

No. 71022-2-1

(King County Superior Court Case No. 12-2-03756-6 SEA)

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**COURT OF APPEALS FOR DIVISION I**

**STATE OF WASHINGTON**

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MIGUEL GAONA

Appellant

v.

GLEN ACRES GOLF & COUNTRY

CLUB and GLEN ACRES

HOMEOWNER'S ASSOCIATION, INC.

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**BRIEF OF RESPONDENT GLEN ACRES HOMEOWNER'S**

**ASSOCIATION**

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## **I. INTRODUCTION**

Appellant commenced this action on January 31, 2012 alleging that he had suffered personal injuries on or about September 2, 2009 when a tree located on the Respondent's premises fell over and struck him while he was working on the grounds performing landscaping maintenance. His notice pleading simply alleged that his injuries were the result of the Respondent's negligence in failing to warn him or otherwise protect him from a dangerous condition on the property. Clerk's Papers (hereinafter "CP") 1-4.

After both sides conducted discovery, Respondents moved for summary judgement. At the hearing on this motion on September 13, 2013, the court granted the motion and dismissed this action. The subject appeal followed.

## **II. COUNTERSTATEMENT OF THE CASE**

Respondent Glen Acres is a condominium association comprised of a 22 acre gated complex of 225 homeowners. CP 122. Appellant's employer, Bill's Maintenance Company, was retained by the association to maintain the common areas of the association including the grounds and landscaping. CP 35-38. On September 2, 2009, while Appellant was mowing the lawn in the common areas of the association, a tree fell over

and a portion of it struck him causing personal injuries.

Bill's Maintenance Company was an independent contractor owned and operated by Bill Placek. Mr. Placek and his company had been performing maintenance of the common areas of the association, specifically including the trees and landscaping, for 32 years prior to the subject accident. CP 120-122. Among the specific tasks Bill's Maintenance Company was hired to perform was to inspect the grounds for hazardous trees. Consistent with that task, Mr. Placek looked at the trees on the grounds for any signs of ill health or distress including dead or diseased limbs, loss of leaves, abnormal growth or development, dead leaves, thin areas of coverage, or insect infestations. CP 35-37. Mr. Placek testified he conducted these inspections weekly. CP 73 (Page 21 of Placek deposition at lines 1-5).

Because Mr. Placek had been working at Glen Acres for 32 years, he had seen the subject tree grow and develop during that entire period. He visually inspected it countless times to see if it might be hazardous. He had a vested interest in inspecting the trees on the grounds because he constantly worked around them and would be the person most threaten by unhealthy trees. He was unequivocal in his testimony that the subject tree

did not display any signs of ill health before falling over. CP 35-37.

The appellant worked at Glenn Acres for approximately six months before his injury. He testified that he had been working in the vicinity of this tree “a lot”. He also testified that he did not notice anything about the tree that he thought made it unhealthy. CP 14-16.

Jane Placek was the manager of the Association at the time of the Appellant’s injury. She is the person who would typically have been contacted by the association members if any of them thought the subject tree or any tree on the property was hazardous. It is undisputed that no one ever contacted her with any concerns about the tree in question before it failed. CP 39-41.

The Appellant did not produce any evidence from any witness who ever saw the tree before it failed and thought it looked hazardous or in ill health.

The Appellant did not produce any evidence that a tree like this one had ever failed and fallen over before with or without injuring anyone.

The tree in question was estimated by Appellant’s arborist to be approximately 50 to 60 years old but there was nothing about the age of the tree that standing alone would make it hazardous. CP 25-26.

From time to time over the years, Mr. Placek reported to the board when trees on the premises appeared to be hazardous. When he did so the board would bring in other vendors to remove the trees and on various occasions, trees were cut down and removed because they were potentially hazardous. CP 39-41.

Appellant's arborist, Scott Baker, provided the only evidence produced by plaintiff concerning the condition of the subject tree before its failure. Mr. Baker never saw the tree before it failed, never saw any pictures of the tree before it failed, or after it failed while it was still lying on the ground. CP 22-23. His first involvement in the case came more than three years after the accident when he went to the property on April 5, 2013 and inspected the remains of the stump of the tree. CP 95. After removing ivy that covered the base of the stump, he noticed an area of decay in it on the north side of the stump, a lack of roots on the south side, and a hollow area at the trunk flare. He also indicated that he felt the tree grew with a lean to the north although he did not indicate the degree of possible lean. CP 97. Based upon his inspection of the stump he opined that "...decay was present when the tree failed and there were clear and visible indications that the tree was in decline and presented a likely

danger of falling.” CP 82.

