No. 43024-0-II

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

SHIRLEY BARRETT

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The case was commenced in Cowlitz County Superior Court by Appellant, Shirley Barrett ("Barrett") via Complaint filed on July 7, 2009. (CP 004–016). Barrett alleged that Respondent Lowe's Home Centers, Inc. ("Lowe's") and its employee, John McDowell, were negligent in unloading a semi-trailer, which resulted in injury to Barrett when freight fell onto Barrett. (CP 004–016).

Freight fell onto Barrett when McDowell released the load held in the semi-trailer by a length of nylon strapping. (CP 089–091). However, Barrett's testimony established repeatedly that, prior to the freight falling, she was aware of the unstable freight and believed it would fall out of the trailer when McDowell finished cutting through the strapping holding the load in place. (CP 085; 089–091). Barrett's knowledge of the unstable load, and the likely outcome, was established by Barrett's own repeated warnings to McDowell as he worked to release the load and Barrett's testimony regarding her own state of mind. (CP 063; 093). As a result of Barrett's concern that the load would fall, Barrett testified that she stood back and out of the way of the semi-trailer and its load while McDowell cut through the nylon strapping. (CP 062–063; 089–091). These facts were established via Barrett's consistent responses to Requests for

Admission, Interrogatories, and deposition testimony. (CP 037–094). Despite her warnings to McDowell, Barrett bent down to retrieve a padlock in the area where the freight would fall while McDowell worked to release the load. Barrett testified that she thought she could swoop in and retrieve the lock and move back out of the way before McDowell finished cutting through the strapping. (CP 091). Barrett left her position beyond the area where the freight fell in order to attempt to retrieve the lock. (CP 091).

Lowe's moved for summary judgment on the basis of primary assumption of risk. (CP 026–036). Lowe's motion relied upon the applicable law and Barrett's interrogatory responses, responses to requests for admission and deposition testimony. (CP 026–094). Barrett did not offer a declaration contradicting her discovery responses or the testimony provided in her deposition. (CP 095–139). This evidence established as a matter of law:

1) Barrett's full and subjective understanding of the risk as demonstrated by her repeated warnings regarding the unstable load and her own testimony regarding her state of mind;

2) Barrett demonstrated that she understood the presence of the risk presented by the unstable freight and appreciated the specific risk presented by the unstable freight; and

3) Despite Barrett's understanding of the risk and appreciation of the risk, Barrett voluntarily left her position of safety well rear of the doors of the semi-trailer, and voluntarily placed herself beneath the unstable load.

(CP 026–036). As a consequence, Lowe's motion for summary judgment was granted via Superior Court Judge Stephen Warning's Order of November 18, 2011. (CP 153–155). A motion for reconsideration followed, which was denied without oral argument. (CP 185–186). Lowe's respectfully requests that this Court affirm the trial court's summary judgment dismissal.

II. ITEMS FOR REVIEW

1. Should summary judgment be upheld where the record is devoid of evidence set forth by the Petitioner establishing any issue of material fact?
2. Should summary judgment be upheld where the trial court properly applied the legal standard applicable to primary assumption of risk?

III. STATEMENT OF THE CASE

A. Procedural History

Barrett commenced the underlying action in Cowlitz County, alleging Lowe's and its employee were negligent. (CP 013–016). Barrett alleged that Lowe's was negligent in unloading freight from a semi-trailer, which fell onto Barrett. (CP 14). Lowe's issued Interrogatories and Requests for Admission to Barrett, then deposed her.

Lowe's moved for summary judgment arguing that Barrett assumed the risk presented by the semi-trailer's load when she voluntarily placed herself beneath the load. (CP 026–036). As a result, the doctrine of primary assumption of risk barred Barrett's claim. (CP 026–036). Barrett submitted a response arguing that primary assumption of risk was inapplicable. (CP 095–108).

