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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

NO. 43024-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

SHIRLEY BARRETT,

Appellant,

v.

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

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Shirley Barrett respectfully replies to Brief of Respondents, LOWE'S HIW, Inc., aka LOWE's, a business entity, and JEFF, aka JOHN McDOWELL, individually (hereinafter referred to alternatively as "Lowe's" or "McDowell").

B. LEGAL ARGUMENT

1. *Review is de novo.*

Respondent/Defendant (hereinafter Lowe's or McDowell) agrees the standard of review is de novo. *Brief of Respondents at 11*. Lowe's also argues that Barrett is precluded from arguing she was a business invitee. *Brief of Respondents at 24*.

By definition, express and implied assumption of risk involve the notion that plaintiff consents to negate a duty the defendant would otherwise have owed to the Plaintiff. *Alston v. Blythe*, 88 Wn. App. 26, 34, 943 P.2d 692 (1997). It is inconsistent for Lowe's to argue the application of assumption of risk but at the same time argue there was no initial duty of care to Barrett.

It is undisputed that Barrett, who worked for Interstate Distributing, picked up and delivered a trailer loaded by Lowe's in Cheyenne, Wyoming for a warehouse in Longview, Washington. CP 61.

Classification of the person as invitee, licensee, or trespasser is a question of law for the court, unless there is some factual dispute over the circumstances surrounding the injured party's entry onto the property.

Ford v. Red Lion Inns, 67 Wn. App. 766, 840 P.2d 198 (1992). A business invitee is one who is invited to enter or remain on land for the purpose directly or indirectly connected with business dealings with the possessor of the land. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting RESTATEMENT (SECOND) OF TORTS § 332 (1965)).

A business owner is under an affirmative duty to protect a business invitee not only against dangers of which he knows, but also against those which with reasonable care he might discover. *Prosser and Keeton on Torts*, 5th Ed., Ch. 10, Sec. 61, p. 419-420.

2. *Application of Assumption of Risk Doctrine.*

Lowe's response essentially makes the same argument advanced at the trial court. That is, that Barrett is prevented from recovery because she

voluntarily stepped into the path of falling boxes knowing the risk presented by the shifting and falling freight.

Lowe's fails to argue how Barrett's actions relieved or negated them of a duty of care. Lowe's argument also fails to distinguish between contributory negligence and assumption of risk. The broadness of their argument eviscerates any meaningful distinction between assumption of risk and contributory negligence.

Lowe's argument also ignores the greater factual context of the incident. Barrett had simply asked for help to secure the freight so she could latch the doors and back up to the dock in order to complete her job. CP 63. McDowell went beyond plaintiff Barrett's request and started to "unsecure" the freight--actions unrelated to Barrett's request. McDowell appeared uninterested in listening to Barrett so she "just let him do what he wanted to do" Id.

Consent lies at the heart of both implied primary and express assumption of risk. *Alston*, 88 Wn. App. at 34. Barrett did not consent to the cutting of the strapping, much less participate. Knowledge of a potential danger is not the equivalent of consenting to take on that danger and relieving another of their duty.

Under the facts presented, Lowe's and McDowell, their employee, owed a duty of care for Barrett, their business invitee. At no time were they relieved of that duty.

3. Material facts preclude summary judgment

Lowe's argument at essence is that Barrett was standing too close to the back of the truck and she knew there was a danger. They seem to argue that McDowell had no knowledge of Barrett's presence, and the lack of knowledge somehow absolves Lowe's of any duty of care.

To the extent knowledge of Barrett's presence is material to the issues of consent, record facts show there was communication between Barrett and McDowell after McDowell had jumped up into the back of the trailer.

Barrett asked, to the effect, whether what he was doing (i.e. cutting the strapping) was wise. McDowell responded "It will be OK. This happens all the time". CP 67, 92. McDowell proceeded with the cutting. Apparently frustrated with the slow pace of cutting McDowell asked Barrett if she had a knife in her truck. CP 90. Barrett plainly testified at deposition "And when he started talking to me, I couldn't hear him, and that's when I moved up to him". CP 133. After McDowell asked Barrett

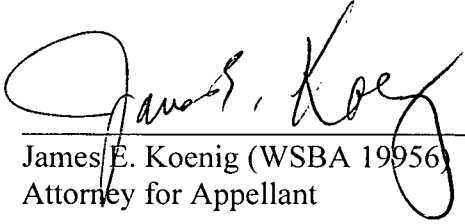
about the knife she backed up to where she had been. CP 90. Barrett then clearly testified “And while I was backing up, I noticed that Interstate’s padlock was on the floor--or on the ground there. So I looked up to make sure that he hadn’t gotten through yet...” CP 90. As the boxes fell, McDowell yelled “Look out”. CP 92, 192. It is plainly inferable from McDowell’s communication that he was aware Barrett was in close proximity to him.

C. CONCLUSION

Implied primary assumption of risk does not apply in this case. Even if it does, issues relating to consent to relieve Lowe’s of a duty of care stemming from communication at the back of the trailer are issues for a jury to decide.

DATED this 15th day of August, 2012.

Respectfully submitted:


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AFFIDAVIT OF SERVICE

I hereby declare under the penalty under the laws of the State of Washington that I have served a true and correct copy of the Plaintiff's Reply Brief upon the individual(s) listed by the following means:

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Signed at Seattle, Washington on this 15th day of August, 2012.



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