89975-4

NO.

SUPREME COURT
OF THE STATE OF WASHINGTON

LOWE'S HIW, INC., aka LOWE'S, a business entity, and JEFF, aka JOHN MCDOWELL, individually,

Petitioners,

v.

SHIRLEY BARRETT,

Respondent.

FILED
MAR - 6 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF
COWLITZ COUNTY, STATE OF WASHINGTON
Superior Court No. 09-2-01350-1

and

COURT OF APPEALS, DIVISION II No. 43024-0-II.

PETITION FOR REVIEW

MCGAVICK GRAVES, P.S.
Lori M. Bemis, WSBA #32921
1102 Broadway, Suite 500
Tacoma, WA 98402
Telephone (253) 627-1181
Facsimile (253) 627-2247

FLOYD PFLUEGER & RINGER, P.S.
A. Troy Hunter, WSBA #29243
200 W. Thomas St., Ste. 500
Seattle, WA 98119-4296
Telephone (206) 441-4455
Facsimile (206) 441-8484
Attorneys for Petitioners

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Other Authority

RAP 13.4(b)(1)

RAP 13.4(b)(2)

RAP 13.4(b)(4)

I. IDENTITY OF PETITIONER

Petitioner is Lowe's HIW, Inc., hereinafter "Lowe's." Lowe's was the defendant in the trial court, and the respondent before Division II of the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Lowe's seeks review of Division II's decision No. 43024-0-II, issued on August 13, 2013 and its January 28, 2014 decision granting, in part, reconsideration (which did not alter the substance of its initial holding), and ordering publication. The reporter citation is not available at the time of this filing; it is available by electronic database at Barrett v. Loew's [sic] Home Centers, Inc., 43024-0-II, 2013 WL 7098825 (Wash. Ct. App. Div. II Aug. 13, 2013). A copy of the Division II's decisions are attached hereto in the Appendix.

III. ISSUES PRESENTED FOR REVIEW

Whether Division II incorrectly reversed the trial court's order granting summary judgment to Lowe's where:

1) Contrary to established Washington law in all Divisions and the Supreme Court, Division II held that the allegedly negligent conduct of the defendant precluded a finding of implied assumption of risk, because plaintiff Shirley Barrett could not consent to the negligent conduct of the tortfeasor, Lowe's. (RAP 13.4(b)(1)-(2).

2) Division II considered participation in the activity resulting in plaintiff's alleged injury as a significant and dispositive factor in applying the doctrine of implied assumption of risk. This analysis is contrary to the decisions in Kavafian v. Seattle Baseball Club Ass'n, 105 Wn. 215, 181 P. 679 (1919) and Taylor v. Baseball Club of Seattle, L.P., 132 Wn. App. 32, 130 P.3d 835 (Div. I 2006) where implied assumption of risk was considered in the context of a spectator at a baseball game. (RAP 13.4(b)(1)-(2).

3) Division II held that Lowe's was precluded from asserting implied assumption of risk *as a matter of law* where plaintiff Barrett made no motion for summary judgment pursuant to CR 56 to dismiss Lowe's defense of implied assumption of risk; on this posture, the issue is preserved for the jury.

4) Plaintiff Barrett failed to put forward evidence as required under CR 56 creating an issue of material fact to defeat a motion for summary judgment.

IV. STATEMENT OF THE CASE

The underlying personal injury action was commenced in Cowlitz County by Shirley Barrett ("Barrett"). Barrett alleged that Lowe's and its employee were negligent. CP 013–016. Specifically, the alleged negligent conduct was Lowe's employee's unloading of freight from a semi-trailer because the freight fell onto Barrett. CP 014. Lowe's defended based on the fact that Barrett's injury was preceded by a number of warnings from Barrett

to Lowe's employee arising from Barrett's own concern that the freight would fall. CP 031-036. These vocalized warnings demonstrated her subjective understanding of the risk posed by the unstable freight in the semi-trailer and her comprehension of that risk. CP 093; Barrett, 2013 WL 7098825 at *1. Barrett herself felt that the freight was unstable and heavy when she attempted (without injury) to open the doors to the semi-trailer. CP 062; CP 079; CP 084. Barrett ceased her efforts to try and open the doors to the semi-trailer after feeling the freight shifting and sought help from a Lowe's employee. CP 062; CP 084. Barrett then repeatedly told the Lowe's employee that the freight was going to fall once it was released by the fabric strap that was securing the freight inside the semi-trailer. CP 084; CP 085; CP 092. Aware of Barrett's warnings, the Lowe's employee cut through the strap while Barrett stood back and behind the semi-trailer beyond where any freight could fall on her.

Barrett repeatedly testified that she stood behind the load while the Lowe's employee worked so that nothing could fall on her. CP 033; CP 084; CP 089. Barrett remained in a position beyond the path of any falling freight for several minutes while the Lowe's employee worked on the strap. CP 090; CP 091. Barrett testified that while the Lowe's employee worked she observed her padlock on the ground and felt that she could "swoop" forward and retrieve the lock before the Lowe's employee finished his efforts to

release the load. CP 091; CP 093. Barrett did not communicate her intention to retrieve the lock or her movements to the Lowe's employee, who, she admits, was not watching her at the time. CP 093. As warned, some items in the truck fell onto Barrett as she was getting the lock when the strap was released. CP 089-092. Had Barrett heeded her own warnings, and remained in her prior and safely chosen location, the items in the load would have missed her. CP 084-085; CP 089.

