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Division III
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No. 373363

COURT OF APPEALS
DIVISION III
IN AND FOR THE STATE OF WASHINGTON

JASON SLEATER,
Plaintiff/Appellant

v.

Richard Griffith I, Jane Doe Griffith I, Richard Griffith II, Jane Doe
Griffith II, Christopher Arkoosh, 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,
Co-Defendants

and

PECK & PECK EXCAVATION CO.,
Co-Defendant/Respondent

RESPONDENT'S BRIEF

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I. INTRODUCTION

The plaintiff¹ appeals the trial court's "Order Granting Summary Judgment entered on December 20, 2019." CP 222; also see *Order* (CP 218-220; 225-227); *Appellant's [sic] Opening Brief*,² "Assignment of Error" at 1. For purposes of this appeal, the parties have designated a total of two hundred thirty-five (235) pages which comprise the *Clerk's Papers*. In *[Plaintiff's] Opening Brief*, Mr. Sleater has only cited to CP 2, 4, 5, 7, 9, 10, and 13. The undersigned has been unable to find any correlation between plaintiff's citations to the record and the *Index to Clerks Papers*. Based on the foregoing citations alone, however, it appears the plaintiff's appeal relies solely on excerpts from his *Summons and Complaint* (CP 1-10) and one page from the defendant's *Answer and Affirmative Defenses* (CP 11-16). "The dilemma in which this places this court is apparent. We cannot both advocate and judge." *State v. Mode*, 55 Wn.2d 706, 710, 349 P.2d 727 (1960).

As other courts have noted, "[i]t is not our task, or that of the district court, to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify

¹ "Plaintiff" or "Mr. Sleater" will be used throughout this brief instead of "appellant" in accordance with RAP 10.4(e).

² *[Plaintiff's] Opening Brief* contains two pages numbered "1", "2", and "3" ("Assignment of Error" and "Argument" sections, respectively). Citations in this brief will retain plaintiff's original page numbers but will also attempt to clarify by reference to section heading where the cite is found in plaintiff's opening brief.

with reasonable particularity the evidence that precludes summary judgment.”

Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996), *see also Heko Services, Inc. v. ChemTrack Alaska, Inc.*, 418 F.Supp.3d 656, 660 (W.D. Wa., 2019).

The plaintiff was the nonmoving party opposing summary judgment at the trial court level and it was his obligation to produce admissible evidence that would preclude the defendant’s motion. CR 56(e). The plaintiff failed to identify a genuine issue of triable fact below and similarly fails in his opening brief before this Court. Instead, he argues: (1) Washington’s common law classification system is harsh and that “[s]mall exceptions must be carved out”³; (2) assuming Washington law is changed, a jury could find for the plaintiff; and (3) the trial court erred by failing to *sua sponte* order a professional survey.

The defendant respectfully requests that this Court affirm the trial court’s decision below.

II. ASSIGNMENTS OF ERROR

The Honorable Annette S. Plese did not err when:

- (1) the plaintiff failed to present a genuine issue of material fact;
- (2) she granted the defendant’s motion for summary judgment; and

³ [Plaintiff’s] *Opening Brief* at 1, “Argument” subsection “I.”.

(3) she ordered plaintiff's claims against the defendant be dismissed with prejudice. CP 219.

III. COUNTERSTATEMENT OF THE CASE

In the "Factual Background" section of his brief⁴, the plaintiff cites only to CP 7 and CP 10. In the "Procedural Background" of his brief (at 3), the plaintiff cites to the record in the following order: CP 2, 4, 5, 9, and 13. According to the *Index to Clerk's Papers*, plaintiff's *Summons and Complaint* are CP 1-10 and defendant's *Answer and Affirmative Defenses* are CP 11-16. Based on this, there is no apparent relationship between the plaintiff's citations to the record and the actual record itself. Therefore, it is incumbent on the defendant to submit the following counterstatement of the case.⁵

A. Counterstatement of Relevant Facts.

According to his *Complaint*, the plaintiff claimed he was "injured when he fell into a man-made ditch located on the Subject Property" on October 25, 2015 at approximately 7:30 P.M. CP 5, ¶8. The subject property located at 2612 N. Chase Lane, Liberty Lake, Washington 99019 was owned by the defendants GRIFFITH I and GRIFFITH II. CP 3-4, ¶1.

⁴ [Plaintiff's] *Opening Brief* at 1, 2, "Statement of the Case" subsections "A." and "B.".

⁵ *Also see* CP 21.

The defendant PECK & PECK performed excavation operations on the subject property. CP 4, ¶4.

