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Court of Appeals
Division III
State of Washington
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No. 373363

**COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON**

JASON SLEATER, Appellant,

v.

Richard Griffith I, Jane Doe Griffith I, Richard Griffith II, Jane Doe Griffith II, Christopher Akoosh, Jane Doe Arkoosh, Dave Farb, Jane Doe Farb, Kootenai Electric Coop, J&J Drilling, Inc., Jane Does and John Does 1-10, and ABC Entities 1-10, Defendants,

and

PECK & PECK EXCAVATION, CO, Respondent.

APELLANT'S OPENING BRIEF

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ASSIGNMENT OF ERROR

1. The Trial Court erred in entering an order on December 20, 2019, granting Defendant's motion for summary judgment.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Washington Courts have traditionally applied the common law duty to avoid "wanton or willful" conduct when assessing a landowner's duty of care toward trespassers. *See Zuniga v. Pay Less Drug Stores, N.W.*, 82 Wn. App. 12, 13, 917 P.2d 584 (1996) (quoting *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41, 846 P.2d 522 (1993)). The issue presented in this appeal is whether an exception should be carved out that allows a party to trespass in an emergency situation to protect life or property.
2. The second issue presented is whether a summary judgment order was proper when it was unknown whether Mr. Sleater was on the Griffiths' property.

STATEMENT OF THE CASE

A. Factual Background

In January 2015, Jason Sleater (hereinafter "Mr. Sleater") and Richard Griffith (hereinafter "Mr. Griffith") entered into a contract for Mr. Sleater to build Mr. Griffith a custom home. (CP 10). Their relationship quickly deteriorated: Mr. Griffith was consistently late on his payments, he was falling behind with the bank, and he generally misrepresented his financial ability to perform. (CP 10). The relationship between the two

became untenable, and on September 8, 2015, Mr. Sleater was sent a letter, by Mr. Griffith's attorney, that informed Mr. Sleater that he was "banned from the site." (CP 7).

On October 25, 2015, appellant, Mr. Sleater, was informed by one of his subcontractors that his "Centurion Construction" business sign, located just off of Mr. Griffith's property, had been vandalized. (CP 10). Spray painted on the sign in bold white letters were the words: "BUILDER IS A CONARTIST. LIAR, AND THIEF." (CP 10). Mr. Sleater immediately contacted his attorney at the time, Rick Wetmore, to discuss whether Mr. Sleater could collect the sign. (CP 10). Rick Wetmore told Mr. Sleater to go pick up his sign; Mr. Wetmore said that he would contact Mr. Griffith's attorney and inform him that Mr. Sleater was going to pick up the vandalized sign. (CP 10).

Later, at approximately 7:30 pm, Mr. Sleater arrived at the Griffith property. (CP 10). The sun had gone down, and the property was pitch black. (CP 10). Mr. Sleater did not realize, and had not been warned, that a trench had been dug by Peck & Peck Excavation Company (hereinafter "Peck & Peck") on or near the property. (CP 10). Upon approaching his sign, Mr. Sleater fell 8 feet into the unmarked rock ditch dug by Peck & Peck. (CP 10). He shattered 3 discs in his neck, partially tore his ACL and MCL, and lost full range of motion. (CP 10).

B. Procedural Background

Following Mr. Sleater's fall, he filed his complaint listing several parties, including Peck & Peck Excavation, Inc., the excavators who actually dug the trench. (CP 2).

As one of the only defendants remaining in the litigation, Peck & Peck filed a motion for summary judgment. (CP 4). The memorandum in support of summary judgment argued that, while Mr. Sleater was collecting his sign, his status was that of a trespasser. (CP 5). The memorandum extended the argument that Peck & Peck owed a duty afforded any other trespasser, notwithstanding the parties' previous interactions nor the fact that Griffiths had defaced Sleater's sign. (CP 5). Despite Mr. Sleater's objections and his pleadings showing sufficient facts concerning his privilege to enter the property under the Restatement (Second) of Torts' necessity exception, the District Court entered an order for summary judgment against Mr. Sleater on the basis that Peck & Peck did not owe the same duty of care as required with a licensee or invitee. (CP 9, 13). Mr. Sleater's case was dismissed with prejudice. (CP 13). This appeal followed.

