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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 35068-8-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STEVE AUST, Appellant

vs.

TERRY ANDERSON, Respondent

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Superior Court erred in dismissing appellant's negligence claim.

B. STATEMENT OF THE CASE

On March 18, 2002, Lewis County Sheriff's Sergeant Steve Aust and Deputy Hal Sprouse were dispatched to 182-133 Hillcrest Road, Chehalis, Washington, within Lewis County, on a domestic violence call. CP 49, 72-73. The call was made by Respondent Terry Anderson's daughter, who had called 911 and reported an incident that had just occurred between Mr. Anderson and his then-wife. CP 72-73. When Sgt. Aust and Deputy Sprouse arrived at the scene with Respondent Anderson, who refused to allow the deputies to enter the residence and attempted to close the door on Sgt. Aust. CP 81. At that point, Anderson engaged both deputies in a struggle. CP 81. During the course of the struggle, Anderson admits that he pinned Sgt. Aust against the cabinet by grabbing his throat and "driving his head, neck and torso backwards over the cabinet countertop." Id. At that point, respondent Anderson had completed the crime of Assault 3^o upon both Aust and Sprouse, to which he later pled guilty and was sentenced. CP 92-98.

A review of Anderson's statement in support of Motion for Summary Judgment below indicates that he did not intend to cause the injuries that resulted from his actions. The clear implication from his statement is that he had Sgt. Aust pinned and in a position of vulnerability but chose not to exert more force due to the threat of being pepper sprayed by deputy Sprouse. CP 81-82. It was Appellant's contention below and is the contention here that Anderson intentionally committed an assault but negligently caused injuries beyond those he intended.

C. ARGUMENT

Summary judgment is appropriate only where there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. See, Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). CR 56(c) provides in pertinent part that: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, there are at least two ways to defend against a summary judgment motion. Where the facts are disputable, the defense may be entirely factually based. Where the

facts are not in dispute, the defense may be entirely based upon the law. Here, the moving party below focused primarily on the law, and the appellant responds to challenge the defendant's reading and application of the law.

1. The Appellant Properly States a Claim for Negligence

To establish negligence, a plaintiff must plead and prove: (1) the existence of a legal duty; (2) a breach of that duty; (3) actual cause; (4) proximate cause; and (5) damages. Hertog v. Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). The existence of a duty is a question of law. The remaining elements – breach, causation and damages – are factual questions for the jury. Keller v. City of Spokane, 104 Wn.App. 545, 17 P.3d 661 (2001); Torres v. City of Anacortes, 97 Wn.App. 64, 73, 981 P.2d 891 (1999), *rev. den.* 140 Wn.2d 1007, 999 P.2d 1261 (2000). “It is in the factual context of proximate cause that we ask whether, in the particular circumstances, the defendant’s liability – or duty – extended to protect a particular plaintiff from the actual events.” Keller, *supra* at 553, *citing*, Hartley v. State, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). “This aspect of duty is always determined by the finder of fact. Keller, at 553.

“In a negligence action, a defendant's duty may be predicated on violation of statute or of common law principles of negligence.” Burg v. Shannon & Wilson, Inc., 110 Wn.App. 798, 804, 43 P.3d 526 (2002), citing, Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982). Here, the duty not to assault is established by RCW 9A.36.031(1)(g), and the Respondent was convicted of violation of that statute. CP 92.

Anderson asserted below that: “Insofar as legislative enactments and judicial decisions are concerned, Plaintiff has made no showing of the existence of a legal duty that is owed by Mr. Anderson to Plaintiff Aust, and will likely be unable to do so.” CP 29:9-10. However, Anderson’s own briefing below contradicts his position:

On appeal, the Supreme Court reasoned that the conduct of Mrs. Riggs would constitute negligence if Mrs. Riggs **unintentionally** but carelessly used excessive force in placing [the plaintiff] in the line of patients going to dinner. *O’Donaghue [v. Riggs]*, 73 Wash.2d at 819 (emphasis added). The Supreme Court further stated that the intention with which Mrs. Riggs acted was the primary determinant of whether her act would be deemed negligent or a battery.

” Id., at 4:6-12. Anderson’s own briefing below thus clearly acknowledges mandatory authority that a person who unintentionally but carelessly uses force on another and thereby

causes injury thereby commits the tort of negligence. The obvious duty is to avoid excessive force that results in injury. How much force is excessive is a jury question.