Barrett opposed Lowe's motion by arguing that the doctrine of primary assumption of risk did not apply in the instant case. (CP 095–087). In opposing Lowe's motion for summary judgment, Barrett did not submit a declaration and did not aver that the facts established by Lowe's via her interrogatory responses, responses to request for admission, or deposition were inaccurate. (CP 095–108). Oral argument was heard on November 18,

2011. Summary judgment was granted by Judge Warning on November 18, 2011. (CP 153–154).

Subsequently, Barrett filed a motion for reconsideration. (CP 156–171). Judge Warning denied Barrett's motion for reconsideration via his Order dated December 12, 2011. (CP 185–186). In his Order, Judge Warning set out his reasoning in granting Lowe's motion for summary judgment:

> [Barrett] voluntarily consented to encounter the very specific risk that the heavy boxes would fall out of the truck after making her own evaluation of how far along Mr. McDowell was in cutting the strapping. She was injured by the same instrumentality and process she considered to be a danger when she placed herself in what she admitted she knew was harm's way. She did so based on her hope that the disaster wouldn't happen until she got back out of way. Unfortunately, Ms. Barrett was absolutely correct in all her surmises except the last one.

(CP 185–186).

Barrett timely appealed Judge Warning's summary dismissal of her case. (CP 187–188).

B. Statement of Facts.

Barrett's interrogatory responses established that she brought the load in question from Cayenne, Wyoming to Lowe's facility in Longview, Washington. (CP 061). Barrett testified that she believed that the semi-trailer's load was unevenly distributed based on the fact that the tandems had

to be adjusted in Cayenne. (CP 061). Lowe's trucks are sealed and Barrett had to contact Lowe's employee, John McDowell, to open the sealed load. (CP 062). Barrett asserted that when McDowell arrived, he directed Barrett to bring the semi-trailer to within ten feet of the loading dock. (CP 062). Barrett then opened the doors to the semi-trailer herself, starting with the right door. (CP 062). Barrett felt strong resistance on the left door and had to let go of the right door to get the left door closed. (CP 062). While Barrett was closing the left door some light boxes fell out of the right side of the trailer, which did not injure Barrett. (CP 062). Barrett then, "decided that [she] needed assistance in regards [sic] to opening the trailer doors." (CP 062). Barrett contacted McDowell and told him she, "needed help with the falling freight." (CP 062).

These facts were set forth in narrative form in Barrett's interrogatory responses:

> When I proceeded to swing open the right door first, I then noticed that the left door had some strong resistance (like weight leaning against the door). I had to let go of the right door to use both hands and body to close the left door. In doing so, some smaller/lighter boxes flew out of the back of the trailer on the pavement. I moved the boxes to the side of the trailer. I proceeded to open the left side door but noticed that some large boxes had fallen, so I immediately closed and latched both doors. I decided that I needed to have assistance in regard [sic] to opening the trailer doors,
>
> . . .

> I had told [Lowe's employee Mr. McDowell] that, I needed help with the falling freight. After expressing to Mr. McDowell again that, I was needing assistance with the fallen [sic] freight, he told me to go back to the dock area and he would meet me their [sic]. When I arrived at the dock area, Mr. McDowell was opening the dock door and jumped out on the pavement. We both walked to the back of the trailer and he then proceeded to open the doors. I remember moving backwards, due to any freight that might continue on falling out, when he opens up the doors. I noticed that when Mr. McDowell opened up the doors the large freight was held up by a nylon rope. Mr. McDowell had a snap blade box knife that he was going to cut the nylon rope with. I asked Mr. McDowell 'Are you sure you want to do that?', and he said 'Don't worry, it'll be Okay!'. [sic] I am sure that Mr. McDowell could hear the hesitation or worrisome [sic] in my voice when I questioned him cutting the rope.
>
> . . .
>
> Unfortunately, Mr. McDowell was on a mission and was not going to listen to what I was saying, so I just let him do what he wanted to do. While Mr. McDowell was having a difficult time cutting the nylon rope, I noticed that the Interstate padlock that is my responsibility was on the pavement approximately five (5) feet directly behind the middle of the semi-trailer doors. I was just about to touch the padlock that was on the pavement, with my torso bent at the waist when, Mr. McDowell yelled extremely loud with worrisome/concern [sic] in his voice, 'Look out; [sic] look out'. I knew at that period of time that I would not have had time to jump out of the way [. . .].

