

No. 39283-6 II

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

MARY SLIGAR, an individual, Appellant,

v.

KARA A. ODELL and "JOHN DOE" ODELL, wife and husband
and the marital community comprised thereof; Respondents.

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

Mark W. Watson, WSBA #24260
Attorney for Appellant
2748 Milton Way, Suite 212
Milton, Washington 98354
253-926-8437

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A. STATEMENT OF FACTS IN REPLY

The facts of this case are largely undisputed. The defendants do not contest that Ms. Sligar had, without objection and in the presence of the defendants prior to the subject attack, (1) petted the defendants' gentler dog, Molly, through the fence, and (2) leaned against the fence and put her hands and arms over or through the fence while talking to the defendants. The defendants likewise do not dispute that Ms. Sligar had, without objection and with the knowledge of the defendants, attached chicken wire to the chain link fence by pushing wire ties through the fence toward the defendants' property, and then reaching through the fence and pulling the wire tie ends back to Ms. Sligar's side to complete the connection.

The defendants likewise do not dispute that their large dog, Chico, had regularly for several years before this attack (1) barked menacingly, (2) foamed at the mouth, and (3) charged the subject fence. The defendants do not contest that Chico had attacked one of Ms. Sligar's small dogs approximately one year before the subject attack.¹ The defendants seem to contest only two things. First, despite the consent that existed prior to the subject attack for Ms. Sligar to have her fingers over or through the fence on numerous occasions, the defendants argue that it was statutorily impossible for her to have obtained any form of consent to be

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The defendants incorrectly argue that Ms. Sligar did not see Chico attack her dog. The record reflects that Chico attacked Ms. Sligar's dog, Little Bit, at which time her sister screamed. Ms. Sligar testified at deposition that she then "went to see what [her sister] was screaming at and Chico had Little Bit by the leg and was pulling – was pulling [Little Bit] through the fence." CP 37. Ms. Sligar clearly saw Chico attacking Little Bit.

present, express or implied. Second, despite the defendants' large dog's consistently violent behavior during the several years before this attack, the defendants argue that they did not know, or could not reasonably have known, that Chico had vicious propensities. The defendants' legal arguments fail as set forth below. Their factual arguments simply raise questions of fact that preclude summary judgment, such as their arguments about whether the defendants knew or should have known that Chico was dangerous. Therefore, the trial court's summary judgment order of dismissal should be reversed. The court should also dismiss the defendants' affirmative defense of trespass with prejudice.

B. LEGAL ARGUMENT

1. Ms. Sligar had consent to have her finger through the fence and therefore, her finger was lawfully through the fence.

The defendants assert that it was impossible for Ms. Sligar to have her finger lawfully through the fence, claiming that RCW 16.08.040 and RCW 16.08.050² prohibit a finding of implied consent if the land is

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RCW 16.08.040 states as follows:

The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

RCW 16.08.050 states as follows:

A person is lawfully upon the private property of such owner within the meaning of RCW 16.08.040 when such person is upon the property of the owner with the express or implied consent of the owner: PROVIDED, That said consent shall not be presumed when the property of the owner is fenced or reasonably posted.

fenced, even if Ms. Sligar had facts to support that she had obtained consent to have her finger through the fence. They also argue that Ms. Sligar **herself** could not presume that she had consent to have her finger through the fence because the strict liability statute forbids her from making that presumption regardless of her prior interactions with the defendants. (Defendants' brief, p. 8). Finally, the defendants argue that the concept of "trespass" does not apply in this case because RCW 16.08.050 limits a lawful entry to an entry done with the express or implied consent of the dog owner.

First, RCW 16.08.050, by its plain language, makes a dog owner liable anytime her dog bites a person who enters the dog owner's land with either the express or implied consent of the dog owner. "[C]onsent may be manifested by action or by inaction, or proved by other evidence to exist in fact." Restatement (Second) of Torts, § 167, comment a; see also Singleton v. Jackson, 85 Wn. App. 835, 839, 935 P.2d 644 (Div. 2, 1997) (consent may be proved by the landowner's failure to object, by the landowner's conduct, or by her express consent). And if the person entering the land has consent of the landowner to do so, express or implied, then the person entering is a licensee and is privileged to so enter. Id. "A licensee is a person who is **privileged**³ to enter or remain on land. .

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The defendants cited Restatement (Second) of Torts § 329 for the idea that Ms. Sligar is a trespasser regardless of whether she accidentally fell and had her finger protrude through the fence. But the provision the defendants cite has not been adopted in Washington and has not been the general rule in cases across the United States for at

. .” Restatement (Second) of Torts, § 330 (1965) (emphasis added).

