

NO. 69916-4-1

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DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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CLARENCE McDONALD AND IRENE McDONALD,

Appellants,

v.

COVE TO CLOVER

Respondent.

2018 MAY 23 PM 2:12  
 COURT OF APPEALS  
 STATE OF WASHINGTON  
 DIVISION I  
 JUDGE  
 S. D. M.

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**RESPONDENT'S BRIEF**

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ORIGINAL

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**A. SUMMARY AND IDENTITY OF PARTIES**

Appellant Clarence “Tom” McDonald fell on wet grass at an outdoor festival held by Respondent Cove to Clover, when Mr. McDonald chose to bypass an existing sidewalk in favor of the grass. Mr. McDonald was exceedingly familiar with such festivals and that they are often held in the rain. Mr. McDonald as a matter of common sense knew that wet grass is slippery. And Mr. McDonald was specifically aware that *this* area of grass was wet and slippery, having walked across it (without incident) just a few minutes before his fall.

The McDonalds sued Cove to Clover for negligence (Mr. McDonald) and loss of consortium (Mrs. McDonald). Mr. McDonald did not allege any defect in the premises, other than the wetness of the grass. On summary judgment, the trial court held that the dangers of wet grass are obvious and that Cove to Clover had no duty to warn, tent off or otherwise protect invitees from the wet grass. Because of lack of duty, the trial court dismissed the McDonalds’ negligence claim. Because there was no tort by Cove to Clover against Mr. McDonald, the trial court also dismissed Mrs. McDonald’s loss of consortium claim.

The McDonalds now appeal the grant of summary judgment to Cove to Clover.

## **B. DECISION BELOW**

The trial court granted the Cove to Clover's Motion for Summary Judgment on January 25, 2013. RP 22:17-19.

## **C. RESPONSE TO ASSIGNMENTS OF ERROR**

No. 1: The trial court correctly granted Cove to Clover's motion for summary judgment, because there were no genuine issues of material fact and as a matter of law the McDonalds had no valid claims against Cove to Clover.

No. 2: The trial court correctly held that Cove to Clover owed no duty of care to Mr. McDonald to protect him from the wet grass, because Mr. McDonald's sole allegation of a defect in the premises was the wetness of the grass, and the fact that wet grass is slippery is so obvious that invitees are expected to realize the danger and protect themselves against it.

No. 3: The trial court correctly held that there were no genuine issues of material fact precluding summary judgment, because the trial court assumed the McDonalds' account of the number of festival attendees and amount of rain, and because the reasonableness of Mr. McDonald's choice to travel over the grass was not at issue because the motion did not concern contributory negligence (rather, only Cove to Clover's duty).

No. 4: The trial court correctly dismissed Mrs. McDonald's loss of

consortium claim, because an element of loss of consortium is a tort against the impaired spouse, and Mr. McDonald had no valid tort claim against Cove to Clover.

**D. COUNTERSTATEMENT OF THE CASE**

*Cove to Clover.* John Nelson created Cove to Clover in 2009, originally as a non-profit running race with a St. Patrick's Day theme. CP 88:2-20, 89:8-14, 92:24-93:2, 107:4-7. It is a charity event benefitting the Highline area food bank and the Highline Schools foundation, CP 92:17-23, with all organizers donating their pay back into the organization. CP 90:1-15, 106:18-22.

In 2011 Cove to Clover added a Celtic festival on the Saturday before the Sunday race. CP 88:25-89:3. The festival portion was abandoned the following year because in 2011 (when Mr. McDonald fell) "no one showed up and [they] lost money on it." CP 90:19-91:3, 91:8-10. There were only five or six vendors (including Mr. McDonald's group). CP 136:24-137:7. There were only "30 people there at times with the maximum maybe of maybe 100 people." CP 102:1-2, 145:10-12. The stage performers even complained about the low turnout. CP 102:3-5.