(CP 62–63).

In sum, as McDowell began opening the trailer doors while Barrett moved backwards, explaining that she was motivated to move back because

of her continued fear of falling freight. (CP 063). When McDowell opened the doors, Barrett could see that the large freight was held in place with a length of nylon strapping. (CP 063). McDowell worked to release the freight by cutting through the nylon strapping. (CP 063). As McDowell worked to cut through the strapping, Barrett testified she asked him, "Are you sure you want to do that?" (CP 063, 092). Barrett's testimony when deposed as to her mindset was consistent with her interrogatory responses:

> Q: Why did you say, "Are you sure you want to do that?" What concern were you trying to –
> A: I was thinking about those heavy boxes coming out once he cut that tape.
> [. . .]
> Q: So it sounds like you saw ahead of time that cutting that strap was going to cause –
> A: A problem.

(CP 092). In Request for Admission number four, Barrett was also asked, "Admit that when you opened the doors to the trailer you could hear and see the freight shifting and falling toward the door." (CP 078). Barrett answered:

> Yes, when I attempted to open up the trailer door on the right, a couple of smaller boxes fell out. When I attempted to open up the left trailer door, the door itself, was much heavier and I could hear freight shifting, so I immediately closed both trailer doors.

(CP 078, 084).

At the time McDowell was working to cut through the strap, Barrett was positioned behind the semi-trailer outside of where any freight would fall. (CP 089). At her deposition Barrett was asked:

> Q: And what was your thinking when you backed up?
> A: I was thinking that something was going to come flying out the door. And when [McDowell] opened it, there was [sic] tall boxes.

(CP 089). As McDowell continued to cut the strapping, which Barrett testified took approximately ten minutes, Barrett noticed the padlock was on the pavement behind the semi-trailer. (CP 063; 089). Barrett decided to retrieve the padlock while McDowell continued cutting through the rope. (CP 063). When deposed, Barrett was asked:

> Q: And your thinking was – and correct me if I'm wrong – that because it had taken Mr. McDowell so long to saw through it that you [sic] get the lock and stand back up before he successfully cut through the –
> A: Yes.
> Q: -- Strapping tape?
> A: Yes, I checked before I even bent down. I looked over to see how far he had gotten through the strapping tape because if he had gotten through quite a ways by then I would not have done that.
> Q: And before you reached down – if you had stayed where you were standing before you reached to get the padlock, would those boxes have fallen on you or were you standing outside of the range of where they would have landed?
> A: I was in the center of the back of the trailer. And they would have just missed me there.

(CP 091).

Barrett also testified that it was not her responsibility to unload freight because she did not want to encounter the risk of injury relating to unloading freight:

> Q: And whose responsibility was it to unload the freight?
> A: Theirs.
> Q: And was that true of Lowe's?
> A: Yes.
> Q: . . . as well?
> A: Yes.
> Q: And was that unique to Interstate deliveries or was that the case with Covenant?
> A: With me. That was the same because I didn't want to – even though I knew that I was a strong female, that I didn't want to have the – to unload the trailer and have – oh, shoot. I didn't want to reach anything and I didn't want to get hurt.
> Q: Okay. So that was that something that you insisted upon at Covenant?
> A: Yes.
> Q: And at B & L?
> A: Yes.
> Q: And at Interstate?
> A: Right.
> Q: Okay.
> A: Yeah.
> Q: So for all deliveries, it was not your responsibility to unload the freight.
> A: No. It wasn't.

(CP 150–151). In addition to this testimony, there is no evidence in the record that McDowell persuaded Barrett to assist him in dealing with the freight on the day of Barrett's injury.

IV. ARGUMENT

A. The Standard of Review is De Novo.

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party (here, Respondent Lowe's) is entitled to summary judgment as a matter of law, and if there is any genuine issue of material fact requiring a trial. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); Green v. A.P.C., 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact. Hash v. Children's Orthopedic Hosp. & Medical Ctr., 49 Wn. App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988).