At summary judgment, Lowe's offered responses from Barrett's interrogatories, requests for admission to Barrett, and her deposition. CP 026-036. In each forum, Barrett consistently testified that she appreciated the risk of the unstable freight, understood the specific danger posed by the Lowe's employee cutting the strap securing the freight, had the option of staying beyond the range of any falling freight, and reiterated that she exercised that option during the more than ten minutes it took to cut through the strap; yet Barrett chose to expose herself to the risk of the falling freight by attempting to retrieve her lock while the Lowe's employee tried to free the freight. CP 060-065; CP 083-087; CP 088-094. Barrett's descriptions of the event, her concerns about the load and the danger it presented, her warnings, and her voluntary decision to retrieve the lock were reiterated consistently. Id.; CP 026–036. The record reflects no dispute as to these facts and Division II did not reach its holding by finding that any issues of

material fact were presented. Barrett, 2013 WL 7098825 at *1. Division II applied these facts to the law inconsistently with Washington State Appellate Court decisions and Supreme Court decisions.

Lowe's argued that, as a result of Barrett's conduct, the doctrine of implied assumption of risk barred Barrett's claim. CP 026–036. Barrett argued that implied assumption of risk was inapplicable because Barrett could not consent to the negligence of Lowe's employee and summary judgment should not be granted. CP 095–108. Division II refused to apply the defense of primary assumption of risk on this basis and distinguished the case on the basis that Barrett had not participated in the act of unloading the trailer. Barrett, 2013 WL 7098825 at *1.

As discussed in this Petition, consideration of negligence in the manner analyzed by Division II – as a bar to application of the defense of implied assumption of risk – is in fact an abrogation of the defense of implied assumption of risk. Negligence is alleged in all tort cases and therefore in all cases where implied assumption of risk is asserted. Consequently, the allegation of negligence cannot properly be a distinguishing feature of the Court's analysis as it would be present in every tort case where the defendant alleges primary assumption of risk. Existing precedent focuses on whether the risk and possible harm are known and understood by the plaintiff, and then encountered voluntarily. Division II

also deviated from existing law by analyzing participation in the risk-creating activity as a requirement of demonstrating consent. Existing case law shows that Washington courts have applied the defense even where the plaintiff does not participate in the risky activity.

V. ARGUMENT

A petition for review by the Washington Supreme Court will be accepted "if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court" or "with another decision of the Court of Appeals." RAP 13.4(b)(1) and (2). The Supreme Court may also review an Appellate Court decision "if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). This case fulfills all of these criteria.

A. The Supreme Court Should Grant Review per RAP 13.4(b)(1) and (2) Because Division II's Decision is in Conflict with Decisions of the Supreme Court and Appellate Courts, Including Divisions II and III.

1. Division II's Decision is Inconsistent with Existing Law by Holding that an Allegation of Negligence Precludes Application of the Defense of Primary Assumption of Risk.

The elements of implied assumption of risk are "(1) the plaintiff impliedly consents to relieve the defendant of a duty to [the plaintiff] about specific, known, and appreciated risks; and (2) the plaintiff engages in conduct, from which consent is implied." Wirtz v. Gillogly, 152 Wn. App. 1, 8, 216 P.3d 416, 420 (Div. II 2009) (internal citations omitted) (analyzing

Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 497, 834 P.2d 6 (1992) and Erie v. White, 92 Wn. App. 297, 303, 966 P.2d 342 (Div. II 1998), review denied, 137 Wn.2d 1022, 980 P.2d 1280 (1999) (citing Alston v. Blyth, 88 Wn. App. 26, 33, 943 P.2d 675 (Div. II 1997)); Kirk v. Wash. State Univ., 109 Wn.2d 448, 746 P.2d 285 (1987). Neither Scott nor its progeny modified the elements necessary to establish the defense of implied assumption of risk. In Erie, Division II affirmed its adoption of Restatement (Second) of Torts § 496 E, explaining that "[s]ince the basis of assumption of risk is the plaintiff's willingness to accept the risk, take his chances, and look out for himself, his choice in doing so must be a voluntary one." Erie, 92 Wn. App. at 305.

In this case, despite: (1) Barrett's verbal warnings in which she describes the risk of the unstable freight; (2) her voluntarily stepping forward beneath the freight; and (3) with full knowledge of the risk of falling freight, Division II concluded that application of the defense was improper because Barrett did not consent to Lowe's negligence. Barrett v. Lowe's [sic] Home Centers, Inc., 43024-0-II, 2013 WL 7098825 (Wash. Ct. App. Div. II Aug. 13, 2013). The unworkability of the analysis in comparison to existing case law is also a factor in favor of review. Division II held "Barrett did not assume the risk of Lowe's and McDowell's negligence." Barrett, 2013 WL 7098825 at *4. Division II commenced and ended its analysis with a

recitation of the applicable case law and an analysis of the concept of duty. Barrett, 2013 WL 7098825 at *4-6. Unlike all other assumption of risk cases in Washington, there is no analysis of Barrett's conduct in terms of demonstrating her consent, comprehension, and voluntariness. Id. Under RAP 13.4(b)(1) and (2) review is warranted because this decision is directly at odds with the well-established case law.