The Sunday running race is always held in Burien, with check-in, vendors and a finish line festival in the town square; 2011's Celtic festival portion was also held in the town square. CP 94:17-21. (The Sunday race

finish line festival is very similar to the Celtic festival, but “with way more people.” CP 95:4-8.) The Burien Town Square is an outdoor location with concrete sidewalks and a concrete stage plaza, plus landscaped areas and small grassy lawns; festival organizers add temporary tents to create beer gardens, vendor booths, etc. CP 103, 101:8-12, 96:22-25, 117:20-120:2, 132, 215-225. (In the photo below, CP 216, bottom left is the stage plaza; middle is the concrete where Mr. McDonald was sitting just before he fell; bottom right is the gentle slope of grass where Mr. McDonald fell. Vendor booths are in the middle right. The parking lot and “steep slope” where Mr. Bickle slipped are both off the page on the right. While this photo shows the Burien Town Square set up for a festival, it was not taken on the day of the subject incident.)



The 2011 event was properly permitted through the City of Burien. CP 94:12-15, 95:21-96:3. In 2011, for the festival Saturday, there were about 10 to 15 volunteers in addition to the two organizers. CP 91:11-16, 92:6-10, 109:19-110:1. Mike Bishoff was the festival director and present continuously for on-site management. CP 108:16-24, 109:7-10, 109:15-18, 115:10-18, 97:6-8. Mr. Bishoff was stationed outside an information trailer, near the stage plaza. CP 114:4-115:9, 111:2-25, 132, 135:7-15, 135:19-136:12, 138:18-21. The trailer was the check-in spot for the vendors. CP 116:3-6. Mr. McDonald's group checked in with Mr.

Bishoff there. CP 116:7-19, 120:7-12; 121:9-122:4, 150:17-20.<sup>1</sup>

***Clarence McDonald's knowledge of the slipperiness of wet grass.***

Mr. McDonald has lived in the Northwest since 1978. CP 204:23-24. Prior to his fall on March 12, 2011, Mr. McDonald had attended ten, twelve or even more Celtic festivals every year for the past decade. CP 200:17-24. In fact, he held his own festival a few months after the Cove to Clover festival (and again in 2012). CP 187:17-188:1, 188:8-10, 210:1-15. The festivals are all outdoors, and all in the Northwest. CP 201:1-2, 201:8-10. At every one of them, he's had to walk across grass. CP 201:5-7. At least some of the time, it is raining and the grass is wet. CP 201:11-15. There are often "[g]entle slopes like that [where plaintiff McDonald fell]." CP 158:11-18.

***The McDonalds didn't tell Cove to Clover about the wet grass.***

Prior to his falling that day, Mr. McDonald did not tell anyone at the festival that he thought the grass there was slippery. CP 201:25-202:3, 209:11-21. (His wife didn't, either. CP 212:1-8.) He didn't tell anyone at the festival that the wet grass was hazardous. CP 194:4-6. He didn't tell anyone at the festival that they should block off the grassy area. CP 194:7-9. He didn't complain to the Cove to Clover organizer, John

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<sup>1</sup> (Mr. Bishoff described Mr. Bickle, believing him to be Mr. McDonald).

Nelson, even when Mr. Nelson went to Mr. McDonald's vendor booth and said hello, in the morning. CP 97:10-24, 98:12-15.

**Mr. McDonald's fall.** Mr. McDonald was a vendor at the festival, advertising his own upcoming festival. CP 208:2-11. On the morning of Saturday, March 12, 2011, "[i]t had been raining and it was damp." CP 184:21, 184:8-9. *See also*, CP 112:10-11 ("It was raining, sprinkling, overcast, cool"), 133:15-18 ("on and off rain all day"). Mr. McDonald arrived about 9:30 or 10:00 a.m. CP 177:19-178:2, 184:4-7. He parked in a dirt parking lot. CP 178:4-6, 180:25-181:6, 183:11-21, 213. He walked to his group's vendor booth, CP 184:14-24. over dirt, grass, asphalt and concrete. CP 184:22-185:5, 213. (He didn't *have* to walk over grass, as there were sidewalks all the way from the parking area to his vendor booth. CP 151:1-152:2.) The grass was wet. CP 193:23. The grass was "manicured," "like it had been taken care of." CP 130:9-11.