Likewise, a nonmoving party (Barrett) attempting to resist a summary judgment "may not rely on speculation, argumentative assertions that unresolved factual matters remain," rather "the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." Halvorsen v. Ferguson, 46 Wn. App. 708, 721, 735 P.2d 675 (1986).

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. Summary Judgment Was Proper.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions show that the moving party is entitled to judgment as a matter of law. CR 56(c); Young v. Key Pharm., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). On appeal of a summary judgment order, the appellate court performs the same inquiry as the trial court. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); *see also* Bostain v. Food Express, Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

Questions of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. Sherman v. State, 128 Wn.2d 164, 184, 905 P.2d 355 (1996); *see also* Kim v. Budget Rent A Car Systems, Inc., 143 Wn.2d 190, 203, 15 P.3d 1283 (2001) ("When, as here, the facts do not admit of reasonable differences of opinion, proximate cause is a question of law to be decided by the court.").

Washington courts have granted summary judgment in the context of primary assumption of risk where reasonable minds could not differ on

whether the plaintiff knew all of the facts a reasonable person would have known, thereby appreciating the risk presented, and yet voluntary accepted the risk despite the availability of a reasonable alternative course of action which would have avoided injury. Erie v. White, 92 Wn. App. 297, 306, 966 P.2d 342 (1998); Wirtz v. Gillogly, 152 Wn. App. 1, 10–11, 216 P.3d 416 (2009).

Here, Barrett's pleadings, deposition testimony, and responses to discovery demonstrated to the trial court that no issues of material fact existed. On the evidence presented, taking all inferences in favor of Barrett, reasonable minds can only conclude that Barrett knew all of the facts relevant to the risk presented and appreciated the specific risk presented by the freight. Despite this knowledge, Barrett voluntarily chose to move from her position of safety and into the path of falling freight, thereby causing her injuries.

In opposing summary judgment, the nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986). Here, Barrett's opposition to summary judgment before the trial court was unsupported by any evidence presenting a factual dispute. Thus, the Order of the trial court should be affirmed.

C. Primary Assumption of Risk Applies in this Case.

In Washington state, "primary implied assumption of risk continues as a complete bar to recovery after the adoption of comparative negligence laws." Scott ex rel. Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 495, 834 P.2d 6 (1992).[1]

> Implied *primary* assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks.

Id. at 497 (emphasis in original). "With implied primary assumption of risk, the plaintiff engages in [ ] kinds of conduct, from which consent is then implied." Erie, 92 Wn. App. at 303.

> To invoke assumption of risk, a defendant must show that the plaintiff knowingly and voluntarily chose to encounter the risk. Thus the evidence must show that the plaintiff (1) had full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.

Id. at 303 (internal citations omitted). Generally, knowledge and voluntariness will be questions of fact for the jury, except where, as in this case, reasonable minds could reach but one conclusion. Id.; Alston v. Blythe, 88 Wn. App. 26, 32–34, 943 P.2d 692 (1997).

In this case, Barrett's claim is barred by the doctrine of assumption of risk. The trial court properly determined that Barrett's testimony

established that she clearly knew and appreciated the risk of placing herself behind the semi-trailer and within the path of falling boxes. (CP 089). Barrett clearly appreciated the risk as demonstrated by her decision to stand beyond where she believed the boxes could fall, as well as her warnings to McDowell. (CP 089). Despite Barrett's perception that the freight presented a danger, Barrett, without communicating to McDowell, stepped into the exact place where the boxes would (and did) fall when he finished cutting through the strap. (CP 091). Barrett's decision to voluntarily encounter the risk presented by the freight is the sole reason she was injured.

On appeal, Barrett attempts to argue that the trial court improperly failed to consider Lowe's duty of care to Barrett. The trial court's analysis was in accord with Washington law. Where primary assumption of risk applies, it "negate[s] the duty the defendant would otherwise have owed to the plaintiff [.]" Erie, 92 Wn. App. at 302. Consequently, further consideration of McDowell's alleged duty to Barrett in this case would not affect the outcome where Barrett's words and conduct clearly demonstrate her consent. *See* id. at 303.

