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DIVISION ONE

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NO. 63317-1-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

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.

**BRIEF OF RESPONDENT PUGET SOUND RETREAT
COMMITTEE**

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TABLE OF CONTENTS

I. STATEMENT OF ISSUES 1

II. STATEMENT OF THE CASE..... 1

III. LAW AND ARGUMENT 5

 A. Summary Judgment Standard of Review..... 5

 B. PSRC Was Not the “Possessor” of the Serenity of
 the Sound Camp and, as a Matter of Law, Owed No
 Duty to Plaintiff. 6

 C. The Trial Court Correctly Found That Even If
 PSRC Was a “Possessor” of Land, the Undisputed
 Facts Demonstrate that PSRC Did Not Breach Any
 Duty..... 10

IV. CONCLUSION..... 15

TABLE OF AUTHORITIES

FEDERAL CASES

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).....6

STATE CASES

Barr v. Day, 124 Wn.2d 318, 879 P.2d 912 (1994).....5

Coleman v. Hoffman, 115 Wn. App. 853, 64 P.2d 65 (2003).....6, 7

Egede-Nissen v. Crystal Mountain, 93 Wn. 2d 127,
606 P.2d 1214 (1980).....11

Guile v. Ballard Community Hospital,
70 Wn. App. 18, 851 P.2d 689 (1993).....14

Higgins v. Stafford, 123 Wn.2d 160, 866 P.2d 31 (1994).....5

Jarr v. Seeco Construction Co., 35 Wn. App. 324,
666 P.2d 392 (1983).....8, 9

Mesa v. Spokane World Exposition,
18 Wn. App. 609, 570 P.2d 157 (1977).....9

Strong v. Seattle Stevedore Co., 1 Wn. App. 898, 466 P.2d 545,
review denied, 77 Wn.2d 963 (1970).....7

Tincani v. Inland Empire Zoological Society,
124 Wn.2d 121, 875 P.2d 621 (1994).....11

Young v. Key Pharmaceuticals, Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989).....5, 6

MISCELLANEOUS

Restatement (Second) of Torts § 328E (1965)7

Restatement (Second) of Torts § 342 (1965).....11

Restatement (Second) of Torts § 343 (1965).....11

Restatement (Second) of Torts § 343A (1965).....11, 12

I. STATEMENT OF ISSUES

1. Did the trial court correctly grant summary judgment in favor of Puget Sound Retreat Committee on the basis that it owed no duty to plaintiff, as it was not a possessor of the camp it was merely renting for the weekend and it had no authority to make any changes to the layout or lighting of the camp, including the walkways and dining hall?

2. Did the trial court correctly grant summary judgment in favor of Puget Sound Retreat Committee when there were no genuine issues of material fact that even if it owed a duty to plaintiff, it did not breach this duty where plaintiff himself admitted that on his own, he decided to leave a lighted walkway and take a shortcut through an unlit area?

II. STATEMENT OF THE CASE

Plaintiff is the personal representative of Herbert Holcombe, who passed away on September 11, 2008.¹ Mr. Holcombe was a participant in a retreat held at the Sound View Camp and Retreat Center over the weekend of September 10-13, 2004. Puget Sound Retreat Committee (“PSRC”) had a very limited role: It organized and administered retreats for Puget Sound SAA. CP 125. PSRC is not a separate corporate entity; it

¹ For ease of reference, the term plaintiff will be used throughout this brief, even though plaintiff now technically refers to the Personal Representative of the Estate of Herbert Dowe Holcombe III.

is merely a committee with no legal standing *per se* and is not created by nor affiliated with Puget Sound SAA. CP 125. Evan Kentop, a member of the PSRC, helped to organize the retreats held at the Sound View Camp and Retreat Center for September 2002-2005. CP 125. All PSRC did was to rent the camp, a rustic, outdoor facility. CP 125. The camp was minimally developed. CP 40. PSRC made no changes or alterations to the camp, but simply held a retreat there, at the existing facilities. CP 125.

Participants at the retreat were provided with an informational and registration brochure, advising them to bring flashlights to the camp. CP 125. The PSRC did not represent that it would provide flashlights. Plaintiff conceded that although the camp brochure he had signed in 2003, identical in relevant respects to the brochure used in 2004, requested participants to bring flashlights, he did not have a flashlight with him in 2004. CP 147; CP 148.

As a mere renter of the locale for this annual retreat, PSRC had no say in how the paths were laid out in the campground or how or if the paths were lit. CP 126. It also made no changes or alterations to the layout of the campground or its pathways, or to the lighting affixed to the buildings on the campground, nor did it have the power or authority to do so. CP 126. PSRC similarly had no input in the placement of the railroad tie that plaintiff claims he tripped over. It did not place the tie initially,

nor did it at any time undertake to move or alter the location of the tie.

