No. 1035349

Court of Appeals No. 59348-3-II

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

DAVID ALLEN,

Petitioners,

v.

PAUL GOETSCH,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent, Paul Goetsch, was the Plaintiff in the Kitsap County trial court proceedings. Respondent requests this Court deny David Allen's Petition for Review.

II. COUNTER-STATEMENT OF THE ISSUES

1. Whether the Court of Appeals decision conflicts with a decision of the Supreme Court when, in determining there is a genuine issue of material fact to survive summary judgment, it applies Washington's longstanding legal framework for premises liability to the facts?
2. Whether the Court of Appeals decision involves an issue of substantial public interest that should be determined by the Supreme Court when, in determining there is a genuine issue of material fact to survive summary judgment, it applies Washington's

3. longstanding legal framework for premises liability to the facts?

III. STATEMENT OF THE CASE

The appellate decision correctly sets forth the relevant facts and procedure. The facts most critical to Mr. Allen's petition for review are summarized, for the convenience of the Court:

Mr. Allen hired Mr. Goetsch to perform electrical work in a pool house on his property. CP 27 (12:12-25).

Mr. Allen's pool house is on a hill that is bare, dry, and without much vegetation so the soil was loose on top. CP 28 (15:6-17:8); CP 30 (25:7-10).

Both parties had commented that the hill was steep and difficult to descend. CP 28 (18:21-19:9)

Mr. Allen always planned to install stairs into the hill. CP 69 (20:22-23).

Mr. Goetsch fell down the hill while carrying a heavy drill during the performance of his work for Mr. Allen. CP 30-31.

IV. REVIEW SHOULD BE DENIED

Review should be denied because Mr. Allen fails to meet the standards in Rule of Appellate Procedure ("RAP") 13.4(b) for granting a petition for review.

Under RAP 13.4(b), this Court will grant a petition for review only when:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Allen identifies RAP 13.4(b)(1) and 13.4(b)(4) as a basis for review but his arguments do not show he has met either standard.

Rather than showing how the Court of Appeals decisions conflicts with a decision of the Supreme Court or how it involves an issue of substantial public interest, Mr. Allen argues the appellate court decision is inherently wrong or is distinguishable from other appellate decisions. These are not sufficient or proper bases for review. Review should be denied.

A. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH ANY DECISION BY THE SUPREME COURT.

Review should be denied because Petitioner fails to show that the Court of Appeals decision conflicts with a decision of the Supreme Court.

Rather than directly address this criteria, Mr. Allen asserts that review is justified for numerous other reasons.

i. Court of Appeals decision does not conflict with another case because it does not "broaden" an exception to premises liability

Petitioner asserts that the Court of Appeals decision "broadens" the exception to the general principle under

Washington law that a landowner is not liable for harm caused by open and obvious conditions. The first flaw in Petitioner's argument is this argument ***identifies no Supreme Court decision in conflict with appellate court decision***. Beyond this dispositive deficiency, Petitioner's argument also fails because the Court of Appeals decision does not "broaden" any exception to premises liability. The Court of Appeals merely considered the facts of the case under Washington's well-established framework for premises liability and determined that there was a genuine issue of fact for trial. That Mr. Allen disagrees with the appellate court decision is not a basis for this Court to accept review.

a. No conflict – Mr. Allen merely disagrees that there is a genuine issue of material fact that Mr. Allen should expect Mr. Goetsch to choose to encounter the dangerous condition

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). One exception to this rule is when the landowner has reason to (1) expect that an invitees' attention may be distracted, such that the invitee will not discover what is obvious or will forget what the invitee has discovered, or fail to protect against it, and (2) anticipate that an invitee will choose to encounter the risk because, to a reasonable person in the position of the invitee, the advantages outweigh the apparent risk. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994).

The appellate court considered the facts in the light most favorable to Mr. Goetsch and ruled those facts raised a reasonable inference that Mr. Allen could anticipate 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. The appellate court recognized Mr. Allen hired Mr. Goetsch to perform a job on Allen's property and that job required traversing the dangerous condition at issue—the steep hill with loose soil. The determination there was a genuine issue

of fact under these circumstances as to whether a reasonable landowner would anticipate that a contractor paid to perform a job would choose to encounter this condition to complete that job was a reasonable interference. The Court of Appeals ruling falls in line with the legal framework established by this Court in *Tincani* and does not broaden a landowner's liabilities for open and obvious dangers.

