

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2007 NOV 14 P 3:17

BY RONALD R. CARPENTER

*hjh*  
CLERK

SUPREME COURT NO. 79252-6

CLERK IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

---

LEO C. BRUTSCHE,

Petitioner,

vs.

CITY OF KENT, a municipal corporation,

Respondent.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

---

---

SUPPLEMENTAL BRIEF OF PETITIONER  
ON THE ISSUE OF TRESPASS

---

---

JOHN R. MUENSTER  
MUENSTER & KOENIG  
1111 Third Avenue, Suite 2220  
Seattle, WA 98101  
(206) 467-7500

JERALD A. KLEIN  
1425 4th Ave., Ste. 518  
Seattle, WA 98101  
(206) 623-0630

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
I. <u>INTRODUCTION</u> .....	1
II. <u>STATEMENT OF THE CASE</u> .....	1
III. <u>ARGUMENT: THE CITY FACES LIABILITY UNDER THE DOCTRINE OF TRESPASS AB INITIO.</u> .....	2
A. <u>Prima Facie Elements of Trespass</u> .....	2
B. <u>The Trespass Ab Initio Doctrine</u> .....	3
C. <u>Analysis of the Trespass Ab Initio Provisions in the Restatement (Second) of Torts (1965).</u> .....	4
1. <u>The City Faces Liability Under § 214(1) of the Restatement.</u> .....	4
2. <u>The City Faces Liability Under Section 214(2) of the Restatement.</u> .....	5
IV. <u>CONCLUSION</u> .....	6

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<i>Bradley v. American Smelting</i> , 104 Wn.2d 677, 709 P.2d 781 (1985) .....	2, 3
<i>Fradkin v. Northshore Utility District</i> , 96 Wn. App. 118, 977 P.2d 1265 (1999) .....	3
<i>Hamilton v. King County</i> , 195 Wash. 84, 79 P.2d 697 (1938) .....	3
<i>Jahns v. Clark</i> , 138 Wash. 288, 244 P. 729 (1926) .....	4
 <u>FEDERAL CASES</u>	
<i>Turner v. Sheriff of Marion County</i> , 94 F. Supp. 2d 966 (S.D. Ind., 2000) .....	4, 6
 <u>RULES, STATUTES AND OTHERS</u>	
RAP 1.2(a) .....	1
<i>Restatement (Second) of Torts</i> (1965) .....	1-6

I. INTRODUCTION

Pursuant to RAP 1.2(a), this Court entered an order expanding review of this case to include the issue of trespass. The Court directed the parties to provide supplemental briefing on that issue, including briefing on the *Restatement (Second) of Torts* (1965) on trespass. This supplemental brief is submitted pursuant to the Court's directive.

II. STATEMENT OF THE CASE

For the Court's convenience, we reproduce here pertinent sections of the statement of the case which were set forth in the petition for review.

This case stems from a raid on Mr. Brutsche's property conducted by police officers who were looking for drugs pursuant to a search warrant. CP 31, lines 18-23. During the raid, Plaintiff offered to escort the officers around the premises and open all doors with his keys. Certificate of Leo C. Brutsche, CP 135, ¶ 5 (offers keys to Sergeant Sidell), CP 136, lines 6-9 (offers to escort officers). The officers refused Plaintiff's offer and instead used battering rams to destroy doors and enter the various buildings. Certificate of Leo C. Brutsche, CP 135, lines 8-10. In his declaration in opposition to the summary judgment, Mr. Brutsche pointed out that the battering ram was unnecessary because using Mr. Brutsche's keys would have been much quicker and quieter, thus taking less time. and would not alert criminals, had there been any. CP 89, lines 18-23, ¶ 7. As explained by Mr. Brutsche:

7. I believe the custom or practice of using a battering ram to breach the doors is unreasonable under the circumstances here. Use of my keys would be much quicker

and quieter, making the entry much safer for the officers. Also, keys would not damage the doors and the door jams like the battering ram.

Certification of Leo C. Brutsche, CP 135, ¶ 7. Mr. Brutsche offered to escort the officers around his property because he knew there were no drugs present. CP 90, lines 3-9.