CP 126. It is undisputed that the Presbytery of Olympia placed the railroad tie in the grassy area as required per regulations to protect a propane tank. CP 41-42.

Plaintiff had attended the same retreat held at the same camp the previous year. CP 125. Mr. Kentop, who also attended the retreats in both 2003 and the year of the accident, 2004, is not aware of any changes to the campgrounds. CP 125. Neither is the Presbytery of Olympia, owner of the camp. CP 42.

Many activities, including all meals, were held in and around the dining hall at camp. CP 126. Plaintiff claims he tripped over a railroad tie as he was taking a shortcut to reach the rear door of the dining hall, where there was no lit path, as he was returning from the Longhouse to obtain a soft drink, before joining the group on the beach for drumming and a bonfire. As confirmed by Mr. Kentop, the dining hall was easily and safely accessible by staying on marked paths and going through lighted doorways each night. CP 126. There was no reason to leave the marked pathways or to enter the dining hall through any door that did not have an outside light. CP 126. Indeed, according to Mr. Kentop's testimony, the path from the Longhouse, where plaintiff was staying, to the dining hall,

was sufficiently lit along the marked path. Plaintiff himself does not dispute this testimony. CP 126; CP 159; CP 157.

As he took the shortcut, plaintiff admitted that it was dark out, so dark out that he could not see the ground as he walked towards one of the doors in the back of the dining hall and could not even see where he was walking. CP 145; CP 146. Plaintiff also acknowledged that he had gone in and out of the dining hall on at least three or four occasions during this 2004 retreat and had done so without incident. CP 153; CP 154. On all other occasions, Plaintiff had used a sidewalk. CP 151. There was a paved walkway to the front door and one that went across the front of the dining hall and down the side towards the back door. CP 144. However, when this incident occurred, plaintiff chose not to take advantage of the sidewalk he had safely used before, but instead, of his own volition, chose to take a shortcut through a grassy area, a route he had not taken before. CP 149; CP 151; CP 152; CP 144. Plaintiff admitted that no one told him to take the shortcut he had chosen. CP 161.

There was no light over the service door that plaintiff was intending to enter. CP 42. Moreover, plaintiff admitted that he has no evidence that even if there had been a coach light over the door he chose to enter through, that this light would have illuminated the railroad tie he apparently tripped over. CP 150; CP 151.

Defendants each filed motions for summary judgment on February 26, 2009. CP 25-38; CP 110-119. The Court granted both of these motions on March 27, 2009. CP 278-283. The appeal was timely filed. Plaintiff's counsel belatedly requested an extension of time to file his opening brief; this one-time extension was granted, with the brief to be filed on August 10, 2009. The brief, however, was not received by PSRC's counsel until August 13, 2009.

III. LAW AND ARGUMENT

A. Summary Judgment Standard of Review

In reviewing an order by a trial court granting summary judgment, this Court must engage in the same inquiry as the trial court. *Barr v. Day*, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). Summary judgment is proper when, viewing all the evidence and reasonable inferences therefrom most favorably to the nonmoving party, the court concludes that: (1) There is no genuine issue as to any material fact; (2) reasonable persons could reach only one conclusion; and (3) the moving party is entitled to judgment as a matter of law. *Higgins v. Stafford*, 123 Wn.2d 160, 169, 866 P.2d 31 (1994); CR 56(c).

A moving party may meet its burden on summary judgment by showing there is lack of competent evidence supporting the nonmoving party's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226,

770 P.2d 182 (1989). Where a plaintiff fails to come forward with facts sufficient to establish the existence of elements essential to his or her claim, “there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

B. PSRC Was Not the “Possessor” of the Serenity of the Sound Camp and, as a Matter of Law, Owed No Duty to Plaintiff.

The trial court correctly held that PSRC was not the “possessor” of the camp where plaintiff was injured and, accordingly, also correctly ruled as a matter of law that PSRC did not owe any duty to plaintiff. CP 279. To reach this appropriate conclusion, the trial court analyzed the scant case law in Washington regarding the definition of “possessor” and correctly found that PSRC, a committee that merely rented out a rustic camp for the weekend, was not the “possessor” of the camp that owed its participants any duties as concerns the physical layout and lighting of that camp.

The trial court also was correct in understanding its role that the issue of whether a duty exists in the first instance is a question of law. *Coleman v. Hoffman*, 115 Wn. App. 853, 859, 64 P.2d 65 (2003). As an elementary proposition, in order for PSRC to owe any duty, plaintiff must

be able to establish that PSRC was a “possessor” of the Sound View Camp and Retreat Center. *See Coleman*, 115 Wn. App. at 859; *see also Strong v. Seattle Stevedore Co.*, 1 Wn. App. 898, 466 P.2d 545, *review denied*, 77 Wn.2d 963 (1970). To qualify as a possessor, there must be evidence that the entity was in control of the property. As set forth in the Restatement (Second) of Torts § 328E (1965), to be a possessor of land, a person or entity must be in occupation of the land “with intent to control it.” Restatement (Second) of Torts § 328E(a).

