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NO. 63317-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

WILLIAM BARBER, as personal representative of the
ESTATE OF HERBERT DOWE HOLCOMBE III,

Appellant,

v.

THE PRESBYTERY OF OLYMPIA, PUGET SOUND RETREAT
COMMITTEE, SOUND VIEW PRESBYTERIAN CAMP, SOUND
VIEW CAMP AND RETREAT CENTER, INTERNATIONAL
SERVICE ORGANIZATION OF SAA, INC., PUGET SOUND SAA, and
INTERNATIONAL SERVICE ORGANIZATION OF COSA,

Respondents.

BRIEF OF APPELLANT WILLIAM BARBER

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I. INTRODUCTION

On September 11, 2004 Herb Holcombe was attending a retreat organized by the Puget Sound Retreat Committee (hereinafter “PSRC”) at the Sound View Camp and Retreat Center (hereinafter “Sound View”) in Longbranch, Washington. While walking at night toward the dining hall, Mr. Holcombe tripped over an unlit railroad tie used as a parking lot bumper. He fell and severely fractured his shoulder.

Despite the presence of issues of fact, the trial court granted motions for summary judgment by all defendants, PSRC and the Presbytery of Olympia, Sound View Presbyterian Camp, and Sound View Camp and Retreat Center (hereinafter collectively referred to as “Presbytery”). The trial court found that the PSRC owed no duty of care to Mr. Holcombe, and that neither PSRC nor the Presbytery breached a duty to Mr. Holcombe.

But Mr. Holcombe had presented evidence that the railroad tie he tripped over was located in an area where pedestrian travel could be expected, was unlit, was a dangerous condition, and the dangerous condition created an unreasonable risk of harm to invitees. The evidence against PSRC created questions of fact regarding whether PSRC was an owner or possessor of Sound View—and therefore owed Mr. Holcombe a

duty--when it leased the facility and sponsored retreats there. Summary judgment against all defendants was erroneous since questions of material fact existed as to all.

Appellant seeks review of the trial court's orders granting summary judgment entered on March 27, 2009. This court should reverse the orders granting summary judgment and remand the case for further proceedings in the trial court.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

1. The trial court erred in finding that defendants did not breach the duty of care they owed to plaintiff.

2. The trial court erred in finding the PSRC did not owe a duty of care to plaintiff.

III. STATEMENT OF ISSUES

1. Does a genuine issue of material fact exist regarding whether defendants breached their duty to an invitee when Mr. Holcombe has presented evidence that the dark and unlit railroad tie he tripped over was a dangerous condition which created an unreasonable risk of harm?

2. Does the PSRC "possess" Sound View when it leases the facility, controls the activities at the facility, has the responsibility to control its guests, and is in full control of the facility as it relates to the Serenity on the Sound Retreat?

IV. STATEMENT OF THE CASE

A. Facts

Herb Holcombe attended Sex Addicts Anonymous (SAA) meetings in the Seattle area. CP 230. SAA is a twelve step program for the “fellowship of men and women who share their experience, strength and hope with each other so they may overcome their sexual addiction and help others recover from sexual addiction or dependency.”¹ Once a year, the Puget Sound SAA holds a retreat, which is open to its members, at Sound View in Longbranch, Washington. CP 230. The name of the annual gathering of Puget Sound SAA members is “Serenity on the Sound,” and it is organized by the Puget Sound Retreat Committee (hereinafter “PSRC”). CP 62. The PSRC rented Sound View from the Presbytery. CP 225-243. It promoted, organized and planned the Serenity on the Sound retreat. Guests who attended Serenity on the Sound paid the PSRC different fees depending upon whether they were staying the weekend, were overnight or were only attending activities during the day. CP 247-248. Mr. Holcombe did not see anyone at Sound View other than the PSRC’s organizers and guests of the retreat. CP 64-65. Mr. Holcombe was an overnight guest.

¹ See Sex Addicts Anonymous webpage: www.sexaa.org.

