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NO. 35264-8-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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SCOTT ALPRIN  
Appellant,

v.

CITY OF TACOMA, et al  
Respondents

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**BRIEF OF APPELLANT**

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2. When there is a recreational area, is it incumbent upon the person who has control of the area to be responsible for injuries caused by artificial conditions created upon the property?

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## A. ASSIGNMENTS OF ERROR

### Assignment of Error

1. The trial court was presented with several theories of liability. However, the court's order was not specific as to the reason for granting summary judgment. Therefore, all issues are reviewed

### Issues Pertaining to Assignment of Error

1. Can reasonable minds come to different conclusions as to fault based on the duties of the parties, the necessity of lookouts, and knowledge of the area under admiralty law?

2. When there is a recreational area, is it incumbent upon the person who has control of the area to be responsible for injuries caused by artificial conditions created upon the property?

## B. STATEMENT OF THE CASE

On August 9, 2004 plaintiff Scott Alprin went to the Beach House restaurant operated by Mr. Gordon Naccarato. Mr. Alprin returned to the Beach House restaurant the next day, August 10, 2004. Mr. Naccarato did caution that at low tide, the channel was very narrow and shallow. Mr. Naccarato made no reference to power lines which crossed a portion of Henderson Bay. CP 56, 57. From the restaurant, one cannot see the power

transmission lines. CP 133.

On August 10, 2005 the afternoon at high tide Mr. Alprin sailed his boat into Henderson Bay entering from the south towards the Purdy Bridge. He did see two white buoys with red stripes but from his position in the boat it was not possible to see any writing or warning on those buoys. CP 58. Only one side of the buoy had writing and that writing at high tide could only be seen from the land side or north side of buoy. Mr. Alprin was approaching from the south. CP 133, 134. Photographs of the buoys demonstrate that at high tide, persons entering from the south cannot see the warnings. Photographs of the buoys have been submitted with Mr. Alprin's declaration. CP 136. Because of their close proximity to the bridge, Mr. Alprin presumed those were no wake warnings. Declaration of Scott Alprin. CP 134

Mr. Alprin was unable to see the transmission lines and had no reason to look above his boat to see if there was any danger of electrocution. The lines were masked by tree foliage on the hillside east of Henderson Bay. There were no red balls or other devices to warn mariners or others of the impending overhead danger. CP 134. After his incident, Mr. Alprin returned and took photographs of the power lines which are

attached to his declaration. CP 136. Looking from the west towards the east, there is an allusion as to where those lines are located. Additionally, Mr. Alprin had referenced a chart which led him to believe that the transmission lines were over the Purdy Bridge north of his location and posed no harm. CP 137. That chart is also attached as Exhibit C. to the Declaration of Scott Alprin. CP 133-137.

Plaintiff's witness, Admiral Shelly was shown two charts in his deposition as Exhibit No. 2 and Exhibit No. 3. They were charts of the Puget Sound area. CP 75. He was then shown Exhibit No. 4 which was the chart utilized by Mr. Alprin. CP 77. He was then asked if he viewed the Puget Sound South Fish n Map as a chart and he answered yes he did and that was the kind of recreational map to be used by recreational boater that was marked as Exhibit 4.

### C. ARGUMENT

#### 1. Standard of Review

Summary judgment is a final and appealable judgment. CR 56. On appeal, the court decides the issue on a de novo basis. *Roger Crane & Assoc. v. Felice*, 74 Wn. App. 769, 773-774, 875 P.2d 705, 708 (1994).

Even in the case of undisputed facts, summary judgment was improper if

reasonable minds could draw different conclusions from those facts.

*Security State Bank v. Burk*, 100 Wn.App. 94, 102, 955 P.2d 1272 (2000);

*Money Savers Pharmacy, Inc. v. Koffler Stores (Western) Ltd.*, 37

Wn.App. 602, 682 P.2d 960 (1984).

In *Security State Bank*, it was undisputed the bank was enforcing a guarantee on the principles of the business. The Principles in turn asserted a UCC Article 9 defense stating that goods seized from the business were sold at deep discount because the bank had not acted in a commercially reasonable manner in handling them post-seizure. It was undisputed that the Bank did not respond to offers to repackage the goods, failed to conduct an inventory, failed to separate parts by product line, handled the goods roughly, and removed protective packaging. *Security State Bank v. Burk*, 100 Wn.App at 96-97. When viewed in the light most favorable to the Burks, the court held that reasonable minds could disagree as to conclusions, and that summary judgment was inappropriate. *Id.* at 102.