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[1] *See also* Ridge v. Kaldnick, 42 Wn. App. 785, 788, 713 P.2d 1131 (1986); Cold v. Stevens Pass, Inc., 45 Wn. App. 393, 401–02, 725 P.2d 1008 (1986).

D. Barrett's Testimony and Conduct Demonstrated Her Full Subjective Understanding of the Risk Posed by the Freight.

Barrett's words and conduct demonstrate her appreciation of the risk. Barrett commenced opening the doors and felt that the freight had shifted. When she tried to open the doors, a few smaller boxes fell out, but did not injure her. (CP 062). As a result, Barrett actually saw, though with lighter boxes, the risk presented by the freight. Barrett stated that as a result of this experience, she felt she needed help with the freight and sought out Lowe's employee McDowell to help her. (CP 062). This is in accord with Barrett's general attitude about unloading freight, which resulted in her insisting that she not unload the freight. (CP 150–151).

Barrett then *repeatedly* warned the Lowe's employee that the freight was unstable. (CP 062; 93). One cannot conclude that Barrett did not appreciate the risk herself as she offered her warnings to McDowell. In further acknowledgment of the risk, Barrett positioned herself to observe Mr. McDowell cut the rope from a safe distance; a distance which she concedes is outside of the area where she expected the boxes to fall. (CP 091).

The instant case is similar to Wirtz v. Gillogly, 152 Wn. App. 1, 216 P.3d 416. In Wirtz, the defendant moved for summary judgment on the basis of implied primary assumption of risk. Id. at 7–8. The trial court

determined that the plaintiff demonstrated knowledge of the risk by observing the tree falling process over several days before his injury, discussing the method of tree falling with the defendant, and recognizing that the method used to fell the tree would bring the tree into the area where the plaintiff was standing. Id. at 10. The plaintiff in Wirtz further demonstrated his understanding of the risk by the plaintiff's testimony that he had planned an escape route if the tree were to fall near him. Id. On appeal, Division Two upheld the trial court's determination that on these facts the defendant demonstrated subjective understanding of the risk presented and no reasonably jury could conclude otherwise.

Like the plaintiff in Wirtz, Barrett demonstrates her acknowledgement of the risk by discussing the unstable freight with the Lowe's employee. (CP 062; 093). Finally, Barrett initially chose to stand beyond where she expected the freight to fall, which Barrett testifies was motivated by her concern that the freight would fall on her. (CP 089).

E. Barrett's Testimony and Conduct Demonstrate Barrett Understood the Nature and Specific Risk Presented by the Freight.

When primary assumption of risk applies, "the plaintiff engages in other kinds of conduct, from which consent is then implied." Alston, 88 Wn. App. at 33. In Barrett's case, summary judgment was properly

granted by the trial court because Barrett's incontrovertible testimony demonstrated her understanding of the nature of the risk the freight presented. On appeal, Barrett devotes much of her brief to a comparison between express and implied primary assumption of risk, but fails to address the numerous instances of Barrett's testimony and evidence which demonstrate Barrett's appreciation of the risk presented by the freight. In her briefing, Barrett further concedes, "From experience, [Barrett] was aware of a potential risk of falling freight." (Appellant's Brief at 17).

Barrett argues that the instant case is similar to Alston. Alston is readily distinguishable from the instant case. In Alston, a pedestrian was injured by a vehicle when she attempted to cross a street. Alston, 88 Wn. App. at 30. The plaintiff in Alston sought to recover from the driver who waived her across the street, which Alston argued caused her to encounter a car she did not see. Id. Because the plaintiff in Alston arguably understood the risks associated with crossing the street, the defendant sought a jury instruction on the application of the doctrine of implied assumption of risk. Id. at 34–35. On appeal, it was determined that an instruction of implied assumption of risk was improper where there was only evidence of a general understanding of the risk of crossing a street but

no evidence that the plaintiff appreciated the specific risk presented by a vehicle she did not see. Id. at 36.