At his deposition Mr. Baker was asked to elaborate on his prior observations. He admitted that the conditions he observed at the base of the tree would not have been visible on a simple inspection. Rather, one would have had to remove the ivy at the base, as he did, and conduct a “basal” inspection of the tree to observe these conditions. He also stated that “I suspect the tree had significant die back in the crown...” but he admitted it was possible it did not. CP 133-136. As already noted, no one who saw the tree before it failed observed or reported any die-back in the crown.

Significantly, Mr. Baker never rendered the opinion that a layman should have noticed that the tree was hazardous. Rather, he only opined that a yearly inspection of the tree by “competent tree practitioners was necessary” to detect this hazard and in his opinion, that should have been performed. CP 83-84.

### **III. STANDARD OF REVIEW**

An appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Anderson v. Weslo, Inc.* 79 Wn. App. 829, 833, 906 P.2d 336 (1995). Summary judgment should

be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kuhlman v. Thomas* 78 Wn. App. 115, 119, 897 P.2d 365 (1995). The court considers the facts in the light most favorable to the nonmoving party and summary judgment should be granted if reasonable minds could reach but one conclusion. *Kuhlman v. Thomas* 78 Wn. App. 115, 119-120, 897 P.2d 365 (1995).

#### **IV. SUMMARY OF RESPONDENT'S ARGUMENTS**

The respondent did not have actual or constructive notice that the subject tree was hazardous before it failed. In the absence of actual or constructive notice of the hazardous condition, the respondent is not liable to the appellant.

The law does not require a residential landowner to hire a professional arborist to inspect all of the trees on their property for hidden and potentially hazardous conditions. Rather, occasional visual inspections by a layman are all that is required to fulfill a residential landowner's duties.

The respondent fulfilled its duty to conduct reasonable inspections of the trees on its property by hiring Bill's Maintenance Company to specifically undertake that task.

A residential landowner owes no duty to an individual to protect him or her from the negligence of his or her own employer. If the inspections conducted by Bill's Maintenance Company were inadequate or not performed properly, that does not impose liability on the respondent.

## **V. ARGUMENT**

### **A. Introduction.**

As a workman on the residential grounds of the association, respondent agrees that the appellant was a business invitee. But two misstatements in the appellant's brief should be addressed at the outset. Both are made on page 1 of his brief where he lists his first issue related to his assignment of error. Appellant describes the respondent as a "commercial owner" of property in his brief. It is not and there is no evidence in the record which suggests it is. Appellant also states that the tree fell in proximity to residential "apartments". That also is incorrect. The respondent is a homeowner's association just as its name implies. There is nothing "commercial" about its operations and there are no "apartments" on the grounds. There are as noted elsewhere, 225 residential units individually owned by the members of the association. This is residential, not commercial property.

B. The Respondent Did Not Have Actual or Constructive Notice That the Subject Tree Was Hazardous Before it Failed. In the Absence of Actual or Constructive Notice of the Hazardous Condition, the Respondent Is Not Liable to the Appellant.

The general duties owed to a business invitee by a landowner have been long established and are generally summarized as follows:

“The duty owed to an invitee is to exercise reasonable care to maintain the premises in a reasonably safe condition, or to warn the invitee of any danger which is known or discoverable by a reasonable inspection on the part of the occupier and not known or not discoverable the invitee using reasonable care for his own safety.”

***Hartman v. Port of Seattle***, 63 Wn.2d 879, 882, 389 P.2d 669 (1964).

Before liability will exist for a dangerous condition on a landowner’s property, the landowner must have actual or constructive knowledge of the existence of the condition ***Grove v. D’Alessandro*** 39 Wn.2d 421, 424, 235 P.2d 826 (1951); ***Iwai v. State*** 129 Wn.2d 84, 96, 915 P.2d 1089 (1996).

(1). *The Respondent Did Not Have Actual Knowledge That the Subject Tree Was Hazardous.*

As the above authorities state, a landowner is only liable to a party

injured by a dangerous condition on the property if the landowner had actual or constructive knowledge of the condition. Appellant does not appear to be contesting that point and respondent suggests that is the proper analysis to follow in deciding this matter.

