

63751-7

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NO. 63751-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SCOTT DAVID McDONALD,

Plaintiff/Respondent,

v.

HIGHLINE SCHOOL DISTRICT #401, a governmental entity,

Defendant/Petitioner.

BRIEF OF APPELLANT HIGHLINE SCHOOL DISTRICT #401

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FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 OCT 26 PM 2:51

ORIGINAL

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I. INTRODUCTION

Law enforcement officers enter private property, during the course of their public duties, at unexpected times and in unexpected manners. They may be searching for evidence, pursuing a suspect, or responding to an emergency call for help. Given their unique position, law enforcement officers do not have a reasonable expectation that property, not otherwise open to the public, has been maintained for their emergency use at any time.

In the present case, respondent Deputy McDonald, a King County sheriff's deputy, allegedly sustained injuries after responding to an emergency call on appellant Highline School District No. 41's property. In order to determine the duty of care owed Deputy McDonald, the School District now seeks a ruling on an issue of first impression of Washington: are law enforcement officers, entering private land in the performance of their public duties, invitees or licensees?

II. ASSIGNMENTS OF ERROR

1. The trial court erred on May 22, 2009, when it denied Defendant's Motion for Summary Judgment and ruled as a matter of law that Deputy McDonald was a business visitor when he entered the School District's property.

2. The trial court erred on June 2, 2009, when it denied

Defendant's Motion for Reconsideration and ruled as a matter of law that Deputy McDonald was a business invitee when he entered the School District's property.

III. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR

Should the Court rule as a matter of law that Deputy McDonald was a licensee on School District property, and therefore that the School District owed him only the duty of care owed to licensees, when he entered the School District property while on duty as a law enforcement officer responding to a reported burglary?

IV. STATEMENT OF THE CASE

The facts material to this appeal are undisputed. The Highline School District owns a parcel of property in Burien, Washington, currently occupied by Highline High School. (CP 21.) On the night of December 20, 2005, someone called 911 to report a possible burglary there. (CP 4.) Deputy McDonald, acting within his capacity as a King County sheriff's deputy, responded to the call. (*Id.*) While searching the premises for possible suspects, Deputy McDonald noticed a garbage dumpster in which a person could hide. (*Id.*) Next to the dumpster was a short flight of steps and a wooden platform providing access to the dumpster. (*Id.*; photograph at CP 26.) While in the process of using the steps and platform, Deputy

McDonald allegedly fell and sustained injuries.¹ (CP 4-5.)

The location of the dumpster and platform at issue in this case is circled on the satellite images of the property, designated as CP 24 and CP 28. The dumpster and platform are School District property. (CP 22.) They were not and are not open to the public.² (*Id.*)

Plaintiff Deputy McDonald filed his Complaint against the defendant School District on December 3, 2008. (CP 3.) He alleges the School District negligently maintained the platform and is therefore liable for his injuries. (CP 5.) On April 24, 2009, the School District filed a motion for partial summary judgment, requesting the trial court to rule as a matter of law that Deputy McDonald was a licensee when he entered School District property, and therefore the School District owed him only the duty of care owed to licensees. (CP 11-20.) The trial court heard oral argument on May 22, 2009, entered an order denying the School District's motion, and ruled that Deputy McDonald was a business visitor. (CP 53-54.)

¹ In his response to the School District's motion for partial summary judgment, Deputy McDonald asserts, via inadmissible hearsay evidence, that the school staff knew the platform steps were "slick" and a "death trap." In its May 22, 2009 order, the trial court granted the School District's motion to strike those statements from the Declaration of Mike C. Mansanarez, and therefore the Court should not consider them. (CP 55-56.) Regardless, these statements go to the issue whether the School District *breached* any duty of care owed to Deputy McDonald, which is not in front of this Court and is immaterial to the determination of what duty applies.

² Deputy McDonald conceded at oral argument on the School District's motion for partial summary judgment that there is no genuine issue of fact that the dumpster and platform were not open to the public.

On June 3, 2009, the School District filed a motion for reconsideration of the trial court's May 22, 2009 order. (CP 57-66.) In the alternative, the School District requested that the trial court certify the issue for discretionary review under RAP 2.3(b)(4). (*Id.*) The trial court requested additional briefing on the School District's motion for reconsideration, but on June 24, 2009, entered an order denying that motion. (CP 86-87.) This court has accepted discretionary review of this issue of first impression in Washington. The School District asks that this Court rule as a matter of law that law enforcement officers who enter private land in the performance of their public duties are licensees, owed the same duty of care landowners owe other licensees.

