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NO. 69916-4-I

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

CLARENCE T. McDONALD and SUSAN McDONALD, husband and
wife,
Plaintiffs-Appellant

vs.

COVE TO CLOVER, a Washington Nonprofit Corporation,
Defendant- Respondent

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COURT OF APPEALS
STATE OF WASHINGTON
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APPELLANTS' REPLY BRIEF

By: CARRIE E. EASTMAN, WSBA# 40792
SANCHEZ, MITCHELL & EASTMAN
Attorneys for Appellants

Office Address:

4110 Kitsap Way Suite 200
Bremerton, WA 98312
Telephone: (360) 479-3000

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I. Argument:

A. Issues of Material Fact Exist:

Cove to Clover argues there were no issues of material fact and claims to accept Tom McDonald's recollection of events yet continues to argue and present disputed facts as its version of what happened. Respondent's Brief at 3. If the facts regarding attendance, weather, and location of the beer garden were irrelevant, Cove to Clover would not continue to dispute them.

The fact of the matter is Cove to Clover claims attendance was low implying Tom McDonald could have used the concrete path rather than traveling over the grass but Tom testified at his deposition that a large crowd had formed and he was forced up the grassy hillside to exit the main stage area. CP at 248-250. This is a material fact dispute because depending on how crowded the festival was affects whether or not Cove to Clover should have anticipated their festival setup would force invitees to encounter an obvious danger like slippery wet grass, which goes to establishing Cove to Clover's duty as explained below.

Cove to Clover now asserts that the beer garden tent was a separate tent from the main stage tent and that Tom was not in the beer garden tent when he exited to the grass. Appellant's brief at 12. Cover to Clover makes this assertion to support its argument that the positioning of the

beer garden tent is irrelevant when in fact it is material because it was the increased foot traffic from the beer garden exit that made the grassy hillside deteriorate with the rain and become muddy. CP 259.

While it is true Tom was not in the beer garden, the beer garden was simply a roped off portion at the back of the main stage tent with exits to the grass on the side. CP at. 101-103 and 181:24. At his deposition Director of Cove to Clover John Nelson indicated that the beer garden was moved from the original permit plan and on Exhibit 2 to his deposition marked where the beer garden was actually located, at the back of the main stage tent. CP at 103. Logically, traffic from the main stage portion of the tent and beer garden portion of the tent intermingled over the grassy hillside where the tent exited. This caused the grassy area to become muddy and slick. CP at 259.

Even though Cover to Clover claims in its brief that the location of the beer garden is irrelevant since Tom was not exiting from the beer garden, Cove to Clover does admit Tom fell in the grassy area next to the beer garden tent when it states in its brief, "Mr. Bishoff and Mr. Werle roped off the entire grassy area next to the beer garden tent, **including where Mr. McDonald (Tom) had fallen.**"¹ Respondent's Brief at 10. (emphasis added). Understanding the location of the tents and exits is

¹ The area was roped off after Tom had fallen and broken his ankle. CP at 129.

material to understanding why Tom traveled over the grass which affects whether or not Cove to Clover should have anticipated invitees would encounter harm.

B. Cove to Clover Owed a Duty to Tom McDonald :

1. Duty exists when a possessor of land should anticipate harm, despite knowledge or obviousness of danger:

Again, Cove to Clover completely ignores the fact that under Washington Law the obviousness of a danger alone does not relieve the landowner of its duty and completely omits the relevant language contained in the *Restatement Second of Torts* as cited by Iwai v. State, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). Respondent's brief at 14-15. Respondent's brief omits that portion of Iwai v. State, which states:

An invitee's awareness of a particular dangerous condition does not necessarily preclude landowner liability. Section 343A of the Restatement, entitled Known or Obvious Dangers, states in part: (1) A possessor of land is not liable to his [or her] invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, ***unless the possessor should anticipate the harm despite such knowledge or obviousness.***" (emphasis added).

Under Iwai v. State even if a danger is obvious, the obviousness of the danger alone does not relieve the possessor of land of their duty to invitees. Here Cove to Clover should have anticipated the harm despite the invitees knowledge of the harm or the obviousness of the harm

because Cove to Clover set up the festival tent in such a way that the natural exit path from the tent, particularly once a crowd formed in front of the main stage, was over the grass.