The appellant made no attempt to produce evidence in response to the summary judgment motion that the respondent had “actual” knowledge that the tree in question was hazardous before it fell. In fact, the only evidence produced to the trial court by those who saw the tree before it fell was that the tree looked normal and healthy. It is undisputed that not even the appellant himself noticed anything hazardous about the tree. Nor did his employer, Mr. Placek, who was specifically tasked with the job of inspecting trees on the grounds for hazards. No one ever reported to the association that there were any issues with the subject tree. Thus, there is no evidence that would support even an inference that the respondent had actual knowledge of the hazardous condition of the tree prior to its fall.

Appellant does appear to argue that the respondent should be deemed to have had “constructive” notice of the tree’s hazardous condition. That issue will be addressed next.

(2). *The Respondent Did Not Have Constructive Knowledge*

*That the Subject Tree Was Hazardous.*

Appellant argues that the respondent should be deemed to have “constructive knowledge” that the subject tree was hazardous. The only evidence appellant produced to support this contention were the statements of his arborist, Scott Baker. However, Mr. Baker never saw the tree before or after it failed and the Appellant did not present any other evidence from any person who actually did see the tree before it failed. Rather, more than three years after the accident, Mr. Baker conducted an inspection of only the remaining stump of the tree. To even conduct that examination, he had to remove a substantial growth of ivy which was present at the base of the tree.

Mr. Baker’s observations and opinions as well as the limitations thereto are set forth in his deposition, his report attached to his declaration submitted in opposition to respondent’s motion, and in the body of the declaration itself. Simplified, he noted defects or conditions in the trunk that led him to believe the tree was in distress. However, he admitted in his deposition that the defects or conditions in the trunk he noted would have been hidden from view by the ivy at the base of the tree and only a basal inspection of the trunk would have revealed them. As far as what

might have been visible to someone doing a simple walk around inspection of the tree, he noted only two things. First, he opined that the tree grew with a lean to the north. He did not specify the degree of lean he felt would have been present. Nor did he say that by itself, a lean in a tree made it hazardous. In fact, Washington case law has already made it clear that a leaning tree would not put a landowner on constructive notice that it was a hazardous tree. See *Lewis v. Krussell* 101 Wn.App. 178, 188, 2 P.3d 486 (2000) citing *Gibson v. Hunsberger*, 109 N.C. App. 671, 428 S.E.2d 489, 492 (1993).

The second thing Mr. Baker stated was “I suspect that the tree had significant die-back in the crown...” CP 136. He did not include this opinion in his prior report. CP 95-106. When asked if it was possible the tree did not have visible signs of distress, he freely admitted that it was possible the tree did not. CP 136. He also never stated in his report, his deposition or his declaration that the lean in the tree and his suspicion of die-back in the crown were conditions a lay person inspecting the tree would have noticed.

Other than Mr. Baker’s “suspicion” that there may have been die-back in the crown, the undisputed evidence before the court is that the tree

did not show any “visible signs” of distress which even Mr. Baker concedes was possible. His “suspicion” that the tree had significant die-back in the crown is mere speculation. The undisputed evidence is that Mr. Placek worked around this tree for 32 years and specifically looked for signs of distress and disease and saw none before it failed. Mr. Placek also inspected the tree immediately after it failed and noted that the leaves were all healthy. CP 76 (Placek deposition at page 30, lines 16-25). Even the appellant did not notice any problem with the tree and he worked around it for several months before his injury. The appellant has not brought forth a single one of the 225 unit owners or anyone else to testify that the tree looked anything but healthy prior to its failure. But even if one were to presume that some die back in the crown existed as Mr. Baker suspects, *it is undisputed that it was not significant enough that anyone noticed it.* Thus, there is no factual dispute and no evidence that the association had actual or constructive notice that the tree in question was hazardous.

This case is similar to *Willis v. Maloof*, 361 S.E.2d 512, 184 Ga.App.349 (1987). In that case, the plaintiff was injured when a tree fell on him. Plaintiff’s arborist inspected the tree after it fell and testified that there were at least three conditions that indicated to him that the tree was

hazardous. The bark at the base of the tree curved under instead of outside which indicated to him it was virtually devoid of roots. He also found a cavity or hollow in the side of the tree and fungus growing on the bark which indicted to him that the tree was diseased and in the process of decaying. Very much like this case, the defendant gardened under and around the tree for over 30 years and did not notice any of the conditions the plaintiff's expert claimed existed. The court basically held that it did not matter what a trained arborist might see and note about a tree, it only mattered what a lay person might see and notice. To quote the court:

“The expert witness presented testimony from which a jury could find that the tree was in fact diseased. However, the testimony of the expert did not establish that a layman should have reasonably known the tree was diseased.”