V. ARGUMENT & AUTHORITIES

A. Standard of Review.

“Appellate review of a trial court's decision on summary judgment is *de novo*.” *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). Summary judgment is properly granted when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” CR 56(c).

B. Deputy McDonald Was a Licensee on School District Property, and the School District Owed Him Only the Duty of Care Owed to Licensees.

In order to establish his negligence claim, Deputy McDonald must

show: (1) the existence of a duty; (2) breach of that duty; (3) resulting injury; and (4) proximate cause. *Musci v. Graoch Assocs. P'ship #12*, 144 Wn.2d 847, 854, 31 P.3d 684 (2001). The primary determination of whether a duty of care exists is a question of law for the court to decide. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). In this case, the duty of care the School District owed Deputy McDonald is dependent on Deputy McDonald's status on the School District's premises. *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996).

1. *On December 20, 2005, Deputy McDonald Was a Licensee on Highline High School Premises.*

The entrant's common law status as an invitee, licensee, or trespasser dictates the landlord's duty of care.³ *Degel*, 129 Wn.2d at 49. An invitee may be either a public invitee or a business visitor. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). A public invitee is one invited to enter land as a member of the public for the purpose for which the land is held open to the public. *Id.* An example of a public invitee is an individual who goes swimming at a beach after receiving a public invitation from the property owner to use the property in that

³ A trespasser is one who enters land without invitation or permission, and not in the performance of a duty to the landowner. *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453 (1966). The parties agree that Deputy McDonald was not a trespasser.

manner, without charge.⁴ See *Fosbre v. Wash.*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967). A business visitor is one who enters land in connection with a business dealing with the landowner. *Id.* An example of a business visitor is an individual who pays an entrance fee to visit a local zoo. See *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128-29, 875 P.2d 621 (1994).

A licensee is one privileged to enter land without an invitation, but with the landowner's consent. *Holm v. Inv. & Sec. Co.*, 195 Wn. 52, 59 (1938); *Younce*, 106 Wn.2d at 667. An example of a licensee is a social guest – one who is invited onto the property but does not meet the definition of an invitee. *Swanson v. McKain*, 59 Wn. App. 303, 309, 796 P.2d 1291 (1990). Only invitees have an implied assurance that the owners have taken precautions to make the premises reasonably safe for their use. *Younce*, 106 Wn.2d at 668.

No Washington court has determined the common law status of a law enforcement officer who enters private land in the exercise of his public duty. *Sutton v. Schufelberger*, 31 Wn. App. 579, 587, 643 P.2d 920 (1982). This is an issue of first impression in Washington.

The weight of authority from other jurisdictions follows what is

⁴ Deputy McDonald acknowledges that, because the dumpster and platform were not open for public use, he could not have been a public invitee.

called the Fireman's Rule: firefighters and law enforcement officers, entering private land in the exercise of their public duties, are licensees. *See, e.g., Louisville & N.R.R. v. Griswold*, 241 Ala. 104, 106, 1 So. 2d 393 (1941); *Scheurer v. Trs. of Open Bible Church*, 175 Ohio St. 163, 192 N.E.2d 38 (1963); *Furstein v. Hill*, 218 Conn. 610, 590 A.2d 939 (1991); *Kennedy v. Tri-City Comprehensive Cmty. Mental Health Ctr.*, 590 N.E.2d 140 (Ind. 1992); *Sherman v. Suburban Trust Co.*, 282 Md. 238, 384 A.2d 76 (1978); *Reetz v. Tipit, Inc.*, 151 Mich. App. 150, 390 N.W.2d 653 (1986); *Knoetig v. Hernandez Realty Co., Inc.*, 255 N.J. Super. 34, 604 A.2d 619 (1992); *Vroegh v. J&M Forklift*, 165 Ill. 2d 523, 530, 651 N.E.2d 121 (1995) (describing fireman's rule as an implied primary assumption of risk).

The Restatement (Second) Torts also follows the Fireman's Rule. It states: "Except as stated in Subsection (2), the liability of a possessor of land to one who enters the land only in the exercise of a privilege, for either a public or a private purpose, and irrespective of the possessor's consent, is the same as the liability to a licensee." Restatement (Second) Torts §345(1). Subsection (2), not applicable here, states: "The liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land *held open to the public*, is the same as the

liability to an invitee.” *Id.* (emphasis added). Deputy McDonald, a King County sheriff’s deputy, was privilege to enter the School District’s property, not otherwise open to the public, without an invitation. This Court should follow the weight of authority and classify Deputy McDonald as a licensee.

