ms. Panizza's claim, PSE made no changes to the stairs prior to Amy Biggs' fall. CP 559. PSE has made no changes to the location of lighting in the Park since 2013. CP 562.

E. In November 2018, Amy Biggs sustained serious injuries falling on the same poorly marked stairway used by Michelle Panizza while walking from the Lodge to the observation deck in the evening.

On November 24, 2018, the Biggs checked into their room and had dinner at the Lodge. CP 546, 549. After dinner, the Biggs went briefly to their room before walking outside to view the holiday lights and the Snoqualmie Falls. *Id.* The Biggs walked outside of the Lodge at approximately 8:00 p.m. and turned left. *Id*. They began walking up the steps on the concrete path that leads from the Lodge to the Snoqualmie Falls observation area. *Id.* Neither Amy nor Dan Biggs noticed any signs stating that the area was closed, or that the area was separate from the Lodge. *Id.*

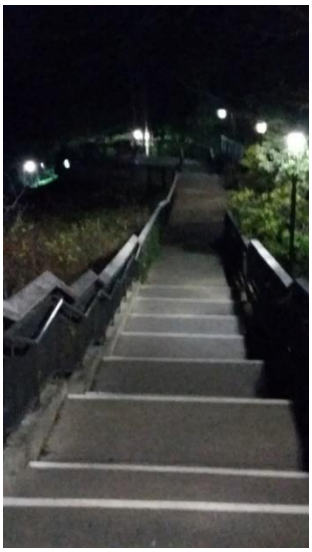
At the time of this incident, Amy and Dan Biggs both thought that the pathway they were on was open to visitors and guests of the Lodge for nighttime viewing of Snoqualmie Falls. *Id.* There were no chains, gates, sandwich boards, cones, or other devices in the pathway indicating that the area was supposedly

closed. *Id*. The Biggs stopped for a moment and looked at the Falls from the beginning of the pathway. *Id.* They began walking toward the observation area to get a better view. *Id.* They saw two other people returning from the observation area. *Id.*

The Biggs walked down some stairs which were clearly visible and then along a flat pathway. CP 546-47, 549-550. Based on the lighting and marking in the area, they thought they were still walking on a flat pathway when suddenly Amy Biggs felt "air" where she expected the flat surface to continue. *Id.* This caused Ms. Biggs to fall abruptly. *Id*. Amy Biggs felt her leg snap and then it "exploded". CP 547. As a result of the fall, Ms. Biggs suffered a tibial plateau fracture in her left leg, requiring multiple surgeries and extensive hospitalization. *Id*. Her husband fell as well. CP 549.

The "flat pathway" was actually a set of stairs that were not obvious and only appeared as a flat pathway due to the lighting conditions and lack of marking on the stairs. CP 546-47,

549-550. There was no sign warning that there were stairs in that location. *Id.* There was no other visual information warning that there were stairs in that location. *Id.* Had the Biggs seen that there were stairs in that location, neither Amy nor Dan would have fallen. *Id.* The fall occurred at the far end depicted in the following picture:



CP 552.

F. A human factors expert review found the fall location to be hazardous, with PSE failing to take any action to protect pedestrians from the danger.

Plaintiff retained human factors expert and safety

professional Joellen Gill. Ms. Gill formed three primary opinions related to the condition of the stairway, PSE's conduct, and Plaintiff's conduct:

i. The fall location was a hazardous condition.

Ms. Gill determined that the configuration of the fall location (the stairway area), at the time of the fall, "created a perceptual trap for pedestrians because it failed to effectively communicate to users of the walkway that the condition (hard to see steps) existed." CP 584-85. For example, there are three steps, but only the top step had a white line. *Id.* The edges of the stairs lacked distinctive tread nosing. *Id.* The existing handrails blended into the color of the guardrails making them difficult to see. *Id.* There was no center handrail in the middle of the stairway. *Id.* The slope of the guardrails did not mirror the slope of the handrails as they did earlier in the walkway. *Id.* There was low illumination (approximately 12% of the required amount). There was no signage indicating the existence of steps. *Id.*

ii. Puget Sound Energy knew from a prior reported injury incident that the stairway created a hazard for pedestrians and took no effective action to warn or protect pedestrians from the hazard.