He stayed at the booth, other than a short coffee break, CP 185:9-186:7, 187:3-14, until sometime between noon and 1 p.m. CP 187:15-188:3, 191:16-24. Then he walked over asphalt and concrete sidewalk – no grass - to get to the concrete plaza stage area. CP 188:15-23, 189:10-25, 203:12-24, 213. He sat on a chair in the front row. CP 190:6-9. He sat for about 10-20 minutes, until a little before 1:00 p.m. CP 191:16-24.

He then stood up and walked towards the parking lot to get his

camera, which he thought he had left in his vehicle. CP 191:22-192:23. On his walk from the stage area to the parking lot he first walked on concrete, and then took a shortcut across the grass. CP 192:19-193:3. A spectator *could* walk between the stage area and the parking lot all on sidewalk, without ever going over any grass. CP 162:7-15, 164:18-165:3. Instead, Mr. McDonald chose the grass shortcut because, he claimed, there was now a “crowd” of people on the sidewalk he’d used 10-20 minutes earlier. CP 202:10-203:1. Mr. McDonald didn’t bother using the other sidewalk, on the other side of the stage plaza. CP 203:2-11.

There were no cones or tape blocking off that area of grass. CP 209:1-10. The grass was wet. CP 193:22-23. The grassy area had a “minor slope” away from the beer garden tent on grass (behind the audience area), “not much,” “a 2 to 4 degree slope.” CP 193:4-14. Mr. McDonald successfully crossed over the grass and was on the sidewalk, about halfway to the parking lot, when he realized that he had left his camera at home. CP 192:6-195:18, 213. So he “turned around and went back” towards the stage area on “the same path that [he] had come.” CP 195:11-22. This time he got about 20 or 30 feet across the grass when he slipped and fell. CP 195:17-196:8 and 213. His “right foot slipped forward and [he] went down on [his] left foot, left leg.” CP 196:9-17. Mr. McDonald says that the sole reason he fell was that the grass was slick.

CP 208:12-21. Medics arrived and took him by ambulance to the hospital.  
CP 199:11-21.

*Ron Bickle's slip.* Shortly before Mr. McDonald fell (on the nearly-flat strip of grass that he had just traversed successfully, moments before), another attendee slipped on a different area of grass. CP 124:16-23. This was Ron Bickle, a member of Mr. McDonald's group. CP 121:9-122:4.<sup>2</sup> Mr. Bickle walked from the stage plaza up the concrete stairs, which he admitted were "fine," CP 152:19-154:24, over a "gentle slope" of grass (where Mr. McDonald later fell), CP 155:2-22, 171:14-172:4, 127:16-21, and then up a "real steep slope" where it "dropped about ten feet" below the sidewalk. CP 156:23-157:22, 176. Mr. Bickle slipped on the steep slope, CP 125:13-19, 122:19-123:4, 125:9-10, 132, sometime before 1:00 p.m., CP 165:8-12, when he too took a shortcut over the grass. CP 165:20-166:6.

Mr. Bickle didn't fall and wasn't injured. CP 166:7-11. But he warned the festival organizers that the grass in that one spot was slippery:

10 [He] came to me [Mike Bishoff] and told me that he had  
11 slipped on the grass and that he was pretty adamant  
12 about making sure that people were aware of the issue  
13 and that we should consider, you know, preventing  
14 people from walking on that one slippery area.

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<sup>2</sup> Mr. Bishoff described Mr. Bickle, believing him to be Mr. McDonald.

(CP 122:10-14, 122:15-123:25.)