The plaintiff claims “Defendants” were negligent because they “owed a duty” “to prevent [him] from falling into the ditch” and breached “their duty to reasonably provide adequate warnings and safety measures”. CP 6, ¶¶15-17.

Because of various contract disputes, GRIFFITH property owners fired the plaintiff and his construction company from the building project. CP 37, 46 (*Griffith II Declaration* ¶ 6). GRIFFITHS also authorized their attorney to send a termination/trespass letter dated September 8, 2015 which advised the plaintiff in relevant part that:

You are hereby banned from the construction site. If you visit the site without the owners' knowledge or consent you will be guilty of trespass and the police will be called to remove you from the site.

CP 40 (*Jolley Declaration* ¶6); CP 37, 46 (*Griffith II Declaration* ¶ 6). At no time after the date of this letter did GRIFFITHS or their attorney authorize the plaintiff to enter the subject property. *Declaration of Counsel*, CP 40 (*Jolley Declaration* ¶ 7); CP 37, 46 (*Griffith II Declaration* ¶ 7).

The plaintiff admits he received a copy of the GRIFFITH termination/trespass letter (*See* CP 43 “*Admission No. 2*”); and admits neither GRIFFITHS nor their attorney rescinded the termination/trespass letter prior to the date of his alleged injury (*Id.* “*Admission No. 3*”).

B. Counterstatement of Relevant Procedural History.

Plaintiff's *Summons* and *Complaint* were filed on October 4, 2018 naming defendants who were individual property owners (GRIFFITHS, ARKOOSH, and FARB); and business entities (KOOTENAI ELECTRIC COOP., PECK & PECK EXCAVATION CO., and J&J DRILLING, INC.); as well as unknown individuals and entities. CP 1, 3.

On January 29, 2019, Defendant PECK & PECK filed its *Answer and Affirmative Defenses*. CP 11-16.

On February 21, 2019, Defendants J&J DRILLING were dismissed. CP 20.

On April 10, 2019, Defendants GRIFFITH I and GRIFFITH II were dismissed. CP 20.

On June 20, 2019, Defendants ARKOOSH were dismissed. CP 20.

On November 20, 2019, Defendant PECK & PECK filed its *Motion for Summary Judgment* (CP 17-19); its *Memorandum in Support of Summary Judgment* (CP 20-28); and *Declaration of Counsel [in Support of Summary Judgment]* with three (3) attached exhibits (CP 33-44).

On December 16, 2019, Defendant PECK & PECK filed its *Motions to Strike and Reply Brief Supporting Summary Judgment*. CP 228-235.

On December 16, 2019, Defendants FARB were dismissed. *See* Appendix Exh. 1.

Aside from un-named individuals and entities, the only remaining defendants are KOOTENAI ELECTRIC COOPERATIVE and PECK & PECK EXCAVATION COMPANY.

On or about December 17, 2019, the plaintiff filed a *Motion to Continue [Summary Judgment]* (CP 52-54); *Memorandum in Support of Motion to Continue [Summary Judgment]* (CP 55-58); *Declaration of Jason Sleater [in Support of Motion to Continue]* (CP 59-61); *Memorandum in Opposition [to Summary Judgment]* (CP 62-71); *Declaration of Jason Sleater [in Opposition to Summary Judgment]* (CP 72-101); and *Declaration of Kevin Holt [in Opposition to Summary Judgment]* (CP 102-217).

On December 20, 2019, the Honorable Annette S. Plese heard oral argument from counsel for the parties and signed the *Order Granting Defendant Peck & Peck Excavation Co.'s Motion for Summary Judgment*. CP 218-220.

On January 16, 2020, the plaintiff filed his *Notice of Appeal to Court of Appeals*. CP 222-227.

On April 22, 2020, the Senior Case Manager of the Court of Appeals Division III sent a letter to plaintiff's counsel advising that "Appellant has failed to timely file the appellant's brief by the due date of April 9, 2020" and the new date for filing was May 4, 2020. *See Appendix Exh. 2.*

On May 1, 2020, *Apellant's [sic] Opening Brief* was filed.

IV. ARGUMENT

A. Standard of Review.

The Court of Appeals 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 (Div.3, 2014), citing *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment should be upheld if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991), citing CR 56; *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989). The non-moving party “may not rest upon the mere allegations or denials of this pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e). “[T]he appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12.