PSE knew that people were using the walkways under low illumination conditions. CP 585. PSE knew that people were using the Park even after dusk, despite its signage. *Id.* PSE took no action to make sure the tread nosings were marked distinctively. *Id.* PSE took no action to make sure that the handrails were conspicuous and mirrored the slope of the steps, or the guardrails to mirror the shape of the handrails. *Id.* PSE provided no signage at the steps to alert people that there was a change in elevation.

iii. The actions of Plaintiff leading to and up to the fall were consistent with foreseeable human behavior.

When people are walking on what they perceive to be a flat, safe walkway, they don't walk looking down at their feet. *Id.* The fact that Plaintiff (and her husband) did not observe the

"closed at dusk" signage and failed to detect the stairway in her path is consistent with human factors research. *Id.* It is common for individuals to not see informational signs when they are not actively looking for information. *Id.*

G. The Court of Appeals found that Amy Biggs was a trespasser as a matter of law and therefore PSE owed her no duty.

The Superior Court granted PSE's motion for summary judgment dismissal of Plaintiff's claims. CP 618-619. Ms. Biggs appealed to Division One of the Court of Appeals. The Court of Appeals found the record:

> shows without dispute that at the time of her injury Biggs was walking on a trail that was open to the public and fell down a stairway that was also open to the public. In that narrow sense (ignoring any posted notice to the contrary), Biggs was on PSE's property with its consent.

Opinion at p. 3. Despite that finding, the Court of Appeals found that PSE withdrew consent by posting two "Closed Dusk Til Dawn" signs along the area in which the Biggs walked. Opinion at p. 5-6. The Court of Appeals held that:

> Applying an objective standard of reasonableness based on consideration of all the existing facts and circumstances - including the content, visibility, and placement of the signs that Biggs admittedly walked past before her fall – no reasonable juror could conclude that Biggs had PSE's permission to enter or remain on its property at the time of her injury.

Opinion at p. 6. The Court of Appeals also declined to consider or apply the constant trespasser exception (as set forth in the RESTATEMENT (SECOND) OF TORTS § 335) in this case for the reason that it has not been expressly adopted by Washington courts. Opinion at p. 7 fn. 2.

For the reasons set forth below, Amy Biggs submits that these conclusions are contrary to established Washington law which requires all facts and inferences are to be construed in the light most favorable to the nonmoving party on summary judgment.

Additionally, the Court of Appeals opinion is inconsistent with Washington law requiring landowners with knowledge of artificial, latent, and dangerous conditions on their property to

take reasonable action to prevent harm to those who foreseeably enter their property ("constant trespassers).

V. AMY BIGG'S PETITION SHOULD BE GRANTED UNDER RAP 13.4(b)(1), (2) & (4).

A. The Court of Appeals erroneously found that Amy Biggs was a trespasser as a matter of law, contrary to Washington Supreme Court and Court of Appeals case law.

Despite (a) substantial evidence of the inadequacy of poorly illuminated signage declaring the park "closed"; (b) Ms. Bigg's uncontroverted testimony that she had a good faith belief she was permitted to be in the Park; (c) PSE's admissions that it was aware of regular public use after dusk; (d) PSE's knowledge of prior injuries suffered by other Lodge guests visiting the Park at the exact same location after dusk; and (e) PSE's failure to take any action to prevent Lodge guests (or anyone) from visiting the Falls at night, the Court of Appeals found that "no reasonable juror could conclude that Biggs had PSE's permission to enter or remain on its property at the time of her injury." Opinion at p. 6.

This decision is in conflict with *Bartlett v. Northern Pac. Ry. Co.*, 74 Wn.2d 881, 882 (1968) and *Grimsrud v. State*, 63 Wn. App. 546, 553 (Div. 1 1991) (adequacy of warnings is question for jury). It is in conflict with *In re Matter of Harvey*, 3 Wn. App.2d 204, 216 (Div. 3 2018) and *Botka v. Estate of Hoerr*, 105 Wn. App. 974, 983 (Div. 1 2001) (implicit permission to enter land may be determined through prior conduct or custom). It is in conflict with the *Singleton v. Jackson*, 85 Wn. App. 835, 839-40 (Div. 2 1997) and RESTATEMENT (SECOND) OF TORTS § 330 CMTS(E)-(F) (whether consent is expressed by acts other than words must be determined after considering all the surrounding circumstances).