Mr. Bickle showed Mr. Bishoff where he had fallen. Mr. Bishoff *immediately* took cones and tape, CP 168:2-10, 173:17-175:3, and roped off that area with a six foot barrier to prevent people from walking there. CP 122:17-18, 123:24-124:2, 125:7-10; 141:13-20, 166:16-167:18, 168:2-6, 141:1-11.

By the time of Mr. McDonald's fall, the steep slope where Mr. Bickle slipped was barricaded and taped off, but the area where Mr. McDonald fell was not yet taped off. CP 99:23-100:11, 100:23-101:7.<sup>3</sup> Mr. Bishoff arrived with the additional barricades as Mr. McDonald's ambulance was leaving. CP 125:10-12. Mr. Bishoff and Mr. Werle roped off the entire grassy area next to the beer garden tent, including where Mr. McDonald had fallen. CP 129:7-14, 169:15-171:9, 143:1-12. Mr. McDonald's friend Mr. Bickle – who had slipped within the hour prior - admitted that Cove to Clover had done everything possible to prevent Mr. McDonald's fall, but that falls on wet grass are not often foreseeable:

- 4 Q Do you think the festival grounds were safe that day,  
5 Saturday?  
6 A It was about as safe as they could make it, I believe.

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<sup>3</sup> Note that Cove to Clover's volunteers Mr. Nelson, Mr. Bishoff and Mr. Werle incorrectly believed that it was Mr. McDonald who had slipped both times, rather than the first slip being by his similar-looking, similarly-kilted friend Mr. Bickle. *See, e.g.*, CP 139:22-140:2, 142:5-16. (None of the three actually saw either slip.)

7 It's just with the rain and stuff, it makes things slick  
8 and you can't really foresee things like that a lot of  
9 times. You can take preventative measures and stuff and  
10 block things like that sometimes.  
11 Q Like they did with the cones?  
12 A Correct. (CP 175:4-12.)

*The McDonalds' lawsuit.* The McDonalds sued Cove to Clover for negligence, with Mrs. McDonald asserting loss of consortium. They did not sue the property owner (City of Burien).

## E. ARGUMENT

### 1. No Material Fact Disputes Precluded Summary Judgment

In granting summary judgment, Cove to Clover and the Court assumed the McDonalds' account of the number of festival attendees and the amount of rain. RP 19:8-12, 21:24-22:17.

Even assuming Mr. McDonald's allegation that "people had crowded all in this area," CP 202:18-19, on one of the sidewalks from the main stage, there remains the undisputed admission by Mr. McDonald that he did not even look to know whether there was a second sidewalk on the far side of the stage plaza, CP 202:10-203:10, as there was. *See* CP 103, 132, 147, 176, 213. Mr. McDonald's friend Mr. Bickle admitted that there was no need for Mr. McDonald to have walked across the grass, given that there was a paved route, CP 164:17-165:3; Mr. Bickle also said Mr. McDonald could have "shoulder[ed] [his] way through" the people

standing on Mr. McDonald's preferred sidewalk and avoided the grass. CP 164:11-17. Thus, as in the South Carolina hotel case,<sup>4</sup> Mr. McDonald took a calculated risk with his shortcut over grass, and solely bears the consequences.<sup>5</sup> The shortcut was a choice, not a required path. The exact size of the crowd that made Mr. McDonald want to take the shortcut is immaterial – and assumed in his favor.

Regardless of how the McDonalds now complain about the beer tent being positioned on the grass, Appellants' Brief at 4-5, RP 15:16-16:7, Mr. McDonald was not in the beer tent. He was in the stage seating area, on the concrete stage plaza. CP 181:20-24. Mr. McDonald's traverse on the concrete walkway, and later across the grass, did not involve the beer tent. CP 213 (note "x" marking where Mr. McDonald fell).