In *Money Savers*, the issue was trademark infringement. There was no material issue of fact regarding the defendant's use of the term "Money Savers" in its advertisements. There was some documentation of shopper confusion, but the trial court nonetheless dismissed the case in summary

judgment. The trial court reasoned that no genuine dispute as to the likelihood of confusion between the businesses. *Money Savers Pharmacy, Inc. v. Koffler Stores (Western) Ltd.*, 37 Wn.App. at 605.

The appellate court noted that the issue of unfair competition is one of fact. It further noted that even if the facts were undisputed, there was still a fact issue if reasonable minds could come to different conclusions. *Id.* at 608.

## 2. Question of Liability.

Proximate cause for an incident is a matter for the finder of fact. Proximate cause has two elements, namely factual and legal cause. *Shah v. Allstate Ins. Co.*, 130 Wn.App. 74, 80, 121 P.3d 1204, 1207 (205). In *Shah*, the plaintiff sued on the theory that the insurance agent had not written the appropriate insurance limits, which were allegedly based on the lender requirements. Allstate defended based on Shah's alleged knowledge and his experience in the insurance industry. The trial court ruled there was no causation as a matter of law.

In this case, the following analysis will show that there is a questions as to the duties of the parties. Thus, there is a question as to who was negligent, and what caused the accident.

Additional guidance comes from the treatment of these issues in federal courts. The applications of law from the federal courts come from cases that were decided on the merits. As the Court will see, even when the cases were decided against the plaintiff, they invariably were the result of a finding of fact, not a summary judgment.

Finally, as case is one of admiralty, therefore, federal substantive maritime and admiralty law applies. *U.S. Express Lines, LTD v. Higgins*, 281 F.3d 383, 390 (3<sup>rd</sup> Cir. 2002).

a. Duties of the Parties: *The Oregon Presumption and Casement Rule*

The Respondent believed that summary judgment was appropriate because there are no material issues of fact. However, Appellant contends that the cited law has misconstrued admiralty law, and that in each instance there is a question of fact for a jury to resolve. But even if there are no questions as to the facts, the case should be sent to a jury because reasonable persons may disagree as to the conclusions to be drawn. In this case, the question will boil down to the duties each party had.

The Respondent has always ignored its own duties under the common law admiralty. A person or entity who places an obstruction over

a navigable waterway has a duty to mark it. Failure to do so is negligence. This principle has existed under the English common law of admiralty, and is recognized by American law. *Casement v. Brown*, 148 U.S. 615, 626; 13 S.Ct. 672, 676; 37 L.Ed. 582 (1893).

The Respondent will assert that there is a presumption that a vessel involved in an allision is at fault unless it can show that it was exercising due care, the object or its owner was at fault, or there was an inevitable event. *The Oregon*, 158 U.S. 186,197, 15 S.Ct. 804,809, 39 L.Ed. 943 (1895); *Bunge Corp. v. Freemont Marine Services*, 240 F.3d 919, 923 (11th Cir. 2001).

In *Woodford*, a boater ran into an unlit electrical transmission line. The towers had been built in 1930, and reconfigured at the request of the Army Corps of Engineers in 1954. The plaintiff was seeking an order of summary judgment. That motion was denied, but in the process, the court discussed the applicable laws. *Woodford v. Carolina Power & Light Co.*, 779 F.Supp. 827, (EDNC 1991).

However, the application in *Casement* negates the *Oregon* presumption. Federal courts have ruled that failure to light power lines to make them visible to boaters is negligent, and overcomes the *Oregon*

presumption. Therefore, the Defendant's application of law on this point does not apply. In fact, the Oregon rule evaporates and the burden is shifted to the defense. *Woodford v. Carolina Power & Light Co.*, 779 F.Supp. at 830-831.