The decision is also in conflict with *Rogers v. Bray*, 16 Wn.App. 494, 496-96 (Div. 3 1976) (where a trespasser is negligently led into believing that a private road is a public road, landowner has a duty of care). Because the decision below fails to follow this Court's controlling precedent and contradicts its

own precedent, review is appropriate under RAP 13.4(b)(1) and (2).

i. The Court of Appeals erred by finding Amy Biggs a trespasser as a matter of law.

The Court of Appeals affirmed summary judgment to PSE by determining as a matter of law that Amy Biggs was a trespasser and therefore was owed no duty of care. This was error because (1) material questions of fact exist as to whether Amy Biggs was a trespasser and/or (2) whether she was negligently induced to believe she had permission to be in the Park after dusk, even if she did not.

A trespasser, for purposes of premises liability, is one who enters the premises of another without invitation or permission, express or implied. *Winter v. Mackner*, 68 Wn.2d 943, 945 (1966); WPI 120.01. "In addition to giving express consent to entry, the possessor of property may impliedly consent to a licensee's entry, through conduct or by application of local custom." *In re Matter of Harvey*, 3 Wn. App. 2d 204, 216 (Div.

3 2018); *see also* RESTATEMENT (SECOND) OF TORTS § 330 CMT. (E):

> The consent which is necessary to confer a license to enter land, may be expressed by acts other than words…. In determining whether a particular course of action is sufficient to manifest a consent to enter the land, consideration must be given to all of the surrounding circumstances.

See also RESTATEMENT (SECOND) OF TORTS § 330 CMT. (F):

> If the possessor has, by word or conduct, sufficiently expressed his consent to the entry of all others or a particular class, it is immaterial whether the particular person entering knows or does not know of the acts or words by which this consent is expressed.

Permission sufficient to establish invitee or licensee status can be implied from the "prior conduct and statements of the property possessors" including where people "may reasonably be foreseen to go." *Botka v. Estate of Hoerr*, 105 Wn. App. 974, 983 (Div. 1 2001) (prior conduct created a question of implied

permission sufficient to overcome summary judgment).

Amy Biggs established a question of fact as to whether she had implied permission to enter the Park after dusk. PSE lights the Falls at night solely at the request of the Salish Lodge so that the Falls can be observed at night. The Lodge does not pay for this lighting. There is a contiguous paved pathway from the Lodge to the Park which does not give any indication of separate ownership of the two properties. There are no barriers on the pathway between the Lodge property and the PSE property along the walkway. PSE lights the paved pathway to the observation deck at night. PSE is aware that Lodge guests (and others) use the Park at night despite the ineffective presence of some signs. PSE takes no action to prevent people from using the Park to view the Falls at night.

These facts, taken in the light most favorable to Amy Biggs, create a strong inference that nighttime guests from the Lodge are implicitly permitted to view the Snoqualmie Falls

from the observation deck at night despite the presence of signage indicating that the Park is closed at dusk.

ii. The Court of Appeals erred in failing to consider whether Ms. Biggs was negligently induced to believe she was not trespassing.

Further, Amy Biggs raised factual issues and reasonable inferences as to whether PSE negligently led her to believe she had permission to enter the Park after dusk to view the Falls. Even if a plaintiff is present on a defendant's property without permission, the defendant is subject to an elevated duty of care if the plaintiff is negligently led to believe that they have permission to be there. A landowner owes a duty of care where "the trespasser is negligently led into believing that a private road is a public road." *Rogers v. Bray*, 16 Wn. App. 494, 496-96 (Div. 3 1976) *citing* RESTATEMENT (SECOND) OF TORTS § 367 (1965). The owner is then under a duty to use reasonable care to maintain the road in a reasonably safe condition for travel. *Id. See also* 16A Wash. Prac., § 18:9 (5th ed.), (Duty of owners and occupiers

of land to adult trespassers).

The same principle applies here. PSE was aware that the public often visits the Park to see the illuminated Falls after dusk, and it knows that its placement of signage does not keep the public from coming into the Park. PSE admitted it does nothing else to enforce its purported hours of "dawn until dusk."

