IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SCOTT DAVID McDONALD, a single man, Respondent, v. HIGHLINE SCHOOL DISTRICT #401, a governmental entity, Petitioner.	)	DIVISION ONE No. 63751-7-I UNPUBLISHED OPINION FILED: June 21, 2010

Dwyer, C.J. — A commissioner of this court granted discretionary review of the trial court's determination of the status of a police officer while on private property for the purpose of establishing a landowner's duty, if any, to the officer. Forty years ago, another division of this court addressed this same question with respect to firefighters and concluded that such individuals qualify as invitees. See Strong v. Seattle Stevedore Co., 1 Wn. App. 898, 902, 466 P.2d 545 (1970). The trial court correctly ruled that Strong remains good law and applies to police officers executing their official duties on private property as equally as it applies to firefighters. The trial court properly applied this controlling authority.

Accordingly, we affirm.

I

On the night of December 20, 2005, King County Sheriff's Department Deputy Scott David McDonald entered the grounds of Highline High School in Burien, Washington, in response to a call from a school security guard reporting that a burglary was taking place on school property. While searching for the suspected burglar, McDonald slipped and fell on a set of wooden stairs that led to a wooden platform next to a dumpster, injuring himself. McDonald subsequently brought an action against the school district, alleging that it had negligently maintained the property where he fell.

Whether McDonald was on the school property as an invitee or as a licensee became the focus of the litigation, as his status was critical to defining the scope of the school district's duty of care. The school district moved for partial summary judgment that McDonald was a licensee, not an invitee, when he entered the school grounds to investigate the reported burglary. Citing to Strong, the trial court denied the school district's motion, ruling instead that McDonald was an invitee.

At issue in Strong was whether a firefighter who was killed while fighting a fire on private property was a business visitor or a licensee. Applying the "economic benefit" test, the court held that the firefighter's status in the context of fulfilling his public duty was as an invitee.

The school district subsequently filed a motion for reconsideration, which the trial court denied, again citing to Strong.

In response to the school district's request, the trial court certified its ruling for discretionary review pursuant to RAP 2.3(b)(4).[1] A commissioner of this court granted discretionary review. The issue identified in the order granting review is whether the reasoning and principle articulated in Strong applies to a police officer investigating a possible burglary.

II

The school district contends that the trial court erred by relying on Strong to determine McDonald's status while he was on school property. We disagree.

We review de novo a trial court's order of partial summary judgment. Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009). Although the trial court herein denied the school district's motion, it nonetheless entered an order of partial summary judgment by concluding that McDonald was an invitee. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

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[1] The rule provides:

> **(b) Considerations Governing Acceptance of Review.** Except as provided in section (d), discretionary review may be accepted only in the following circumstances:
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> . . .
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> (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b)(4).

material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

As noted above, we accepted discretionary review because the trial court certified that its order "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." RAP 2.3(b)(4). Indeed, the commissioner's ruling granting discretionary review characterizes the issue of whether the reasoning in Strong applies to a police officer's fulfillment of his or her public duty as one of first impression. However, upon considering Strong, the longevity of that decision, the principles governing premises liability in Washington, and the analogous positions occupied by firefighters and police officers while fulfilling their official duties vis-à-vis landowners, we conclude that there is no substantial ground for a difference of opinion.

To prevail on a negligence claim, "a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause." Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996) (citing Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127–28, 875 P.2d 621 (1994)). Only the first element is implicated in this appeal. Whether and to what extent a defendant owed a plaintiff a duty is a question of law. Degel, 129 Wn.2d at 48 (citing Tincani, 124 Wn.2d at 128).

In Washington, "[t]he legal duty owed by a landowner to a person entering the [landowner's] premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee." Iwai v. State, 129 Wn.2d 84, 90–91, 915 P.2d 1089 (1996) (citing Younce v. Ferguson, 106 Wn.2d 658, 662, 724 P.2d 991 (1986)); accord Musci v. Graoch Assocs. Ltd. P'ship No.12, 144 Wn.2d 847, 854–55, 31 P.3d 684 (2001) (citing Degel, 129 Wn.2d at 49). With respect to both invitees and licensees, Washington law follows the Second Restatement of Torts.[2] Kamla v. Space Needle Corp., 147 Wn.2d 114,

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[2] With respect to invitees, the Second Restatement provides, in pertinent part:

> § 332. Invitee Defined
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> (1) An invitee is either a public invitee or a business visitor.
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.
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> § 343. Dangerous Conditions Known to or Discoverable by Possessor
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> 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
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> (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
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.
>
> § 343A. Known Or Obvious Dangerous
>
> (1) 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 §§ 332, 343, 343A (1965).