2. Division II's Analysis is Contrary to the Law Division II Purports to Rely Upon, Specifically *Scott* and *Kirk*.

Division II also held in this case, "the Scott and Kirk cases demonstrate the assumption of risk doctrine does not bar recovery for actions caused by the defendant's negligence." Barrett, 2013 WL 7098825 at *3. This is a grave mischaracterization of the analysis employed by the Supreme Court in these cases. It is overbroad and fails to recognize the necessity in athletic cases, like Kirk and Scott, of teasing out the inherent risk in the sport from the possible additional risk introduced by the defendant's alleged negligent conduct. In both Kirk and Scott, the Supreme Court first analyzed the risk inherent in the sport and then analyzed whether the defendant introduced additional risk through their alleged negligence. Kirk, 109 Wn.2d at 456; Scott, 119 Wn.2d at 498. The Court also evaluated what risks are known and appreciated by the plaintiff. Id.

In this case, Division II's analysis with respect to the defense of implied assumption of risk focused solely on the finding that Lowe's was

negligent. The allegation of negligence is not a dispositive factor in primary assumption of risk cases. As stated in Scott, "primary implied assumption of risk should continue to be an absolute bar after the adoption of comparative fault because in this form it is a principal of **"no duty" and hence no negligence, thus negating the existence of the underlying cause of action."** Scott, 119 Wn.2d at 498, quoting W. Keeton et al., *Prosser and Keeton on Torts* § 68, at 484 (5th ed. 1984) (analyzing Kirk v. Wash. State Univ., 109 Wn.2d 448, 746 P.2d 285 (1987) (emphasis supplied). Yet, in this case, the Court begins and ends its analysis with duty. Barrett, 2013 WL 7098825 at *4-6. Division II also never answers the implicit consequence of why Barrett's actual conduct does not demonstrate the intent to negate any duty owned by Lowe's. Scott, 119 Wn.2d at 498.

In Scott, a skier was injured when he collided with a shed close to a ski run. Scott, 119 Wn.2d at 487-488. The Supreme Court confirmed that the operator of a ski resort owes a duty to a skier to discover dangerous conditions and warn *unless the conditions are open and obvious*. Id. at 500-501. The Court then thoroughly analyzed whether the danger was open and obvious - making it clear that if the danger been open and obvious, then the plaintiff may have consented to encounter it. Id.

In both Scott and Kirk, the Supreme Court also differentiated between the risks a participant in a sport inherently presumes and unknown

risks introduced by defendant's conduct. Scott, 119 Wn.2d at 502; Kirk, 109 Wn.2d at 456. Only after establishing the inherent risks did the Court then consider whether the specific risk encountered by the plaintiff was known to the plaintiff. Scott, 119 Wn.2d at 502; Kirk, 109 Wn.2d at 456. Here, Division II failed to analyze this case in accord with Scott and Kirk and in fact misapplied the holdings of those cases. Scott and Kirk clearly distinguish the risk that caused injury from the *known* and *comprehended* risk inherent in the sport. Further, if that risk was open and obvious, then dismissal could still be proper under implied assumption of risk.

Division II's decision in this case clearly deviates from Kirk and Scott because the risk here was known and appreciated by Barrett and open and obvious, unlike the risks at issue in Kirk and Scott. Division II failed to consider that Barrett's conduct demonstrated her knowledge and comprehension at the time she chose to step beneath the freight, then concluded that Lowe's negligence precluded dismissal without considering the role of Barrett's conduct in precipitating injury. Moreover, Division II fails to find an issue of material fact with respect to Barrett's comprehension and understanding of risk or her decision to voluntarily step forward beneath the freight.

3. Division II's Decision is also Contrary to Decisions Considering Implied Assumption of Risk in Context which do not Involve Sports.

Division II's error is readily apparent when compared with Division II's prior decisions arising outside of the arena of sports. In Erie, the plaintiff cut through strapping designed to hold him to a tree when trimming a tree. Erie v. White, 92 Wn. App. 297, 301, 966 P.2d 342 (Div. II 1998). The plaintiff alleged that the defendant negligently provided inappropriate equipment because the equipment for trimming a tree should have metal backing to prevent the risk of cutting through the strap and falling. Erie, 92 Wn App. at 299. Division II upheld summary dismissal despite the allegation of negligence. Id. at 299. The defendant's negligence in providing the wrong equipment did not bar application of implied assumption of risk because the risk associated with the equipment was known and comprehended by the plaintiff. Id. at 297. As Erie demonstrates, the introduction of an allegation of negligence is not dispositive to the analysis of primary assumption of risk, where the risk is known and comprehended by the plaintiff. This is because, as both the Washington Appellate Courts and Supreme Court have repeatedly held, where implied assumption of risk applies, it abrogates any duty owed to the plaintiff. Erie, 92 Wn. App. at 302 (analyzing Kirk, 109 Wn.2d at 453); Alston v. Blyth, 88 Wn. App. 26, 32, 943 P.2d 675 (Div. II 1997); Leyendecker v. Cousins, 53 Wn. App. 769, 773, 770 P.2d 675 (Div.

