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NO. 69916-4-I

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

CLARENCE T. McDONALD and SUSAN McDONALD, husband and
wife,
Plaintiffs-Appellant

vs.

COVE TO CLOVER, a Washington Nonprofit Corporation,
Defendant- Respondent

BRIEF OF APPELLANT

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I. Introduction:

This is a personal injury matter arising out of a slip and fall incident that occurred at Defendant Cove to Clover's March 12, 2011 Celtic Festival. Clarence T. McDonald (hereinafter Tom McDonald) slipped and fell during the festival and broke his ankle. His wife Susan McDonald is a co-plaintiff for her loss of consortium claims.

II. Assignments of Error:

A. Assignments of Error:

No. 1: The trial court erred in entering the order of January 25, 2013 granting the Defendant Cove to Clover's motion for summary judgment.

No. 2: The trial court erred in determining the Cove to Clover owed no duty of care to Tom McDonald.

No. 3: The trial court erred in determining there were no issues of material fact precluding summary judgment.

No. 4: The trial court erred in dismissing Susan McDonald's loss of consortium claim.

B. Issues Pertaining to Assignments of Error:

No. 1: Should Cove to Clover have anticipated harm on the premises to business invitees despite the invitees knowledge of the harm or the obviousness of the harm, and thus did Cove to Clover have a duty to

warn and protect business invitees from such harm? (Assignment of Error 1 and 2).

No. 2: Do material issues of fact exist precluding dismissal on summary judgment? (Assignment of Error 1 and 3).

No. 3: Should Mrs. McDonald's loss of consortium claim have been dismissed? (Assignment of Error 4).

III. Statement of The Case:

On March 12, 2011, Tom McDonald attended the Defendant Cove to Clover's Celtic Festival at the Burien Town Square. Mr. McDonald is one of the organizers of another Celtic festival, the Hood Canal Highland Celtic Festival, and was volunteering at the Hood Canal Highland Celtic Festival's information booth during the Cover to Clover Celtic Festival. CP at 188 and at 240. Mr. McDonald arrived at the festival around 10:00 a.m. and remained in the Hood Canal Highland Celtic Festival booth for most of the morning, leaving only once to get coffee. CP at 239-243. Around noon Mr. McDonald, his wife Susan McDonald, and a friend Mary MacDonald, left the booth and headed over to the main stage tent to watch a performance. They wanted to make sure they got good seats so they headed over to the main stage area early. CP at 242-244. They walked over the asphalt street and concrete sidewalk to get from the booth to the main stage area. CP at 243. Just before the performance was

scheduled to begin, Mary MacDonald asked Mr. McDonald if he had a camera, Mr. McDonald thought he had one in his vehicle and left to get it. CP at 245.

There is a dispute as to the number of people in attendance at the festival that day and how large of a crowd had formed around the main stage. Mr. McDonald testified at his deposition and distinctly recalls a large crowd had gathered around the front of the main stage just before the performance began. He recalls the large crowd because he could not get through to get to his car for his camera and was forced up the grassy hillside to exit the main stage area. CP at 248-250. Ron Bickle, another attendee of the festival, and Mary MacDonald also testified at their depositions that the crowd was large. CP at 256 and CP at 264. Conversely John Nelson, President of Cove to Clover, and Mike Bishoff, employee of Cove to Clover, testified attendance was low. CP at 270-271 and at 275. This is one of the material disputes in the facts that remains as it goes to the reasonableness of Mr. McDonald's actions.

Half-way to his vehicle Mr. McDonald realized his camera was not in his car and turned back. CP at 247. On his way down the hill back to the seating area, his foot slid out from under him and he broke his ankle. CP at 247.

There is varying testimony as to the weather on the day of the festival. Mike Bishoff testified, "It wasn't steady rain all day. It was kind of on and off rain, but on and off all day." CP at 274. Mike Werle, volunteer for Defendant Cove to Clover, testified at his deposition that it rained more than an inch in 24 hours and was solid heavy rain all day. CP at 278. Ron Bickle testified it had been a little bit of mist and rain on and off all day. CP at 255. Mr. McDonald also recalled that it was overcast and rained on and off. CP at 246. Mary MacDonald testified that the weather was windy, nasty, and rained all day. CP at 263. The amount of rain that had fallen over the course of the day is material in determining the alleged obviousness of the danger in crossing over the grass and Mr. McDonald's reasonableness, and is another material fact that remains in dispute.