2. *The Trial Court Improperly Relied Upon the Strong Decision When Denying the School District’s Motions.*

In classifying Deputy McDonald as a business visitor, the trial court relied upon the early Division I opinion in *Strong v. Seattle Stevedore Co.*, 1 Wn. App. 898, 466 P.2d 545 (1970). There, the defendant land possessor negligently started a fire on its own premises, and a firefighter died while attempting to extinguish the fire. *Id.* at 898. The court rejected the majority rule from other jurisdictions, and held the firefighter to be a business visitor invitee. *Id.* at 902. In doing so, the court considered the “economic benefit test,” which states:

‘[A]n invitee is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant is then engaged. To qualify as an invitee or business visitor under this definition, it must be shown that the business or purpose for which the visitor comes upon the premises is of actual or potential benefit to the owner or occupier therefore.’

Id., at 902-03, citing *McKinnon v. Washington Fed. Sav. & Loan Ass’n*, 68 Wn.2d 644, 649, 414 P.2d 773 (1966).

To find that a visitor is an invitee under the economic benefit test, there must be evidence that the visitor conferred some economic benefit upon the landowner. *McKinnon*, 68 Wn.2d at 644. However, an economic benefit does not automatically qualify a visitor as an invitee. *See Thompson v. Katzer*, 86 Wn. App. 280, 286, 936 P.2d 421 (1997) (the fact that an entrant confers an economic benefit to a landowner, although a factor to consider, does not automatically render the entrant a business visitor). The test, as stated in *McKinnon*, focuses on whether the visitor entered land in connection with some business purpose. Unlike the plaintiff in *McKinnon*, a member of a Girl Scout troop using the defendant's building to hold troop meetings, Deputy McDonald had no business relationship with the School District. He entered the School District property in response to an emergency situation not of the District's creation, and his purpose was to apprehend criminal suspects and protect the public safety. Deputy McDonald cannot be classified as a business visitor.

Furthermore, that the School District could have "benefited" from the possible apprehension of a suspect and the possible return of stolen property is immaterial to this analysis. Had Deputy McDonald entered School District property in response to a reported assault, his apprehension of criminal suspects would not confer an economic benefit to the School

District. The court should not create a distinction between the duty a landowner owes to law enforcement officers responding to burglary or property theft crimes, and those responding to assault, domestic violence, or other “non-economic” crimes. In other words, the legal classification of a police officer coming onto private property not otherwise open to the public should not turn on the nature of the underlying criminal activity involved, and on whether there is some notion of “economic benefit” to the landowner flowing from the officer’s presence on the property. Such a distinction is unworkable and would have a chilling effect on landowners who wish to report burglaries or theft.

Finally, while the *Strong* court relied heavily on the economic benefit the defendant landowner received from the fire department’s response, the court explicitly limited its holding to the specific facts of that case, where the defendant landowner also negligently caused the fire requiring the firefighters’ response. *Strong*, 1 Wn. App. at 902 and 905. In that situation (obviously not present here), the policy rationale behind classifying law enforcement officers an invitee was stronger; the possessor of the land was directly responsible for the situation that placed the firefighters in danger, thus increasing the duty of care it owed to the decedent.

By contrast, the School District did not negligently cause the

attempted burglary on its premises and was not responsible for the law enforcement response. In a situation such as this one, the landowner should not be burdened with a heightened duty of care. The *Strong* holding was limited to its specific facts, is distinguishable from this case, and is not controlling on this issue.

Regardless of the holding in *Strong*, the most important distinction between an invitee and a licensee is that licensees do not have an implied assurance that property, not otherwise held open to the public, has been made reasonably safe for their use. *Younce*, 106 Wn.2d at 688. Law enforcement officers enter private land at unpredictable times and in unpredictable manners. Deputy McDonald could not reasonably believe the School District maintained all parts of its property, which were not open to the public, in a manner to ensure his emergency use. This Court should therefore hold that Deputy McDonald was a licensee when he entered School District property.

3. *The School District Owed Deputy McDonald the Duty of Care Owed to Licensees.*

In Washington, a landowner owes invitees an affirmative duty to use ordinary care to keep premises in a reasonably safe condition. *Degel*, 129 Wn.2d at 49. By contrast, in Washington, a landowner is subject to liability for harm caused by a condition of the land and incurred by a

licensee, only if

- (a) the possessor knew or had reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved.

Tincani, 124 Wn.2d at 133. Because Deputy McDonald was a licensee on School District property, the School District only owed him the duty of care owed to other licensees.