II 1989), *review denied*, 781 P.2d 1320). Scott, 119 Wn.2d at 498; Kirk, 109 Wn.2d at 453-54; Wirtz, 152 Wn. App. at 8.

A plaintiff can consent to expose herself to the risk presented by allegedly negligent conduct, so long as that risk is appreciated and understood.[1] Washington Supreme Court and Appellate Court decisions analyze implied assumption of risk cases on the basis of whether a risk is known or unknown to the plaintiff. Regan v. Seattle, 76 Wn.2d 501, 458 P.2d 12 (1969) (go-cart driver did not assume risk of *unknown* risk of water on the course); Wood v. Postelthwaite, 6 Wn. App. 885, 496 P.2d 988 (Div. I 1972) (golfer does not assume unknown, unforeseen risk of being hit by ball due to inadequate warning, but may assume known, inherent risks of the game). It is undisputed that Barrett knew, observed, comprehended, and voluntarily encountered the risk. Alleged negligence is not a dispositive factor under Washington's jurisprudence. Barrett, 2013 WL 7098825 at *1.

Division II's decision also conflicts with its previous decision, Wirtz v. Gillogly, 152 Wn. App. 1, 216 P.3d 416 (Div. II 2009).[2] (RAP

[1] Significantly, Division II merely assumes that Lowe's conduct was negligent. However, Barrett offered no evidence factually supporting the contention that Lowe's employee was actually negligent in releasing the freight where the employee observed plaintiff Barrett standing beyond where any freight could fall on her. There is no "per se" negligence with respect to the proper or improper manner of unloading the freight in a semi-trailer and no facts were offered that Lowe's employee was negligent in unloading the freight.

[2] Notably the same trial court Judge who heard the summary judgment motion in Wirt decided the summary judgment motion in this case, the Honorable Stephen M. Warning.

13.4(b)(2)). In Wirtz, the plaintiff observed his companions felling trees and was ultimately injured when a tree fell on him. Wirtz, 152 Wn. App. at 10. Division II dismissed the case on summary judgment, based on the defense of implied assumption of risk. Id. at 11. The plaintiff had observed defendants fall trees, was repeatedly advised to wear a hardhat yet refused to do so, and was invited by the defendants to remove himself from the situation. Id. at 2-6. Like Barrett, the plaintiff also had an escape route for himself, demonstrating appreciation of the need for escape and the viability of other options. Id. at 10. Ultimately, the plaintiff also was injured when a tree fell on him. Id. at 4.

Division II's analysis in Wirtz varied significantly from the analysis it used in the instant case. Specifically, the Wirtz court identified the factors allegedly demonstrating defendants' negligence, including failing to require plaintiff to wear a hardhat and allowing the plaintiff to work without a hardhat. Id. The plaintiff also argued that the tree felling process should have been abandoned after the tree split. Id. at 5. Unlike the case before us, Division II did not find these factors significant in Wirtz because plaintiff was familiar with the risk, appreciated the risk, and had alternatives available to him (e.g. not participating). Id. at 7-8. Had Division II used the same analysis in Wirtz as it used in the instant case, it could not have found that Wirtz assumed the risk. Using the same

analysis, Division II would have been bound to hold that Wirtz, despite his conduct, did not consent to the risk of his partners' negligence. Such a holding would be absurd where Wirtz continued to stand beneath a tree he says he feared may fall on him. Id. Yet this is the result Division II reached in this case despite the fact that the allegation of negligence was as present in Wirtz as it is in this case.

Finally and most recently, Division III affirmed Division II's analysis in Wirtz and Erie and explicitly rejected the treatment of negligence as a dispositive factor in the case of Jessee v. City Council of Dayton, 173 Wn. App. 410, 293 P.3d 1290 (Div. III 2013). In Jessee, Division III considered whether the assertion of negligence altered the analysis under implied assumption of risk. Id. The Jessee plaintiff climbed steps she perceived as dangerous, and actually commented on as dangerous only moments before climbing the steps, and falling. Jessee, 173 Wn. App. at 415. Division III properly focused on the plaintiff's manifestations of an understanding of the risk prior to climbing the stairs; the alleged negligent construction of the steps did not bar application of the defense of implied assumption of risk because of the ample, uncontroverted evidence of comprehension of the risk and the plaintiff's voluntary conduct in encountering the risk. Id. at 414-416.

Jessee is also consistent with existing law. In Jessee, as in this case, the defendant was allegedly negligent. Specifically, the defendant allegedly

constructed and permitted to remain in use stairs which were unsafe and non-ADA compliant. Id. at 415. Jessee shows that the allegation of negligence on the part of the tortfeasor does not end the court's analysis with respect to implied assumption of risk. Id. at 413-416. This is the result required by precedent.

The existing Division II decision introduces the element of negligence on the part of the defendant as a factor which precludes application of the defense of implied assumption of risk in all cases involving negligence. This outcome is inconsistent with existing tort law, and has been specifically considered and rejected by every court in Washington that has previously entertained the argument. *See* Erie, 92 Wn. App. at 302; Scott, 119 Wn.2d at 498; Kirk, 109 Wn.2d at 453-54; Wirtz, 152 Wn. App. at 8; Jessee, 173 Wn. App. at 415. Moreover, even in cases where negligence is not explicitly argued, it is an implied component because all tort cases involve the allegation of negligence on the part of the defendant. As a result, the fate of the defense itself is in question as a result of Division II's published decision.