Mr. Holcombe attended the retreat for the first time in September of 2003. CP 230-231. In 2004, Mr. Holcombe again attended the PSRC's "Serenity on the Sound" retreat. He arrived at Sound View at approximately 5:00 p.m. on September 10, 2005. CP 233-234. He ate dinner, listened to a speaker and attended a SAA meeting that evening. CP 63. The next evening, September 11, 2008, Mr. Holcombe attended a candlelight service in the Dining Hall. CP 235. Following the candlelight ceremony, the PSRC organized a bonfire at a fire pit near the waterfront. CP 236. Mr. Holcombe went to his cabin located in the Long House in order to retrieve a jacket. CP 236. After getting his jacket, Mr. Holcombe walked to the Dining Hall to get a soda before continuing on to the bonfire ceremony. CP 236, 239.

He left the Long House and began walking on a maintained pathway from the Long House to the Dining Hall. The pathway was bordered on each side with short landscaping lights which illuminated the pathway. CP 237. This illumination ended forty to fifty feet from the Dining Hall. *Id.* There were no lights to designate a path or illuminate the ground from the point where the pathway lights ended to the closest dining hall entrance, which Mr. Holcombe estimated was approximately forty feet away. CP 64, 243. "The only light in that area was coming from the kitchen window..." which was near the rear entry to Dining Hall. CP 237.

Foreseeably, Mr. Holcombe walked directly toward the Dining Hall's rear doorway. CP 184.

As Mr. Holcombe walked toward the rear entrance to the Dining Hall his foot struck an object in his path and he flew forward, slamming to the ground shoulder first. CP 237. The object he tripped over was a dark colored and unlit railroad tie resting on the ground in his path which was not visible to Mr. Holcombe. *Id.* Mr. Holcombe had not seen or noticed this railroad tie previously. CP 240. The railroad tie was placed perpendicular to the rear entry to the Dining Hall, but in a darkened area where it could not be seen at night. The placement of the railroad tie in an access route to the Dining Hall, and in an area where it could not be seen at night, created a dangerous trip hazard. CP 185-186. Indeed, at least one other guest of the camp had tripped on the same railroad tie on a prior occasion. CP 221-223.

According to the declaration of David Clark, which was submitted in support of defendant Presbytery's motion for summary judgment, the railroad tie Mr. Holcombe tripped on was placed to protect the building and a propane tank. CP 41-43. Even this explanation raised issues of fact since the propane tank was protected by bollards, which are placed upright and are clearly visible in pictures of the area. CP 185, 217. The bollards are not dark in color. The bollards do not pose a trip hazard because they

extend upwards into any pedestrian's view making them easier to see at night. *Id.* Further, the camp uses split rail fences, which likewise are not a trip hazard, in other areas around the Dining Hall. *Id.* If guests were not supposed to be walking in the area where Mr. Holcombe fell, better lighting, a split rail fence, or additional bollards were all appropriate alternatives to placing an unlit and dark colored tripping hazard on the ground. *Id.*

After recovering his faculties following his fall, Mr. Holcombe felt sharp pain in his shoulder. CP 241. When he was able, he stood, continued to the Dining Hall, entered the kitchen, and informed the people in the kitchen that he had tripped, fallen and injured his shoulder. CP 68, 71-72. The people in the Dining Hall began searching for Dr. Keith Anderson, an orthopaedic physician who was attending the camp. CP 68. Dr. Anderson was summoned from the bonfire, and after examining Mr. Holcombe's injured shoulder he determined that the injury was serious and required immediate medical treatment. CP 68. Dr. Anderson transported Mr. Holcombe to Swedish Hospital where examination revealed a displaced proximal humerus fracture. Following the incident, Evan Kentop, a representative of the PSRC, filled out an accident report, which in response to a question asking how to avoid future accidents states: "Remove low log used as road block by dining hall." CP 56.

Mr. Holcombe's physicians were unable to repair the injury to his shoulder. After two attempts to surgically reduce his injured shoulder were unsuccessful, his physicians recommended a shoulder replacement. CP 229. Following shoulder replacement surgery, Mr. Holcombe continued to have pain in his shoulder, as well as limited use of his right arm. He was unable to lift his right hand above shoulder level. CP 226-228.

B. Procedure

Appellant filed an action against The Presbytery of Olympia, Puget Sound Retreat Committee, Sound View Presbyterian Camp, Sound View Camp and Retreat Center, International Service Organization of SAA, Inc., Puget Sound SAA, and International Service Organization of COSA on September 7, 2007. CP 1-18.