ARGUMENT

Standard of Review

This Court reviews “a summary judgment order *de novo*, engaging in the same inquiry as the Trial Court.” *Keck v. Collins*, 181 Wn. App. 67, 78, 325 P.3d 306 (2014). When a summary judgment order is at issue on appeal, this Court, like the District Court, views the evidence “in a light most favorable to the nonmoving party.” *Id.* at 79. The Court then assesses whether “there is *no* substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) (emphasis added). Only on a finding of “no genuine issue of material fact” is a party “entitled to judgment as a matter of law.” *Berger v. Sonneland*, 144 Wn.2d 91, 102, 26 P.3d 257 (2001) (quoting *Folson v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

I. **Washington’s common law duty is valid, but harsh. Small exceptions must be carved out in order to account for multiple situations and do justice appropriately.**

The trial court erred when it entered an order for summary judgment. The order failed to consider the proper scope of a property owner’s duty to a trespasser when there is an emergency and a necessity to rescue property. The major question for decision is one of first impression in Washington — should the Restatement’s necessity exception be

adopted in Washington State? Washington’s traditional approach when analyzing issues concerning the standard of care due to a trespasser has been the common law standard which holds that “a landowner’s only duty to trespassers is to avoid willfully or wantonly injuring them.” *Zuniga v. Pay Less Drug Stores, N.W.*, 82 Wn. App. at 13. The standard, is a broadly applicable standard, that works for most situations, but needs to be subject to a few exceptions to maintain flexibility in assessing every scenario. *See Younce v. Ferguson*, 106 Wn. 2d 658, 666, 724 P.2d 991 (1986) (acknowledging that “slow, piecemeal *development*” of the common law standards is one compelling reason to keep the common law distinctions) (emphasis added).

This Court must decide whether to develop the common law doctrine further, and carve out an exception consistent with the Restatement (Second) of Torts §197 and §345. The Restatement § 197 provides:

- (1) One is privileged to enter land or remain on land in the possession of another if it appears reasonably necessary to prevent serious harm to
 - a. The actor, or his land, or chattels, or
 - b. The other or a third person, or the land or chattels or either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.
- (2) . . .

Restatement (Second) of Torts, section 197 (1965).

The Restatement (Second) of Torts § 345, which should be read in conjunction with § 197, as both sections talk about the duty owed to privileged parties, states in pertinent part:

- (1) Except as stated in Subsection (2), the liability of a possessor of land to one who enters the land only in the exercise of a privilege, for either a public or a private purpose, and irrespective of the possessor's consent, is the same as the liability to the licensee.
- (2) . . .

Restatement (Second) of Torts, section 345 (1965).

In assessing whether to adopt these Restatement provisions, this Court should look first at the Restatement itself. Following that, three factors set carving out this exception as proper moving forward: (1) the historical precedent of this Court has been to carve out exceptions; (2) similar exceptions have been set out by the legislature; and (3) other jurisdictions have adopted the Restatement provisions..

A. Washington Courts have routinely relied on the Restatement for guidance in assessing torts claims. It should continue to do so here.

Washington Courts have, “in the past looked to the Restatement (Second) of Torts (1965) for guidance in reviewing problems of landowner liability.” *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 131-32, 606 P.2d 1214 (1980). *Egede-Nissen* provides several examples of former cases that have looked directly to the Restatement for

guidance. *Id.* at 132. The *Egede-Nissen* Court cites as examples: *Memel v. Reimer*, 85 Wn.2d 685, 687, 538 P.2d 517 (1975) (adoption of section 342 regarding duty owed licensees); *Mckinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 414 P.2d 773 (1996) (adoption of section 332 defining invitees); and *Miniken v. Carr*, 71 Wn.2d 325, 328-29, 428 P.2d 716 (1967). *Egede-Nissen* 93 Wash.2d at 132.

Although the Restatement (Second) of Torts section 197 and section 345 have not yet been addressed in this state, the Restatement in general has been embraced by Washington Courts, in part because of its continued reliance on the common law classifications of invitees, licensees, and trespassers. *Id.* at 131-32. This Court should continue to rely on the Restatement (Second) of Torts and analyze the traditional common law duty to trespassers of “wanton and willful” conduct subject to some well delineated exceptions.