Here, unlike in Alston, there is no tenable argument that Barrett did not understand the risk presented of the freight, or that the freight presented some risk Barrett did not comprehend. Any argument offered by Barrett that she did not comprehend the risk must fail. It is simply not supportable that Barrett understood the risk of the freight sufficiently to warn McDowell, but failed to appreciate that the freight presented the same risk to her. Further, in this case, Barrett's own testimony repeatedly demonstrates that she understood the risk and, as a result, was motivated to 1) seek McDowell's help with the freight and 2) stand in a position which she believed would place her beyond any falling freight. (CP 062; 089; 091).

F. Barrett Voluntarily Encountered the Risk Presented by the Freight.

Voluntariness depends upon whether a plaintiff chooses to encounter a risk, "despite knowing of a reasonable alternative course of action." Erie, 92 Wn. App. at 304. Put simply, the plaintiff must have had an opportunity to avoid the danger by acting differently. Id. at 304–05; *See also*, Restatement (Second) of Torts § 496E. Here, immediately prior to her injury, Barrett was engaging in the course of conduct that would

have avoided her injury. Barrett testified that she was standing back and out of the way of where the freight would fall when released. (CP 089; 091) Instead of continuing to stand out of the way, Barrett decided to try and pick up the padlock before the Lowe's employee was able to cut through the rope holding the freight, gambling that she could do so before McDowell would finish cutting through the strapping. (CP 091). Barrett's encounter with the freight is the result of her sole decision to retrieve the padlock.

Barrett's unequivocal testimony established that she believed that she could grab the lock and return to her position, beyond the range of the falling freight, before the Lowe's employee cut through the strapping (CP 091). There is no evidence that the Lowe's employee asked Barrett to assist with the freight, there is no declaration or other testimony in the record establishing that Barrett stepped forward because of a conversation with McDowell, or that McDowell had any role whatsoever in Barrett's decision to move into the path of the falling freight. (CP 062; 091). Yet, as the holding in Erie illustrates, even if such requests were made, they would provide insufficient evidence to show that Barrett's decision to move under the freight was involuntary. Erie, 92 Wn. App. at 306 n.26.

The instant case is in accord with Erie and Wirtz. Reasonable minds could not differ on whether Barrett had available to her another course of action which would have avoided injury; namely continuing to stand outside of the area where the freight would fall. Further, the facts here are even more compelling than those in Erie and Wirtz because Barrett was actually engaging in the alternative course of action which would have avoided injury before she alone decided to move into the known and acknowledged zone of danger.

The case of Leyendecker v. Cousins, 53 Wn. App. 769, 770 P.2d 675 (1989), does not demand a different result, despite Barrett's argument to the contrary. In Leyendecker, unlike in the instant case, there was no testimony explaining Leyendecker's reasoning for turning into the hazard of the helicopter tail rotor which injured him. *See* Leyendecker, 53 Wn. App. at 775. From such evidence, the plaintiff's consent could not be shown as a matter of law. Id. Contrastingly, in this case, Barrett's own testimony regarding her state of mind demonstrates that she understood the risk, but tried to retrieve the padlock before McDowell could finish cutting the load free. (CP 062; 091). Barrett simply gambled that she could avoid the risk by moving quickly. (CP 091).

On appeal, Barrett argues that consent is not demonstrated in this case because Barrett did not unload the truck or assist with unloading the truck, did not agree with McDowell's decision to cut the strapping, and did not help with cutting the strapping. (Brief of Appellant at 20). At its core, Barrett's argument is that consent may only be demonstrated by the specific behavior she enumerates in her brief. This is not the law. As the doctrine's name conveys, consent is *implied* by the words and conduct of the plaintiff. Alston, 88 Wn. App. at 33–34. Again, the evidence that Barrett voluntarily encountered the risk of freight falling on her is unquestionably established by her testimony:

> Q: And your thinking was – and correct me if I'm wrong – that because it had taken Mr. McDowell so long to saw through it that you [sic] get the lock and stand back up before he successfully cut through the –
> A: Yes.
> Q: -- Strapping tape?
> A: Yes, I checked before I even bent down. I looked over to see how far he had gotten through the strapping tape because if he had gotten through quite a ways by then I would not have done that.
> Q: And before you reached down – if you had stayed where you were standing before you reached to get the padlock, would those boxes have fallen on you or were you standing outside of the range of where they would have landed?
> A: I was in the center of the back of the trailer. And they would have just missed me there.

