

FILED
SUPREME COURT
STATE OF WASHINGTON
11/22/2024 3:28 PM
BY ERIN L. LENNON
CLERK

Supreme Court No. 1035349

Court of Appeal Cause No. 59348-3-II

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

PAUL A. GOETSCH,

Respondent,

v.

DAVID ALLEN,

Appellants,

REPLY TO PETITION FOR REVIEW

WATHEN | LEID | HALL | RIDER, PC

Rick J Wathen, WSBA #25539

William L. Weber III, WSBA #28867

Attorneys for David Allen

222 Eturria Street

Seattle, WA 98109

Telephone: (206) 622.0494

I.	STATEMENT.....	1
II.	ARGUMENT.....	2
	A. RAP 13.4(b)(1) Conflict with Supreme Court.....	2
	B. Unreasonable Inference.....	4
	C. RAP 13.4(b)(2) Conflict with Court of Appeals...	5
	D. RAP 13.4(b)(4) Substantial Public Interest.....	5
III.	CONCLUSION.....	6

TABLE OF CASES AND AUTHORITIES

Washington Cases

<i>Eylander v. Prologis Targeted U.S. Logistics Fund, LP</i> , 2 Wn.3d 401, 539 P.3d 376 (2023).....	3
<i>Geise v. Lee</i> , 84 Wn.2d 866, 868, 529 P.2d 1054 (1975)	3
<i>Hill & Stout, PLLC, v. Mut. Of Enumclaw Ins. Co.</i> , 200 Wn.2d 208, 217, 515 P.3d 525 (2022).....	4
<i>Mihaila v. Troth</i> , 21 Wash. App. 2d 227, 505 P.3d 163 (2022).....	5
<i>Sjogren v. Props of Pac. NW, LLC</i> , 118 Wn.App. 144, 148-49, 75 P.3d 592 (2003).	2
<i>Tincani v. Inland Empire Zoological Soc.</i> , 124 Wn.2d 121, 139, 875 P.2d 621 (1994).....	3

Rules

RAP 9.12.....	4
RAP 13.4(b)	2
RAP 13.4(b)(1).....	2
RAP 13.4(b)(2).....	5
RAP 13.4(b)(4).....	2,5
RAP 13.4(2).....	2,5

I. STATEMENT

Respondent's summarization of the facts omits three critical facts: (1) that Mr. Goetsch had negotiated the slope at least once before without incident so he had intimate personal knowledge of the landscape and condition; (2) Goetsch was an experienced professional electrician that knew what kind of tools he would need to perform the job; and (3) there was an alternative route that Mr. Goetsch could have taken, and, in fact, that he did take after the incident. But this dispute over "facts" is largely irrelevant to the petition for review because as the respondent agrees the issue is whether there were facts that would permit reasonable inferences in the record to support Goetsch was motivated to complete the job. The record upon which the Court of Appeals relies is silent from Goetsch on his motivations and the Court of Appeals erred when they made an unreasonable inference from "facts" not a part of the record to support the

ruling.

II. ARGUMENT

The issues forming the basis for this petition are not complicated or complex. The review should be granted because Petitioner does meet the standards set forth in RAP 13.4(b). The Court of Appeals decision in this matter is in conflict with the cumulation of legal theory on landowner duties to invitees. RAP 13.4(2). Moreover, under RAP 13.4(b)(4), the decision of the Court of Appeals involves a substantial public interest since the decision appears to create a bar to the application of the “open and obvious” analysis to landowner duties when a contractor is involved.

A. RAP 13.4(b)(1) Conflict with Supreme Court

As the Respondent acknowledges, under Washington law, landowners typically have no duty to protect invitees from open and obvious dangers. *Sjogren v. Props of Pac. NW, LLC*, 118 Wn.App. 144, 148-49, 75 P.3d 592 (2003). The duty of a

landowner is one of reasonable care. *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975). Therefore, a landowner is not a guarantor of safety--even to an invitee. *Id.* at 871. Landowners are not guarantors of safety to invitees and are allowed, and even encouraged, to rely on the expertise of the professional contractors they hire to carry out specialized work on the premises. *Eylander v. Prologis Targeted U.S. Logistics Fund, LP*, 2 Wn.3d 401, 539 P.3d 376 (2023). Thus, the general rule in Washington disfavors landowner liability to business invitees that are contractors. The exception at issue in the matter at hand is if the landowner should anticipate the invitee will choose to encounter the risk nevertheless. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994). *Tincani* involved a teenage customer at a zoo, not a seasoned electrician walking with tools.

The Court of Appeals' ruling expands an exception to the general rule by finding that Mr. Allen should have anticipated

Mr. Goetsch would “choose to encounter the presumed danger posed by the hill because Goetsch wanted to finish the job and get paid.” Opinion at 9. No Washington Supreme Court ruling to date has extended an exception to landowner duties to invitees that creates per se liability on landowners if a contractor is involved. That is essentially what the Court of Appeals did here, however.