4. The Appellate Court's Decision is Inconsistent with Existing Law Established by the Supreme and Appellate Courts by Holding that a Plaintiff Who Does Not "Participate" in the Risky Activity Has Not Shown Consent.

Division II's decision is also inconsistent with existing law in its focus on plaintiff Barrett's failure to "participate" in the activity which

resulted in injury. Division II reasoned, "the plaintiff in Wirtz manifested his consent to assume the risk: he voluntarily participated in the tree-felling process . . ." Barrett, 2013 WL 7098825 at *4. Participation in the risky activity is often an aspect in cases where the defense of implied assumption of risk is argued, but participation is not a required element or distinguishing feature of the analysis.

Since 1919, Washington courts have applied implied assumption of risk even where the plaintiff did not participate in the risky activity. In the seminal case of Kavafian, the Supreme Court dismissed the plaintiff's case on summary judgment after finding that the plaintiff had assumed the risk of injury at a baseball game. Kavafian v. Seattle Baseball Club Ass'n, 105 Wn. 215, 181 P. 679 (1919). In Kavafian, the plaintiff was injured at a baseball game by a stray ball that went into the stands. Kavafian, 105 Wn. at 219. The plaintiff was merely a spectator of the game, not a participant. Id. at 219-20. In dismissing the plaintiff's case, the Supreme Court determined that the plaintiff (1) was familiar with baseball games as a frequent spectator; (2) could have sat behind a safe screened portion of the grandstand, but did not; and, (3) voluntarily sat where he was not protected by the screen. Id. On these facts the Court found the plaintiff assumed the known risk of injury by a wayward ball. Kavafian, 105 Wn. at 220. Kavafian laid out the touchstone elements of comprehension, appreciation, and voluntariness

present in all implied assumption of risk cases. The holding makes clear that participation may be *one way* that consent to the risk can be shown, but it is not the only way to show consent.

Division I also affirmed the same analysis and result. Taylor v. Baseball Club Seattle, L.P., 132 Wn. App. 32, 130 P.3d 835 (Div. I 2006). In Taylor, Division I found implied assumption of risk where the plaintiff was injured during the warm-up portion of a baseball game. Taylor, 132 Wn. App. at 41. Again, the injured party was merely a spectator of the game. Id. Both decisions are contrary to Division II's analysis that participation, or lack of participation, is a distinguishing factor.

The introduction of the element of participation in the instant case is also problematic because it is unworkable. If lack of participation is now a factor in applying the defense of implied assumption of risk, what are the components of the analysis? Here, unlike a passive pedestrian walking by, Barrett was participating in the delivery of goods. She drove the truck, she began to open the doors to the semi-trailer despite her insistence that handling the load was excluded from her job duties. This acquainted her personally with the heft of the load and its instability and could be considered participation. Barrett, 2013 WL 7098825 at *1. After her attempt to open the doors, she pushed them closed and sought help from the Lowe's employee. Plaintiff Barrett participated in the risky activity at least as much

as a spectator in a sporting event. If it is proper to introduce this element to the doctrine of implied assumption of risk, the Appellate Court has done so in a way that is unworkable and provides troubling precedent in the realm of tort law. The analysis is also inconsistent with Taylor and Kavafian. RAP 13.4(b)(1)-(2).

B. The Supreme Court Should Grant Review per RAP 13.4(b)(4) Because Modification of the Law Applicable to Torts is of Substantial Public Interest.

The Supreme Court may accept review "if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Division II's decision is of public interest because the tort system is a significant part of the legal system. While justice favors resolution of cases on its merits, the efficient administration of justice also acknowledges the value in expeditiously resolving disputes in accord with the law. Moreover, every litigant is entitled to peace and finality where the law and facts permit such a result, even without the benefit of a trial. Summary judgment is the embodiment in the civil rules of this policy and remains a vital feature of our court system and an important way to maintain the efficiency of our courts and avoid useless trials. A significant quantity of cases arise in the context of tort. In the Barrett decision, Division II departs from Washington's existing body of law in two key respects: (1) it introduced the allegation of

defendant's negligence as a bar to application of the implied assumption of risk defense; and (2) it adds "participation in the risk" as an additional distinguishing element.

The introduction of negligence as a basis for not applying primary assumption of risk is contrary to existing Washington law. Further, Division II did not conduct its analysis of the role of Barrett's allegation of negligence in light of her actual conduct as was done in Erie, Wirtz, Scott, Kirk, and Jessee. Every single tort case involves an allegation of negligence. On this basis, negligence cannot be introduced into the analysis without deviating from all of Washington's existing jurisprudence analyzing the defense of implied assumption of risk. Division II has essentially abrogated the defense of implied assumption of risk. Every tort litigant faced with the defense could cite to the instant case and allege that, despite their conduct showing otherwise, she did not consent to the alleged negligence of the defendant. This would render the defense of implied assumption of risk non-existent. Should the Supreme Court see fit to modify or limit the defense of implied assumption of risk it should not be done in this case where no actual evidence of negligence on the part of Lowe's was ever introduced, nor should such abrogation be done without a considered review of Washington's tort law and our courts' refusal to abrogate implied assumption of risk despite repeated invitations to do so.