4. *Public Policy Implications Support Deputy McDonald's Classification as a Licensee.*

The difference between the standard of care owed to invitees and licensees is significant. If the jury is instructed that, as an invitee, the School District owed Deputy McDonald an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition, the ramification would be an imposed duty that encompasses a responsibility to prepare all property, even if not open to the public, in a way that will be safe for law enforcement officer use *at all times* and *in all manners*. Plaintiffs in such cases will be able to prove negligence simply by showing that the School District knew its steps were unsafe and, even though not open to the public, failed to reasonably maintain them. However, by classifying Deputy McDonald as a licensee, the Court will

require him to prove that he did not have any reason to know that the platform steps might not be maintained specifically for his emergency use, and that the School District should have expected that he would not recognize the possible risks undertaken in using the steps and platform in the course of his emergency response. This more limited duty protects landowners from an extremely broad duty and the unreasonable burden of maintaining property in a certain condition for law enforcement, even when not otherwise open to the public.

For example, to avoid breaching the duty owed to a law enforcement invitee, a landowner could be required to maintain an abandoned building, although completely closed to the public, in a manner reasonably safe for a law enforcement officer to quickly access and search it in pursuit of a criminal suspect. A homeowner would be required to maintain his basement workshop in a safe manner, anticipating the remotest possibility that a police officer might enter it during a search of the house in response to a burglary alarm. Likewise, a landowner could be required to maintain a construction site in a manner reasonably safe for law enforcement access and use, at all times, in the event of an emergency search for evidence.

These few examples demonstrate how impractical it is to classify a law enforcement officer responding to a call as an invitee. Landowners

cannot predict criminal activity or law enforcement response, and they cannot be expected to maintain all property, not otherwise open to the public, in a reasonably safe manner for an emergency police response at any time. A rule that classifies law enforcement officers in Deputy McDonald's position as invitees would have a chilling effect on land owners wishing to call 911.

The Restatement illustrates the Fireman's Rule with the following example:

A is in possession of a building in which, on a back stairway not open to the public, there is a step in which is dangerously defective. A and his employees do not know of the defect, but by the exercise of reasonable care could easily discover it. In the middle of the night a fire breaks out in the building, and B, a public fireman, comes to extinguish it. He ascends the stairway, and is injured by the collapse of the defective step. A is not liable to B.

Restatement (Second) Torts § 345, illustration 1.

Additionally, the Supreme Court of Connecticut describes the policy rationale behind qualifying law enforcement officers as licensees, and imposing only a limited duty of care on property owners as follows:

[P]olice officers often enter property at unforeseeable times and may enter unusual parts of the premises under emergency situations. Such public officers enter the land regardless of the owner's consent; indeed, if the conditions for the exercise of their public duty exists, the owner would not be privileged to exclude them. Recognizing that *only invitees may rely on an implied representation of safety*, courts have considered it unreasonable to require

landowners to undertake the same standard of care for public officers *whose presence the landowners can neither predict nor interdict*. There would be an obvious hardship in holding otherwise, because landowners would then be under compulsion to keep all parts of the premises in a condition perhaps uncalled for by the normal use to which the premises are devoted.

Furstein, 218 Conn. at 616-17 (internal citations omitted) (emphasis added). Under these strong policy implications, a law enforcement officer in Deputy McDonald's position should be considered a licensee, and the duty of care owed to licensees should apply.

VI. CONCLUSION

This case presents a pure issue of law that has not been decided in Washington. When Deputy McDonald entered School District property and accessed a platform and dumpster not open to the general public, he was acting as a licensee. He did not enter the land to conduct any business dealings with the School District, but instead to apprehend criminal suspects and protect the public safety. As a law enforcement officer, responding to an emergency situation, Deputy McDonald could not reasonably believe the premises, not open to the public, had been made safe for his use.

Further, law enforcement officers are public servants and serve a unique and necessary role to ensure citizen safety. In the course of their official duties, they may be called, at any time, to enter private land and

access unusual and unpredictable locations in pursuit of criminal suspects or other evidence. It is burdensome and unworkable to impose upon landowners an affirmative duty to maintain in a reasonably safe manner all aspects of their property, not otherwise open to the public, at all times, due to the remote chance of police activity on the premises. The Court should hold that Deputy McDonald was a licensee when entering the School District property, and as such, the School District owed him only the duty of care it owes to other licensees.

Respectfully submitted this 23rd day of October, 2009.

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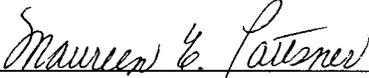
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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2009, I caused BRIEF OF APPELLANT HIGHLINE SCHOOL DISTRICT #401 to be filed with the Clerk of the Court and delivered to the following in the manner described:

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