B. The Plaintiff Has Failed to Meet His Shifting Burden of Proof When Opposing Summary Judgment.

At the summary judgment hearing, after a review of the parties’ written materials and after oral argument of counsel, the trial court

determined that the plaintiff was trespassing on the GRIFFITH defendants' property at the time of his injury and that PECK & PECK breached no duty owed to him. CP 218-219. According to his *Complaint*, the plaintiff claims that PECK & PECK was negligent because it "owed a duty" and "breached [its] duty to reasonably provide adequate warnings and safety measures" "to prevent [him] from falling into the ditch." CP 6, ¶¶15-17. The essential elements of a negligence action are (1) the existence of a duty to the plaintiff; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and injury. *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989). "The determination of the existence of a duty is a question of law." *Atherton Condominium Apartment-Owners Ass'n Bd. Of Directors v. Blume Development Co.*, 115 Wn.2d 506, 528, 799 P.2d 250 (1990), citing *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988); *Mele v. Turner*, 106 Wn.2d 73, 78, 720 P.2d 787 (1986); *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984); *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982) (footnote authorities omitted).

The defendant argued and cited longstanding Washington jurisprudence at the trial court level establishing that the only duty it owed the trespassing plaintiff was "not to commit [willful or] wanton misconduct." CP 23, quoting WPI 120.02 ("Duty to Trespasser"). The trial

court found “that plaintiff was a trespasser at all times relevant; and that defendant PECK & PECK breached no legal duty to the plaintiff.” CP 219. This appeal follows the trial court’s *Order Granting [Defendant’s] Motion for Summary Judgment*. CP 218-220.

The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). In this case, the defendant PECK & PECK successfully argued below that it “Breached No Duty Owed to the Plaintiff”. CP 24, “Argument of Counsel” subheading “C.”. In response to the defendant’s summary judgment argument and authorities showing an absence of evidence to support the plaintiff’s claims that a duty was breached, the inquiry then shifts to the party with the burden of proof at trial – the plaintiff.

If, at this point, the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion [for summary judgment].

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct 2548, 91 L.Ed.2d 265 (1986)).

In *Plaintiff's Memorandum in Opposition [to Summary Judgment]*, Mr. Sleater made the following statements and arguments which failed to satisfy his shifting burden of proof:

- “Assuming that the exact location where Plaintiff fell was inside Griffith’s property line, Mr. Sleater was still not a trespasser.” CP 66, ln. 12-13 (subheading “A. The Plaintiff is Not a Trespasser.”).
- “Although Plaintiff has been unable to locate Washington authority concerning section 345 of the Restatement (Second), Washington State courts have relied on the Restatement for authority.” CP 66, ln. 13-15 (subheading “A. The Plaintiff is Not a Trespasser.”).
- “Plaintiff now contends that he did not fall within the property line of the Griffith property, and was therefore not a trespasser.” CP 69, ln. 13-14 (subheading “B. Peck & Peck Owed the Same Duty to the Plaintiff as Subject Property Owners.”).
- “[E]ven if the court finds that Plaintiff’s fall did occur on property owned by Griffith, the private necessity privilege insulates Plaintiff from being characterized as a trespasser.” CP 69, ln. 21-23 (subheading “C. Peck & Peck Breached a Duty Owed to the Plaintiff.”).

“A party [opposing summary judgment] may not rely on mere allegations, denials, opinions, or conclusory statements but, rather must set forth

specifics indicating material facts for trial.” *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004), citing CR 56.

Judge Plese properly granted summary judgment because the plaintiff’s response was nothing but “allegations, denials, opinions, [and] conclusory statements”. This Court should affirm the decision below because the plaintiff failed to meet his shifting burden of proof after the defendant established that he was a trespasser and that no duty owed to him was breached.

C. The Plaintiff Cannot Cite Any Washington Authority Supporting His Argument.

Instead of meeting his shifting burden of proof, Mr. Sleater below and on appeal asks the Court to change the common law and adopt RESTATEMENT⁶ sections which loosen the duty owed to trespassers making it “the same as the liability to a licensee.” CP 66, ln. 24; *[Plaintiff’s] Opening Brief*, “Argument” section at 3, quoting RESTATEMENT (SECOND) OF TORTS § 345. The plaintiff has previously conceded that his arguments require the Court to accept “persuasive authority.” CP 69, ln. 16. The defendant submits that the facts of this case and the authorities relied on by

⁶ For the remainder of this brief, when the word “RESTATEMENT” is used, it should be understood to mean the “RESTATEMENT (SECOND) OF TORTS”.

the plaintiff do not warrant an erosion of longstanding Washington common law. The trial court's decision should be left undisturbed.