***Willis v. Maloof***, 361 S.E.2d 512, 513-514, 184 Ga.App.349 (1987).

Just as in *Willis*, there is no evidence presented in this case that a lay person conducting a reasonable inspection would have been on constructive notice that this was a hazardous tree. The most that can be said from the evidence the appellant produced is that a professional arborist like Mr. Baker would have noticed a problem with the tree.

C. A Landowner in Washington Is Not Required to Hire a

Professional Arborist to Periodically Inspect Trees on Their  
Property.

Appellant argues in the first of his designated issues that even if the tree did not show visible signs of distress which would be revealed by a simple visual inspection to a lay person, the respondent should be deemed to have constructive notice because a “competent tree professional” should have been hired to inspect the tree and if so, the dangerous condition of the tree would have been discovered by such a professional.

Mr. Baker concluded in his declaration presented to the trial court that:

“Based on my inspection and observations at the sight, I opine that the tree maintenance inspections, if any, that may have been conducted were insufficient to assess the condition of the tree. The location, moisture, the tree’s age and species, the ivy coverage that contributed to the degree of moisture and the shallow soil that prohibited much root depth provided ideal conditions for tree failure. A yearly inspection at the very least, of these willows *by competent tree practitioners*, was necessary (emphasis added). CP 83-84.

Mr. Baker’s opinion focuses on the heart of the real issue the court must address. In ruling on summary judgment and this appeal, the trial court and this court must accept his opinion that an inspection by, as he put it, “competent tree practitioners”, would have revealed that the subject

tree was potentially hazardous. But was the respondent under a duty to have its trees inspected by what Mr. Baker calls “competent tree practitioners” or were periodic visual inspections by landscape maintenance personnel sufficient to discharge defendants’ inspection obligations? Stated another way, is a landowner required under Washington law to hire arborists to periodically inspect their property for hazardous trees. No Washington case has ever so held and at least one has implied that no such duty exists.

*Lewis v. Krussell*, 101 Wn. App. 178, 2 P.3d 486 (2000) would appear to be the closest Washington case to the instant situation. In that case, two large trees fell onto an adjacent home (as opposed to a workman on the property). The court reviewed extensive authorities from Washington and other states and made several observations that should aid this court in reaching the proper result in this case. The court looked extensively at the duty owed in that case and concluded the landowner had no duty to remove otherwise healthy trees. First, although a landowner presumably has a duty to make reasonable inspections of the trees on their property, and remove those it finds to be hazardous, “[T]he landowner is under no duty to ‘consistently and constantly’ check for defects.” *Lewis* at

page 187 citing, *Ivancic v. Olmstead*, 66 N.Y.2d 349, 488 N.E.2d 72, 73, 497 N.Y.S.2d 326 (1985) and other cases. At pages 186-187, the *Lewis* court stated:

“Actual or constructive notice of a ‘patent danger’ is an essential component of the duty of reasonable care. [Citations omitted]. Absent such notice, the landowner is under no duty to ‘consistently and constantly’ check for defects. [Citations omitted]. .... The alleged defect must be ‘readily observable’ so that the landowner can take appropriate measured to abate the threat. [Citations omitted].”

*Lewis* holds that a landowner only needs to check trees on their property for visible, apparent and patent defects that are “readily observable”. Washington’s approval of those cases from other jurisdictions also holding that a defect in a tree must be readily observable before liability would attach would be inconsistent with a holding that a landowner is also under a duty to hire “competent tree practitioners” or arborists to find hidden defects. If the defect in a tree is “readily observable” no arborist would be needed to inspect for it. If it is hidden, no liability would attach.

The previously cited case of *Willis v. Maloof*, 361 S.E.2d 512, 184 Ga.App.349 (1987) is the only case discovered by the respondent to have touched on the issue of whether or not a duty existed for a landowner to

have their trees inspected by a professional arborist. The court implicitly rejected any such duty stating:

“The only duty imposed upon defendant was that of a reasonable man; defendant would not be charged with the knowledge or understanding of an expert trained in the inspection, care and maintenance of trees.”

*Willis v. Maloof*, 361 S.E.2d 512, 514, 184 Ga.App.349 (1987).

D. The Respondent Fulfilled its Duty to Conduct Reasonable Inspections of the Trees on its Property by Hiring Bill’s Maintenance Company to Specifically Undertake That Task.

A landowner owes a duty to a business invitee to conduct reasonable inspections of its property for hazardous conditions. *Iwai v. State* 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). However, the duty to inspect is not unlimited and other courts have elaborated on that point.