Use of the battering ram caused extensive damage to Mr. Brutsche's doors, door jams and windows. CP 90, lines 10-20. Mr. Brutsche had to hire a carpenter who repaired the door jams and doors for the sum of \$4,921.51. CP 90, lines 16-18, *See also* Declaration of James Warner, CP 131-133.

The officers found nothing. Nothing was seized. *See* Affidavit of Attestation of Documents, CP 87, the Inventory and Return of Search Warrant, CP 86, at page 87, answer to item 7.

III. ARGUMENT: THE CITY FACES LIABILITY UNDER THE DOCTRINE OF TRESPASS AB INITIO.

A. Prima Facie Elements of Trespass

Washington courts rely on the *Restatement (Second) of Torts*, § 158 (1965), for the elements of trespass:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

- (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
- (b) remains on the land, or
- (c) fails to remove from the land a thing which he is under a duty to remove.

*Bradley v. American Smelting*, 104 Wn.2d 677, 681, 709 P.2d 781 (1985).

The question in any action for trespass is whether there has been an intentional or negligent intrusion onto or into the property of another, or “an unprivileged remaining on land in another’s possession”. An intentional or negligent intrusion onto the property of another that interferes with the other’s right to exclusive possession is a trespass. A negligent intrusion occurs “where the actor does not use reasonable care to prevent the exercise of his privilege from involving an unreasonable risk of harm to the legally protected interests of others.”

*Fradkin v. Northshore Utility District*, 96 Wn. App. 118, 123, 977 P.2d 1265 (1999) (citing *Bradley, supra*, and the *Restatement (Second) of Torts*) (footnotes omitted).

B. *The Trespass Ab Initio Doctrine*

Mr. Brutsche sought damages under the trespass *ab initio* doctrine. The doctrine was recognized and applied against local government in *Hamilton v. King County*, 195 Wash. 84, 79 P.2d 697 (1938). In *Hamilton*, the owner of a mink farm gave county employees permission to construct a drainage ditch on his property. Unfortunately, the county employees constructed the ditch much closer to the building where the owner’s mink animals were being raised than apparently had been agreed upon, causing the death of many mink kittens. This Court held that the county faced liability under the doctrine of trespass *ab initio*. *Hamilton*, 195 Wash. at 92-93, 79 P.2d at 701. The doctrine has been applied in other jurisdictions in the context of service of a search warrant:

Under the doctrine of trespass *ab initio*, a person who lawfully enters property under color of law (*e.g.*, a government agent or private individual acting under legal authority) then later abuses that authority by a positive act of misconduct

will be considered a trespasser *ab initio* and liable in trespass for his acts from the first moment of his entry.

*Turner v. Sheriff of Marion County*, 94 F. Supp. 2d 966, 984 (S.D. Ind., 2000) (analyzing Indiana state law). *See also Jahns v. Clark*, 138 Wash. 288, 294-295, 244 P. 729 (1926) (discussing doctrine in police shooting case). Under the doctrine, the City faces liability in trespass.

C. *Analysis of the Trespass Ab Initio Provisions in the Restatement (Second) of Torts (1965).*

1. *The City Faces Liability Under § 214(1) of the Restatement.*

Section 214 of the *Restatement (Second) of Torts*, captioned “Liability for Excess; Trespass ab Initio”, contains two provisions. We discuss each in turn.

Section 214(1) provides: “An actor who has in an unreasonable manner exercised any privilege to enter land is subject to liability for any harm to a legally protected interest of another caused by such unreasonable conduct.”

Comment a. on Subsection (1) states in pertinent part:

A privilege to enter land may be unreasonably exercised either by the intentional doing of an act which a reasonable man would not regard as necessary to effectuate the purposes for which the privilege is given, or by any negligence in the manner in which the privilege is exercised. Subsection (1), therefore, applies not only where the actor deliberately abuses his privilege . . . but also where the actor does not use reasonable care to prevent the exercise of his privilege from involving an unreasonable risk of harm to the legally protected interests of others.