On September 11, 2008, Mr. Holcombe passed away. An Estate was opened for Mr. Holcombe on December 5, 2008, and the personal representative of the Estate of Holcombe, William Barber, was substituted as plaintiff on December 31, 2008.

On February 26, 2009 defendants filed motions for summary judgment against plaintiff. CP 25-38; CP 110-119. On March 27, 2009, the court granted defendants' motions. CP 278-283.

V. ARGUMENT

A. Standard and Scope of Review

Summary judgment rulings are reviewed *de novo*. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 196 P.3d 691, 696 (2008). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). Any doubt as to the existence of an issue of material fact must be decided in favor of the non-moving party. *Atherton Condominium Ass'n v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

If reasonable persons might reach different conclusions from the evidence and from all its inferences, summary judgment must be denied. *Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992). If any reasonable hypothesis would entitle the non-moving party to prevail, summary judgment must be denied. *Cofer v. Pierce County*, 8 Wn.App. 258, 505 P.2d 476 (1973). Consequently, if different inferences or conclusions might be drawn from the evidence, or if the evidence is reasonably subject to conflicting inferences, then granting a summary judgment motion is inappropriate. *South Side Tabernacle v. Pentecostal*

Church of God, 32 Wn.App. 814, 650 P.2d 231 (1982). Further, an affidavit expressing an expert opinion, even on an ultimate issue of fact, is sufficient to create a genuine issue of material fact, thus precluding summary judgment. *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). *Lamen v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 588 P.2d 1346 (1979).

B. The PSRC “Possessed” The Land And Owed A Duty Of Care To Mr. Holcombe Because it Rented The Camp, Was Responsible For Controlling Its Guests, And Was In Control Of The Land As Related To The Serenity On The Sound Retreat

Mr. Holcombe was an invitee of the PSRC at Sound View. The PSRC had scheduled activities for its guests at the Serenity on the Sound retreat, including activities at night. It is not disputed that defendants should have reasonably anticipated that invitees, like Mr. Holcombe, would access the Dining Hall at night. Indeed, guests accessing the Dining Hall is a foreseeable activity.

Washington has adopted the *Restatement (Second) of Torts* § 363 (1965) definition of a “possessor of land” for purposes of premises liability. See, *Strong v. Seattle Stevedore Co.*, 1 Wn.App. 898, 466 P.2d 545 (1970). § 363 states:

A possessor of land is

(a) a person who is in occupation of the land with intent to control it or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Id.

The term “possessor of land” has been interpreted broadly to impose a duty of care even on persons who do not hold title to the property. For example, in *Jarr v. Seeco Constr. Co.*, 35 Wn.App. 324, 327, 666 P.2d 392 (1983), a prospective purchaser brought an action against a real estate broker to recover for injuries sustained while attending an open house at an unfinished construction site. The court concluded that the real estate broker showing the property was a “possessor of land” and could be held liable for harm caused thereby under a theory of premises liability. *Id.* The court cited the Restatement, concluding, “a possessor of land is ‘a person who is in occupation of land with intent to control it.’” *Id.*

In *Strong*, the appellate court was presented with the question of whether a stevedore company which rented a crane from the Port of Tacoma was a possessor of land. *Strong*, 1 Wn.App. at 901. The Court reasoned that because the defendant stevedore company had rented the

tower crane from the City of Tacoma for the purpose of unloading ships, which was its business, it was a possessor of land. The fact that the stevedore company “was not responsible for the maintenance of the crane and its appurtenances...” did not change the fact that it was a possessor of land. *Id.*

Thus, the question of whether a particular party is a “possessor of land” requires a factual inquiry into the control exercised by the party over the property. *See, e.g., Mesa v. Spokane World Exposition*, 18 Wn.App. 609, 612, 570 P.2d 157 (1977). Issues of scope of authority and control are ordinarily issues of fact. *Id.* at 612; *see also Blackman v. Federal Realty Investment Trust*, 444 Pa.Super. 411, 416, 664 A.2d 139, 142 (1995)(The question of whether a party is a “possessor” of land is a determination to be made by the trier of fact).