Cove to Clover argues Tom's actions are irrelevant because "his behaviors are not at issue at all" (Respondent's Brief at 13) but also argues it had no duty because by his actions he assumed the risk. Respondent's Brief at 12. Not only does this argument contradict itself, it misses the point that the reasonableness of Tom's actions goes to establishing the duty of Cove to Clover because Cove to Clover has a duty to protect even from obvious or known dangers when it should expect invitees to encounter the danger because "to a reasonable person in that position the advantages of doing so would outweigh the apparent risk." Musci v. Graoch Associates Ltd. P'ship No. 12, 144 Wn. 2d 847, 860, 31 P.3d 684, 690 (2001) (internal citations omitted). To evaluate whether Cove to Clover should have anticipated Tom would encounter the wet grass despite wet grass being slippery, the finder of fact must determine if it was reasonable, and thus expected, that Tom would travel over the grass under the circumstances. Given the crowd and natural exit path established by the tent setup, it is more likely than not, a jury would determine Tom's route of travel was reasonable, and thus expected, and therefore Cove to

Clover had a duty to protect because it should have anticipated the danger would be encountered despite the obviousness of the harm.

2. Cove to Clover had actual notice the grass had become muddy and slick:

Cove to Clover argues Tom did not tell the festival organizers the grass was slippery as if that somehow relieves Cove to Clover of its duty, (Appellant's Brief at 6) but Tom had no opportunity and no obligation to warn Cove to Clover. Cove to Clover on the other hand had actual notice the grassy hillside had become muddy and slick due to the rain and foot traffic. Both Ron Bickle and Mary MacDonald reported the dangerousness of the grass area to Cove to Clover but Cove to Clover failed to take action. CP at 257-258 and at 266-267.

Cove to Clover argued to the trial court, and argues again here that the grass where Mr. McDonald fell was not the exact same location where others had warned because Ron Bickle had slipped at the top of the grassy hillside and Mr. McDonald had fallen further down the grassy hillside, RP at 18-19, however Ron Bickle's testimony indicates he warned Cove to Clover organizers that the area on the grassy hillside where the tent exited had become muddy and slick due to the combination of rain and heavy foot traffic. CP at 257-259.

Cove to Clover had knowledge of the dangerous condition and owed a duty to its invitees because it should have anticipated the harm despite the invitees knowledge or the obviousness of the danger.

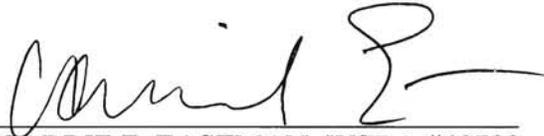
II. Conclusion:

The trial court committed error in granting Cove to Clover's motion for summary judgment since Cove to Clove did owe a duty to Mr. McDonald and there are issue of material fact that should be heard and determined at trial. Since Mr. McDonald's claim should not have been dismissed, Mrs. McDonald's loss of consortium claim should not have been dismissed either. This matter should be remanded to the trial court for trial.

Dated this 19th day of June, 2013.

Respectfully Submitted,

SANCHEZ, MITCHELL & EASTMAN

BY 
CARRIE E. EASTMAN, WSBA #40792
Attorneys for Appellants

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IN THE COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

CLARENCE T. MCDONALD and SUSAN
MCDONALD , husband and wife,

NO. 69916-4-1

Appellants,

DECLARATION OF MAILING

vs.

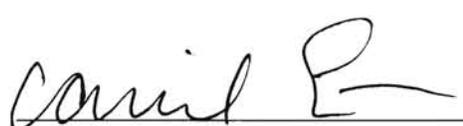
COVE TO CLOVER, a Washington Nonprofit
Corporation,

Respondents.

I, CARRIE E. EASTMAN, declare under penalty of perjury under the laws of the State of Washington that on the 19th day of June, 2013, I sent or delivered true and correct copies of the following document: *APPELLANTS' REPLY BRIEF* and a copy of this *declaration of mailing* by U.S. Mail first class postage prepaid, to the following named persons at the addresses indicated, to wit:

Suzanne Pierce, Esquire
Patrick N. Rothwell, Esquire
Davis Rothwell Earle & Xochihua, PC
Columbia Center
701 Fifth Avenue, Suite 5500
Seattle, WA 98104-7047

DATED: This 19th day of June, 2013, at Bremerton, Washington.


CARRIE E. EASTMAN