The McDonalds' second alleged fact dispute is the exact amount of rain. But *all* of the witnesses (summarized by the McDonalds at 3:4-12 of their brief) testified that it rained that day. Mr. McDonald's own version is that when he arrived at the festival "[i]t had been raining and it was

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<sup>4</sup> See *Meadows v. Heritage Village Church*, 305 S.C. 375, 376, 378, 409 S.E.2d 349 (1991) (CP 69), discussed in Cove to Clover's Motion at CP 23:11-24:13.

<sup>5</sup> Cove to Clover is not arguing contributory negligence, regarding the reasonability of Mr. McDonald's own actions. Cove to Clover is arguing an absence of its own liability, which is an appropriate focus of a summary judgment motion.

damp,” CP 184:21, and the ground was wet. CP 186:14-18. He knew the grass was wet *before* he fell. He testified that at the stage, he walked up the concrete steps (CP 192:23-24, shown in the photo on page 4 above) and across grass that he knew was wet, CP 193:1-3, 193:22-23, to the sidewalk, where he realized he’d left his camera at home. Then he backtracked over “[t]he same path that [he] had come” and fell on the grass, halfway back to the concrete steps. CP 195:16-25. Thus, not only was Mr. McDonald exceedingly familiar with wet grass at Celtic festivals generally, but he knew the exact risk this particular patch of wet grass posed to him, because he had just crossed it, moments before he backtracked and fell.

Finally, the McDonalds argue that the reasonableness of Mr. McDonald’s choice to travel over the grass is somehow a disputed fact issue. Appellants’ Brief at 4-5; RP 16:18-25. But Mr. McDonald’s behaviors are not at issue at all. Cove to Clover’s motion did not concern his contributory negligence but rather only Cove to Clover’s duty. (Cove to Clover’s breach is also not at issue. RP 19:19-20.)

**2. Cove to Clover Did Not Owe Any Duty to Mr. McDonald, so His Negligence Claim Was Properly Dismissed**

Mr. McDonald’s claim against Cove to Clover must be dismissed because Cove to Clover, as a land possessor, had no duty to invitee Mr.

McDonald to protect him from wet grass. The fact that wet grass is slippery is so obvious that invitees are expected to realize the danger and protect themselves against it.

*Cove to Clover's duty.* A possessor of land owes a duty of reasonable care to invitees with respect to dangerous conditions on the land. *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983); *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980). But a landowner/possessor is not a guarantor of safety. *Geise v. Lee*, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975). *See also, Coleman v. Ernst*, 70 Wn. App. 213, 222, 853 P.2d 473 (1993)(occupiers of land are not the "insurers against all happenings that occur on the premises").

Washington courts apply the principles contained in *Restatement (Second) of Torts* §§ 343 & 343A (1965) in determining possessor liability to invitees. *Iwai v. State*, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). Section 343 explains that a possessor is subject to liability for physical harm caused to its invitees by a condition of the land only if the possessor (1) knows or in the exercise of reasonable care should have discovered the condition, and (2) should realize that it poses an unreasonable risk of harm to such invitees, and (3) *should expect that they either will not discover or*

realize the danger or will fail to protect themselves against it, and (4) fails to exercise reasonable care to protect such invitees to protect them from danger.

***Cove to Clover had no duty to warn of wet ground, because it is an obvious danger.*** Somewhat surprisingly (given our local weather), Washington appellate courts do not appear to have discussed land-possessor liability for falls on wet outdoor surfaces in any published case.

***Other courts hold that wet grass does not create negligence.*** Alabama courts have repeatedly held that a reasonable person knows, or should know, that rain causes surfaces (including grass) to become slick, and thus, premise occupiers are not liable for slippery conditions caused by rain:

A reasonable person would be expected to realize that rain falling on grass would cause the grass to be wet and that a slope covered by wet grass would naturally be slippery.