B. This Court has carved out exceptions to the common law premises liability before.

When the equities so require, this Court has not been shy about carving out exceptions to the harsh common law doctrine. Two cases, *Rogers v. Bray* and *Laudermilk v. Carpenter*, prove that exceptions are available when the circumstances require. *See generally Rogers v. Bray*, 16 Wn.App. 494, 557 P.2d 28 (1976), and *Laudermilk v. Carpenter*, 78

Wn. 2d 92, 457 P.2d 1004 (1969). The Court in *Rogers* held that there is an elevated duty imposed on landowners “when [a] trespasser is negligently led into believing that a private road is a public road.” *Rogers* 16 Wn. App. at 496. In *Rogers*, the Defendants continued to leave a chain draped across their private roadway, despite the fact that the Defendants knew motorcyclists were accessing the road. *Id.* at 494-95. The Plaintiff, Rogers, struck the chain while riding his motorcycle. *Id.* at 495. The impact fractured his left leg. *Id.* Citing the Restatement, the Appellate Court overturned a summary judgment order, and carved out an exception that allowed the Plaintiff the opportunity to prove the Defendants had a duty so long as the Plaintiff could convince a jury that he was “negligently misled” down the private road. *Id.* at 495-96 (citing the Restatement (Second) of Torts §367 (1965)).

Laudermilk v. Carpenter is another case where the Court demonstrated its willingness to extend the standard duty of care to protect technical trespassers in certain cases. *Laudermilk* 78 Wn.2d at 95 (citing *Bjork v. Tacoma*, 76 Wash. 225, 135 P. 1005 (1913) and *Cox v. Hugo* 52 Wn.2d 815, 329 P.2d 467 (1958) as precedent for the duty of care to children who are technical trespassers).

Laudermilk, involves children who were badly burned by an incinerator on Defendant’s property. *Id.* at 93. The *Laudermilk* Court

looked toward exceptions to the general common law rules to do justice in this case because the common law doctrines were so harsh. *Id.* at 95. The Court understood clearly that the children were “technical trespassers,” but still the duty of care in this case, according to the Court, was still that of “reasonable care.” *Id.* The Court allowed an exception to be fashioned in order to decide whether a wrong had been done to the children. *Id.* The Court here should do the same with the private necessity exception. The analysis should not stop solely at “wanton” and “willful” conduct.

C. The Washington legislature has expressed through its laws that the law with respect to trespassers should not be as harsh as the common law doctrine implies.

Similarly, the Washington Legislature has codified laws that, while not directly applicable to this case, also limit the harsh attitude of the law toward trespassers. For example, the legislature has stated that it is a defense to the crime of trespass if “[t]he actor reasonable believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain.” RCWA 9A.52.090(3) (2011). In 2012, Congress passed another bill that provided mitigating circumstances under the tort of trespass. *See* RCWA 64.12.040 (2012). Under the mitigating circumstances statute, if the trespass was “casual or involuntary,” judgment would “only be given for single damages.” *Id.*

Undoubtedly, these statutes do not obligate this Court to create an exception of necessity. However, the laws do demonstrate the Legislature's concern that common law doctrines, and the way trespassers are treated by the law, can be too harsh under the circumstances. Similar policy reasons would be implicated by the adoption of a necessity defense. The defense would provide a balancing test with the firm understanding that the common law distinctions provide well-worn principles that land, and the owner's interests upon the land should be protected. However, emergencies, and the infrequent need to access and come upon private land is inevitable and should, on occasion, be balanced against the land owner's interest. In those situations, technical trespassers should not be barred from all recovery simply because they had no other option. This principle has been codified in the crime of trespass, and similarly it should be carved into this Court's premises liability jurisprudence here.

D. Other circuits' implementation of the necessity defense should provide persuasive evidence that the exception needs to be adopted in Washington.

The necessity privilege provides only a small road to recovery for technical trespassers, who were injured while trying to protect themselves or their property in an emergency situation; it is not a complete overhaul of the common law standard of care. Other circuits have already implemented the necessity defense, and have shown the limited nature of

the privilege and the defense. Those opinions lend credibility to the assertion that the adoption of the necessity defense and the privilege associated with it is a good practice — it keeps with the principles of the common law doctrine, but allows a slight mitigation to the harmful effects in cases where life or property is at risk.

