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MAR 29 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 359778

(Spokane County Superior Court No. 14-02-02608-5)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

KEVIN SCHIBEL and TERRI SCHIBEL, Appellants.

vs.

SPOKANE TEACHERS CREDIT UNION, Respondents,

APPELLANT SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Plaintiffs respectfully submit this supplemental brief on whether an Order Denying Plaintiffs' Motion for Partial Summary Judgment that Plaintiff was a Business Invitee as a Matter of Law is appealable when there are no material facts in dispute. The only challenge Plaintiffs make to trial court is a pure question of law.¹ Because the facts regarding Kevin Schibel's entry upon the property were "uncontested" and the parties both agreed the record was complete, "the legal status of the entrant as invitee, licensee, or trespasser was a question of law" for the trial court.² The question before the court at partial summary judgment was solely a question of law and therefore, properly reviewable de novo after a verdict is rendered at trial.

II. SUPPLEMENTAL BRIEF LEGAL ARGUMENT

1. Denial of summary judgment is reviewable where the facts are undisputed and the only issue is a question of law.

Denial of a motion for partial summary judgment is generally not subject to review following a trial "if the denial was based upon a

¹ *Martin v. City of Seattle*, 111 Wash. 2d 727, 733 (1988); *Barnett v. Buchan Baking Co.*, 45 Wash. App. 152, 156, (1986), *aff'd*, 108 Wash. 2d 405 (1987).

² *Beebe v. Moses*, 113 Wn. App. 464, 479 (2002).

determination that material facts are in dispute.”³ But where the parties dispute no issues of fact at summary judgment, the issue is reviewable as a substantive question of law.⁴

In reviewing a partial summary judgment motion where no facts are in dispute, this Court “takes the position of the trial court” by “examining the pleadings, affidavits, and depositions before the trial court” during summary judgment, and decides whether the same decision would have been rendered.⁵ “The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court... We review de novo the existence of a duty as a question of law.”⁶

Washington’s Supreme Court explains that because “summary judgment seeks, at root, judgment as a matter of law... [the] same principle guides review of the *denial* of summary judgment.”⁷ “An appellate court reviews de novo a grant *or denial* of summary judgment. Such an order is subject to review ‘if the parties dispute no issues of fact

³ *Johnson v. Rothstein*, 52 Wn. App. 303, 305, 759 P.2d 471 (1988).

⁴ *Washburn v. City of Fed. Way*, 178 Wash. 2d 732, 749, (2013) (citing CR 56(c)).

⁵ *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wash. 2d 780, 787 (2005).

⁶ *Washburn v. City of Fed. Way*, 178 Wash. 2d 732, 752 (2013).

⁷ *Washburn v. City of Fed. Way*, 178 Wash. 2d 732, 749, (2013) (citing CR 56(c)).

and the decision on summary judgment turned solely on a substantive issue of law.”⁸

[D]enial of a summary judgment motion may be reviewed after entry of final judgment... We distinguish in this regard *Johnson v. Rothstein*, 52 Wash.App. 303, 759 P.2d 471 (1988), which held that denial of a summary judgment was not reviewable following trial if the denial was based on a determination that there were disputed issues of material fact. Johnson specifically reserved the issue of whether denial of summary judgment on a substantive legal issue, which this case presents, is also not reviewable.

McGovern v. Smith, 59 Wash. App. 721, 734–35, 801 P.2d 250, 257 (1990), opinion modified on reconsideration (Feb. 6, 1991).

An exception to this general approach exists for the situation where denial of summary judgment turned on a substantive legal issue rather than a factual dispute. In that instance, the appellate court may review the ruling despite subsequent entry of a final judgment if the issue is solely one of substantive law. Review of legal rulings is de novo.

Nw. Bus. Fin., LLC v. Able Contractor, Inc., 196 Wash. App. 569, 574 (2016) (citing *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wash.App. 791, 799, 65 P.3d 16 (2003); *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wash.App. 66, 79, 248 P.3d 1067 (2011)).⁹

At Plaintiff’s motion for partial summary judgment, the court was well aware the Defense was not disputing any facts:

⁸ *Washburn v. City of Fed. Way*, 169 Wash. App. 588, 609, 283 P.3d 567, 578 (2012) (citing *Univ. Vill. Ltd. Partners v. King Cty.*, 106 Wash. App. 321, 324, (2001); *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wash. App. 791, 799–800, (2003)).

⁹ See also *Pointe at Westport Harbor Homeowners' Ass'n v. Engineers Nw., Inc., P.S.*, 193 Wash. App. 695, 702 (2016); *Citizens for Safe & Legal Trails v. King Cty.*, 118 Wash. App. 1048 (2003); *Bulman v. Safeway, Inc.*, 96 Wash. App. 194, 198 (1999); *In re Marriage of Wilson*, 98 Wash. App. 1032 (1999).