The creation, modification, limitation, or elimination of an entire defense applicable to tort litigants is a significant matter of public concern. Presently, Division II's published decision has added unworkable, confusing, and inconsistent analysis to Washington's tort jurisprudence. Division II's analysis with respect to participation is similarly problematic as introducing a new specific distinguishing element to primary assumption of risk contrary to Kavafian and Taylor. The defense of implied assumption of risk has been a feature of Washington tort law since its inception and was preserved even after adoption of the comparative fault scheme. A change of this significance deserves careful consideration by the Washington Supreme Court and an opinion reflecting a workable analysis in accord with this State's jurisprudence.

VI. CONCLUSION

Petitioner respectfully requests that the Supreme Court accept review of this case. This matter is ripe for review under the standards set forth in RAP 13.4(b)(1), (2) and (4) because it significantly alters the law applicable to implied assumption of risk and is a matter of significant public concern.

DATED: 2/21/14

McGAVICK GRAVES, P.S.

By: _____
Lori M. Bemis, WSBA No. 32921
Attorney for Petitioners

APPENDICES

A. Order Granting Reconsideration in Part, Amending Opinion, and Publishing

B. Unpublished Opinion

Appendix A

FILED
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DIVISION II

2014 JAN 28 AM 9:50

STATE OF WASHINGTON

BY_____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHIRLEY BARRETT, individually,

Appellant,

v.

LOEW'S HOME CENTERS, INC., aka LOWE'S, a business entity; and JEFF aka JOHN MCDOWELL, individually,,

Respondents.

No. 43024-0-II

ORDER GRANTING RECONSIDERATION IN PART, AMENDING OPINION, AND PUBLISHING

Respondent filed a motion for reconsideration of our August 13, 2013 unpublished opinion. After further review of the records and files herein, we grant the motion in part and amend the opinion as follows:

It is ordered that the first sentence of the third full paragraph of page 5 that reads:

> In this case, Barrett did not assume the risks created by McDowell negligently unloading the trailer.

is deleted. The following sentence is inserted in its place:

> Viewing the facts presented to the trial court at summary judgment in a light most favorable to Barrett, she did not assume the risks created by McDowell negligently unloading the trailer.

It is further ordered that, through the court's own motion, this opinion is published. The final paragraph that reads: "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted.

Dated this 28TH day of JANUARY, 2014.

Penoyar, J.

We concur:

Hunt, J.

Bjorgen, J.

Appendix B

FILED
COURT OF APPEALS
DIVISION II
2013 AUG 13 AM 10: 29
STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHIRLEY BARRETT, individually, Appellant, v. LOEW'S HOME CENTERS, INC., aka LOWE'S, a business entity; and JEFF aka JOHN MCDOWELL, individually,, Respondents.	No. 43024-0-II UNPUBLISHED OPINION

PENOYAR, J. — Shirley Barrett was injured by falling boxes while watching John McDowell, a Lowe's employee, unload the trailer she had delivered. She sued both Lowe's and McDowell for negligence. The trial court granted summary judgment in favor of Lowe's.[1] Barrett appeals, arguing that the trial court erred by concluding that implied primary assumption of risk applied to bar her recovery. Because Barrett did not assume the risk of McDowell's negligence in unloading the trailer, we reverse the trial court's summary judgment order and remand for further proceedings.

FACTS

Barrett, a long-haul truck driver, delivered a trailer to the Longview Lowe's on August 3, 2006. Her job did not include unloading the trailer, but she would sometimes open the trailer doors in the loading dock. When she attempted to open the trailer doors in the Lowe's loading dock, she noticed that the cargo had shifted and some boxes appeared to be pressed against the doors. Barrett asked Lowe's receiving manager, McDowell, for help. Barrett stood back as McDowell opened the trailer doors. They discovered that some large boxes near the doors were

[1] For simplicity's sake, we refer to both defendants collectively as Lowe's.

held up by a nylon rope. McDowell proceeded to cut through the rope holding the boxes in place. Barrett expressed her concern at McDowell's actions, asking him, "Are you sure you want to do that?" Clerk's Papers at 93. She stated in her deposition that she thought the boxes would fall once McDowell cut through the rope.

While McDowell was attempting to cut the rope, Barrett noticed that the lock she used to secure her trailer was on the ground between her and the trailer. Without saying anything to McDowell or making eye contact, she walked forward and bent to retrieve the lock. At that moment, McDowell succeeded in cutting the rope, and the boxes held by the rope came sliding out of the trailer and hit Barrett, knocking her to the ground and injuring her. Barrett sued Lowe's for negligence. Lowe's moved for summary judgment, arguing that the assumption of risk doctrine barred her claim. The trial court agreed and granted Lowe's motion. Barrett filed a motion for reconsideration, which the trial court denied. Barrett appeals.

ANALYSIS

Barrett argues that the trial court erred by granting Lowe's summary judgment motion and concluding that the assumption of risk doctrine applies in this case. Because there is no evidence that Barrett consented to relieve Lowe's of the duty of care owed her, we agree.