1. Younce v. Ferguson Does Not Support Erosion of the Common Law as Plaintiff Suggests.

The plaintiff openly acknowledged that he “has been unable to locate Washington authority” favorable to his argument. CP 66, ln. 13. Because of this dearth of authoritative support, the plaintiff now argues that “Washington’s common law duty is valid, but harsh” and argues “[s]mall exceptions must be carved out in order to account for multiple situations and do justice appropriately.”⁷ The plaintiff cites to *Younce v. Ferguson*⁸ for the proposition that the common law classification standard in premises liability cases “needs to be subject to a few exceptions to maintain flexibility in assessing every scenario.”⁹ *Younce* does not support the plaintiff’s argument as he suggests. In fact, a closer review of the case reveals that the Washington Supreme Court did not support an erosion of the common law at all but rather reaffirmed the longstanding classifications of invitee, licensee, and trespasser “to determine the duty of care owed by an owner or

⁷ [Plaintiff’s] *Opening Brief*, at 1, “Argument” subsection “I.”.

⁸ *Younce v. Ferguson*, 106 Wn.2d 658, 724 P.2d 991 (1986).

⁹ [Plaintiff’s] *Opening Brief* at 2, “Argument” subsection “I.”.

occupier of land.” *Younce v. Ferguson*, 106 Wn.2d 658, 663, 724 P.2d 991 (1986)¹⁰.

Instead of taking a mere three (3) words out of their context as the plaintiff has done (“slow, piecemeal *development*”¹¹), the following verbatim restatement better explains the Supreme Court’s reasoning when it reaffirmed common law classifications as determinative of the standard of care owed by an owner or occupier of land in Washington.

The reasons proffered for continuing the distinctions include that the distinctions have been applied and developed over the years, **offering a degree of stability and predictability** and that a unitary standard would not lessen the confusion. Furthermore, a slow, piecemeal development rather than a wholesale change has been advocated. **Some courts fear a wholesale change will delegate social policy decisions to the jury** with minimal guidance from the court. *See Hawkins, Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions* Utah L.Rev. 15 (1981). **Also, it is feared that the landowner could be subjected to unlimited liability.**

We find these reasons to be compelling. As noted by the Kansas court in *Gerchberg*, 223 Kan. at pages 450–51, 576 P.2d 593 **Error! Bookmark not defined.:** **“The traditional classifications were worked out and the exceptions were spelled out with much thought, sweat and even tears”.** **We are not ready to abandon them for a standard with no contours.** It has been argued that jury instructions can provide adequate guidance. In fact, amicus has suggested and other courts have found that the following factors should be considered by the jury: (1) the circumstances under which

¹⁰ There is no disagreement between the parties that PECK & PECK owes the same duty to the plaintiff, if any, as the subject property owner. *[Plaintiff’s] Opening Brief*, at 11, subheading “A.”; *see also* CP 23-24, subheading “B.”.

¹¹ *[Plaintiff’s] Opening Brief* at 2, “Argument” subsection “I.”.

the entrant was on the property; (2) the foreseeability of the injury or damage given the type of condition involved; (3) the nature of the property and its uses; (4) the feasibility of either correcting the condition on the property or issuing appropriate warnings; and (5) such other factors as may be relevant in the particular case. These factors are similar to the concerns being addressed by the current Restatement rules and caselaw. **We do not choose to erase our developed jurisprudence for a blank slate. Common law classifications continue to determine the duty owed by an owner or occupier of land in Washington.**

Younce, 106 Wn.2d at 666 (bold added) (underline quoted by plaintiff in his *Opening Brief* at 2).

The plaintiff would have this Court abandon the “degree of stability and predictability” offered by Washington’s common law in favor of “unlimited liability” for landowners, and delegating “social policy decisions to the jury” – all of which are contrary to the principles set forth in the *Younce* decision. Summary judgment should be affirmed by this Court.

2. *Egede-Nissen v. Crystal Mountain Does Not Support Erosion of the Common Law as Plaintiff Suggests.*

The plaintiff next argues that since Washington courts have looked to other sections of the RESTATEMENT to resolve premises liability issues “[i]t should continue to do so here” and adopt the private necessity privilege as an exception to the traditional common law duty to trespassers. *See [Plaintiff’s] Opening Brief*, at 3 “Argument” section, subheading “I.A.”. At the top of page 4 of his *Opening Brief*, the plaintiff cites to the *Egede-Nissen*

*v. Crystal Mountain*¹² case and other Washington cases because they have relied on other sections of the RESTATEMENT as support for their opinions.