The signs are small, cluttered among other signs, and are not conspicuous. Whether the signs provide an adequate warning is a question of fact precluding summary judgment. *See e.g. Grimsrud v. State,* 63 Wn. App. 546, 553 (Div. 1 1991) ("Here, the question of whether the signs provided an adequate warning to motorists of the hazardous condition of the roadway is a question of fact for the jury.").

It is foreseeable overnight guests of the Lodge will assume the contiguous concrete pathway leading from the Lodge to the observation deck is a permitted place for them to visit at night.

PSE knows that after-dusk visits often occur, despite its

signage. Whether the small, unlit and inconspicuous signs placed on the walkway between the Lodge and the Park are adequate to inform a nighttime Lodge visitor that the Park is actually closed is a question of fact.

The Court of Appeals acknowledged that Ms. Biggs was on a pathway open to the public "but for" any posted notice. Whether the posted notice was adequate, and whether the other acts and omissions of PSE would lead a reasonable person to believe they had permission to enter the Park, is a question of fact for a trier of fact.

The trial court and Court of Appeals substituted its own judgment for that of the trier of fact rather than considering all facts and inferences in the light most favorable to Amy Biggs. Summary judgment as to Ms. Biggs status as a trespasser as a matter of law was error.

B. Assuming *arguendo* Ms. Biggs' status was a trespasser, the Court of Appeals erroneously failed to apply the "constant trespasser" doctrine.

Despite (a) PSE's admissions that it is aware of regular public use of the pathway and observation area in the Park after dusk; (b) PSE's awareness of prior falls and at least one serious injury suffered by another Lodge guests visiting the Park at the exact same location after dusk; (c) PSE's knowledge that prior falls were blamed on poor or deceptive lighting conditions; and (d) PSE's admission that no warning signs regarding the poorly lit steps were in place, the Court of Appeals refused to apply the principles set forth in the RESTATEMENT (SECOND) OF TORTS § 335 (1965). Because the decision below fails to follow this Court's controlling precedent and contradicts its own precedent, review is appropriate under RAP 13.4(b)(1) and (2). Further, it is in the substantial public interest to clarify the duties of a landowner to known "constant trespassers", at least insofar as those duties apply to possessors of land that is held out to the public for recreational purposes with purported limitations on the times of its use. RAP 13.4(b)(4).

i. The Court of Appeals erred in refusing to further analyze the facts of this case under the duty to warn known constant trespassers of artificial, dangerous, latent conditions.

The RESTATEMENT (SECOND) OF TORTS § 335 (1965) provides that a possessor of land who knows, or should know, that trespassers constantly intrude upon a limited area of its land is still subject to liability to trespassers for known and latent dangerous conditions:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if (a) the condition (i) is one which the possessor has created or maintains and (ii) is, to his knowledge, likely to cause death or seriously bodily harm to such trespassers and (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

RESTATEMENT (SECOND) OF TORTS § 335 (1965) (Artificial

Conditions Highly Dangerous to Constant Trespassers on Limited Area) (basing Illustration 1 on *Clark v. Longview Public Service Co.,* 143 Wn. 319 (1927)).

Although there are no Washington cases directly analyzing this section of the Restatement, the Restatement itself draws its first illustration from a Washington case and is consistent with the ways Washington courts have treated trespassers in the premises liability context. *See e.g. Clark v. Longview Public Service Co., supra*; *Rogers v. Bray*, 16 Wn. App. 494, 496-96 (Div. 3 1976) (private roads mistaken as public roads).

Additionally, § 335 was cited with approval in *Schwartz v. King County*, 200 Wn.2d, 231, f.3 for its definition of "artificial condition" in the context of the recreational immunity statute. Section 335 also tracks almost identically with RCW 4.24.210(4)(a), which imposes duties on landowners to the recreating public to conspicuously warn of a "known dangerous

artificial latent condition".

ii. Application of § 335 of the Restatement is consistent with this Court's prior decisions, including Clark v. Longview Public Service Co.

In a footnote, the Court of Appeals refused to apply § 335 of the Restatement on the grounds that Washington has not adopted the "constant trespasser" exception to the general rule of trespass, *citing Sikking v. Nat'l R.R. Passenger Corp.*, 52 Wn. App. 246, 247 (Div. 2 1988). Opinion at p. 7, fn. 2. This footnote ignores the fact that this Court *has* referenced and relied on § 335 when discussing Washington Recreational Immunity Statute, RCW 4.24.210. It also ignores the fact that *Sikking* considered § 334 of the Restatement (Highly Dangerous *Activities*), not § 335 (Highly Dangerous *Conditions*) (emphasis added).