The D.C. Circuit has provided the most comprehensive analysis of the necessity defense. *See Toomer v. William C. Smith & Co., Inc.*, 112 A.3d 324 (D.C. 2015). In *Toomer*, the plaintiff’s (“Toomer’s”) dog ran onto the neighboring apartment property. *Toomer*, 112 A.3d at 325. Toomer feared that he would either lose his dog, or that the animal would injure someone. *Id.* Acting quickly, Toomer attempted to climb the fence separating his property from the apartment, but he slipped on grease that had been applied to the fence to prevent trespassers. *Id.* “[H]is left calf was impaled on the post.” *Id.* Toomer’s initial case was dismissed on summary judgment because of the standard of care applied to trespassers was only the duty to avoid “wanton” and “willful” conduct. *Id.* The Appellate Court, however, overturned the summary judgment order. *Id.* at 328-29. According to the Court, the proper standard of care to apply “turn[ed] on whether or not [Toomer’s] entry . . . was privileged.” *Id.* at 328-29 (citing the Restatement (Second) of Torts § 197(1)(1965)). The Court held that the proper inquiry, therefore, was not whether the conduct

was “wanton” or “willful”, but instead whether a “reasonable jury could conclude” that “Mr. Toomer reasonably believed that his entry was necessary to protect” his dog. *Id.* at 329.

Illinois is another jurisdiction that has concluded that the Restatement sections 197 and 345 are applicable to emergency situations. *See Lange v. Fisher Real Estate Development Corporation*, 832 N.E.2d 274 (Ill. App. Ct. 2005). In *Lange*, the Plaintiff was a cab driver who chased after a woman trying to avoid paying her cab fare. He chased her into an unfinished condominium project and down a hallway, only to discover that the hallway had no floor. *Id.* at 276. The Plaintiff fell ten (10) feet, and shattered his femur. *Id.* In its analysis, the Illinois Court cited the Restatement (Second) of Torts section 197 and section 345. *Id.* at 279. The Court reiterated that a person is entitled to a privilege when it is “reasonably necessary to prevent serious harm to the actor, or his land or chattels.” *Id.* (citing Restatement (Second) of Torts §197). The *Lange* Court stated further: “one who enters pursuant to a privilege of necessity enjoys the status of a licensee.” *West v. Fautro*, 66 Ill. App.3d 815, 817 (1978)). The *Lange* Court found that the Plaintiff did not meet the requirements of establishing a private necessity, but the Court acknowledged that the privilege was indeed a valid one. *Id.* at 280-81.

As these opinions show, there are situations that a privilege must be created in order for a technical trespasser to have any recovery in an emergency situation. *See also Trisuzzi v. Tabatchnik*, 666 A.2d 543, 285 N.J.Super 15 (N.J.Super.A.D. 1995); and *Vincent v. Lake Erie Transportation Company*, 124 N.W. 221 (Minn. 1910). The common law doctrine of foreclosing “willful” and “wanton” behavior should not be an all-encompassing standard. Instead, it should be a baseline for the Court. The Courts then assess whether the facts show that there would be an emergency that granted a privilege in a given situation. The question then would be one for a jury: does the protection of life or property under a given set of facts rise to the level of an emergency that would grant a privilege? Ultimately, the authority to establish an exception rests at the court’s discretion, however, as other jurisdictions and the comments in the Restatement show — the exception should be carved out.

II. **A reasonable jury could come to the conclusion that Mr. Sleater was privileged to enter the Griffiths’ property to protect his property and business reputation.**

After carving out the exception, all that is needed for a remand is to answer the question of whether a reasonable jury could find that Mr. Sleater was acting reasonably under the circumstances. *See Humes v. Fritz Companies, Inc.*, 125 Wn. App. 477, 105 P.3d 1000 (2005) (analyzing a summary judgment order on the issue of whether a “reasonable jury could

find that Humes acted unreasonably in the face of an emergency”). On the facts pled, a reasonable jury could find for Mr. Sleater here. First, the duty Mr. Griffith owed to Mr. Sleater is transferred to Peck & Peck. Second, Mr. Sleater has pled sufficient facts that show his actions were taken in an emergency situation to protect his reputation, his business, and his livelihood. In these circumstances, a jury needs to be the one to assess the facts and determine whether there was a sufficient emergency to grant Mr. Sleater a privilege to enter the property.

A. Peck & Peck owed the same duty to Mr. Sleater as subject property owners.

To begin, Mr. Sleater is owed the same duty by Peck & Peck that would be owed by Mr. Griffith. *See Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 328, 666 P.2d 392 (1983) (“The Restatement posits liability not only for possessors of land, but also for those persons acting on behalf of the possessor with respect to harm caused by their activities”).

Here, Peck & Peck owed the same duty to warn Mr. Sleater as Mr. Griffith. So long as Mr. Sleater can show that a reasonable jury could find that Mr. Griffith, the property owner, would have owed him a duty, the duty owed will transfer to Peck & Peck. *See Restatement (Second) of Torts section 383* (1965).