Mr. Smith indicates to the court that there are no disputes of fact, and it is a fact in the case that the representative of defendant has indicated, yes, we do invite the public; yes, we do permit the public to shop – to park here, and we do so as a member of the community, in hopes of attracting business... I was prepared, I'll tell you, when I walked out here to deny the motion and state that there were, you know, still remaining issues of fact. Mr. Smith's position that there are no issues of fact and that all that remains is for the court to decide this as a matter of law.¹⁰

The record before the trial court at the summary judgment hearing establishes there was no genuine dispute as to any material facts.¹¹ The Defense did not dispute Schibel's statement of facts (the facts put forward were direct admissions from defendant depositions).¹² Both sides agreed the record was complete. The Defense admitted the facts presented were true, stating "The parties are correct, Your Honor, that there's no facts in dispute, and this is a decision that's a matter of law for you today and not for the jury."¹³ Even after the summary judgment hearing, the Defense proposed order to the Court again emphasized:

"The parties in their briefing specifically indicated that there were no disputed facts, and that the Court should rule of Mr. Schibel's status as a matter of law. STCU's proposed order addresses this very issue, and it is not to be left to the jury... the parties stated at hearing, there were no disputed issues of fact, and that Plaintiffs' status for premises liability purposes was a question of law for the Court."¹⁴

¹⁰ RP 18-19.

¹¹ RP 15.

¹² See CP 66.

¹³ RP 15.

¹⁴ CP 153; CP 157.

As the nonmoving party, the Defense cannot now seek to create material facts where at partial summary judgement they admitted there were none. At summary judgment, “the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.”¹⁵

2. When the facts are undisputed, a visitor’s legal status is a substantive question of law.

All of Washington’s Appellate Divisions have held that where the facts regarding entry onto a landowner's property are undisputed, the legal status and the duty owed is a substantive question of law for the court to decide:

“Where, as here, the facts surrounding the complaining party's entry upon the property in question are not contested, the determination of the legal status of that entrant as either an invitee, licensee or trespasser is a question of law... The common law status of an entrant, although based upon the pertinent facts, rests upon the legal effect of actions taken by the parties, which is a question of law.”

Swanson v. McKain, 59 Wash. App. 303, 307, 796 P.2d 1291, 1293–94 (1990); See also *Beebe v. Moses*, 113 Wash. App. 464, 467, 54 P.3d 188, 189 (2002); *Ford v. Red Lion Inns*, 67 Wash. App. 766, 769, 840 P.2d 198, 200 (1992).

¹⁵ *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wash. 2d 1, 13, 721 P.2d 1, 7 (1986); See also *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn. 2d 16 (2005) (“The nonmoving party must present evidence that demonstrates that material facts are in dispute. If the nonmoving party fails to do so, then summary judgment is proper.”)

III. CONCLUSION

All three Appellate Divisions hold the status of entrant onto land is a question of law and reviewable de novo. Partial summary judgment motions on the status of an entrant onto land is a pure question of law when both sides concede the record is complete and there are no material issues of fact. In this situation, the trial court has an obligation to provide guidance to the litigants on the applicable legal status of an entrant onto land and not leave the application of law to uncontested facts to the jury.

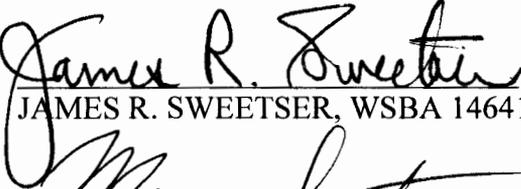
Interpretation of the law is for the court, and issues of fact are left to the jury only if they are in dispute. By issuing no decision on Plaintiff's legal status as a matter of law, it resulted in multiple jury instructions on Mr. Schibel's legal status, when there should have only been one invitee instruction.

This is not harmless error. The defense argued there was a very distinct difference in the duty of care owed to an invitee versus a licensee. The defense argued there was no duty of reasonable care owed to a licensee.

The trial court should not be encouraged to avoid an appealable issue when the issue is a pure question of law. Failure to apply the law at partial

summary, when there were no material facts in dispute and both parties concede the record is complete, should not be encouraged or cast aside as harmless. Requiring the trial court to rule on a pure issue of law at partial summary judgment promotes judicial economy, simplifies and narrows the issues for trial, reduces confusion of the litigants and ultimately the jury.

RESPECTFULLY SUBMITTED THIS 29th day of March, 2019.


JAMES R. SWEETSER, WSBA 14641

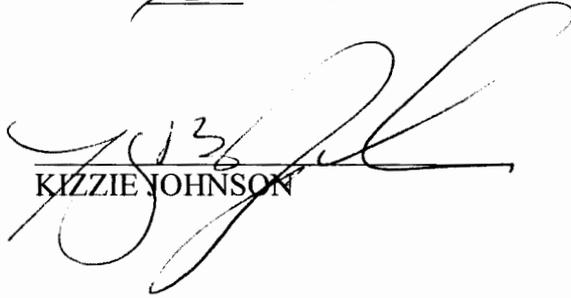
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury, that on the 29th day of March, 2019, I caused to be served a true and correct copy of the foregoing document on the following:

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