In this case it is undisputed that the PSRC leased Sound View for the purpose of using the land for its Serenity on the Sound retreat. CP 237-238, CP 136-138. The PSRC promoted the retreat, created a schedule of events, and operated the retreat at Sound View camp. CP 237-238.

Once leased, the property was not open to other groups. The PSRC provides self serving assertions that because it did not maintain the grounds or have any say in their layout, it did not “intend to control” Sound View. However, as demonstrated by the court’s holding in *Jarr*

and *Strong*, the fact that the PSRC was not responsible for maintenance may be relevant to whether it exercised sufficient control to possess Sound View, but is not determinative. As in *Jarr*, the PSRC was in complete control of its event (Serenity on the Sound), had the responsibility to control its guests, and was in control of the land as related to its Serenity on the Sound Retreat. CP 225-248. The scope of control of the PSRC is no different from the control exercised by the realtor in *Jarr*. Thus, a factual issue existed as to the PSRC's status as a "possessor" of the land under §§ 328E and 383 of the *Restatement (Second) of Torts* for purposes of liability under § 343.

C. The Presbytery Owes Mr. Holcombe a Duty of Care Based on Its Status as an Owner of Land

Defendants conceded that Mr. Holcombe was an invitee on the premises owned by Presbytery at the time of the subject accident. CP 254.

Although defendant Presbytery did not possess the land when Mr. Holcombe was injured because it had leased the property to the PSRC, it is not relieved of liability by PSRC's possession of the land. CP 257. In *Brunton v. Ellensburg Elks*, 73 Wn.App. 891, 872 P.2d 47 (1994), the Court outlined a land owner's duties when a property is leased for the purpose of admission of the public. In *Brunton* the plaintiff suffered injury at a wedding reception when she tripped and fell on stairs due to

inadequate lighting. The Court held that where a landlord leases its premises for the purpose of inviting public admission, it may be held liable pursuant to *Restatement (Second) of Torts*, §359 (1964), which reads as follows:

A lessor who leases land for a purpose which involves the admission of the public is subject to liability for physical harm caused to persons who enter the land for that purpose by a condition of the land existing when the lessee takes possession, if the lessor

- (a) knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons, and
- (b) has reason to expect that the lessee will admit them before the land is put in a safe condition for their reception, and
- (c) fails to exercise reasonable care to discover or to remedy the condition, or to otherwise protect such persons against it.

Id. The court reasoned that a landlord's responsibility to the public is so great that he cannot be permitted to shift that duty from himself. If a landlord would be liable should he admit the public to the land himself, he should not be allowed to avoid that liability by leasing the land with the intention that the public be admitted. *Id.* at 894. Accordingly, the Presbytery is also liable to plaintiff as a possessor of land.

D. Sound View Defendants Owed Duties to Invitee Mr. Holcombe Which Include An Affirmative Duty To Discover And Repair Dangerous Conditions

Defendants concede that Mr. Holcombe was an invitee to the Sound View Camp and Retreat Center at the time of the subject incident. CP 254. As the operators of a business, the defendants owe a duty of reasonable care to the guests who are invited to the premises. WPI 120.06.01. WPI 120.07 provides the standard governing when a business operator is liable for injuries and damages suffered by a business invitee injured on the business premises:

A business operator is liable for any injuries to his/her invitees caused by a condition on the business premises if the owner or occupier:

- (a) Knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees;
- (b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
- (c) Fails to exercise ordinary care to protect them against the danger.

See also, *Iwai v. State*, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996).

In *Tincani v. Inland Empire*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994), the Court assessed the duty of care owed invitees pursuant to *Restatement (Second) of Torts*, §§ 343 and 343A (1965), which define the

standard of care owed to invitees for dangerous conditions on a premises, including known or obvious ones. *Tincani* relies specifically on § 343 and its Comment *b.*, and also expressly adopts § 343A(1) as “the appropriate standard for duties to invitees for known or obvious dangers.” 124 Wn.2d at 139 (citations omitted).