(CP 091).

Further, Barrett incorrectly relies on Little Rapids v. McCamy, 218 Ga. App. 111, 460 S.E.2d 800 (1995). Putting aside that the Georgia Appellate Court's decision is not binding on Washington Courts, the case is distinguishable. In McCamy, the injured plaintiff was helping his co-worker unload some boxes when the boxes fell on him, causing injury. Id. at 112. Unlike in Barrett's case, the plaintiff in McCamy could not see what his co-worker was doing and was harmed when his co-worker moved in an unanticipated and unseen manner. Id.

G. Barrett Has Not Demonstrated Issues of Material Fact that Preclude Summary Judgment.

Barrett did not demonstrate to the trial court that issues of material fact existed in this case. On appeal, Barrett now argues that she stepped forward in response to a question from McDowell that Barrett could not hear. (Appellant's Brief at 17). There is no testimony in the record regarding this assertion, and Barrett cites to none in her brief. Barrett's testimony unequivocally establishes that she stepped forward in an effort to retrieve the fallen padlock before she believed McDowell would finish cutting through the rope. (CP 091). Further, assuming such a conversation occurred, it would not change the fact that Barrett's testimony still shows that her decision to try and retrieve the padlock was

hers alone and not motivated by any conduct on McDowell's part. (CP 091).

Barrett now argues a different motivation for her behavior. However, such speculative and argumentative assertions are plainly insufficient to create an issue of material fact. Barrett's assertions, even if true, are insufficient under the law to avoid summary judgment on the basis of primary assumption of risk. Meyer, 105 Wn.2d at 852; Erie, 92 Wn. App. at 306 n.26.

H. Barrett Cannot Argue for the First Time on Appeal that She Was a Business Invitee; Regardless, Barrett's Alleged Status as a Business Invitee Does Not Preclude Summary Judgment.

Barrett also argues on appeal that as a business invitee she was owed a duty of care. This argument was not made in opposition to Lowe's motion for summary judgment. (CP 095–108). A similar tactic was tried in the case of Cano-Garcia v. King County, 277 P.3d 34 (2012). In Cano-Garcia, the Court declined to consider an issue because the appellant raised it for the first time on appeal. Id. at 48–49 (citing to RAP 9.12).

Even if this court considered Barrett's argument, it has previously been rejected on similar facts in the case of Hymas v. UAP Distribution, Inc., 167 Wn. App. 136, 272 P.3d 889 (2012). In Hymas, the injured plaintiff argued that the property owner had breached his duty of care by

failing to protect the plaintiff, an employee of a contractor on defendant's premises, from a known danger. Id. at 163–64. The appellate court rejected the argument based on the plaintiff's familiarity with the hazard that resulted in the injury. Id. Similarly here, Barrett's familiarity with the hazard and her decision to encounter it is dispositive regardless of her purported status as a business invitee.

V. CONCLUSION

This Court should affirm the trial court's summary judgment dismissal. Primary assumption of risk applies in the instant case. Barrett was aware the freight in the semi-trailer had shifted. She opened the doors and actually observed lighter freight fall from the truck. She sought help and warned Lowe's employee McDowell that the load was unstable. Barrett then stood back from the semi-trailer based on her desire to be beyond the area where the freight would fall. Barrett left her position of safety voluntarily, in full understanding of the risk presented by the freight, thereby putting herself in harm's way. These facts are squarely in accord with the outcome in Erie and Wirtz where summary judgment was granted

on the basis of primary assumption of risk. The same result should occur in this case.

DATED this 16th day of July, 2012

MCGAVICK GRAVES, P.S.

By: _____
Lori M. Bemis, WSBA #32921
Of Attorneys for Respondents

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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 E-Mail to Mr. Koenig, per agreement of counsel, and via U.S. Mail, a copy of the Brief of Respondents to:

James E. Koenig, Esq.
Law Offices of James Koenig
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