By stating that a person is lawfully on the dog owner’s property if she has the express or implied permission to be there, RCW 16.08.050 is merely distinguishing between a licensee and a trespasser. By the terms of the statute, a licensee is entitled to the benefits of strict liability, while a trespasser is not. A licensee is lawfully on property specifically because she has either the express or implied permission to be there. Singleton, 85 Wn. App. at 839. A trespasser, on the other hand, is not lawfully on the property specifically because she does not have either express or implied consent to be there. Id. Thus, RCW 16.08.050, by its very terms, requires the court to first determine whether the person is a trespasser or not, and the statute changes nothing about the licensee/trespasser analysis. If the person is not a trespasser, i.e., has the express or implied consent of the landowner to be there, then statutory strict liability applies.

The rule that a person entering someone else’s land is not a trespasser if she has the landowner’s implied consent to do so applies whether the landowner’s property is fenced or not. RCW 16.08.050 merely disallows a presumption of consent, express or implied. It does not obviate implied consent simply because a fence is present. Obviously, if the victim of the dog attack puts forth actual testimony or other evidence tending to show that she has the landowner’s consent to enter the property, whether that consent is express or implied, then no presumption of consent

least several decades. This will be analyzed further below.

is necessary. Indeed, the rule in Washington is that “a presumption of fact does not have for its basis another existing fact or facts, but is indulged in to supply that which one would ordinarily expect to exist, but for which there is no actual affirmative proof; while an inference is drawn from some existing fact or facts.” McGinn v. Kimmel, 36 Wn.2d 786, 790, 221 P.2d 467 (1950). In other words, because Ms. Sligar has put forth affirmative proof that she had put her hand and fingers over and through the fence numerous times before the attack, and that the defendants consented thereto by their inaction and lack of objection, then she does not need a presumption of consent to have her finger through the fence when it was bitten off by Chico.

The defendants’ attempted interpretation of the dog bite statutes is strained and illogical. The court’s purpose in construing any statute is to avoid such illogical, unlikely, or strained results. State v. Chhom, 162 Wn.2d 451, 464, 173 P.3d 234 (2007). “We review de novo a trial court’s legal conclusions, including its statutory interpretation. Am. Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 5, 802 P.2d 784 (1991). ‘If the statutory meaning is clear, we give effect to the plain language without regard to the rules of statutory construction. When interpreting statutes, our function is to give effect to the object and intent of the legislature. We assume that the legislature means what it says.’” Vance v. XXXL Development, LLC 150 Wn. App. 39, 206 P.3d 679 (Div. 2, 2009).

In the case at bar, the defendants essentially argue that, despite all the evidence Ms. Sligar presented of at least implied consent to have her finger through the fence, it would be impossible for her to ever prove

implied consent when her finger was bitten off simply because a fence was present. The defendants instead seem to argue that the only type of consent possible when a fence is present is express consent. But if that were true, then the Legislature would have said that the dog bite victim is lawfully on the dog owner's fenced property only with the "express consent of the owner." The Legislature instead said that the victim is lawfully there with the "express **or implied** consent of the owner." RCW 16.08.050 (emphasis added). Similarly, if the Legislature wanted to obviate only implied consent anytime a fence is present, it would have simply said "implied consent shall never be found" if a fence is present. The Legislature instead wrote that both express and implied consent "shall not be presumed" when a fence is present. RCW 16.08.050. But Ms. Sligar has submitted a wealth of evidence to prove consent without the need for a presumption.

The defendants acknowledge that implied consent is possible in some circumstances. (Defendants' brief, p. 9). But the defendants then argue that implied consent is an impossibility if the property over which the landowner gave implied consent is fenced or posted, regardless of the prior interactions between the landowner and the person entering the land. Id.

If the court accepts the defendants' argument that implied consent is impossible when land is fenced or posted, then express consent under the same statutory language would also be impossible if the land is fenced or posted. Put simply, RCW 16.08.050 rules out a presumption of both express and implied consent if a fence is present or the property is posted.

Thus, by accepting the defendants' illogical statutory interpretation that the Legislature obviated implied consent in RCW 16.08.050 whenever a fence is present, the court would have to rule that express consent is also obviated when a fence is present. Put simply, If that interpretation is accepted, then a landowner with fenced land can give express permission for his neighbor to hop the fence to mow his lawn, but can then argue that the fence hopping neighbor is not entitled to statutory strict liability if the neighbor is later bitten by the landowner's dog after hopping the fence. That is a ridiculous result, but one that would follow if this court accepts the defendants' argument that (1) implied consent is impossible when a fence is present, and (2) implied consent can only be proven if the person attacked by the dog gets the benefit of a presumption of lawfulness despite all other evidence the attacked person may possess.

The defendants attempt to mask the Legislature's choice to include both express and implied consent in the presumption/fence part of RCW 16.08.050 by arguing that the only way the person could get permission to enter fenced land is by obtaining the "**actual** consent" of the landowner. (Defendants' brief, p. 9). But consent, whether express or implied, is "actual consent." In other words, implied consent is just as much "actual consent" as is express consent. See Restatement (Second) of Torts, § 167, comment a; see also Singleton, 85 Wn. App. at 839. Either Ms. Sligar actually had consent, whether implied or express, or she did not. The defendants' statutory interpretation must fail.