Plaintiff’s reliance on *Strong* is unavailing. In *Strong*, a fireman was killed when he was putting out a fire caused when a cable, carrying 440 volts of electrical power between a massive crane and the cable it operated on, was pinched, creating a fire on the wooden pier on which the crane was affixed. The court ruled that because the defendant controlled the operation of the crane in loading the ship, and that the crane literally was not capable of movement off the pier, the crane became part of the pier and the defendant was deemed to be the possessor of land. Significantly, the defendant was found to supervise the operation of the crane and to exercise control over the pier.

In contrast, here there were no facts for the trial court to find that PSRC supervised the operation of the camp. The facts are undisputed that PSRC did not occupy the camp “with intent to control it.” The camp was

controlled by Sound View Camp, who retained the authority to limit the types of activities that occurred on the property. CP 137-139. Moreover, the omissions of which plaintiff complains were in no way created by PSRC; *i.e.*, PSRC did not and could not decide on the lighting at the camp; PSRC did not and could not determine the layout of the walkways at the camp; PSRC did not and could not direct the placement of any railroad ties at the camp. Significantly, the other defendants have never taken the position that PSRC had any of these responsibilities.² CP 25-38.

Plaintiff's reliance on *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 666 P.2d 392 (1983), cited for the first time in its appeal, similarly does not advance the case for plaintiff. In *Jarr*, a prospective buyer was injured when he was looking around an unfinished condominium during an open house, while the agent of the listing real estate broker stayed in his car. The plaintiff in *Jarr* was injured when he pulled some sheetrock that was leaning against a wall.

The court in *Jarr* did not conclude that the real estate broker was a possessor of land based on the scrutiny of any facts, however. The real estate company conceded at oral argument that it was a possessor of land

²Neither has plaintiff in the context of its summary judgment briefing. Although plaintiff submitted a declaration from an expert, Richard Gill, Gill never asserts that the duties to plaintiff were owed by any entities other than the Presbytery of Olympia and/or Sound View Camp. CP 185-186.

for purposes of premises liability. 35 Wn. App. at 329. Moreover, the construction company, who also was a defendant, had answered one of the real estate company's requests for admission by asserting that the broker was in complete charge of the open house. *Id.*

In sharp contrast, here PSRC did not concede it was the "possessor" of the camp or that it was in control of the camp at oral argument or any other time. In fact, the very basis of PSRC's motion for summary judgment was that it was not the possessor of the camp. CP 115; CP 270-271. Moreover, at no time have the other defendants in this case asserted that PSRC was the possessor of the camp. Indeed, the other defendants did not even file an opposition to PSRC's motion for summary judgment.³

Finally, plaintiff's citation to *Mesa v. Spokane World Exposition*, 18 Wn. App. 609, 570 P.2d 157 (1977), also cited for the first time in this appeal, is not instructive, either. In *Mesa*, the plaintiff was injured when he fell down an unbarricaded ventilator shaft. As in *Jarr*, the court was not called upon to answer the issue of control of premises. It was not disputed that the western portion of the Opera House and Washington

³ The other defendants did file a reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, in which plaintiff had raised arguments concerning the status of PRSC as a possessor of the camp, but the other defendants did not join in plaintiff's arguments that PSRC was the possessor of the camp. CP 264-268.

State Pavilion was under the sole control of defendant Max J. Kuney Corporation and that the eastern portion was under the sole control of a different defendant, H. Halvorson, Inc. *Id.* at 611. The factual issues centered around the breadth of Spokane World Exposition's invitation to the public and whether the other two defendants knew or should have known of the invitation's overbreadth and thereby, breached their respective duties by not failing to make the premises secure or to post signs or to barricade the ventilator's shaft. Again, therefore, there were no facts for the court to consider on the issue of control; this issue was conceded.

The undisputed facts in this case were correctly viewed by the trial court in finding that PSRC was not the "possessor" of the camp. Accordingly, the trial court correctly concluded that PSRC owed no duty to plaintiff.

C. The Trial Court Correctly Found That Even If PSRC Was a "Possessor" of Land, the Undisputed Facts Demonstrate that PSRC Did Not Breach Any Duty.

Although unnecessary for its dismissal of plaintiff's claims against PSRC, given its ruling that PSRC was not a possessor of the camp and therefore owed no duty, the trial court further ruled that even if PSRC could be deemed a possessor of the camp, the undisputed facts showed that PSRC did not breach any duty towards plaintiff. CP 279.