The relevant question is not whether our Courts have looked to the RESTATEMENT for guidance in the past regarding premises liability issues but rather whether our Courts have adopted the “private necessity” privilege which affords trespassers a basis for recovery under exigent circumstances. The plaintiff concedes this issue when acknowledging “the Restatement ... section 197 and section 345 have not yet been addressed in this state”. *[Plaintiff’s] Opening Brief* at 4. The *Crystal Mountain* case is inapposite to the plaintiff’s argument proposing an erosion of Washington’s longstanding common law scheme.

[Plaintiff] and amicus curiae urge this court to discard the categorical approach to landowner liability. Although we have questioned the common-law classification scheme in the past, **we are not ready at this time to totally abandon the traditional categories and adopt a unified standard** [of reasonable care under all circumstances].

...

Under the circumstances of this case, we decline to depart from our adherence to the current common-law scheme.

Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 131-32, 606 P.2d 1214 (1980) (bold added). Plaintiff has cleverly argued that he is merely seeking to “carve out” an exception to the common law rather than a

¹² *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 606 P.2d 1214 (1980).

wholesale abandonment, but the effect is the same – a unified standard expanding a landowner’s duties owed to trespassers where not previously recognized. The defendant urges this Court to decline the plaintiff’s invitation to set aside longstanding Washington jurisprudence.

As will be explored in the following argument section, even if this Court were inclined to adopt the private necessity privilege it would provide no relief to the plaintiff in this case because there was no serious and imminent threat or other exigent circumstance that would serve to excuse the plaintiff’s entry onto the subject property at the time of his injury. Absent an underlying “emergency”, there is no “private necessity” and no privilege afforded under the RESTATEMENT. Summary judgment was appropriate under these circumstances and should be affirmed on appeal.

D. The Private Necessity Privilege Provides No Remedy to the Plaintiff Under Our Facts.

The plaintiff asks this Court to re-write our common law based on decisions from other states¹³ because he can find no favorable Washington law to support his argument. But, a closer review of that “persuasive authority” reveals that even it provides no support for the plaintiff’s proposed erosion of Washington common law.

¹³ Cases from three (3) states (IL, NJ, MN) and the District of Columbia have been cited by the plaintiff. See *[Plaintiff’s] Opening Brief*, at 7-10.

The plaintiff posits that “[t]his Court must decide” whether to adopt the RESTATEMENT (SECOND) OF TORTS §197 and § 345. *[Plaintiff’s] Opening Brief*, “Argument” section, at 2. Why “must” this Court do anything of the sort? The plaintiff argues that “[o]ther circuits’ implementation of the necessity defense¹⁴ should provide persuasive evidence that the exception needs to be adopted in Washington.” *[Plaintiff’s] Opening Brief* at 7, subheading “D.”. It has been more than half a century since the RESTATEMENT (SECOND) OF TORTS was drafted; Washington courts have not previously adopted the “private necessity” privilege; and the plaintiff has failed to provide any reason (much less any compelling reason) why this Court “must” adopt the privilege now.

The first “persuasive” case plaintiff relies upon is *Toomer v. William C. Smith & Co., Inc.*¹⁵ presumably because it “has provided the most comprehensive analysis of the [private] necessity defense”. *[Plaintiff’s] Opening Brief* at 8. The *Toomer* opinion “is an unpublished decision under D.C.App.R. 28(h) and is of no precedential value”. CP 121. So, plaintiff’s most authoritative case has no precedential value at all, much less any “persuasive” authority for purposes of this appeal.

¹⁴ The plaintiff repeatedly and erroneously refers to the private necessity privilege as a “defense”. It is not a defense. In the few jurisdictions where it has been adopted, it is a limited common law privilege afforded to persons acting reasonably in response to emergency circumstances who would otherwise be considered trespassers.

¹⁵ *Toomer v. William C. Smith & Co., Inc.*, 112 A.3d 324 (D.C. 2015).

The next private necessity case relied on by the plaintiff is *Lange v. Fisher Real Est. Dev. Corp.*¹⁶. The plaintiff in *Lange* was a cab driver who ran after his non-paying fare onto a dark construction site and fell approximately 10 feet into a hole which resulted in a shattered femur, bruises and contusions. CP 113. The Illinois Court of Appeals affirmed summary judgment and found the “plaintiff did not have a privilege of private necessity to enter this construction site. Thus, he was a trespasser.” CP 117. Instructive to our case, the *Lange* court explained in the following excerpts why the private necessity privilege did not apply:

Generally, under Illinois law, a landowner owes no duty of care to a trespassing adult except to refrain from willfully and wantonly injuring him.

CP 114, opinion at 277.