An example of a presumption of implied consent to enter land is found in the Division Two case of Singleton, 85 Wn. App. 835. In that case, a Jehovah's Witness was engaging in door to door religious solicitation. The approach to the house where she was soliciting had three steps that led to a wooden deck. Id. at 837. The deck had asphalt shingles arranged like a path to two separate doors visible from the porch, as well as a door mat in front of one of the two doors. Id. at 837-38.

The person in the home came to the door to meet the solicitor, but then explained that she did not want to speak to the solicitor. Thus, the solicitor turned to walk away, stepped off the asphalt shingles and directly onto the wood deck, slipped and then fell. Id. at 838.

The solicitor, who was injured in the fall, sued the land possessor for her injuries. The trial court dismissed the solicitor's lawsuit against the landowner on summary judgment after ruling that the solicitor was a trespasser and, therefore, the landowner had no duty to her. Id. at 838.

Division Two of the Court of Appeals reversed the trial court's summary judgment order. First, the court made the distinction between a trespasser and a licensee by stating as follows:

A "trespasser," . . . 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.' " Winter v. Mackner, 68 Wn.2d 943, 945, 416 P.2d 453 (1966) (quoting Schock v. Ringling Bros. & Barnum & Bailey Combined Shows, 5 Wn.2d 599, 605, 105 P.2d 838 (1940)), overruled on other grounds, Potts v. Amis, 62 Wn.2d 777, 384 P.2d 825 (1963). A "licensee," on the

other hand, is “ ‘a person who is privileged to enter or remain on land only by virtue of the possessor's consent.’ ” Tincani, 124 Wn.2d at 133, 875 P.2d 621 (quoting Restatement (Second) of Torts § 330). Thus, the determination of whether a person is a trespasser or a licensee hinges on whether the possessor has granted consent or permission to enter the property. Singleton, 85 Wn. App. at 839.

Second, the court ruled that even strangers of the landowner can reasonably interpret a path to the front door, or a “knocker” on the front door, as giving implied consent to approach the front door. Id. at 841-42. In the absence of “no trespassing” or “no soliciting” signs, or in the absence of an approach that is physically blocked, even a stranger is entitled to a presumption of implied consent to approach the home despite having no other evidence of consent. Id. at 842.

The plaintiff in Singleton had implied consent to approach the front door even though the homeowner had never allowed her to approach before or had ever had any form of interactions with the solicitor. And she was deemed to have such consent even though the land possessor rebuffed her solicitation on the day the solicitor fell and was injured. In other words, the court ruled that the solicitor was entitled to a presumption of implied consent to enter the property resulting simply from an approach that was free of signs or a physical barrier to the door. The presumption of implied consent that she was given made her a licensee, not a trespasser.

Ms. Sligar in the case at bar has direct evidence of at least implied consent to have her hands through or over the fence, which direct evidence of consent was missing for the person entering the property in Singleton.

First, the defendants in the case at bar had actually witnessed Ms. Sligar reaching through the fence to pet their gentle dog, Molly. The defendants never objected. The defendants in the case at bar talked to Ms. Sligar in the back yard while she had her body, hands, and arms across the fence. The defendants never objected. The defendants knew that Ms. Sligar had attached chicken wire to the chain link fence with wire ties, and the defendants never objected to Ms. Sligar reaching through the fence to assemble the wire ties. Thus, Ms. Sligar has better evidence to prove implied consent than was present in Singleton. Ms. Sligar does not need any presumptions of implied consent when she has direct evidence of such consent.

Arguably, RCW 16.08.050, by prohibiting a presumption of consent if the landowner's property is fenced or posted with no trespassing signs, may have insulated the landowner in Singleton from statutory strict liability if the property was fenced or posted. That is because the solicitor in Singleton had no facts other than the absence of a fence and "no trespassing" signs to support any form of consent, express or implied. Therefore, she was forced to rely on a presumption of implied consent based upon the presence of steps to a porch and asphalt shingles in the form of a trail to the doors of the home.

However, if the solicitor in Singleton had other evidence of consent to approach the home despite the presence of a fence or "no trespassing" signs, then her status as a licensee would have remained

intact. Consider a hypothetical. Assume the land in Singleton was fenced. Further assume the solicitor had approached the home on three separate occasions by hopping the fence, with the knowledge of the land possessor, one time each of the prior three weeks. Each time, the solicitor was greeted on the porch by the land possessor. On each of those three occasions, the land possessor expressed no interest in the religion, but he engaged in polite conversation about the weather and the like and never expressed any objection to the solicitor hopping the fence. After a few minutes of talking, the solicitor merely leaves by hopping the fence on her way out.