Without much discussion, the Court of Appeals distinguishes the *Clark* decision on the grounds that the opinion narrows its analysis to possessors of land containing high

voltage power lines. Opinion at p. 7, fn. 2. Although the *Clark* decision does find a common law duty of a landowner to known trespassers by virtue of the presence of high voltage power lines (a dangerous *condition*), the opinion does not expressly or impliedly limit its holding to landowners regarding electricity. *Clark* should be read to apply to landowners with knowledge of any artificial and dangerous *condition*. A poorly lit and poorly marked stairway (i.e. a "perceptual trap") is the dangerous condition alleged in this case. CP 584-85.

As this Court has held, existence of an artificial dangerous condition is generally a question of fact. *Schwartz v. King County*, 200 Wn.2d 231, 243 (2022).

iii. Application of § 335 of the Restatement of Torts (Second) should result in reversal.

All of the elements of § 335 are present in this case. As discussed *supra*, PSE admitted that it knows the public often uses the Park after dusk. The poorly lit concrete walkway and stairway are an artificial condition created by PSE. Ms. Biggs

presented evidence that the condition was latent and dangerous. The lighting conditions and other visual cues did not reveal the stairs, and the stairs were not otherwise marked so as to be discovered by anyone using the Park after dark.

PSE was notified of an identical incident on the same set of stairs causing serious bodily injury and involving Lodge guests at least three years before Amy Biggs and her husband fell. PSE did nothing following that incident to make the stairs safer or more visible. There was no sign warning of the unlit and unmarked stairs.

Application of § 335 to the undisputed facts in this case requires reversal of the Court of Appeals' and trial court's decision.

VI. CONCLUSION

Amy Biggs respectfully requests this Court to accept review to reverse the Court of Appeals' decision so that this case may be decided on its merits.

Respectfully submitted this 21st day of February 2024.

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I certify that the foregoing brief contains 4,994 words in compliance with RAP 18.7.

APPENDIX A

Unpublished Opinion, Biggs v. Puget Sound Energy, Inc., Division One of the Court of Appeals, No. 85010-5-I

FILED
1/22/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AMY BIGGS, Appellant, v. PUGET SOUND ENERGY, INC., a Washington public utility corporation, Respondent.	No. 85010-5-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Amy Biggs (Biggs) appeals from a trial court's summary judgment order dismissing her premises liability claim against Puget Sound Energy (PSE). Finding no error, we affirm.

I

Biggs and her husband were staying at the Salish Lodge (Lodge) on November 24, 2018. Around 8 p.m., after having dinner at the Lodge, Biggs and her husband walked to the Snoqualmie Falls Park (Park), which is next to the Lodge, to view Snoqualmie Falls. When they entered the Park, they passed a sign, which PSE had posted, stating "PARK CLOSED DUSK TIL DAWN." They then continued down a stairway, along the pathway, and past another sign, also posted by PSE, which likewise stated "PARK CLOSED DUSK TIL DAWN." After

passing the second sign, Biggs proceeded down a second stairway where she fell. Biggs suffered a serious injury (a tibial plateau fracture), requiring surgery.

Biggs sued PSE as the owner of the premises and claimed PSE "negligently failed to maintain the pedestrian area in a reasonably safe condition." PSE filed a motion for summary judgment asserting that it "did not owe [Biggs] a duty of ordinary care at the time of her fall because she was a trespasser as a matter of law." Biggs opposed the motion and asserted that she was not a trespasser when she fell because PSE "impliedly gives permission" for the "public to enter the Park to view the Falls at night." To support that argument, Biggs asserted, among other things, that the pathway was open to the public, PSE maintains lights along the path and illuminates Snoqualmie Falls after dark, and PSE had not installed any chains, gates, or other devices prohibiting access to the Park even though it knows that visitors enter the Park after dusk.

The trial court granted PSE's motion. The court ruled that Biggs was "trespassing when she entered the park because there were signs informing her the park was closed. She walked by those signs. Because she was trespassing, PSE owed her no duty, except to refrain from [causing] willful and wanton injury to her. Plaintiff does not allege those occurred." Biggs appeals.