With respect to licensees, the Second Restatement provides, in pertinent part:

> § 330. Licensee Defined
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> A licensee is a person who is privileged to enter or remain on land only by virtue

125, 52 P.3d 472 (2002) (citing Iwai, 129 Wn.2d at 93); Younce, 106 Wn.2d at 667; McKinnon v. Wash. Fed. Sav. & Loan Ass'n, 68 Wn.2d 644, 650–51, 414 P.2d 773 (1966). The difference between the duty of care owed to licensees and that owed to invitees is that, with respect to licensees, a landowner has no duty to discover dangerous conditions and the provision of a warning about a dangerous condition *or* the taking of corrective action is sufficient to fulfill his or her duty. This is in contrast to the affirmative duty owed to invitees to ascertain dangerous conditions *and* to take corrective measures to protect the personal safety of invitees. Tincani, 124 Wn.2d at 134 (quoting Memel v. Reimer, 85 Wn.2d 685, 689, 538 P.2d 517 (1975)); Younce, 106 Wn.2d at 668–69. With respect to trespassers, Washington law follows the traditional rule that landowners must refrain from wantonly or willfully injuring trespassers. Degel, 129 Wn.2d at 51 (citing Ochampaugh v. City of Seattle, 91 Wn.2d 514, 518, 588 P.2d 1351 (1979)). Thus, there are "'three levels'" of care owed to entrants on to land depending upon the entrant's status, with the highest level of care being

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of the possessor's consent.

§ 342. Dangerous Conditions Known To Possessor

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

(a) the possessor knows or has 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.

Restatement (Second) of torts §§ 330, 342.

owed to an invitee. Fuentes v. Port of Seattle, 119 Wn. App. 864, 869, 82 P.3d 1175 (2003) (quoting Johnson v. State, 77 Wn. App. 934, 940, 894 P.2d 1366 (1995)).

In Strong, the court analyzed whether Strong, a firefighter killed while fighting a fire on a shipping pier, was properly categorized as an invitee or as a licensee. 1 Wn. App. at 902. Applying the "economic benefit" test articulated in McKinnon, 68 Wn.2d at 648–49, and in the Second Restatement of Torts, the court concluded that Strong qualified as an invitee. Strong, 1 Wn. App. at 902. The court reasoned that "[t]here was at least a potential economic benefit to be derived by" the pier operator because of Strong's presence and attempts to extinguish the fire, as the saving of the pier would result in its continued operation and would prevent the further spread of the fire. Strong, 1 Wn. App. at 903.

In so concluding, the court acknowledged that, at the time, it was departing from the "majority rule . . . that a fireman is . . . generally owed no care by the possessor of land except not to willfully or wantonly cause injury to him," *i.e.*, the so-called "Fireman's Rule." Strong, 1 Wn. App. at 902 (citing Annot. 86 A.L.R. 2d 1210–12 § 4(a) (1962)). However, the court also observed that courts in several other jurisdictions had carved out exceptions to that rule. Strong, 1 Wn. App. at 902. Despite concluding that Strong was an invitee, the court concluded that the pier operator had not been negligent because Strong's

knowledge of the hazards associated with the fire was superior to that of the pier operator. Strong, 1 Wn. App. at 904.

The school district does not cite to any Washington authority questioning the soundness of the reasoning in Strong. Nor does a review of case law reveal a subsequent decision disagreeing with the reasoning or holding announced in Strong. Thus, Strong remains good law to this day, more than forty years after it was decided.

Strong governs the determination of McDonald's status while he was on school district property. There is no meaningful distinction between the status of Strong and that of McDonald. At the time of the events giving rise to the respective negligence claims brought in Strong and in this case, both Strong and McDonald were public officers fulfilling their public duties by responding to incidents occurring on another's property. In addition, to the extent that Strong's presence on the pier had the potential to confer an economic benefit on the pier operator, the same can be said for McDonald's presence on the school grounds. McDonald was investigating a suspected burglary, a crime that might very well have resulted in damage to school property. By entering the school grounds to apprehend the suspected burglar, McDonald had the potential to thwart whatever mischief and attendant property damage the suspected burglar might have caused. Therefore, pursuant to the undisturbed reasoning articulated in Strong, the trial court correctly concluded that McDonald was an invitee on the

night in question.