Now assume that, on the fourth trip, the solicitor hops the fence, engages in the same polite conversation, and is then bitten by the land possessor's dog in the process of exiting the property. While the solicitor may not be entitled to the presumption of consent to be on the property by virtue of the fence, she clearly has evidence to support a claim that the land possessor had given implied permission to hop the fence by failing to object to the solicitor's presence on the property on the three prior occasions. The hypothetical solicitor would not be summarily barred from asserting a statutory strict liability claim because no presumption of implied consent is necessary in light of the facts of the hypothetical. At a minimum, the solicitor should be able to present her evidence to a jury on the issue of whether consent attached or not. RCW 16.08.050 would not bar a claim of strict liability under those facts.

By way of a slightly altered hypothetical, assume the land is fenced with a decorative white picket fence, which has a small gate on the walkway leading up to the porch. The gate is easy to open from outside the property, so the solicitor simply pushes the gate open and walks up the walkway toward the home. Again, while the solicitor may not be entitled to a presumption of implied consent to approach the home, the fact that a gate is present in the middle of a decorative fence on a walkway approach to the home is enough to get to the jury on the issue of whether she reasonably interpreted the presence of a gate and a merely decorative fence as indicators of implied consent.

There are countless hypotheticals that could be considered. But the point is that, just because a fence is present, a person bitten by a dog on the property is not summarily precluded from submitting direct evidence of implied consent. Ms. Sligar should be given the same opportunity, so the trial court should be reversed.

2. Ms. Sligar was not a trespasser, and she correctly characterized the law applicable thereto.

The defendants assert that Ms. Sligar's appellate brief openly mischaracterized Restatement (Second) of Torts, § 166, and the rule that an accidental intrusion removes the actor from the class of a trespasser. (Defendants' brief, p. 17).⁴ To gut the defendants' argument on this point,

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The defendants also assert that the three illustrations Ms. Sligar provided were equally mischaracterized. But Restatement (Second) of Torts § 166, at comments b and c, specifically states that a person who enters the land of another unintentionally is not a

the following is a direct quote from that section of the Restatement:

c. While the rule stated in this Section [166] deals only with the non-liability in trespass for an accidental intrusion on land in the possession of another, the doctrine has a further importance in that **it removes the actor from the class of trespassers** and relieves him from the burdens incident thereto, including the liability to third persons stated in § 381, and the **possessor's immunity from liability to trespassers stated in § 333.**

Restatement (Second) of Torts, § 166, comment c (emphasis added).

Comment b to this same section states that the old English common law deemed a person entering the land of another a trespasser regardless of whether the person intended to enter, and regardless of whether the person entered the land accidentally. But comment b went on to state that, currently, an entry onto another's land "is not a trespass on land and imposes no liability upon him." Thus, this section not only insulates the accidental enterer from liability to the landowner, but it also keeps him from being deemed a trespasser. It also removes what would otherwise be the possessor's immunity from liability. To further end the defendants' allegation that Ms. Sligar misrepresented the content of the Restatement, section 166 is attached hereto as Appendix A for the court's review.

The defendants go on to cite this court to Restatement (Second) of Torts, § 329 (1965), for the alleged proposition that an accidental trespasser who enters the land of another in a non-negligent manner is still

trespasser. While the illustrations only mention that the person entering the land is not liable to the landowner, comment c specifically states that the rule also removes any immunity from liability normally applied to a trespasser.

a trespasser and will be treated as such for purposes of premises liability. But the defendants did not cite any cases, Washington or otherwise, adopting that section of the Restatement. Indeed, Ms. Sligar's counsel has been unable to locate any Washington cases adopting that section either. But the Restatement (Second) of Torts, § 166 (1965), has been specifically adopted by Washington courts. Fradkin v. Northshore Utility Dist., 96 Wn. App. 118, 123, 977 P.2d 1265 (1999).

Not only has Washington adopted section 166, but cases from across the United States are in accord with the rule and have concluded that an accidental entry onto another's land is not a trespass:

The trend of modern authority is that an unintended intrusion upon the land in possession of another does not constitute a trespass. Feiges v. Racine Dry Goods Co. 231 Wis. 270. Puchlopek v. Portsmouth Power Co. 82 N. H. 440, 442. White v. Suncook Mills, 91 N. H. 92, 97--98. Durst v. Wareham, 132 Kans. 785, 789. Peacock v. Nicholson, 11 T. L. R. 225. Gayler & Pope, Ltd. v. B. Davies & Son, Ltd. [1924] 2 K. B. 75. Prosser on Torts, pages 77--78. This view has been adopted by the American Law Institute. The rule formulated by the Institute is that "Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest." Restatement: Torts, § 166. As pointed out in comment c, this rule not only deals with nonliability for trespass of an accidental intrusion on land in the possession of another but it has a further importance in that it **removes the actor from the class of trespassers and relieves him from the burdens incident thereto in an action against the possessor.** See also Restatement: Torts, § 158, comment e. Recent decisions of this court tend to support this rule. See United Electric Light Co. v. Deliso Construction Co. Inc. 315

Mass. 313, 318; Marengo v. Roy, 318 Mass. 719, 721. In the United Electric Light Co. case it was said at page 318, 'A trespass requires an affirmative voluntary act upon the part of a wrongdoer and in that respect differs from negligence.'