We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law. CR 56(c); *Folsom*, 135 Wn.2d at 663. We construe the facts and reasonable inferences in favor of the nonmoving party. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is appropriate if reasonable persons could reach only one conclusion from the evidence presented. *Korslund*, 156 Wn.2d at 177.

There are four varieties of assumption of risk in Washington: (1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Express and implied primary assumption of risk apply when the plaintiff has consented to relieve the defendant of a duty regarding specific known risks. *Gregoire*, 170 Wn.2d at 636. Express assumption of risk exists if the plaintiff states that she consents to relieve the defendant of any duty owed. *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 719, 965 P.2d 1112 (1998). Lowe's does not argue express assumption of risk applies here. Implied primary assumption of risk is shown by the plaintiff engaging in conduct that implies her consent. *Home*, 92 Wn. App. at 719. The defendant must establish that "'the plaintiff (1) had [knowledge] (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.'" *Gregoire*, 170 Wn.2d at 636 (quoting *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987)). Knowledge and voluntariness are questions of fact for the jury unless reasonable minds could not differ. *Home*, 92 Wn. App. at 720. Implied primary assumption of risk is a complete bar to a plaintiff's recovery. *Gregoire*, 170 Wn.2d at 636.

By contrast, implied unreasonable and reasonable assumption of risk are treated as forms of contributory negligence. *Kirk*, 109 Wn.2d at 454. They apportion a degree of fault to the plaintiff and reduce her damages. *Gregoire*, 170 Wn.2d at 636. They arise where the plaintiff knows about a risk created by the defendant's negligence but chooses to voluntarily encounter it. *Lascheid v. City of Kennewick*, 137 Wn. App. 633, 643, 154 P.3d 307 (2007). "In most situations, a plaintiff who has voluntarily encountered a known specific risk has, at worst, merely failed to use ordinary care for his or her own safety, and an instruction on contributory negligence is all that is necessary and appropriate." *Dorr v. Big Creek Wood Prods., Inc.*, 84 Wn. App. 420, 426, 927 P.2d 1148 (1996).

"The difficulty is to determine in which case the plaintiff's conduct is merely negligent and is covered by comparative fault rules and in which case it manifests a consent to accept the entire risk and is a complete bar to the claim." DAN B. DOBBS, THE LAW OF TORTS § 212, at 541 (2000). Washington courts have treated this issue as one of scope, examining whether the plaintiff impliedly consented to the risks inherent in participating in a particular activity. When the defendant's negligent acts increase the risks, then the plaintiff is not assumed to have consented to those additional risks. *See Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 503, 834 P.2d 6 (1992).

In order to determine what risks Barrett assumed, it is necessary to determine what duties Lowe's owed Barrett. *See Scott*, 119 Wn.2d at 500. The existence of a duty is a question of law. *Tallariti v. Kildare*, 63 Wn. App. 453, 456, 820 P.2d 952 (1991). Barrett argues that she was an invitee and thus owed a duty of reasonable care. A business invitee is a person who is invited to enter premises for a purpose connected with business dealings with the land's possessor. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting RESTATEMENT (SECOND) OF

TORTS § 332 (1965)). The possessor owes the invitee a duty of reasonable care. *Younce*, 106 Wn.2d at 667. Here, Barrett was on the premises to engage in business dealings with Lowe's. Therefore, she was an invitee and was owed a duty of reasonable care. Lowe's failed to establish that Barrett consented to relieve them of that duty.

In *Scott*, our Supreme Court held that implied primary assumption of risk did not bar an injured skier's recovery. 119 Wn.2d at 503. There, a 12-year-old was injured during ski school when he went off of the course and hit an abandoned tow-rope shack. *Scott*, 119 Wn.2d at 488. He sued the ski resort for negligence, and the resort argued that he was completely barred from recovery because he had assumed the risk. *Scott*, 119 Wn.2d at 488, 499. The court concluded that the skier had assumed the risks inherent in skiing, but he had not assumed the risk of negligent operation by the resort. *Scott*, 119 Wn.2d at 503. The court noted that the skier may have been negligent, but his negligence was a question of fact for the jury and did not operate as a complete bar to his recovery. *Scott*, 119 Wn.2d at 503.

Similarly, in *Kirk*, 109 Wn.2d at 454, the Supreme Court held that implied primary assumption of risk did not bar a cheerleader's recovery after she was injured during an unsupervised practice. Although she had assumed the risks inherent in cheerleading, she had not assumed the risks created by the school's negligence in failing to supervise the practice and provide adequate practice facilities. *Kirk*, 109 Wn.2d at 454-55.

In this case, Barrett did not assume the risks created by McDowell negligently unloading the trailer. Arguably, falling freight is an inherent risk of unloading a trailer. But, Barrett's job duties did not include unloading the trailer, and she was not helping to unload when she was injured by the boxes. Moreover, as the *Scott* and *Kirk* cases demonstrate, the assumption of risk doctrine does not bar recovery for actions caused by the defendant's negligence. Here, there are

facts indicating that McDowell was acting negligently by cutting the rope holding the boxes in place. McDowell's alleged negligence was not an inherent risk of Barrett's job.