The duties a possessor of land owes to an invitee⁴ are as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(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 reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965), cited with approval in

Tincani, 124 Wn.2d at 138. However, there is no duty to warn of open and obvious dangers.

A possessor of land is not liable to his 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.

Restatement (Second) of Torts § 343A(1) (1965).

⁴ Plaintiff has merely asserted that plaintiff was an invitee. CP 254. However, this classification is accurate only so long a plaintiff remained within the scope of the invitation. See *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994); *Egede-Nissen v. Crystal Mountain*, 93 Wn. 2d 127, 132, 606 P.2d 1214 (1980). Arguably, once plaintiff left the lighted sidewalk, his status changed to that of licensee, with the commensurate lesser duties owed to him. *Tincani*, 124 Wn. 2d at 133-34; see also Restatement (Second) of Torts § 342 (1965). The difference is that an invitee "is . . . entitled to expect that the possessor will exercise reasonable care to make the land safe for his [or her] entry." *Tincani*, 124 Wn.2d at 138, quoting Restatement (Second) of Torts § 343, comment b. Regardless of whether plaintiff was a licensee or invitee, however, PSRC neither owed nor breached a duty to him.

Here, plaintiff himself created the danger by walking through an unmarked and unlit grassy area, where there was no sidewalk and where he had not walked before. As the Restatement itself points out,

If [the invitee] knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.”

Restatement (Second) of Torts § 343A (1965), comment e.

The undisputed facts here establish the following:

- Plaintiff had been advised to bring a flashlight, but failed to do so (CP 113; CP 114);
- Plaintiff was familiar with the ingress and egress to the dining hall and on every other occasion before the night of his fall, had used paved, lighted walkways to enter the dining hall and had done so without incident (CP 153; CP 153; CP 151; CP144);

- Plaintiff admitted that the walkways and lighting over the front door of the dining hall were sufficient (CP 159; 157);
- There was no invitation to enter through the service entrance to the dining hall, as there was no light over that doorway (CP 41);
- Plaintiff admitted that he chose, and was in no way instructed by the PSRC, to take a shortcut through the unlit grassy area (CP 149; CP 151; CP 152; 144; CP161);
- Plaintiff admitted the area was dark and that he could not see the ground in front of him (CP 142; CP 143; CP 145; CP 146).
- PSRC had no authority or control over the layout of the walkways, the lighting of the walkways, or the location or type of lighting on the outside of the dining hall at the camp (CP 171; CP 172);
- The Presbytery of Olympia had placed the railroad tie in the grassy area, as required per regulations to protect a propane tank (CP 41-42).

Plaintiff left the lighted sidewalk at his own peril and took an unmarked path that was not intended. That he fell and injured himself cannot be attributed to the acts or omissions of PSRC as a matter of law.

Plaintiff's reliance on the declarations of Richard Gill, a human factors expert, or Joe Cutro, another participant at the retreat, to create genuine issues of material fact utterly fails. The conclusory statements of Gill, who has never been to the site and whose opinions are based on photographs that have not been authenticated to represent the situation as it existed the night plaintiff fell, run afoul of the well-established prohibitions that expert opinions must be based on facts. "Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment." *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 19, 851 P.2d 689 (1993). In large part, Gill's statements fit into this category of impermissible testimony. CP 184-187. Moreover, it is significant that Gill asserts that the Presbytery of Olympia and/or Sound View Camp should have had a safety and risk program, not PSRC. CP 186.

Plaintiff's reliance on only the first declaration, and therefore incomplete, testimony of Joe Cutro similarly fails to create any genuine issues of material fact. CP 221-223; CP 276-277. The two incidents have virtually nothing in common, except that both gentlemen apparently

tripped over the same railroad tie. Cutro makes clear in his second declaration that he only tripped over the railroad tie because he was backing up and did not see the tie because it was in his blindspot. CP 277. He did not know if the incident occurred during daylight or nighttime, but was certain that he had never advised anyone on the PSRC of his stumble. CP 277.

There are no facts, therefore, that establish a breach of duty on the part of PSRC. The trial court properly dismissed all claims against PSRC on this basis, as well as the initial basis that there was no duty owed by PSRC to plaintiff in the first instance.

IV. CONCLUSION

The trial court's order, granting summary motion in favor of PSRC, should be affirmed.

DATED this 14th day of September, 2009.

BETTS, PATTERSON & MINES, P.S.

By *S. Karen Bamberger*
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of Snohomish County. I am over 18 years of age and not a party to this action. My business address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, WA 98101-3927.

On the 11th day of September, 2009, I caused the attached Brief of Respondent Puget Sound Retreat Committee to be served via hand-delivery by ABC Legal Messengers upon:

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DATED this 11th day of September, 2009 at Seattle, Seattle, Washington.


Denise Mary Pope