

64829-2

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No. 64829-2

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

RONALD W. MOE, Respondent,

v.

GARY D. GRABER and JANE DOE GRABER husband and wife
and the marital community composed thereof; and JOHN DOES
and JANE DOES 1 through 10, Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY
#08-2-08349-5

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Plaintiff Ronald Moe argues a contradiction. On the one hand, Moe alleges Defendant Gary Graber waived his right to argue that an unknown third-party was at fault. (Respondent's Brief at 11) ("Graber did not plead nonparty at fault as a defense"). On the other hand, he notes that the trial court rejected Graber's argument that an unknown party released the cattle on the road. (Respondent's Brief at 19) ("trial court expressly rejected Mr. Graber...was victimized by unknown third parties").

Graber properly raised the issue of third-party liability. Because he was acting pro se when he filed his answer, Graber did not strictly comply with the technical requirements of CR 8(c) and 12(i). But he substantially complied -- his answer clearly alleged a nonparty was at fault or was liable as an intentional tortfeasor. (Answer; CP 402-405). Furthermore, the trial court addressed, but did not rule on, the issue of a nonparty opening the cattle gates and causing the accident.

The trial court erred, however, by failing to assign fault or liability to the unknown vandal. The court ruled that there was no evidence Graber was victimized, yet concluded that any unknown party was at best an intervening rather than superseding cause.

(Finding of Fact ¶ 17, Conclusion of Law ¶ 9; CP 12, 16). Substantial evidence does not support this finding of fact and the conclusion of law is in error. Appellant Gary Graber respectfully requests the Court to vacate the trial court's judgment and remand for retrial.

I. Graber Raised – And The Court Ruled On – A Nonparty At Fault

Graber raised the issue of nonparty liability in his answer and at trial. As detailed below, substantial evidence supports a finding that an unknown third party opened the gates that allowed Grabers' cows to enter the road. But the trial court found this evidence lacking or irrelevant. Because this was error, Graber has appealed.

Respondent Moe asserts that third party liability, whether allocating fault to a nonparty or excluding damages caused by an intentional tortfeasor, is a new argument on appeal. (Respondent's Brief at 13). This is incorrect for two reasons.

First, Graber, acting pro se, substantially complied with the pleading rules for raising nonparty fault. In his answer, Graber made clear that an unknown vandal caused the accident by releasing the cows.

The defendant admits he has a duty to keep livestock in an enclosed area and was discharging his duty. The cow was loose and on the roadway because vandals had trespassed and committed malicious mischief by opening four of the cattle gates that the defendant keeps closed.

(Answer section VI; CP 407) (Answer section XIII; CP 407) (“the defendant’s cow was on the roadway as a result of acts of vandalism by third parties”).

These allegations substantially complied with CR 8(c) and 12(i).

Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute. It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Application of Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981).

The doctrine of substantial compliance applies to the civil rules.

Morin v. Burris, 160 Wn.2d 745, 755, 161 P.3d 956 (2007) (“we

have not exalted form over substance but have examined the defendants’ conduct to see if it was designed to and, in fact, did apprise the plaintiffs of the defendants’ intent to litigate the cases”).

Here, Graber’s pro se answer notified plaintiff Moe that a nonparty was to blame for the accident, and that the identity of the

vandals is unknown. This satisfies every reasonable objective of CR 8(c) and CR 12(i).

Graber's mistake was that he did not title his allegations an affirmative defense. But this is not fatal. Under CR 8(c),

when a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

CR 8(c). Furthermore, CR 8(f) provides that "all pleadings shall be so construed as to do substantial justice." Plaintiff Moe had fair warning that an unknown third party was at fault for his injuries.

Second, Graber submitted evidence on, and the trial court considered, the existence of a nonparty contributing to the accident. Vandals had destroyed the farmhouse on the property, stolen metal machinery from the barn, and used the outbuildings to strip cars. (12/03/09 VRP 106-107, 156-159). In addition, on the night of the accident, the herd of cows was milling in an area near the fence, rather than where it normally congregated at night. (12/01/9 VRP 46). Someone had cut the bailing twine that normally held the gates secure. This all suggested that someone had opened the gates shortly before the accident.

By evaluating the evidence, the parties and the trial court implicitly accepted the defense.

“Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties.” Bernsen v. Big Bend Elec. Coop., 68 Wn. App. 427, 433-34, 842 P.2d 1047 (1993). However, in light of the rule's policy to avoid surprise, affirmative pleading sometimes is not required.

Henderson v. Tyrrell, 80 Wn. App. 592, 624, 910 P.2d 522 (1996).

The parties tried the affirmative defense by implied consent.

The trial court erred by admitting evidence of nonparty fault and then ruling it irrelevant.

MR. WOLFF: ...My question was whether or not the Court found that the defendant opened the gate or whether or not it was open by somebody other than the defendant?

THE COURT: I think that the odds are that the defendant himself did not open the gate, but that's ultimately not determinative in the Court's decision.

(12/07/09 VRP 110). The Court ruled that regardless of who opened the gate, Graber should have prevented the cows' escape.