This Court should hold that the City here can face liability under Subsection (1). First, the term “land” includes “buildings”. Second, the use

of the battering rams could be found by the trier of fact to be an unreasonable exercise of the privilege to enter (the search warrant). Third, a trier of fact could find that a reasonable man would not regard the use of the battering rams as necessary to effectuate the purposes for which the privilege (the search warrant) was given. Fourth, in the alternative, the trier of fact could find that the police did not use reasonable care to prevent the search from involving an unreasonable risk of harm to the legally protected interest of Mr. Brutsche against the unnecessary destruction of his property.

Comment b. to Subsection (1) notes that in the vast majority of cases, the intentional or negligent misconduct of the actor “is of such a character as to be intended to harm or likely to harm the land itself or persons or chattels upon it.” Such is the case here, under plaintiff’s facts.

2. *The City Faces Liability Under Section 214(2) of the Restatement.*

Subsection (2) of § 214 provides as follows:

One who properly enters land in the exercise of any privilege to do so, and thereafter commits an act which is tortious, is subject to liability only for such tortious act, and does not become liable for his original lawful entry, or for his lawful acts on the land prior to the tortious conduct.

Comment e. on Subsection (2) states that the subsection rejects the doctrine of trespass ab initio. The principal reason given for the rejection was stated as follows:

The rule developed at a time when punitive damages were not allowed in tort actions, . . . . The development of punitive damages, as stated in § 908, has removed this justification.

Comment e. on Subsection (2), *Restatement (Second) of Torts*, page 409.

The rationale for rejecting the rule set forth in the *Restatement* does not apply in Washington because punitive damages are not available in common law tort actions.

The doctrine of trespass ab initio is in force in Washington. There are no Washington decisions overruling the doctrine. This Court should hold that plaintiff is entitled to a trial on his trespass claim. *Compare: Turner v. Sheriff of Marion County, supra*, 94 F. Supp. 2d 984, fn.27 (noting that although the doctrine of trespass ab initio has been criticized and was rejected in the *Restatement*, there were no Indiana decisions overruling the doctrine, and that the doctrine should be applied in the case before the court absent a contrary decision by the Indiana Supreme Court).

Even if § 214(2) had been adopted in Washington, the City would face liability for the property destruction even if the initial police entry pursuant to the search warrant was deemed proper. However, since the term “land” includes a “building”, we contend that each use of the battering ram to enter a different building constituted a trespass for which Mr. Brutsche is entitled to compensation.

#### IV. CONCLUSION

The decision of the Court of Appeals is in conflict with decisions of this Court applying the trespass ab initio doctrine. This Court should reverse

the Court of Appeals on the trespass issue as well as the other issues upon which review was granted. The trial court's order on summary judgment should be reversed. This cause should be remanded for trial.

DATED this the 14<sup>th</sup> day of November, 2007.

Respectfully submitted,

MUENSTER & KOENIG

By: S/Signed Telephonically  
JOHN R. MUENSTER  
Attorney at Law  
WSBA No. 6237

LAW OFFICES OF JERALD KLEIN

By: S/Signed Telephonically  
JERALD KLEIN  
Attorney at Law  
WSBA No. 9313  
Of Attorneys for Petitioner Leo C. Brutsche

FILED AS ATTACHMENT  
TO E-MAIL

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2007 NOV 14 P 3: CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

The undersigned hereby certifies under penalty of perjury under the Laws of the <sup>CLERK</sup> State of Washington that she served a copy of the above Supplemental Brief of Petitioner on the Issue of Trespass to counsel for Respondents and Amicus via e-mail and first class mail on the 14<sup>th</sup> day of November, 2007, at the following addresses:

Richard B. Jolley  
Keating, Bucklin & McCormack  
800 Fifth Ave., Suite 4141  
Seattle, WA 98104-3189

Sofia D'Almeida Mabee  
City of Yakima – Legal Dept.  
200 S. 3<sup>rd</sup> St.  
Yakima, WA 98901-2830

Daniel Brian Heid  
City of Auburn  
25 W. Main St.  
Auburn, WA 98001-4998

DATED this the 14<sup>th</sup> day of November, 2007.

MUENSTER & KOENIG

By:   
ANDI ANDERSON  
Legal Assistant

AS ATTACHMENT  
TO E-MAIL