Cove to Clover had actual notice of the deteriorating condition of the grassy hillside by more than one individual. Ron Bickle, had traveled up the hillside prior to Mr. McDonald's fall, slipped, and reported the dangerous condition to the festival organizers, though he did not mention this to Mr. McDonald until after the festival. CP at 251-252 and 257-258. The combination of rain and foot traffic had made it muddy and slick. CP at 260. Cove to Clover set up the tents such that a high volume of traffic exited from the tents towards the grass, creating a higher volume of traffic

over the grass, which combined with the rain made it muddy and slick. CP at 259. Ron Bickle talked to Cove to Clover organizers about this and suggested they move the beer garden exit route but was ignored. CP at 257. Mary MacDonald also noticed the area was getting muddy and slick and reported it twice to organizers but was completely ignored. CP at 266-267.

IV. Argument:

A. Standard of Review:

An order of Summary Judgment is reviewed de novo. Smith v. Safeco Ins. Co., 150 Wn. 2d 478, 483, 78 P.3d 1274, 1276 (2003).

B. Summary Judgment Standard:

The trial court erred in granting Defendant Cove to Clover's motion for summary judgment. The appellate court makes the same inquiry as the trial court and must view the facts in the light most favorable to the nonmoving party. Doherty v. Municipality of Metro. Seattle, 83 Wn. App. 464, 468, 921 P.2d 1098, 1101 (1996). Only if there is no issue of material fact and the moving party is entitled to judgment as a matter of law should summary judgment be granted. Id. Here, there are issues of material fact as explained below and Cove to Clover is not entitled to judgment as a matter of law and thus the trial court's entry of the order granting summary judgment was in error.

C. Duty of Cove to Clover:

The trial court committed error by determining Cove to Clover owed no duty to Mr. McDonald. RP at 21. Since Cove to Clover set up the festival tents in a way that they exited over the grassy hillside, Cove to Clover should have anticipated the harm to invitees despite the invitees' knowledge or the obviousness of the danger.

1. Cove to Clover was the Possessor of Land:

"A person is a possessor of land if he or she is...a person who is in occupation of the land with intent to control it." Smith v. Stockdale, 166-Wn.App. 557, 567-568, 271 P.3d 917, 923 - 924 (2012). Here Cove to Clover had a permit from the City of Burien to use the Burien Town Square for its Cove to Clover Festival. CP at 95-97. Cove to Clover had control over the Burien Town Square during the two day event, was responsible for the set-up and oversight of the festival, and was thus the possessor of the property that owed a duty of care to Mr. McDonald on March 12, 2011. CP at 95-97.

2. Cove to Clover owed a duty to Mr. McDonald:

The duty owed by a possessor of land, depends upon the entering party's common law status. If the entrant is a business invitee, as Mr. McDonald was at the Cove To Clover Festival, he is owed a duty of reasonable care. A duty of reasonable care requires the possessor of land

to inspect the property for dangerous conditions and make repairs, safeguards, or warnings as are necessary to protect the invitee. Id.

In its motion for summary judgment Cove to Clover claimed it did not have a duty to protect Mr. McDonald from the slippery grass hillside because it is obvious that wet grass is slippery and thus dangerous. CP at 19-21. The trial court agreed with Cove to Clover and held the dangers of wet grass are obvious and thus a possessor of land does not owe a duty to the invitee. RP at 21.

Both the trial court and Cove to Clover completely ignore the fact that under Washington Law the obviousness of a danger alone does not relieve the landowner of its duty or liability. Under Iwai v. State, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996):

An invitee's awareness of a particular dangerous condition does not necessarily preclude landowner liability. Section 343A of the Restatement, entitled Known or Obvious Dangers, states in part: (1) A possessor of land is not liable to his [or her] invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, ***unless the possessor should anticipate the harm despite such knowledge or obviousness.***" (emphasis added).

Under Iwai v. State even if a danger, such as wet grass, is obvious, the obviousness of the danger alone does not end the liability inquiry and does not relieve the possessor of land of their duty to invitees. Here Cove to Clover should have anticipated the harm despite the invitees knowledge of

the harm or the obviousness of the harm because Cove to Clover set up the festival tents in such a way that the natural exit path from the tents, particularly once a crowd formed in front of the main stage, was over the grass.