Edgarton v. H. P. Welch Co., 321 Mass. 603, 612-13, 74 N.E.2d 674 (Mass., 1947) (emphasis added).

Even cases more recent than Edgarton are in accord. In Baltimore Gas and Elec. Co. v. Flippo, 684 A.2d 456 (Md.App.,1996), aff'd on other grounds, 705 A.2d 1144, a ten-year-old boy climbed a tree. While climbing, he lost his balance and unintentionally grabbed a high voltage power line while he was falling. The boy was injured and sued the power company that owned the power lines. Id. at 460.

The power company asserted at trial that the boy was a trespasser because he had no permission to touch the power lines and, therefore, the power company was not liable for the boy's injuries. Id. at 458. The boy prevailed at trial under the theory that the power company's liability fell under the rules applicable to the boy as a licensee. In affirming the trial court's decision, the appellate court stated as follows:

[O]ne can commit a trespass by entering, intruding, or encroaching on personal property, and no tortious intent, i.e., intent to trespass, is required in order for one to be a trespasser. **What is required, however, is volition, i.e., a conscious intent to do the act that constitutes the entry upon someone else's real or personal property. An involuntary entry onto another's property is not a trespass.** See, e.g., Young v. Vaughan, 6 Del. 331, 1 Houst. 331 (1857) (act must be a conscious one to constitute trespass); Edgarton v. H.P. Welch Co., 321 Mass. 603, 74 N.E.2d 674 (1947) (unintended intrusion upon land does not constitute trespass); Wisconsin Power & Light Co. v. Columbia County, 3 Wis.2d 1, 87 N.W.2d 279 (1958); McDermott v. Sway, 78 N.D. 521, 50 N.W.2d 235 (1951)

(when there is no intentional act voluntarily done there is no trespass); Feiges v. Racine Dry Goods, 231 Wis. 270, 285 N.W. 799 (1939) (when there is no intentional act, there is no trespass); Socony-Vacuum Oil Co. v. Bailey, 202 Misc. 364, 109 N.Y.S.2d 799 (N.Y.Sup.1952) (trespass requires an intentional act); Hudson v. Peavey Oil Co., 279 Or. 3, 566 P.2d 175 (1977) (liability for trespass will not be imposed for an unintentional trespass unless it arises out of defendant's negligence or an ultrahazardous activity); Texas-New Mexico Pipeline Co. v. Allstate Constr., 70 N.M. 15, 369 P.2d 401 (1962) (the act must be more than voluntary-- it must be intentional to make one liable for trespass); Mountain States Tel. & Tel Co. v. Horn Tower Constr. Co., 147 Colo. 166, 363 P.2d 175 (1961); Gallin v. Poulou, 140 Cal.App.2d 638, 295 P.2d 958 (1956) (no liability for trespass unless it is intentional); Baker v. Newcomb, 621 S.W.2d 535 (Mo.Ct.App.1981) (liability for trespass if intent exists to do act); General Tel. Co. v. Bi-Co Pavers, Inc., 514 S.W.2d 168 (Tex.Ct.App.1974) (trespass requires an intentional act); Randall v. Shelton, 293 S.W.2d 559 (Ky.1956) (trespass requires intent); Kite v. Hamblen, 192 Tenn. 643, 241 S.W.2d 601 (1951) (trespass requires intentional act).

In Puchlopek v. Portsmouth Power Co., 82 N.H. 440, 136 A. 259 (1926), the defendant electric company maintained a live electrical transformer surrounded by a wooden picket fence. It was alleged that when the decedent plaintiff child accidentally fell down, the resultant accidental protrusion of the child's hand between the pickets and onto a live wire constituted trespass. **The Court stated, "[I]f the decedent slipped and fell towards the fence, it was a case of force exerted by accident on him and not of force exerted by him." Id., 136 A. at 260. Absent a volitional force or intent, an act cannot be affirmative in nature, and thus cannot be the subject of an action for trespass.**

Baltimore Gas and Elec. Co. v. Flippo, 684 A.2d 456, 461 (Md.App.,1996), aff'd on other grounds, 705 A.2d 1144) (emphasis added).

Applying the above to the case at bar, it is clear that Ms. Sligar properly characterized the rule of law that unintentional entries onto the land of another keep the person entering the land from being deemed a

trespasser. The person will instead be deemed a licensee. And it is clear that courts all across the United States have adopted that same rule. Thus, not only is the person entering the land of another outside the class of a trespasser and insulated from liability to the landowner, but the landowner will be liable under the rules pertaining to a licensee.