To discount the liability of a third party, the Court implicitly ruled that enough time existed for Graber to inspect the gates, see the open one, and close it before cattle escaped. Yet vandalism on the night of the accident was unpreventable and unstoppable.

Even locks on the gates can be sliced with a bolt cutter, as rancher John Hillis testified. (12/03/09 VRP 114-115). The trial court erred by holding Graber responsible regardless of the acts of third parties.

II. Tegman Requires Segregating Damages Caused By The Intentional Tortfeasor

Washington law requires the trier of fact to segregate the damages caused by an intentional tortfeasor from those caused by negligent ones. This is so even if the plaintiff is partially at fault for his injuries.

A negligent defendant cannot be jointly and severally liable with an intentional tortfeasor for plaintiff's damages.

Where the plaintiff's injuries are the result of both negligence and intentional torts, the damage attributable to the intentional tort must be segregated from the liability of other defendants for their negligence, since the negligent defendants are not jointly and severally liable for the intentionally inflicted harm. For example, where a plaintiff was the victim of conversion as well as legal malpractice in permitting the conversion to occur, the trial court improperly entered judgment against all defendants for the damages sustained, without segregating the damages for the intentional torts.

16 Washington Practice § 12.29 (citing Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 75 P.3d 407 (2003)).

The Supreme Court in Tegman examined and forbade joint and

several liability between a negligent and intentional tortfeasor, not that between negligent tortfeasors.

Citing Rollins v. King County Metro Transit, 148 Wn. App. 370, 199 P.3d 499 (2009), respondent Moe argues that Tegman does not apply to cases of several liability between plaintiff and defendant. (Response Brief at 13). But Rollins does not support such a broad statement. Instead, *where the trier of fact excludes damages caused by intentional conduct*, Tegman does not require segregation of damages.

The jury here was instructed that plaintiffs had to prove that Metro was negligent, that Metro's negligence was a proximate cause of plaintiffs' injury, that there may be more than one proximate cause of an injury, and that its verdict should be for Metro if it found the sole proximate cause of injury was a cause other than Metro's negligence. The court also instructed the jury about calculating damages:

In calculating a damage award, you must not include any damages that were caused by acts of the unknown assailants and not proximately caused by negligence of the defendant. Any damages caused solely by the unknown assailants and not proximately caused by negligence of defendant King County must be segregated from and not made a part of any damage award against King County.

Rollins v. King County Metro Transit, 148 Wn. App. 370, 379, 199 P.3d 499 (2009).

Here, the trial court did not exclude damages caused by the vandals who opened the gate. Instead, the court held Graber responsible for the accident regardless of how the cows escaped. Because this made Graber jointly and severally liable with the intentional tortfeasors, the court violated Tegman by failing to segregate damages.

III. Substantial Evidence Does Not Support The Trial Court's Findings Related To Nonparty Liability.

The trial court found “no evidence that defendant Gary D. Graber was actually victimized on the day of the collision or any other day prior to the collision.” (Findings of Fact ¶ 17; CP 12). Substantial evidence does not support this finding.

First, uncontested evidence proved that Graber had trouble with trespassers in the past. (Respondent's Brief at 6) (“just one week before the collision, Mr. Graber found a ‘chop shop’ in one of the properties’ buildings”). Respondent Moe simultaneously faults Graber for not taking *additional* precautions to prevent vandalism, and argues that no evidence exists that vandals opened Graber's

gates. With each act of vandalism, however, Graber took reasonable care to fix the problem and prevent further damage.

Second, Trooper Eagle, the first person at the scene after the collision, confirms the circumstantial evidence of vandalism. He testified that he saw the bailing twine laying on the ground next an open gate. (12/01/09 VRP 33). Next, he testified that he saw the cows on the road go through that open gate to return to their pasture. (12/01/09 VRP 52). Someone had broken through the bailing twine, opened the gate, and allowed the cows to escape.

Third, no reasonable explanation exists for the escape *other* than the cows went through the open gate. The trial court adopted a form of strict liability – Graber owned the cow on the road, therefore he is liable for the collision. How the cow got there was irrelevant. But the court's decision necessarily assumes that Graber had control over every gate at every moment. No rancher has that power. Because substantial evidence does not support the lack of vandalism, the trial court erred.

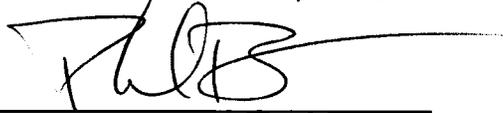
CONCLUSION

The trial court's decision rests on a contradiction: Gary Graber should have foreseen vandals opening his gates, but no evidence exists that vandals opened the gates shortly before the

accident. According to the trial court, regardless of how the cows made their way to the road, Graber is liable. Because this is incorrect as a matter of fact and law, Appellants Gary and Ruth Graber respectfully request this Court to vacate the trial court's judgment and remand for retrial.

DATED this 16th day of November, 2010.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the Opening Brief of Appellant to:

Law Office of Ben W. Wells, P.S.
210 E. Third St.
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DATED this 16th day of November, 2010.


Heidi Main