Even if the Court were to apply the *Oregon* presumption, which is inappropriate in the case, it is a presumption of liability when a vessel hits a stationary object, there is still an opportunity for the vessel to show that it was not at fault. *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1349-1353 (9th Cir. 1986). In *Atropos Island*, there were two collisions. The first involved the *Atropos Island*, the second involved the *Cynthia*. While the *Cynthia* was found liable, the *Atropos Island* was not. This case illustrates that the rule cannot be arbitrarily applied, but it rather must be viewed in the totality of circumstances. It is the Appellant's position that the *Oregon* presumption does not apply. However, even under the *Oregon* presumption there is still a triable issue of fact.

Based on this analysis, the Court should apply the *Casement* analysis, thus placing the burden of proof on the defense. The defendant created the hazard that should have been properly marked. In accordance with *Woodford*, the Court should reject the *Oregon* presumption and apply

the *Casement* rule.

Using the *Casement* analysis, the Defendant is negligent. The power lines are hard to see, even for an experience professional who is actively looking for them. According to the Defendant, the placement of the buoys is about 50 yards from the lines. CP 2. Defendant's Motion Page 2. At this distance, a vessel drifting at one knot would travel that 50 yards in a mere 90 seconds. The writing on the buoys is hard to read. The placement and writing creates a situation where, if you can read the buoys, you are already too close to the hazard. Therefore, there is ample evidence to show that the Defendant is presumptively negligent.

The Respondent believed that their warnings were adequate because the Coast Guard approved the plans for the buoys. However, the Coast Guard approval should only be looked at as an approval of the design in conformity for the regulations on buoys. The plans do not seem to warrant the adequacy for the purpose of providing notice. Therefore, this is not a defense in itself.

The Court should take note of the fact that whether the courts are applying a *Casement* analysis or the *Oregon* presumption, the cited cases resulted in trials. Even in *Atropos Island*, the *Oregon* presumption case

still required a finding of fact. This is in line with the fact that negligence and proximate cause are findings of fact, and are not amenable to summary judgment.

b. The Issue of Lookouts

The Respondent asserted that summary judgment was appropriate because there was an improper lookout. Even in the light most favorable to them, this is still a case for a jury. However, the law on that matter is also mixed. Therefore, the trial court erred on granting summary judgment on this basis also.

The inland rules require that a vessel maintain a proper lookout by sight and sound. 33 USCA Sec. 2005.<sup>1</sup> However, the rule does not demand that a single individual be dedicated to that function. Exception from this rule have been cited under the common law, and Courts have determined that it cannot be strictly applied where the operator has a clear and unobstructed view. *Schumacher v. Cooper*, 850 F.Supp. 438, 448-449 (1994). As the *Schumacher* Court notes, Congress stated that it is reasonable for a watch officer to have multiple duties on certain small boats. S. REP. No. 96-979, at 7-8, 1980 U.S.C.C.A.N. 7068, 7075.

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<sup>1</sup> It is the contention of Mr. Alprin that Inland Rules do not apply in the Puget Sound. However, maritime custom carries a similar obligation. Therefore, the analysis is applied in this instance.

Without such an exception, no individual could operate a vessel of any size by himself. Regardless, the question of efficacy of a lookout is determinative, not whether a lookout was specifically designated.

The question of whether there was an adequate lookout must be determined in the totality of the circumstances. *Cenac Towing Co. v. Keystone Shipping Co.* 404 F.2d 698 (5<sup>th</sup> Cir. 1968). The Defendant is simply implying that the situation is *res ipsa loquitor*. An allision occurred, therefore there was no lookout. But at best, the alleged lack of lookout is only evidence of negligence, and is not sufficient to condemn Mr. Alprin without some proof that the efficacy of a lookout contributed to the collision. *The Oregon*, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1895).

The power lines are very hard to see. There were warning buoys, but they were hard to read. Mr. Alprin was advised to remain beyond the buoys, but the warning was due to the depth of water, not the overhead lines. The buoys appeared to be marking a channel, not overhead lines. Therefore, in the light most favorable to Mr. Alprin, there is still a triable issue. The circumstance indicate that a lookout would not have made a difference because he was not on notice of the obstruction and could not see it in any event.