The undisputed evidence in the case at bar is that Ms. Sligar did not volitionally put her finger in the fence. The undisputed evidence is that Ms. Sligar was lawfully on her own property when she slipped and had her finger inadvertently protrude through the fence. The rule of law applied across the United States is that she was not a trespasser and, therefore, her finger was lawfully through the fence. Obviously, Ms. Sligar, like anyone else, has the consent of a landowner to be on the landowner's property when she ended up on the property through no volitional act. Thus, she is entitled to the benefits of statutory strict liability.

On this same point, the defendants cite Matson v. Kivimaki, 200 N.W.2d 164 (Minn., 1972). In that case, a person intentionally tried to squeeze between a fence to enter the dog owner's property. While so doing, he was bitten by a dog. The court determined that the person bitten was not entitled to the benefits of strict dog bite liability because he was a trespasser.

Matson is inapposite to the case at bar. Here, the undisputed evidence is that Ms. Sligar did not intend to have her finger protrude

through the fence. She merely fell and unfortunately had her finger protrude through the fence through no volitional act of her own. And the undisputed evidence is that Ms. Sligar had put her hands over or through the fence on many occasions with the knowledge of the defendants, who never objected to the same. Ms. Sligar has sufficient facts to justify a finding of at least implied consent to have her fingers through the fence.

Based upon the foregoing, the court should reverse the trial court's order of summary judgment and remand this case. And because the defendants have no evidence that Ms. Sligar was a trespasser, it should dismiss the defendants' affirmative defense of trespass with prejudice.

3. The trial court also erred when it dismissed Ms. Sligar's claim of negligence.

With respect to dog bites, several Washington cases "make it clear a negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen." Arnold v. Laird, 94 Wn.2d 867, 871, 621 P.2d 138 (1980).

A case directly on point to the case at bar, which was cited in Ms. Sligar's opening brief and was relied upon in Arnold v. Laird, is Brewer v. Furtwangler, 171 Wash. 617, 18 P.2d 837 (1933). The Supreme Court in

that case ruled that a dog owner “is no more justified in keeping a vicious dog chained on uninclosed land in the daytime, as in the case at bar, than he is in keeping a vicious dog untied on fenced land in the daytime.” Id. at 623. Thus, landowners are liable to a plaintiff who unknowingly crossed another’s land.

The defendants failed to even cite Brewer in their brief to this court, let alone try to distinguish or attack the rules of law set forth therein. Brewer is indistinguishable from the case at bar. The trial court erred in summarily dismissing Ms. Sligar’s negligence claim, so this court should reverse and reinstate that claim.

Another case supporting Ms. Sligar’s negligence claim is Arnold, supra. In that case, a girl climbed a cyclone fence separating her yard from the defendants’ yard. In so doing, the defendants’ dog bit or scratched the girl. The girl then sued the dog owners on the basis of common law strict liability only. She did not plead a negligence claim. Id. at 869.

Near the end of trial, the plaintiff tried to inject a negligence claim. But the only evidence the plaintiff submitted of negligence was that the defendants’ dog (1) had been teased by people running a stick along the cyclone fence in the dog’s presence, (2) had been inadequately housed, and (3) had been improperly fed. Id. The court ruled that negligence had not been proven because there was no proof that the dog was vicious. Id. Instead, the court ruled that negligence will apply if “the owners failed to assert the type of control which a reasonable person would exercise under

the attendant circumstances. Further, it is not per se unreasonable to keep a dog in a fenced backyard **if the animal has not exhibited dangerous tendencies.**” Id. at 871-72 (emphasis added). The court also noted that the plaintiffs had not injected a negligence cause of action into the case until the end of trial and, therefore, it would have been improper to instruct the jury on a negligence claim.

The facts of Arnold are distinguishable from the case at bar. First, Ms. Sligar specifically pled a negligence claim. CP 4-5. Second, Ms. Sligar has submitted abundant evidence that Chico had exhibited dangerous tendencies at least three times per week since the defendants moved next door in 2004. Thus, he had exhibited those dangerous tendencies for approximately two years up to the time of the subject attack. Those dangerous tendencies included routine foaming at the mouth, vicious barking, and charging the fence where this attack occurred. Ms. Sligar also introduced evidence that Chico had attacked one of her small dogs by biting and trying to pull it through the fence. Finally, Ms. Sligar introduced evidence that, after the attack, the defendants erected a solid wood fence that stopped the possibility of their dogs biting someone through the fence. None of those facts were present in Arnold.

Although the facts of Arnold are distinguishable, the law that the court applied is directly on point and proves that Ms. Sligar’s negligence claim should not have been summarily dismissed. The Arnold court specifically ruled that it is not “per se unreasonable to keep a dog in a

fenced backyard if the animal has not exhibited dangerous tendencies.” Id. at 871-72. Obviously, the converse is also true. It is per se unreasonable to keep a dog in a fenced back yard that still allows the dog to attack another person if the dog has exhibited dangerous tendencies. And the defendants’ argument that a dog owner is liable in negligence only if she knew of her dog’s dangerous propensities is simply incorrect. The Arnold court confirmed that a dog owner is negligent even if she does not know of any dangerous tendencies, if the owner failed to take reasonable measures to prevent harm later inflicted. Arnold, 94 Wn.2d at 870. “The amount of care required is commensurate with the character of the animal. . . . The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen.” Id. at 871.