Under this analysis, a landowner may be held liable in negligence for a condition creating an unreasonable risk of harm if the landowner should expect that the invitee will not discover or realize the potential danger *or will fail to protect against it.* § 343. If the condition is “known or obvious,” liability may still be found if the landowner “should anticipate the harm despite such knowledge or obviousness.” § 343A. In *Tincani*, the Court concluded that a material issue of fact existed regarding whether the owner of a zoo should have anticipated that a teenaged invitee would be harmed climbing on an obviously dangerous cliff on its premises. *Id.* at 141. “Reasonable care requires the landowner to inspect for dangerous conditions, followed by such repair, safeguards, or warning as may be reasonably necessary for protection [of the invitee] under the circumstances.” *Id.* at 139.

The duty of care necessarily includes an *affirmative* duty to discover dangerous conditions through reasonable inspection, and a duty to repair that condition or warn the invitees of the hazard, unless it is

known or obvious. *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980); *Restatement (Second) of Torts* § 343 (1965)). The extent of the duties that a possessor owes to a business invitee depends upon what the invitee is to do on the premises, what the possessor encourages the visitor to do, the places to which the invitee may foreseeably go, and where the possessor expects the invitee to go. *Miniken v. Carr*, 71 Wn.2d 325, 428 P.2d 716 (1967). “Given the existence of a duty, the scope of that duty under the particular circumstances of the case is for the jury.” *Jarr*, 35 Wn.App. at 330.

E. Mr. Holcombe Submitted Evidence That The Railroad Tie He Tripped Over Was A Dangerous Condition That Defendants Should Have Discovered, Warned About, Removed, or Repaired

Plaintiff’s evidence showed that a rational trier of fact could find that the placement of an unlit and dark colored railroad tie in an area where it was reasonably foreseeable that guests would walk constitutes an unreasonable risk of harm. Such a finding means breach of defendants’ duty to plaintiff.

Mr. Holcombe could not see the railroad tie that caused him to trip and fall on September 11, 2004. The deposition testimony from Mr. Holcombe supports his claim that the railroad tie was not readily visible at the time that he tripped on it. The Declarations of Dr. Richard Gill and

Mr. Cutro create a reasonable inference that it was foreseeable that an invitee walking to the rear door of the Dining Hall at night would not be able to discern that the railroad ties created a hazardous condition. Further, Dr. Gill's declaration outlines the factual basis for his conclusion that it was reasonably foreseeable the railroad ties posed an unreasonable risk of harm to invitees like Mr. Holcombe. CP 182-219. This is supported and reinforced by the declaration of Mr. Cutro, who at a previous Serenity on the Sound retreat tripped over the same railroad tie that caused Mr. Holcombe's fall. CP 221-223. Nothing changed following Mr. Cutro's fall, and injury.

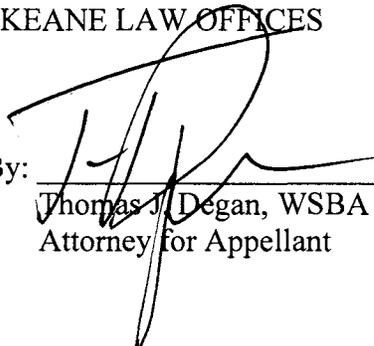
In light of the evidence placed before the trial court, summary judgment was improper because plaintiff raised questions of fact which should be resolved by a factfinder.

VI. CONCLUSION

Plaintiff respectfully requests that the trial court's March 27, 2009 summary judgment order be reversed and the matter be remanded.

Respectfully submitted this 12th day of August, 2009.

KEANE LAW OFFICES

By: 

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**COURT OF APPEALS,
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WILLIAM BARBER, as personal)
representative of the ESTATE OF)
HERBERT DOWE HOLCOMBE III,)

Appellant,)

vs.)

THE PRESBYTERY OF OLYMPIA, a)
Non-Profit Corporation, PUGET)
SOUND RETREAT COMMITTEE,)
SOUND VIEW PRESBYTERIAN)
CAMP, SOUND VIEW CAMP AND)
RETREAT CENTER,)
INTERNATIONAL SERVICE)
ORGANIZATION OF SAA, INC.,)
PUGET SOUND SAA, and)
INTERNATIONAL SERVICE)
ORGANIZATION OF COSA,)

Respondents.)

**CERTIFICATE OF
SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington that the following is true and correct:

That on August 12, 2009 I sent, via legal messenger, a true and correct copy of the Brief of Appellant William Barber to:

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DATED at Seattle this 12th day of August, 2009.


Sarah Stegner