Neither in its briefing nor at oral argument did the school district offer a principled reason for distinguishing Strong from the situation herein presented.[3] Instead, the school district appears to argue that Strong was wrongly decided in the first instance. Although the court recognized in Strong that it was departing from the majority rule in existence at the time, 1 Wn. App. at 902, nothing required it to decide otherwise. Indeed, as a generation of expectations concerning tort liability has likely developed in light of Strong, it would be imprudent and potentially harmful for us to depart from this well-established precedent.

The school district urges us to adopt section 345 of the Second Restatement of Torts, which specifically addresses the status of public officers such as firefighters and police officers as either invitees or licensees when executing their public duties on private property.[4] However, we decline the

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[3] In its briefing, the school district mischaracterizes the holding in Strong as being limited to circumstances in which a landowner's negligence triggered the assistance of a public officer. See School District's Opening Br. at 10. Although the court noted that some courts in *other jurisdictions* had carved out an exception to the majority rule—the so-called Fireman's Rule—"where there is active negligence," Strong, 1 Wn. App. at 902 (citing Annot. 86 A.L.R.2d 1217–20 §§ 8(b), 8(c), 9 and 10(a) (1962)), it did not indicate that a public officer could be considered an invitee only where his or her presence on the property of another was triggered as a result of the owner's or possessor's negligence. Rather, the court relied exclusively on the economic benefits test in its analysis. See Strong, 1 Wn. App. at 902–04. In addition, the school district mistakenly relies on Thompson v. Katzer, 86 Wn. App. 280, 286, 936 P.2d 421 (1997), where the court observed that an entrant is not necessarily an invitee merely because he or she confers an economic benefit on an owner or possessor of land. Thompson involved a visit that was primarily social or familial and is not analogous to the factual situation herein presented.

[4] This section of the Second Restatement provides:

> § 345. Persons Entering in the Exercise of a Privilege
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> (1) 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

school district's invitation. Although adoption of section 345 might have some appeal, it fails to account for situations such as the one herein presented, where a police officer is called to investigate a suspected ongoing crime at the request of a landowner or the owner's agent and, in execution of his or her official duty, sustains an injury in a location that the landowner contends was not open to the public. Importantly, our Supreme Court has not seen fit to adopt this section of the Restatement as it has with other sections. Thus, Strong is still good law and applies in the situation herein presented.

Moreover, we note that tentative drafts of a Third Restatement of Torts concerning premises liability have been prepared. The tentative draft reflects a growing trend toward dispensing altogether with the status-based duties.[5]

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private purpose, and irrespective of the possessor's consent, is the same as the liability to a licensee.
(2) 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.

Restatement (Second) of Torts § 345.

[5] The current tentative draft of the Third Restatement of Torts provides as follows:

§ 51. General Duty of Land Possessors

Subject to § 52, a land possessor owes a duty of reasonable care to entrants on the land with regard to:

(a) conduct by the land possessor that creates risks to entrants on the land;

(b) artificial conditions on the land that pose risks to entrants on the land;

(c) natural conditions on the land that pose risks to entrants on the land; and

(d) other risks to entrants on the land when any of the affirmative duties provided in Chapter 7 is applicable.

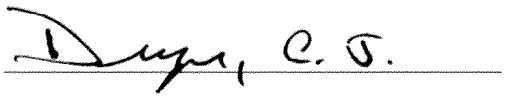
§ 52. Duty of Land Possessors to Flagrant Trespassers

(a) The only duty a land possessor owes to flagrant trespassers is the duty not to act in an intentional, willful, or wanton manner to cause physical harm.

However, until our Supreme Court rejects the traditional three-tier hierarchy of status-based duties, we are bound to follow it.[6]

Strong is well-established precedent. It wholly applies to the factual situation presented in this case. The trial court correctly applied it to McDonald's case.

Affirmed.



We concur:

(b) Notwithstanding Subsection (a), a land possessor has a duty to exercise reasonable care for flagrant trespassers who reasonably appear to be imperiled and
(1) helpless; or
(2) unable to protect themselves.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§ 51, 52 (Tentative Draft No. 6, 2009).

[6] We note that this framework has been sharply criticized as anachronistic, see Beebe v. Moses, 113 Wn. App. 464, 468–72, 54 P.3d 188 (2002) (Sweeney, J., concurring), and that there appear to be as many jurisdictions that no longer operate within it as there are jurisdictions that continue to do so. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 51 Reporters' Note cmt. a (Tentative Draft No. 6, 2009). However, we cannot overrule our Supreme Court on this point of law. State v. Lee, 147 Wn. App. 912, 920 n.2, 199 P.3d 445 (2008) (quoting State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)), review denied, 166 Wn.2d 1016 (2009).

Appelwick, J. Grosse, J.