*Shelton v. Boston Fin., Inc.*, 638 So.2d 824, 825 (Ala. 1994) (CP 84) (granting summary judgment to landlord who was not liable for injuries sustained by tenant when she stepped off a concrete walkway and slipped on the wet grass around the walkway). *See also, Katrensky v. United States*, 732 F. Supp. 2d 1194, 1200 (M.D. Ala. 2010) (CP 49) (granting summary judgment to defendant because “Alabama courts have consistently recognized the obvious fact that at an entrance to a building

on a rainy day water will be present”); *Ex Parte Neese*, 819 So.2d 584, 590 (Ala. 2001) (CP 72) (location of door mat coupled with being wet from the rain was obvious to the plaintiff); *McCarthy v. Mobile Int’l Raceway*, 669 So.2d 960, 962 (Ala. 1995) (CP 66) (affirming summary judgment in favor of property owner after plaintiff fell in descending a slippery, grassy hillside); *Hines v. Hardy*, 567 So.2d 1283, 1284 (Ala. 1990) (CP 41)) (plaintiff knew crosstie was wet from rain and thus, as a matter of law, was on notice of the slippery condition); *Lawson v. Williams*, 514 So.2d 882, 883 (Ala. 1987) (CP 57) (plaintiff should have known that leaves accumulated after rain would probably be wet and slippery).

Numerous other courts in other states agree. The Connecticut Supreme Court affirmed summary judgment against a plaintiff who took a shortcut across wet grass and fell:

There was an unpaved roadway which the plaintiff could have utilized but he chose not to because it was wet and muddy and contained potholes.

Rather than walk on the above roadway the plaintiff chose to walk on a grassy area which was on a slight incline according to his deposition. While walking on this grassy area the plaintiff claims to have fallen and suffered the injuries complained of.

. . . The plaintiff claims that he utilized the grassy area due to the condition of the roadway. However, there is no claim that the grassy area was in any way dangerous or unsafe. ***Certainly our tort law has not developed to the point that***

**wet grass, even on a slight incline, is an unsafe condition that requires either warning or rectification.** Whatever condition did exist was also open and obvious to the plaintiff.

*Pacelle v. The Taft School Corp.*, CV 970406686S, 2000 Conn. Super. LEXIS 1044 (April 26, 2000)(unreported), at \*1-2, \*3 (CP 77-78; emphasis added). *See also, Legasse v. Amabile*, CV990151784, 2001 Conn. Super. LEXIS 1504 (Conn. Super. May 30, 2001)(unreported), at \*9 (CP 61) (granting summary judgment; steep grass slope used by plaintiff before injury was open and obvious condition so defendants owed no duty to plaintiff).

A Massachusetts appeals court affirmed a trial court, holding in a suit by an employee injured when he mowed his employer's lawn that "there was no duty on the defendant to warn the plaintiff of the open and obvious danger of slipping on the wet grass." *Baldwin v. Pisacreta*, 5 Mass. App. Ct. 810, 361 N.E.2d 951 (1977) (CP 31).

New York courts agree that property occupiers have no duty to warn of wet grass, because it is an obvious risk. *See, e.g., Fintzi v. New Jersey YMHA-YWHA Camps*, 97 N.Y.2d 669, 765 N.E.2d 288 (N.Y. App. 2001) (CP 39) (reversing trial court's denial of summary judgment; plaintiff fell on wet grass field at camp while supervised by defendant property occupiers); *Bonilla v. Starrett City*, 270 A.D. 377 (N.Y. 2000)

(CP 32) (affirming summary judgment in favor of defendant property owners; plaintiff slipped on wet grass in play area owned and maintained by defendants). *See also, Schiffman v. Spring*, 202 A.D. 1007 (N.Y. App. 1994) (CP 82) (reversing trial court’s denial of summary judgment; plaintiff fell on wet, muddy soccer field).

In Ohio, the court of appeals affirmed summary judgment for defendant property occupiers, holding that wet, slick grass was an open and obvious defect, so golf course proprietors had no duty to golf cart operators and passengers with regard to the wet grass. *Ritenauer v. Lorain Country Club*, C.A. No. 01CA007811, 2001 Ohio App. LEXIS 4016 (Ohio App. Sept. 12, 2001), at \*7 (CP 80).