Taking the facts in a light most favorable to Ms. Sligar, which is required when reviewing a summary judgment order, Ms. Sligar has presented enough evidence to reach the jury on the question of whether the defendants should have done something more than simply confine their dog in a back yard bounded only by a chain link fence that has been proven not to prohibit Chico from attacking a person or animal who accidentally had a finger or paw protrude through the fence. She has also submitted substantial evidence of consistent past behavior of Chico that should have put the defendants on notice that Chico may inflict harm. The

trial court should be reversed on Ms. Sligar's negligence claim.

4. The trial court erred when it dismissed Ms. Sligar's common law strict liability claim.

The defendants assert that Ms. Sligar did not plead a strict liability claim in her complaint. That allegation fails to note that the trial court, in summarily dismissing Ms. Sligar's case with prejudice, considered substantial briefing and evidence submitted with respect to her common law strict liability claim. For example, Ms. Sligar's brief to the trial court included a section under the heading "Even if the court believes statutory strict liability does not lie, Ms. Sligar still has claims for common law strict liability and negligence." CP 60. That section of the briefing went on to set forth the law applicable to common law strict liability claims and asked that said claim not be dismissed. CP 60-61.

The general rule in this state is that a theory of recovery must be either **pled or argued** at the trial court level to be considered on appeal. For example, in Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982), the plaintiff failed to plead a negligence per se claim at the trial court level. The plaintiff likewise failed to argue that claim at the trial court level and instead sought to assert the claim for the first time on appeal. The court refused to consider the negligence per se theory of recovery on appeal because it was not argued to the trial court. Id. at 440.

In the case at bar, Ms. Sligar raised common law strict liability as a basis for recovery in her briefing submitted to the trial court. She did not raise this theory for the first time on appeal. Additionally, the defendants

never objected to Ms. Sligar's evidence and briefing in support of her common law strict liability claim at the trial court level. They instead raised this argument for the first time on appeal, which should bar them from asserting now that Ms. Sligar did not plead the claim below. Id.; RAP 2.5.

Finally on this point, CR 15(b) specifically allows a party to assert issues not raised by her complaint if they are considered by the trial court "by express or implied consent of the parties. . . ." In fact, if evidence submitted at trial is objected to based upon a failure to plead what is being alleged, the trial court must allow the pleadings to be amended if doing so will further substantial justice in the case, and when the objecting party does not prove prejudice for allowing the amendment. CR 15(b). A motion to amend on this basis can be made even after judgment is rendered, but failure to amend does not change the outcome of a trial on the issues raised after pleading. Id. Here, Ms. Sligar briefed and argued several theories of recovery to the trial court, including common law strict liability and common law negligence. The defendants never objected to that briefing or argument on any grounds, let alone that it was not pled. This court should consider the common law strict liability claim.

The defendants next argue that, because they did not know that Chico had vicious propensities, they are not strictly liable. But that is a misstatement of the law. The law for common law strict liability is simple. A person "who keeps a dog and who knows or reasonably should

know the dog has vicious or dangerous propensities likely to cause the injury complained of is liable for injuries caused by the dog regardless of negligence by either the keeper or the injured person.” Arnold, 94 Wn.2d at 869. The defendants’ argument that they must have some actual knowledge of the dangerous tendencies is misplaced. While the Restatement of Torts may speak to some form of actual knowledge, Washington courts merely require that the dog owner either knew of the vicious behavior, or simply should have known. Id.

In the case at bar, Ms. Sligar submitted un rebutted evidence that Chico had engaged in vicious behavior for two years at a rate of three times each week during that two years. She submitted evidence that Chico had attacked Ms. Sligar’s own dog one year before Chico attacked Ms. Sligar. She submitted evidence that she put up chicken wire to keep Chico from attacking her dogs again. And she submitted evidence that, after this attack, the defendants put up a solid wooden fence, presumably to keep their dogs from attacking more people through the chain link fence. All of that evidence is sufficient to overcome summary judgment. The trial court erred in dismissing this case on summary judgment, so this court should reverse.

5. As a matter of public policy, it would be unfair to summarily dismiss this case under the facts applicable hereto.

The Legislature has determined that owners of dogs that bite other innocent people are subject to strict liability, regardless of the owner’s knowledge of dangerous propensities. At common law, the owner of a

dog that bit another may have been entitled to “one free bite” before being strictly liable. But that was changed when the strict liability statute was enacted. In determining that liability would attach despite a lack of knowledge of vicious propensities, the Legislature determined that personal safety of innocent people bitten by the dog outweighed any immunity to an otherwise non-negligent dog owner.