II

We review summary judgment rulings de novo. *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 808, 120 P.3d 593 (2005). Summary judgment is properly granted when the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law. CR 56(c). We review all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 768, 508 P.3d 193 (2022). Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. *Welch v. Brand Insulations, Inc.*, 27 Wn. App. 2d 110, 114, 531 P.3d 265 (2023).

Under Washington law, landowners owe no duty to trespassers "except to refrain from causing willful or wanton injury." *Sikking v. Nat'l R.R. Passenger Corp.*, 52 Wn. App. 246, 247, 758 P.2d 1003 (1988). Because there is no evidence or argument that PSE caused willful or wanton injury to Biggs, the dispositive issue here is whether Biggs was a trespasser at the time of her injury. The record shows without dispute that at the time of her injury Biggs was walking on a trail that was open to the public and fell down a stairway that was also open to the public. In that narrow sense (ignoring any posted notice to the contrary), Biggs was on PSE's property with its consent. *See Singleton v. Jackson*, 85 Wn. App. 835, 839-40, 935 P.2d 644 (1997) (possessor of property may consent to entry through conduct, by omission, or by means of local custom, as well as through oral or written consent).

But such consent can be withdrawn in a variety of ways, including by posting a sign. We have adopted Comment "e" of the Restatement (Second) of Torts § 330 (Am. Law Inst. 1965), which squarely addresses that issue. *See Singleton*, 85 Wn. App. at 839. It states:

> The consent which is necessary to confer a license to enter land, may be expressed by acts other than words. Here again the decisive factor is the interpretation which a reasonable [person] would put upon the possessor's acts. Thus one who constructs and opens a roadway across his land for the benefit of his friends and neighbors may thereby express his willingness to permit the entry of strangers who wish to cross the land, *unless he posts a notice to the contrary*; and this is true although the possessor in fact intends to permit the entry only of particular individuals.

RESTATEMENT (SECOND) OF TORTS § 330 cmt. e (emphasis added). The *Restatement* thus confirms that while consent may be communicated in numerous ways—including by conduct or omission—it may also be withdrawn by posting notice to the contrary.

Division Two's opinion in *Singleton* is in accord with these legal principles. The court there addressed whether Singleton, a Jehovah's Witness, was a trespasser when she slipped and fell on the front porch of a house owned by Jackson and part of which the Colsons (Jackson's son and daughter-in-law) used as a business office. 85 Wn. App. at 837. In addition to adopting the legal principles set forth in the *Restatement*, as recited above, the court reiterated, "A 'trespasser,' for purposes of premises liability, is one 'who enters the premises of another without invitation or permission, express or implied, but goes, rather, for his own purposes or convenience, and not in the performance of a duty to the owner or one in possession of the premises.'" *Id.* at 839 (quoting *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453 (1966)). The court ultimately concluded that Singleton was *not* a trespasser at the time of her injury, in part, because "[t]here was no evidence that Jackson or the Colsons notified her by posting signs . . . that she was not welcome." *Id.* at 842.

Here, the record shows, without dispute, that PSE provided the requisite notice by posting signs that Biggs was not welcome in the Park at the time of her injury because the Park was "CLOSED DUSK TIL DAWN." While PSE posted such signs throughout the Park (and similar information can be found in publicly accessible websites and PSE's filings with the Federal Energy Regulatory Commission), *Singleton* focuses the inquiry on notice to the alleged trespasser. *See* 85 Wn. App. at 842 (examining whether Jackson or Colsons "notified [Singleton] by posting signs"). Biggs walked past two such signs before her fall. The signs are clear, unobstructed, and next to the path, and a reasonable person would interpret these signs as notice of PSE's intent to prohibit visitors from entering or remaining in the Park from dusk to dawn. And it is also undisputed that Biggs entered the Park after dusk (at approximately 8 p.m. in the month of November). As such, reasonable minds can reach but one conclusion from the admissible facts in evidence, which is that Biggs did not have PSE's consent to be in the Park—and was therefore a trespasser—at the time of her injury.