The Supreme Court of South Carolina reversed a trial court’s refusal to grant defendant’s motion for judgment notwithstanding the verdict, where the plaintiff slipped on wet grass on hotel defendant’s grounds: “[Defendant] had no duty to warn [plaintiff], its invitee, about the wet grass because it was a natural condition, the peril of which was obvious.” *Meadows v. Heritage Village Church*, 305 S.C. 375, 378, 409 S.E.2d 349 (1991) (CP 70). This court discussed the ineffectiveness of its plaintiff arguing that she *had* to take a shortcut across the grass:

[Appellant] parked her car in a distant parking lot. Since the gravel path back to the hotel was flooded, [Appellant] decided to cross the wet grass back to the hotel. Crossing

the grass was the shortest way to the hotel, but there were at least two other ways: a paved driveway and a sidewalk.

. . . .  
[Appellant] did not show that [Respondent] could reasonably have foreseen that she would choose to try to cross the wet grass instead of using one of the other ways back to the hotel. While [Appellant] argues that crossing the grass was necessary because [Respondent] deprived her of any reasonable alternative, her own expert testified that there were other routes back to the hotel. In addition, [Appellant] could have looked for another parking space or simply have driven back to the hotel; however, instead of choosing a different route, [Appellant] took a calculated risk for convenience's sake.

*Id.*, at 376 (CP 69), 378 (CP 70). Similarly, here Mr. McDonald argues that it was “reasonable” for him to take a shortcut (from the concrete stage plaza to the parking lot) across the grass, because the sidewalk he had previously traversed was now “crowded.” But he admitted that he did not even look to know whether there was a second sidewalk on the far side of the stage plaza, CP 202:10-203:10, as there was. *See* CP 213, 103, 132, 147, 176. Mr. McDonald’s friend Mr. Bickle admitted that there was no need for Mr. McDonald to have walked across the grass, given that there was a paved route. CP 164:17-165:3. Mr. Bickle also said Mr. McDonald could have “shoulder[ed] [his] way through” the people standing on Mr. McDonald’s preferred sidewalk and avoided the grass. CP 164:11-17. Thus, as in the South Carolina hotel case, Mr. McDonald took a calculated risk with his shortcut over grass, and solely bears the consequences.

Given the existence of concrete sidewalks meant for pedestrian travel, that Mr. McDonald had in fact traversed minutes before, Cove to Clover had no duty to foresee that he would avoid the sidewalks in favor of wet grass that he knew was slippery.

Returning to the main topic here, some courts have specifically articulated, on their facts, that even a *child* knows wet grass is slippery:

Appellant received a new bicycle for his eighth birthday about a month before the accident. The accident occurred when appellant attempted to ride his bike down a very steep hill in the park, on an overcast day when the grass was wet with dew.

....

[W]e conclude that the danger of riding a bicycle down a very steep, wet, grassy hill is obvious from the appearance of the property itself, even to children exercising a lower standard of due care. Even children instinctively recognize steepness of a hill and slipperiness of wet grass.

*Mathews v. City of Cerritos*, 2 Cal. App. 1380, 1382, 1385 (Cal. App. 1992) (CP 63-64) (affirming summary judgment in favor of defendant property owners)(internal citation omitted). Mr. McDonald was walking rather than riding his bicycle, but the same principle applies. *See also*, *Fintzi*, 97 N.Y.2d at 670 (CP 39) (no liability to 10-year-old plaintiff running on wet grass).

***Mr. Bickle's earlier slip, in a different location, did not put Cove to Clover on notice.*** Mr. Bickle's slip (without fall or injury) is irrelevant. This is not a dog bite case, where one bite puts a dog's owner on notice of

liability for all future bites, or a property owner for falls anywhere on the entire wet landscape. Because wet grass's slipperiness is such an obvious danger, even if Cove to Clover had actual (or constructive) notice of it, such notice wouldn't impose liability.