"The private necessity privilege allows one to enter the premises of another without permission *in an emergency situation when such entry is reasonably necessary to avoid serious harm*. [Citation.] However, * * * 'the privilege must be exercised at a reasonable time and in a reasonable manner' and in light of all of the circumstances. [Citation.]" (Emphasis added.) *Benamon*¹⁷, 294 Ill.App.3d at 90, 228 Ill.Dec. 494, 689 N.E.2d at 370.

CP 115 (italics in original).

The private necessity privilege does not apply in the instant case. Here, plaintiff testified that he was not threatened by his passenger. Nonetheless, without any threat

¹⁶ *Lange v. Fisher Real Est. Dev. Corp.*, 832 N.E.2d 274 (Ill.App. 1 Dist. 2005).

¹⁷ *Benamon v. Soo Line R.R. Co.*, 294 Ill.App.3d 85 (1997).

toward him, plaintiff decided to pursuing the “fleeing fare,” which plaintiff testified was approximately \$6.

CP 116, opinion at 279 (bold added).

Not only does the holding of *Benamon* require that an emergency situation present itself before the private necessity exception be considered, but there must also be no other options available that are less safe.

Id. (bold added).

We further believe that a landowner does not *automatically* owe the higher duty of ordinary care to every trespasser who enters land pursuant to a private necessity.

CP 116 (italics in original), opinion at 279-80.

Because the only duty on the part of the defendants here was to refrain from willfully and wantonly injuring plaintiff – a trespasser – **defendants had no duty to warn plaintiff of the open and obvious hole.**

CP 118 (bold added), opinion at 281-82.

At the top of page 10 of his brief, the plaintiff cites to New Jersey and Minnesota cases without any discussion of the opinions for the proposition that “there are situations that a privilege must be created in order for a technical trespasser to have any recovery in an emergency situation.” Mr. Sleater has never identified the “emergency situation” that required his trespass, nor has he explained how the timing and manner of his entry was reasonable “in light of all the circumstances”. A closer review of the record

on appeal will serve to further emphasize the deficiencies in the plaintiff's bare argument.

Here are the relevant facts in our record presented in a question and answer format which warrant a finding that the private necessity privilege is inapplicable here -- like the holding in the *Lange* case.

QUESTION 1: Why the need to trespass?

ANSWER: The plaintiff went onto the subject property to recover his "company builder sign that ... had been vandalized" (CP 73, ¶ 4, ln. 12-13); photo of sign at CP 79.

QUESTION 2: Was there an "emergency" – or was the threat to person or property imminent?

ANSWER: No. The plaintiff subjectively "considered the situation an emergency." CP 66, ln. 5. However, the record reflects that the plaintiff emailed his former lawyer regarding his vandalized sign on "Monday, October 25, 2015 1:05 PM". CP 77. He fell "[a]t approximately 7:30pm" (CP 74, ln. 16) nearly 6 hours and 30 minutes later. The passage of time alone illustrates that this was no emergency, nor was there an imminent threat to person or property that warranted his trespass.

QUESTION 3: Was the timing and manner of plaintiff's entry onto the property reasonable under the circumstances considering whether other safer options were available to the plaintiff?

ANSWER: No, the timing and manner of plaintiff's entry was not reasonable as there were safer options available. When the plaintiff arrived in his truck at the subject property "[i]t was pitch black when I got there." CP 74, ln. 23. Instead of proceeding on foot in the dark, safer alternatives might have included: (1) parking his work truck at an angle to allow his vehicle headlights to illuminate his direction of travel; (2) returning to his work truck for a flashlight; or (3) returning the next day during daylight hours. This is not meant to be an exhaustive list. Because there were numerous safer alternatives available to the plaintiff, his actions on the night of his injury were not reasonable as a matter of law. The private necessity privilege does not apply. *Accord Benamon v. Soo Line R.R. Co.*, 294 Ill.App.3d 85, 228 Ill.Dec. 494, 689 N.E.2d 366 (1997).

There is no need for this Court to adopt RESTATEMENT sections 197 and 345 because the "private necessity" privilege is inapplicable and therefore provides no remedy to the plaintiff under our facts. At all times relevant to these proceedings, Mr. Sleater remained a trespasser and the defendant breached no duty owed to him – under Washington law and in the jurisdictions in which the "private necessity" privilege has been adopted. Summary judgment was appropriate and should be affirmed by this Court.

E. Plaintiff Now Assigns Error Because the Trial Court Did Not Advocate on His Behalf.

The plaintiff's last argument in his opening brief is that 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."¹⁸ There is nothing in the record to suggest that a motion to order a property survey was ever made by the plaintiff at the trial court level and it is ridiculous to suggest that the trial court had any obligation to enter such an order *sua sponte*.