Notwithstanding the foregoing analysis, Biggs argues that the "signs are small, cluttered among other signs, and are not conspicuous," she "did not see" the signs as she and her husband walked along the path, and "whether the signs provide an adequate warning is a question of fact precluding summary judgment." These arguments fail because the applicable test is an objective one: "the decisive factor is the interpretation which a *reasonable [person]* would put upon the possessor's acts." RESTATEMENT (SECOND) OF TORTS § 330 cmt. e (emphasis added). Washington courts have similarly held that when applying the

reasonable person standard to a plaintiff's conduct, "'the inquiry is whether or not [the plaintiff] exercised that reasonable care for [their] own safety which *a reasonable [person] would have used under the existing facts and circumstances*.'" *Dunnington v. Virginia Mason Med. Ctr.*, 187 Wn.2d 629, 637-38, 389 P.3d 498 (2017) (emphasis added) (quoting *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 182, 412 P.2d 109 (1966)). Applying an objective standard of reasonableness based on consideration of all the existing facts and circumstances—including the content, visibility, and placement of the signs that Biggs admittedly walked past before her fall—no reasonable juror could conclude that Biggs had PSE's permission to enter or remain on its property at the time of her injury.[1]

Lastly, Biggs argues that the following evidence shows that PSE either "impliedly consent[ed]" or "negligently induced" her to believe she had permission to enter the park: (1) there is a contiguous paved pathway from the Lodge to the Park that does not give any indication of separate ownership of the two properties; (2) there are no barriers on the pathway between the Lodge property and the PSE property along the walkway; (3) PSE illuminates the paved pathway to the observation deck where guests can view Snoqualmie Falls; and (4) PSE is aware that the guests who stay at the Lodge visit the Park at night to view the

[1] Additionally, even if Biggs's subjective perspective were relevant here, the record does not support her assertion that she "did not see" the signs as she and her husband walked along the path. Biggs did not testify that she never saw a "PARK CLOSED DUSK TIL DAWN" sign posted by PSE, but rather that "I don't recall seeing it." Biggs also testified that she visited the Park "over 20 times" before her fall, and she admitted that she saw a sign indicating "no drone or UAV flying allowed," which is similar in size and placed in close proximity to the "PARK CLOSED DUSK TIL DAWN" sign that she walked past prior to her fall.

falls, which PSE illuminates. Even when this evidence is viewed in the light most favorable to Biggs, it does not show that a *reasonable person* could properly conclude that they had PSE's permission to enter or remain on its property after dusk and before dawn despite walking past two of PSE's prominently posted signs stating "PARK CLOSED DUSK TIL DAWN."[2]

III

The trial court correctly ruled that Biggs was a trespasser at the time of her injury and, as a result, correctly granted summary judgment in PSE's favor. We affirm.[3]

Feldman, J.

WE CONCUR:

Chung, J.

Coburn, J.

[2] Biggs also argues that even if she were a trespasser, under the "constant trespasser doctrine" landowners owe a duty to warn trespassers of known, artificial, latent, and dangerous conditions. Washington has not adopted the "constant trespasser" exception to the general rule of trespass. *Sikking*, 52 Wn. App. at 248-49. Nevertheless, Biggs argues that our Supreme Court's decision in *Clark v. Longview Public Service Co.*, 143 Wn. 319, 255 P. 380 (1927), permits us to adopt this exception. Biggs overlooks or ignores the portion of the opinion that narrows its analysis to possessors of land containing "high-voltage electricity" where the possessor may have reason to believe trespassers "may come into its proximity." *Id.* at 323. Because no such facts are presented here, we reject this argument.

[3] The trial court also ruled, in the alternative, that the recreational use immunity statute (RCW 4.24.210) applies to PSE and immunizes it from this lawsuit. Because we agree with the trial court that Biggs was a trespasser when she suffered her injury, we do not reach the immunity issue.

CERTIFICATE OF SERVICE AND FILING

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding, and am competent to be a witness therein. My business address is Grube Orehoski, PLLC, 1200 Fifth Avenue, Suite 1711, Seattle, Washington 98101. On February 21, 2024, I caused the foregoing PETITION FOR REVIEW with APPENDIX to be served on the Respondent through its counsel of record as follows:

VIA EMAIL

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Dated this 21st day of February 2024.

/s/ Joseph A. Grube
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GRUBE OREHOSKI, PLLC

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