Additionally, none of Barrett's actions manifest an intent to relieve Lowe's of its duties. In *Leyendecker v. Cousins*, 53 Wn. App. 769, 775, 770 P.2d 675 (1989), the court determined that the application of primary implied assumption of risk was inappropriate where the plaintiff walked into a spinning helicopter rotor. Although the plaintiff saw the rotor, appreciated the risk it posed, and still voluntarily chose to walk near it, there was no evidence that the plaintiff consented to relieve the defendant of any duties before encountering the risk. *Leyendecker*, 53 Wn. App. at 775. The court reasoned that the plaintiff was not expecting to encounter the helicopter and the defendant did not know that the plaintiff would risk walking near it. *Leyendecker*, 53 Wn. App. at 775. Similarly, here, Barrett was not expecting to encounter this particular hazard. Her job did not include unloading the trailer, and her actions—backing up and asking McDowell if he was sure he wanted to cut the rope—indicate that his actions were unexpected. Additionally, the defendants did not know that she would risk walking near where McDowell was working—she was not involved in unloading the trailer and she did not warn McDowell that she had stepped closer.

Finally, this case is distinguishable from cases where primary assumption of risk has barred a plaintiff's recovery. For example, in *Wirtz v. Gillogly*, 152 Wn. App. 1, 3-4, 216 P.3d 416 (2009), the plaintiff was injured by a falling tree while helping the defendant clear trees from his property. The court granted the defendant's motion for summary judgment because the plaintiff had assumed the risk of injury. *Wirtz*, 152 Wn. App. at 7. He knew the tree could fall and injure him because he had observed and discussed the tree felling process and he had planned an escape route to avoid the falling tree. *Wirtz*, 152 Wn. App. at 10. Additionally, his

actions were voluntary because he could have refused to help at any point. *Wirtz*, 152 Wn. App. at 10-11.

Wirtz is distinguishable because the plaintiff was injured by a risk inherent in the activity he was engaged in and because he manifested consent to assume that risk. A tree falling and injuring a participant is a risk inherent in tree felling. But McDowell's negligence in unloading the trailer was not a risk inherent in Barrett's job. Further, the plaintiff in *Wirtz* manifested his consent to assume the risk: he voluntarily participated in the tree-felling process and did not argue that it was unsafe or attempt to remove himself from the situation. By contrast, Barrett did not manifest her consent to assume the risk of Lowe's negligence: she did not voluntarily participate in unloading the freight and she expressed concern at McDowell's actions and backed away from the trailer.

We hold that Barrett did not assume the risk of Lowe's and McDowell's negligence. Barrett may have been contributorily negligent when she stepped closer to the trailer, but this is a question of fact for the jury and should not bar her negligence claim entirely. Therefore, we reverse the trial court's summary judgment order and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Hunt, J.

Bjorgen, J.

COURT OF APPEALS
DIVISION II
2014 FEB 26 AM 10:37
STATE OF WASHINGTON
BY
DEPUTY

SUPREME COURT OF THE STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF COWLITZ COUNTY
No. 09-2-01350-1

and

COURT OF APPEALS, DIVISION II
No. 43024-0-II

LOWE'S HIW, INC., aka LOWE'S , a business entity, and JEFF, aka JOHN MCDOWELL, individually, Petitioners, v. SHIRLEY BARRETT, Respondent.	DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via electronic mail a copy of the Petition for Review to:

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McGAVICK
GRAVES
A Professional Services Corporation
1102 Broadway, Suite 500 • Tacoma, Washington 98402
Telephone (253) 627-1181 • Fax (253) 627-2247

James E. Koenig, Esq.
Law Offices of James Koenig
216 First Ave. S., Suite 204
Seattle, WA 98104
jim@koeniglawoffice.com

Signed at Tacoma, Washington this 25th day of February 2014.

McGAVICK GRAVES, P.S.

By: Erin M. Hahn
Erin M. Hahn

McGAVICK GRAVES
A Professional Services Corporation
1102 Broadway, Suite 500 • Tacoma, Washington 98402
Telephone (253) 627-1181 • Fax (253) 627-2247

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LOWE'S HIW, INC., aka LOWE'S , a business entity, and JEFF, aka JOHN MCDOWELL, individually, Petitioners, v. SHIRLEY BARRETT, Respondent.	ACCEPTANCE OF SERVICE

The undersigned acknowledges service and receipt on behalf of Respondent, Shirley Barrett, and of a true copy of the Petition for Review at 3:00 a.m./p.m. on the 25th day of February, 2014 by electronic mail at jim@koenigiawoffice.com.

DATED this 25th day of February 2014.

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing electronic document(s) attached to this declaration, which consist of 1 page(s) is a complete and legible image that I have examined personally and that was received by me ~~via FAX at the following number 253-627-2247 or~~ via e-mail at cmm@mcgavick.com.
Dated 2/25/14.

LAW OFFICE OF JAMES KOENIG

By: _____
James E. Koenig, WSBA No. 19956
Attorney for Respondent

McGAVICK
GRAVES
A Professional Services Corporation
1102 Broadway, Suite 500 • Tacoma, Washington 98402
Telephone (253) 627-1181 • Fax (253) 627-2247