B. Unreasonable Inference

The Court of Appeals is only permitted to consider evidence and issues called to the attention of the trial court. RAP 9.12; *Hill & Stout, PLLC, v. Mut. Of Enumclaw Ins. Co.*, 200 Wn.2d 208, 217, 515 P.3d 525 (2022). Respondents have not and cannot show that the inferences drawn by the Court of Appeals relating to Mr. Goetsch’s motivations are based on facts anywhere in the record. The only “fact” in the record in this regard is that he is a contractor. That simply is not a sufficient factual basis to justify the Court of Appeals’ decision

and the decision fundamentally changes the law and evidentiary burdens if approved by this Court. The Court of Appeals' decision is based not on facts or reasonable inferences but speculation. The ruling is in contravention of any prevailing Court of Appeals or Supreme Court decisions. The record does not reflect that Mr. Goetsch needed to complete the job in order to get paid, since he had not yet started when the incident occurred.

C. RAP 13.4(b)(2) Conflict with Court of Appeals

If a ruling is misapplied, it is by definition in conflict with it. If the Supreme Court agrees there was insufficient evidence in the record for the Court of Appeals to apply the analysis in *Mahalia v. Troth*, 21 Wash. App. 2d 227, 505 P.3d 163 (2022) then the standard in RAP 13.4(b)(2) has been met.

D. RAP 13.4(b)(4) Substantial Public Interest

The decision of the Court of Appeals does expand the duties of landowners and changes the legal landscape for contractors.

The Court of Appeals ruling effectively changed the law such that in any incident involving contractors the landowner can be held liable regardless of the nature of the condition and the expectations of the contractor. Thus, the Court of Appeals' decision will affect a number of proceedings in the lower courts by barring any attempt for summary judgment to hold contractors accountable for their own decision making and agility while on another's property regardless of the nature of a condition they choose to encounter. The contractor will not even need to declare that he/she just wanted to get paid, the courts will just assume that.

II. CONCLUSION

In order for the Court of Appeals to reverse a trial court on summary judgment it should be required to rely on facts in the record and that was not done here. The Supreme Court should accept this petition for review.

I certify that this memorandum contains 949 words, in compliance with the RAP18.17.

Respectfully submitted this 22nd of November, 2024.

WATHEN | LEID | HALL | RIDER, P.C.

/s/ Rick J Wathen

Rick J Wathen, WSBA #25539

/s/ William L. Weber III

William L. Weber III, WSBA #28867

Attorneys for Appellant David Allen

222 Etruria Street, Seattle, WA 98109

Tel: (206) 622-0494

rwathen@wlhr.legal

wweber@wlhr.legal

Certificate of Service

I, Sonia Chakalo, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the above-referenced action.

2. I hereby certify that I caused to be filed on November 22nd, 2024, an original Reply to Petition for Review (a copy of which is attached) with the Supreme Court for the State of Washington, and a copy of the aforementioned document was also served on:

David P. Horton, WSBA #27123 Kitsap Law Group 3212 NW Byron Street. Ste 101 Silverdale, WA 98383 T: 360/692-6415 F: 360/692-1257 dhorton@kitsaplawgroup.com tracey@kitsaplawgroup.com lisa@kitsaplawgroup.com kelly@kitsaplawgroup.com	[X] E-Mail [] 1 st Class U.S. Mail [] Legal Messenger [] Facsimile
--	--

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of November, 2024, at Seattle, Washington.

/s/ Sonia Chakalo
Sonia Chakalo, Legal Assistant
schakalo@wlhr.legal

COLE WATHEN LEID HALL P.C.

November 22, 2024 - 3:28 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 103,534-9
Appellate Court Case Title: Paul A. Goetsch v. David Allen
Superior Court Case Number: 22-2-00524-8

The following documents have been uploaded:

- 1035349_Answer_Reply_20241122152526SC936032_4048.pdf
This File Contains:
Answer/Reply - Reply to Answer to Petition for Review
The Original File Name was PLD Reply to Petition for Review by the Supreme Court final.pdf

A copy of the uploaded files will be sent to:

- dhorton@kitsaplawgroup.com
- meg@kitsaplawgroup.com
- schakalo@wlhr.legal
- tracey@thwpllc.com
- wwbeber@wlhr.legal

Comments:

Sender Name: Office Manager - Email: accounting@cwlhlaw.com

Filing on Behalf of: Rick J. Wathen - Email: rwathen@cwlhlaw.com (Alternate Email:)

Address:
222 Etruria Street

Seattle, WA, 98109
Phone: (206) 622-0494

Note: The Filing Id is 20241122152526SC936032