2. The Appellant Properly Presented Evidence of Causation and Damages.

Sgt. Aust alleges that he was injured by Respondent Anderson. In support of his position, and in opposition to summary judgment below, Sgt. Aust submitted a medical report wherein a medical doctor diagnosed spinal injuries and opined that the injuries were caused by Anderson. CP 16-24. Taken in the light most favorable to Sgt. Aust as the nonmoving party, this is evidence upon which a jury could find that Mr. Anderson breached his duty not to assault Sgt. Aust, actually and proximately causing injury.

3. Respondent Anderson Incorrectly Asserts that Mr. Aust is Not Permitted to File an Action for Negligence.

Anderson claims that he intentionally assaulted Sgt. Aust and thereby caused the injuries complained-of. Although the assault was clearly intentional, a jury could find that the injuries were not. Sgt. Aust has the right to present evidence that Anderson did not intend to injure Aust. The jury can determine whom to believe. See, O'Donoghue v. Riggs, 73 Wn.2d 814, 440 P.2d 823 (1968).

In O'Donaghue, the plaintiff was a patient at Eastern State Hospital when she was injured by the defendant nurse, who allegedly pushed the plaintiff to the ground while trying to get her to line up with other patients. The plaintiff sued for negligence and the defendant responded that if plaintiff had any cause of action, it would be for battery, because the conduct complained-of was intentional rather than negligent. The question presented was whether the trial court should have allowed the alternate theory of negligence to be presented to the jury. The Court in O'Donaghue stated and analyzed the issue thus:

In her complaint, [plaintiff] claims that these acts, attributable to [defendant], constituted negligence. The trial court submitted the case to the jury as an action based on negligence. The defendant claims this was error. She claims that if the acts attributed to her were actionable, they were actionable as a civil action for "assault" and not for negligence. **It was not error for the trial court to submit this case to the jury as a negligence case.** [Plaintiff's] testimony quoted above is the only direct evidence in the case stating the manner in which the incident occurred. [Defendant] denies there was any such incident. **If the incident occurred, as the jury had a right to believe, then [defendant's] conduct would constitute negligence if she unintentionally but carelessly used excessive force in placing [plaintiff] in the line of patients going to dinner.** Under such circumstances as we have here, the intention with which Mrs. Riggs acted would be the primary question in determining whether her act

should be deemed negligent or whether it should constitute battery.

...

In this case, the trial court could have properly submitted to the jury the alternate theory requested by the defendant and could properly have permitted the jury to determine whether [defendant's] conduct, if they believe the incident occurred, constituted either negligence or battery.

73 Wn.2d at 827-28 (emphasis added, footnote omitted).

Sgt. Aust does not challenge whether defendant intentionally came into contact with him. Instead, Sgt. Aust's theory is that the defendant carelessly used too much force during the contact and thereby caused plaintiff's injuries. This theory is expressly endorsed by the Court in O'Donaghue.

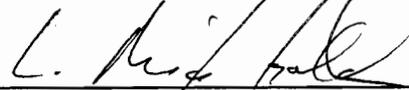
Plaintiff has the right to phrase his case in terms of negligence and it is up to the finder of fact to determine whether plaintiff intentionally or caused the injuries complained of. Certainly, under the rule of O'Donaghue, plaintiff is entitled to present his theory to a jury.

D. CONCLUSION

For the reasons stated above, and pursuant to the points and authorities cited herein, this case should not have been dismissed below.

Respectfully submitted this 22nd day of September, 2006.

JEREMY RANDOLPH
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "L. Michael Golden", written over a horizontal line.

L. MICHAEL GOLDEN, WSBA# 26128
Sr. Deputy Prosecuting Attorney
Of Attorneys for Appellant

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STATE OF WASHINGTON
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

STEVE AUST, a married man,

Plaintiff,

vs.

TERRY CLARK ANDERSON, a
married man,

Defendant.

NO. 05-2-00389-6

CERTIFICATE OF MAIL

I hereby certify that on the 25th day of September 2006, I deposited in the United States mail, with postage prepaid, copies of the following documents:

1. Appellant's Opening Brief; and
2. Certificate of Mailing.

for delivery to the following individuals at their respective addresses:

Kevin Yamamoto
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of September, 2006, at Chehalis, Washington.

Janelle L. Kambich

JANELLE L. KAMBICH