Furthermore, Cove to Clover had no actual notice of the alleged dangerousness of the "gentle slope" until Mr. McDonald fell there. Cove to Clover *did* have actual notice of the slipperiness of a "steep slope" (where Mr. Bickle slipped), but that was in a different area of the park.<sup>6</sup> Mr. Bickle testified that Mr. McDonald did *not* fall on the steep slope, while he himself did. CP 155:23-157:22, 165:18-19. *Compare* the steep slope shown in the right-center of CP 220, *with* the gentle slope shown on the right side of CP 216. *See also* CP 222 (photo of stage seating area, with gentle grass slope behind where Mr. McDonald fell and where the beer garden was located). Appellants' brief incorrectly combines the two slopes into a single one, "*the* grassy hillside" or "the area." Appellants' Brief, at 4-5.

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<sup>6</sup> Mr. Bickle told a festival organizer about where he had slipped, "on the steep part" of the grass separate from the "gentle slope" where McDonald later fell. Mr. Bickle also suggested that the volunteers move the beer garden entrance, but ***he did not do that until after Mr. McDonald fell.*** CP 173:7-14.

Mary MacDonald went to a festival volunteer after Mr. Bickle fell and told her *that spot* was dangerous. CP 266:18-21. Ms. MacDonald talked to Cove to Clover again ***after*** Mr. McDonald fell, CP 266:6-12, but that second conversation of course couldn't put Cove to Clover on prior notice.

It is undisputed that *immediately* after Mr. Bickle gave actual notice of the steep slope, telling a volunteer he'd slipped there, Cove to Clover barricaded the steep slope. CP 168:2-10, 173:17-175:3.

**3. Mrs. McDonald's Loss of Consortium Claim Was Predicated on Mr. McDonald's Claim, so Her Claim Was Properly Dismissed**

Mrs. McDonald's claim against Cove to Clover must be dismissed because her loss of consortium claim is predicated on her husband having a valid claim, which she does not. Loss of consortium claim is a separate, not derivative, claim. *Green v. A.P.C.*, 136 Wn.2d 87, 101, 960 P.2d 912 (1998). However, one element of loss of consortium is the tort committed against the "impaired" spouse. *Lundgren v. Whitney's Inc.*, 94 Wn.2d 91, 96, 614 P.2d 1272 (1980). Because there is no tort by Cove to Clover against Clarence McDonald, Mrs. McDonald's loss of consortium claim against Cove to Clover also must be dismissed.

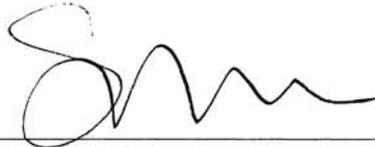
**F. CONCLUSION**

The McDonalds want "dog-bite" liability: once a property owner has been told, or observes, that wet grass is slippery, then any slip-and-fall *anywhere* on its property would create strict liability. This would make premises liability far stricter outdoors, where the property owner has less control over the environment, than indoors. RP 20:21-22:7. (To compare, Kmart's water spill on aisle 5 doesn't put it on notice of the slipperiness of

aisle 17.) This would effectively shutter all parks (and all businesses with exits to the outdoors) whenever it rains, has been raining, or is about to rain. Instead, courts reject such strict liability and hold as this trial court did: there is no duty to protect against wet grass because it is an obvious danger. An outdoor festival in the Northwest, in mid-March, in the rain, will be wet.

RESPECTFULLY SUBMITTED this 22nd day of May, 2013.

DAVIS ROTHWELL  
EARLE & XÓCHIHUA, PC

A handwritten signature in black ink, appearing to read 'Suzanne Pierce', written over a horizontal line.

Suzanne Pierce, WSBA No. 22733  
Attorneys for COVE TO CLOVER

DECLARATION OF SERVICE

I, Laura Bilderback, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of RESPONDENT'S BRIEF via U.S. mail, first class, postage prepaid, to all counsel of record as follows:

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Laura Bilderback