Once again, the Court should note that in *Schumacher* and *Cenac Towing Co.* the trial courts did not simply look to see if there were lookouts and grant summary judgment. Rather, both cases were tried and resulted in findings of fact.

c. The Issue of Charts

The Appellant cited *Graves v. United States* for the proposition that a boater is charged with the responsibility of knowledge of NOAA charts. *Graves v. United States*, 872 F.2d 133, 136 (6<sup>th</sup> Cir. 1989). However, this is an overstatement of the case.

The fact pattern in *Graves* involves a boater who went over the sill of a dam operated by the Army Corps of Engineers. The boaters claimed that there were inadequate warnings, particularly when the bend of the river created an optical illusion. But the Court should note that the issue was also addressed by application of Army regulation, not admiralty common law. Additionally, the trier in this case made a finding based on adequacy of warnings.

As previously pointed out, there is a presumption that failure to adequately mark an artificial hazard is negligent. Therefore, this it was an issue for a jury, and not an issue as a matter of law.

The court in *Graves* was reviewing a district court finding of fact applying a clearly erroneous standard. The district court found that the Corps of Engineers had satisfied its duty to provide adequate warnings to boaters. In *dicta*, the court alluded to imputed knowledge that a boater could have based on NOAA charts available. However, this was only one factor that the district court used. Furthermore, the district court did not resolve the issue by summary judgment, but rather made its ruling as a finding of fact. Therefore, in the light most favorable to Mr. Alprin, this case must still be tried to jury.

Once again, the Court should note that the *Graves* trial court did not resolve the case in summary judgment. As with other cases involving negligence and proximate cause, the matter was resolved with a finding of fact.

d. State Law Analysis

When they have a recreational area, it is incumbent upon the person who has control of the area to be responsible for injuries caused by artificial conditions created upon the property. The water in question here is an area where recreational boaters go on a regular basis. A fact question exists as to whether this condition was a latent condition precluding

summary judgment for the power company. The plaintiff testified that he was unable to see the power lines from his vantage point on the water. Further, he testified that the physical evidence demonstrated that the buoys placed in the water only had writing on one side and that writing or warning could only be seen from the North at high tide. Additionally, the placement of the buoys in an area where the tide runs gives a mariner in the sailboat insufficient time to react once he does learn that there is an overhead electrical danger based upon the buoys. The tide flow and the location of the buoys is a question of fact that can only be determined by the jury as to the adequacy of the warning of the artificial condition which caused the injury. *Ravenscroft v. Washington Power Co.*, 136 Wash. 2d 911, 969 P.2d 75 (1998).

Summary judgment was reversed in the case of *Cultee v. City of Tacoma*, 95 Wash. App. 505, 977 P.2d 15 (1999) A child drowned by flooding. The issue to be decided in part was, did the flooding create a known dangerous artificial latent condition? That fact issue precluded summary judgment. In examining the condition over Henderson Bay, it is clear that it is an artificial condition and further clear that it is dangerous. The city knew it was a dangerous situation when they placed buoys in

A trier of fact must examine the causation based on the failure to adequately warn of the presence of danger. Even if there is question about whether the *Casement* rule of *Oregon* presumption applies, it is a matter for the jury, not one of law.

The issue of lookouts is similar. Whether the lookouts were adequate is not a matter of law. Even the federal case law indicates a there is some controversy in this area when small boats are involved. The matter of the charts do not conclusively establish negligence or proximate cause. Based on this analysis, there was no basis for summary judgment.

Based on the above argument, the appellant requests that the lower court be overturned and the case remanded for trial on the issues.

The placing of an artificial condition upon the public waterway and recreational area precludes summary judgment

Respectfully submitted this 1 day of December, 2006.

  
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IN THE COURT OF APPEALS DIVISION NO. II  
IN AND FOR THE COUNTY OF PIERCE

SCOTT ALPRIN, a single person,  
Plaintiff,

COURT OF APPEALS NO. 35264-8-II

v.

CITY OF TACOMA AND TACOMA  
PUBLIC UTILITIES AND AGENCY OR  
DEPARTMENT WITHIN THE CITY OF  
TACOMA,

DECLARATION OF DELIVERY

Defendant.

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I personally delivered a true and accurate copy of the Brief of Appellant to:

M. Joseph Sloan, Assistant City Attorney  
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DATED this 1 day of December, 2006 at Tacoma,  
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