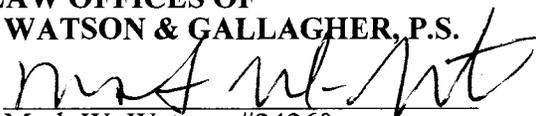
Allowing Ms. Sligar’s case to proceed would further that Legislative declaration. Innocent people, such as Ms. Sligar, should have the right to pursue an action for injuries suffered when they are bitten by a neighbor’s dog while standing in her own back yard. She did nothing wrong to caused the defendant’s dog to bite her, and dismissing her case under these facts flies in the face of the Legislature’s declaration in enacting RCW 16.08.040, et seq.

C. CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the trial court, reinstate Ms. Sligar’s causes of action, and dismiss the defendants’ affirmative defense of trespass with prejudice.

DATED this 2 day of December, 2009.

**THE LAW OFFICES OF
WATSON & GALLAGHER, P.S.**


Mark W. Watson, #24260
Attorney for Mary Sligar, Appellant

APPENDIX A

TOPIC 3. ACCIDENTAL ENTRIES ON LAND

§ 166. Non-liability for Accidental Intrusions

Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.

See Reporter's Notes.

Comment:

a. As to the carrying on of an abnormally dangerous activity, see § 165 and Comments *a* and *d* to that Section. As to intrusions under mistake, see § 164.

b. The early English common law seems to have imposed liability upon one whose act directly brought about an invasion of land in the possession of another, irrespective of whether the invasion was intended, was the result of reckless or negligent conduct, or occurred in the course of an abnormally dangerous activity, or was a pure accident, and irrespective of whether harm of any sort resulted to any interest of the possessor. All that seems to have been required was that the actor should have done an act which in fact caused the entry. At the present time, however, except in the case of one carrying on an abnormally dangerous activity, an unintentional and non-negligent entry or remaining on land in the possession of another or causing a third person or thing so to enter or remain is not a trespass on land and imposes no liability upon him. This is true although harm results to the land or to some other interest of the possessor.

Illustrations:

1. A is walking along the sidewalk of a public highway close to the border of B's land. Without fault on his part, A slips on a piece of ice, and falls against and breaks a plate glass window in B's store adjoining the sidewalk. A is not liable to B.

2. A, while driving his automobile along the street in the exercise of due care, is suddenly overcome by a paralytic

See Appendix for Reporter's Notes, Court Citations, and Cross References.

stroke, which he had no reason to anticipate. He loses control of the automobile and falls across the steering wheel, thereby turning the car so that it runs upon and damages B's lawn. A is not liable to B.

3. A piles logs on his land by the side of a stream well above high-water mark. An unprecedented freshet carries away the logs and deposits them on B's land downstream, causing harm to the land. A is not liable to B.

4. A is carefully driving his well-broken horses on a highway. Frightened by a locomotive, they become unmanageable and run away, striking and damaging an iron lamp post on B's land. A is not liable to B.

5. A ships by the B Express Company a box containing nitro-glycerine. A does not notify the B Company of the contents of the box, nor is there anything in its appearance to suggest its contents. While it is in transit, a servant of the B Company observes that the contents of the box are leaking, and that they resemble sweet oil. The servant, in accordance with the practice of the B Company to make an examination of packages which appear to be damaged, attempts to open the box and thereby causes the nitro-glycerine to explode. The explosion throws debris upon the adjoining premises of C, damaging the structures upon it. The B Company is not liable to C.

c. While the rule stated in this Section deals only with the non-liability in trespass for an accidental intrusion on land in the possession of another, the doctrine has a further importance in that it removes the actor from the class of trespassers and relieves him from the burdens incident thereto, including the liability to third persons stated in § 381, and the possessor's immunity from liability to trespassers stated in § 333.

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**COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON**

MARY SLIGAR, an individual,

Appellant,

v.

KARA A. ODELL and "JOHN DOE"
ODELL, wife and husband and the marital
community comprised thereof;

Respondents.

NO. 39283-6--II

DECLARATION OF SERVICE

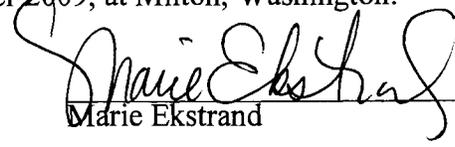
Marie Ekstrand hereby declares and states as follows:

On December 2, 2009, I deposited into the U.S. mail a true and correct copy of Appellant's Reply Brief, postage prepaid, to the Attorneys of record for defendants Odell, as follows:

Eric S. Newman, Esq.
Rachel M. Reynolds, Esq.
McDermott Newmann
1001 Fourth Avenue, Suite 3200
Seattle, WA 98154

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

Dated this 2 day of December 2009, at Milton, Washington.


Marie Ekstrand

THE LAW OFFICES OF WATSON & GALLAGHER, P.S.
2748 MILTON WAY, SUITE 212
MILTON, WASHINGTON 98354
253-926-8437
FAX 253-926-8426