The argument raised by the plaintiff at the trial court level was that "[t]here is a clear dispute of a material fact related to whether Plaintiff was a trespasser, licensee or invitee." CP 69, ln. 25-26, "Conclusion" section. The plaintiff initially alleged that his injury occurred on the "subject property" owned by the GRIFFITH defendants (*see* CP 3-4 and 5, *Complaint* ¶¶ 1 and 8); he then changed his position in opposition to summary judgment when he provided his subjective opinion that he fell on a "Spokane County/Kootenai/Avista [right of way]" (CP 77); and argued "[b]ecause Plaintiff has asserted that he did not make it onto Griffith's property, there was clearly no trespass." CP 69, ln. 19-20. These contradictory statements by the plaintiff are "mere allegations or denials"

¹⁸ [*Plaintiff's*] *Opening Brief* at 13, subheading "III."

which do not create a question of fact and cannot serve as a proper basis to oppose summary judgment. *See* CR 56(e). This Court should give plaintiff's personal opinions and bare conclusions no consideration for purposes of this appeal.

Furthermore, the plaintiff did not move or otherwise request that the trial court order a survey. He cannot raise this issue for the first time on appeal. "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The defendant can only presume that this is the plaintiff's attempt to circumvent the Rules of Appellate Procedure to have this Court review the trial court's denial of his CR 56(f) motion without the requisite and timely *Notice of Appeal*.

CR 56(f) (emphasis in original) provides as follows:

When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that [the party] cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The plaintiff failed to timely identify what "facts essential to justify [his] opposition [to summary judgment]" will be obtained through additional discovery if ordered. *See* CP 52-54; CP 55-58; CP 59-61. Under this rule, a trial court may properly deny a motion for a continuance under any of the following circumstances:

(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.

Tellevik v. Real Property, 120 Wn.2d 68, 90, 838 P.2d 111 (1992).

Following timely appeal, “[a] court’s denial of a CR 56(f) motion is reviewed under an abuse of discretion standard.” *Id.* citing *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990).

The plaintiff has not assigned error to the trial court’s decision to deny his motion for continuance and proceed with the summary judgment hearing on December 20, 2019. Because the plaintiff has failed to lay any foundation for an appeal of this issue, there is nothing in the record before this Court to allow it to review the decision below under an abuse of discretion standard. The defendant respectfully submits that it would be appropriate for this Court to disregard plaintiff’s last argument. RAP 2.5(a); RAP 9.12.

F. Attorney’s Fees and Expenses.

The defendant does not want to presume the outcome of this appeal but, should this Court affirm the trial court’s order granting summary judgment, the defendant respectfully requests that it be found the “prevailing party” and that it should be allowed to pursue its attorney’s fees

and costs pursuant to the applicable rules and Washington case law. RAP 18.1(b).

V. CONCLUSION

Based on the foregoing argument and authorities, as well as the record on appeal, PECK & PECK respectfully submits that there is no legitimate reason to overturn the trial court's *Order* granting summary judgment in its favor. The plaintiff has failed to present any question of material fact as is his burden as the non-moving party under CR 56. There is no need for this Court to adopt the RESTATEMENT sections proposed by the plaintiff because the "private necessity" privilege is inapplicable when viewed through the prism of the facts in this case – there was no "emergency" and there were safer, more reasonable options available to the plaintiff than to trespass on property in the "pitch black". Finally, the plaintiff never asked the trial court for a survey of the property, has never timely assigned error to the trial court's denial of his CR 56(f) motion, and cannot be allowed to raise these issues for the first time on appeal.

RESPECTFULLY SUBMITTED this 22nd day of June, 2020.

LAW OFFICES OF MARK DIETZLER



Daniel E. Stowe, WSBA #27281
Attorney for Def. Peck & Peck Excav. Co.

VI. APPENDIX

In accordance with RAP 10.4(c), the defendant attaches the following Exhibits for further consideration by this Court and in supplement to the preceding *Respondent's Brief*.

Exhibit 1. True and correct copy of *Stipulation and Order of Dismissal of Defendant David Farb and Jane Doe Farb Only*, signed by Judge Plese on December 7, 2019.

Exhibit 2. True and correct copy of April 22, 2020 letter from Joyce A. Roberts to plaintiff's counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June, 2020, I sent for delivery a true and correct copy of the foregoing **RESPONDENT’S BRIEF** by the method indicated below, and addressed to the following:

Kevin P. Holt
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kholt@holtlawoffice.com
Attorney for Plaintiff

<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

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THE HONORABLE ANNETTE PLESE

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

JASON SLEATER,

Plaintiff,

v.