b. No conflict – Mr. Allen merely disagrees with inferences drawn by court

Mr. Allen argues the appellate court's decision is based only on supposition and improper inferences, rather than sufficient evidence. He accuses the court of "manufactur[ing] the idea that Goetsch" felt he had to encounter the hill because he wanted to finish the job, and criticizes the inference that Mr. Goetsch traversed the hill to finish his job and get paid. Even assuming Mr. Allen's argument is correct (which it is not – in reviewing an order on summary judgment, an appellate court is to consider all the fact and all "reasonable inferences" to be

drawn from those facts per *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000), he fails to show how the decision contradicts another Supreme Court decision. Review should not be granted.

c. No conflict – Mr. Allen merely disagrees that a hill is dangerous condition

Mr. Allen disagrees with the determination that the slope on his property was a dangerous condition. In support of this argument, Mr. Allen asserts that the opinion is inconsistent or distinguishable from of *McDonald v. Cove to Clover*, 180 Wn. App. 1, 7, 321 P. 3d 259 (2014). The *McDonald* case is not a Supreme Court ruling and, therefore, that the appellate court ruling might be distinguishable from *McDonald* is not a proper basis for review under RAP 13.4.

Further, *McDonald* involves very different facts. In *McDonald*, the condition was "wet grass" and the plaintiff was an attendee of a festival, not a contractor.

McDonald and the case at bar are in conflict. They are distinguishable on their specific facts.

d. No conflict – Mr. Allen merely disagrees about the evidence

That Mr. Goetsch had traversed the same area twice before (and that Mr. Allen had seen this on at least occasionally) and the lack of evidence of an impairment on Mr. Goetsch part *supports* the appellate court's decision. The issue was whether a reasonable landowner would anticipate that Mr. Goetsch would choose to encounter the open and obvious risk on the property. Mr. Goetsch made the decision to encounter the risk on numerous occasions (as he was motivated to complete his job and get paid). This supports the inference that he had to accept the risk to complete the job and get paid.

ii. The court of appeal decision does not conflict with *Mihalia*

Petitioner asserts that the Court of Appeals decision improperly applies the ruling of *Mihaila v. Troth*, 21 Wn. App. 2d 227, 505 P.3d 163 (2022). The first flaw in Mr. Allen's

argument is that he ***fails to assert or claim that the opinion conflicts with Mihaila.*** He merely asserts the ruling was misapplied.

Mr. Allen's argument relies on the assertion that the facts of *Mihailia* differ from the facts here (in *Mihaila*, the condition was admitted to be dangerous, testimony from a safety expert, the specific facts in the plaintiff's declaration). This alone does not establish a conflict between the two cases.

Mr. Allen disagrees with the appellate court's determination there was sufficient evidence to raise a genuine issue of material fact. This is an improper and insufficient basis for the Supreme Court to accept review.

B. THE COURT OF APPEALS DECISION DOES NOT INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

Mr. Allen asserts that the decision "expands" the liability of landowners and that this is contrary to public policy. The decision applies the longstanding

Washington framework for premises liability to the facts. The decision does not expand the premise liability of a landowner or change the legal landscape.

That Mr. Allen disagrees with the way the appellate court applied the law to the facts in reaching its determination that there is a genuine issue of material fact is not a proper basis for review.

A decision may warrant review on the basis that it involves an issue of substantial public interest if it has the potential to affect a number of proceedings in the lower courts and will avoid unnecessary litigation and confusion on a common issue. *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016). Here, the appellate court determined there was a genuine issue of material fact as to whether the steepness of the hill was a dangerous condition and whether Mr. Allen should have expected harm to Mr. Goetsch even given the open and obvious nature of the hill.

The appellate court's decision does not alter or change the legal framework for determining premises liability issues. Rather, it merely addresses whether the particular facts of the present case are sufficient to raise a genuine issue of material fact for trial. Mr. Allen has not shown that this decision regarding the existence of a genuine issue of material fact, an issue that is highly fact specific, will affect a "number of proceedings in the lower courts."

V. CONCLUSION

The Court of Appeals decision that a question of material fact existed to preclude summary judgment does not conflict with a decision of this state's Supreme Court, nor involve an issue of substantial public interest that requires determination by the Supreme Court. Because none of the RAP 13.4(b) criteria is implicated to warrant a review by this Court, Mr. Allen's petition for review should be denied.

*I certify that this memorandum contain 1905 words, in compliance with RAP 18.17. [up to 5000 allowed]**

RESPECTFULLY SUBMITTED this 7th Day of November 2024.

/s/David P. Horton

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DECLARATION OF SERVICE

I Tracey Hamilton-Oril, the undersigned hereby declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

I am over the age of eighteen (18) years, not a party to this action and competent to be a witness herein.

Due to an ECF System Filing outage, I caused the foregoing document to be served on the following parties via email.

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

Dated this 7th day of November 2024 at Silverdale, Washington.

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