"Liability may manifest where the landowner has reason to expect the [invitee] will encounter the known or obvious danger because to a reasonable person in that position the advantages of doing so would outweigh the apparent risk." Mucsi v. Graoch Associates Ltd. P'ship No. 12, 144 Wn. 2d 847, 860, 31 P.3d 684, 690 (2001) (internal citations omitted). Here Cove to Clover had reason to expect invitees would encounter the known or obvious danger since a reasonable person would follow the natural exit path over the grass.

Cove to Clover not only set up the tents in a way that gave it reason to expect invitees would encounter the danger, it had actual notice the grassy hillside had become muddy and slick due to the rain and foot traffic. Both Ron Bickle and Mary MacDonald reported the dangerousness of the grass area to Cove to Clover but Cove to Clover failed to take action. CP at 257-258 and at 266-267. Cove to Clover argued to the trial court that the grass where Mr. McDonald fell was not the exact same location where others had warned because Ron Bickle had slipped at the top of the grassy hillside and Mr. McDonald had fallen

further down the grassy hillside, RP at 18-19, however Ron Bickle's testimony indicates he warned Cove to Clover organizers that the area on the grassy hillside where the tent exited had become muddy and slick due to the combination of rain and heavy foot traffic. CP at 257-259.

Cove to Clover had knowledge of the dangerous condition and had owed a duty to its invitees because it should have anticipated the harm despite the invitees knowledge or the obviousness of the danger.

D. Issues of Material Fact:

The trial court erred in determining there were no issues of material fact precluding summary judgment. RP at 21-22.

In evaluating Cove to Clover's duty, one must determine if the circumstance at hand was one in which Cove to Clover should have anticipated harm despite the obviousness of the danger. To determine whether or not harm should have been anticipated one has to determine if a reasonable person would likely encounter the harm because the advantages of doing so outweigh the risks. Mucsi v. Graoch Associates Ltd. P'ship No. 12, 144 Wn. 2d 847, 860, 31 P.3d 684, 690 (2001) (internal citations omitted). To evaluate Mr. McDonald's reasonableness in encountering the risk the disputed facts relating to the crowd size and rain are material and must be resolved by a jury.

A jury must decide if it was reasonable for Mr. McDonald to travel over the grass under the circumstance. Although the amount of rain fall is in dispute, once a jury hears the testimony from Mr. Bishoff, Mr. Bickle, and Mr. McDonald, it is more than likely a jury will determine it had been overcast with misty rain on and off rather than a torrential downpour as Mr. Werle testified, and it is more than likely a jury will determine it was completely reasonable for Mr. McDonald to travel over the grass when he could not get through the crowd over the concrete path.

E. Susan McDonald's Loss of Consortium Claim:

As the trial court dismissed Mr. McDonald's claim, it also dismissed Mrs. McDonald's loss of consortium claim. RP at 21. It was an error to dismiss Mr. McDonald's claim and thus it was an error to dismiss Mrs. McDonald's loss of consortium claim.

V. Costs on Appeal

Appellants McDonald should be awarded their costs on appeal under RAP 14.2 and respectfully request this court enter an order awarding costs.

VI. Conclusion:

The trial court committed error in granting Cove to Clover's motion for summary judgment since Cove to Clove did owe a duty to Mr. McDonald and there are issue of material fact that should be heard and

determined at trial. Since Mr. McDonald's claim should not have been dismissed, Mrs. McDonald's loss of consortium claim should not have been dismissed. This matter should be remanded to the trial court for trial.

Dated this 24th day of April, 2013.

Respectfully Submitted,

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6 **IN THE COURT OF APPEALS, DIVISION 1 OF THE STATE OF WASHINGTON**

7
8 CLARENCE T. MCDONALD and SUSAN
MCDONALD,

NO. 69916-4-1

9 Appellant,

DECLARATION OF MAILING

10 vs.

11 COVER TO CLOVER, a Washington
Nonprofit Corporation,

12 Respondent.

13
14 I, KANDY M. FULLILOVE, declare under penalty of perjury under the laws of the State
15 of Washington that on the 24th day of April, 2013, I sent true and correct copies of the following
16 document: *Brief of Appellant* by U.S. Mail first class postage prepaid, to the following named
17 persons at the addresses indicated, to wit:

18 The Court of Appeals of the State of Washington
19 Division 1
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23 DATED: This 24th day of April, 2013, at Bremerton, Washington.

24 
KANDY M. FULLILOVE

DECLARATION OF MAILING -1

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