RICHARD GRIFFITH I and JANE
GRIFFITH I, husband and wife; RICHARD
GRIFFITH II and JANE DOE GRIFFITH II,
husband and wife; CHRISTOPHER
ARKOOSH and JANE DOE ARKOOSH,
husband and wife; DAVE FARB and JANE
DOE FARB, husband and wife; KOOTENAI
ELECTRIC COOP, an Idaho Cooperative;
PECK & PECK Excavation Company; J&J
DRILLING, Inc., a Washington corporation;
Jane Does and John Does 1-10; ABC Entities
1-10; ABC political subdivision of
Washington State,

Defendants.

NO. 18-2-04333-1

STIPULATION AND ORDER OF
DISMISSAL OF DEFENDANT
DAVID FARB AND JANE DOE
FARB ONLY

(Clerk's Action Required)

*File Remains
open*

IT IS HEREBY STIPULATED that an order may be entered herein dismissing all
claims brought by PLAINTIFF JASON SLEATER that would or could have been
asserted in this action against DEFENDANTS DAVID FARB AND JANE DOE FARB

STIPULATION AND ORDER OF DISMISSAL OF
DEFENDANT DAVID FARB AND JANE DOE FARB
ONLY - 1

Goehler & Associates
Mailing Address:
PO Box 64093
St. Paul, MN 55164-0093
Tel: (206) 326-4217
Fax: (855) 827-7902

1 shall be dismissed with prejudice and without costs or attorney's fees to either party.

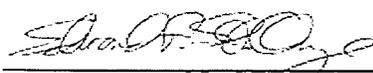
2 This dismissal does not affect PLAINTIFF'S claims against any other defendants.

3 DATED this ____ day of December, 2019.

4 HOLT LAW OFFICE

GOEHLER & ASSOCIATES

5
6 ~~Kevin Holt, WSBA #42332~~
7 ~~Attorney for Plaintiff~~


8 Edward F. St. Onge, Jr., WSBA #25240
9 Attorney for Defendant David Farb

10 **ORDER**

11 THIS MATTER having come before the undersigned judge in the above-entitled
12 court, the Court having reviewed the stipulation of the parties, and otherwise deeming
13 itself fully advised in the premises, it is now, therefore

14 ORDERED, ADJUDGED AND DECREED that all claims of PLAINTIFF
15 JASON SLEATER that were or could have been asserted in this action against
16 DEFENDANTS DAVID FARB AND JANE DOE FARB shall be dismissed with
17 prejudice and without costs or attorney's fees to either party. This dismissal does not
18 affect PLAINTIFF'S claims against any other defendants.

19 DATED this 7 day of December, 2019.

20
21 
22 THE HONORABLE ANNETTE PLESE

23
24
25
26 STIPULATION AND ORDER OF DISMISSAL OF
DEFENDANT DAVID FARB AND JANE DOE FARB
ONLY - 2

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Prepared and Presented by:
GOEHLER & ASSOCIATES



Edward F. St. Onge, Jr. WSBA #25240
Attorney for Defendant David Farb

Approved as to form: Notice of Presentation Waived:

HOLT LAW OFFICE


Kevin Holt, WSBA #42332
Attorney for Plaintiff

STIPULATION AND ORDER OF DISMISSAL OF
DEFENDANT DAVID FARB AND JANE DOE FARB
ONLY - 3

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*The Court of Appeals
of the
State of Washington
Division III*



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April 22, 2020

Kevin P. Holt
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CASE # 373363
Jason Sleater v. Richard Griffith, et ux, et al
SPOKANE COUNTY SUPERIOR COURT No. 182043331

Counsel:

Appellant has failed to timely file the appellant's brief by the due date of April 9, 2020. Unless the appellant's brief or a motion for extension of time to file it is received within 10 days from the date of this letter, by May 4, 2020, this matter will be referred to the Clerk/Administrator.

Sincerely,

RENEE S. TOWNSLEY
Clerk/Administrator

A handwritten signature in black ink that reads "Joyce A. Roberts". The signature is written in a cursive style.

Joyce A. Roberts, Senior Case Manager

RST:jr

c: Daniel E Stowe
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LAW OFFICES OF MARK DIETZLER - LIBERTY LAKE

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Appellate Court Case Title: Jason Sleater v. Richard Griffith, et ux, et al
Superior Court Case Number: 18-2-04333-1

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Filing on Behalf of: Daniel E Stowe - Email: daniel.stowe@libertymutual.com (Alternate Email: SpokaneLegalMail@LibertyMutual.com)

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