B. A reasonable jury could find for Mr. Sleater.

Mr. Sleater has pled sufficient facts to show that there is a genuine issue of material fact; summary judgment is not proper in this case. See *Berger v. Sonneland*, 144 Wn.2d at 102. Mr. Sleater's advertisement sign had been spray painted in bold letters with the words, "BUILDER IS A CONARTIST. LIAR, AND THIEF." (CP 10). Those inflammatory words were meant to damage and destroy Mr. Sleater's reputation as a contractor in the area. A general contractor's reputation, like many occupations, is directly linked to their livelihood, their ability to find customers, and the general ability to run their business in an effective manner. As Mr. Sleater has stated, he talked to his attorney to decide whether it would be proper to go collect his sign, his attorney informed the other party, and he was not going to cause mischief; instead, Mr. Sleater was only going to collect his sign and maintain his business's reputation. (CP 10).

On these facts, a jury should be the ones deciding whether Mr. Sleater's decision to remove his sign from the outskirts of property is enough to constitute an emergency when his business's reputation was directly at stake. The task of the jury should be assessing whether Mr. Sleater acted reasonably when he had his attorney inform Mr. Griffith's attorney that he was coming to collect his sign. It is a necessity that a jury should be the one to assess whether Mr. Sleater acted within a reasonable

time after his discovery of the sign to constitute an emergency. Under these facts, it would be impossible for the court to decide this case on the briefs alone. A fact finder is necessary. After all, “it is presumed, that juries are the best judges of facts; it is on the other hand presumable that the courts are the best judges of law.” *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794).

III. The Trial Court erred by granting a summary judgment motion without first ordering a professional survey to sort out whether Mr. Sleater was on Mr. Griffith’s property at the time of the fall.

Even if the court decides that Mr. Sleater had no privilege on the property, this case should still be remanded. The Trial Court erred when it failed to consider the argument that Mr. Sleater was potentially not on Mr. Griffith’s property at the time of his fall. A “trespass” in Washington is defined as “an intrusion onto the property of another that interferes with the other’s right to exclusive possession.” *Matter of Harvey*, 3 Wn. App.2d 204, 216, 415 P.3d 253 (2018) (quoting *Bradley v. Am. Smelting & Ref. Co.*, 104 Wash.2d 677, 690-91, 709 P.2d 782 (1985)). The question then is whether Mr. Griffith was in exclusive possession of the roadway and ditch that Mr. Sleater fell into, or whether it was owned by some other entity who failed to give permission.

The facts of the case create a material dispute about that issue. To be defined as a trespasser, Mr. Griffith would have had to be in sole

possession of the property. *See Matter of Harvey*, 3 Wn. App. 2d at 216. In Mr. Sleater's declaration, it was clarified that Mr. Sleater never made it to the property line that held his business sign. CP 10. The declaration makes clear that it was more likely that it was a community owned access road. CP 10. At this point, it is not clear who owns the property. The roadway could have been owned by an entity that owned the street, it could have been a common area of homeowner's association, or it could have been some other entity who had never provided Mr. Sleater and the world appropriate warnings about the danger of the ditch. The party that actually has possession of the road is in dispute in this case. A genuine issue of material fact exists. Mr. Sleater's actions would not meet the definition of "trespass" under Washington law. A shoot from the hip approach of declaring Mr. Sleater a trespasser without definitively establishing that he was, in fact, on Mr. Griffith's property at all would not be a proper administration of justice, and would be in exact opposition to the traditional Washington definition of "trespass." A remand is required to sort out exactly where the property line is.

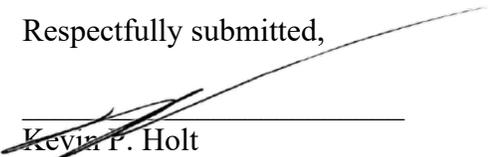
CONCLUSION

There is no basis for a summary judgment in favor of Peck & Peck after considering the need for a private necessity exception in Washington. There is a clear dispute of material fact related to whether Mr. Sleater was

a trespasser, a licensee, or an invitee. Further, to label Mr. Sleater as a trespasser, he should first be permitted to establish the exact location of the trench at the time of his fall. The Trial Court's order granting summary judgment should be reversed, and a jury should find the facts that will tend to prove whether Mr. Sleater was a licensee, an invitee, or a trespasser.

DATED this 1 date of May, 2020.

Respectfully submitted,



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