“The extent of the duty to inspect is dependent upon the circumstances and the relationship between the landowner and the invitee. Comment “e” [to the Restatement (Second) of Torts § 343] reads as follows:

*e. Preparation required for invitee.* In determining the extent of preparation which an invitee is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the

owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors."

*Stimus v. Hagstrom* 88 Wn. App. 286, 294-295, 944 P.2d 1076 (1997).

*Lewis v. Krussell*, 101 Wn. App. 178, 187, 2 P.3d 486 (2000) cited above noted that a landowner is not required to 'consistently and constantly' check for defects." That court further held that the only type of defects the landowner is required to check for are ones which are readily observable, apparent and patent. Applying the standards set forth in *Lewis*, it is clear the respondent more than fulfilled its obligation to conduct "reasonable" inspections of the trees on its property. Mr. Placek's declaration and deposition make that clear. This is not a situation where the homeowner's association did nothing with regard to its inspection obligations. It is undisputed that Bill's Maintenance Company was retained by the respondent to specifically look for signs of visible distress in the trees on the property and that company did not observe any with regard to the subject tree. Neither did anyone else including the appellant.

The Appellant does not appear to argue that a homeowner's association cannot fulfill its "lay" inspection obligations by hiring a landscaping service to do so. Rather, appellant argues that it is a question

for the jury to decide if a “reasonable” inspection could be accomplished in this case without hiring a professional arborist. The appellant cites no authority from this or any other jurisdiction which imposed such a duty on a landowner. To hold that a residential landowner must periodically retain arborists or other similarly trained individuals to inspect for hazardous trees on their property would be the imposition of an expensive new duty on landowners which has never previously been imposed on them in this or any other jurisdiction. Duty is a question of law for the court, not one of fact for the jury. *Hutchins v. 1001 Fourth Ave. Associates* 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). [See also, *Nivens v. 7-11 Hoagy’s Corner* 133 Wn.2d 192, 205-207, 943 P.2d 286 (1997) where the court addressed the question of whether a landowner owed a business invitee a duty to hire security guards. The court looked at that question as one of “duty” to be decided by the court, not a question of “reasonableness” to be decided by the jury].

The appellant has made no compelling argument for the imposition of a new and expensive duty on a residential landowner which would require the landowner to always hire arborists and the trial court properly rejected any such duty.

In an apparent attempt to argue adequate inspections were not accomplished and thereby create a disputed fact, appellant suggests there is a credibility issue involving Mr. Placek's declaration and testimony and that of Mr. Baker. There is no credibility issue presented.

As previously discussed in detail, Mr. Baker's actual observations were limited to the stump of the tree made more than three years after the accident in question. He admitted the areas he examined would be hidden from view unless one conducted a "basal inspection". Mr. Placek never claimed he did so or that the conditions Mr. Baker observed in the stump did not exist. There is no dispute as to that evidence and no credibility question.

As already noted, Mr. Baker also stated "I suspect that the tree had significant die-back in the crown..." But he went on to candidly admit that it was possible the tree did not have visible signs of distress. For his part, Mr. Placek simply indicated that he did not notice any problems with the health of the tree even if they existed as Mr. Baker "suspects". That is not a factual dispute nor is anyone's credibility put into question by the difference between Mr. Baker's suspicions and Mr. Placek's actual observations.

One of three possibilities exist regarding Mr. Baker's statements about the tree and none of the possibilities would call for anything but affirmation of the trial court. First, even he admits that it is possible that the tree did not show any visible signs of distress and his "suspicion" that there was significant die-back in the crown of the tree does not eliminate the possibility that there was no such die-back. This possibility is supported by every other piece of evidence in the case and is unquestionably the most likely. The second possibility is that the tree did have some die-back in the crown as Mr. Baker suspected, but it was not significant enough that anyone, including Mr. Placek, noticed it. That possibility is also supported by all the other evidence before the trial court as again, no one ever reported seeing any problem with the tree. The third possibility is that Mr Baker's suspicion was correct and there was noticeable die-back in the crown sufficient to put Mr. Placek on notice the tree was hazardous but Mr. Placek simply missed those signs or failed to report them due to his negligence. However, this third possibility does not aid the appellant for the reasons discussed in the balance of this brief.

E. A Residential Landowner Owes No Duty to a Party to  
Protect Him from the Negligence of His Own Employer.

There is an exception to the general rule that a landowner must inspect their property for hazardous conditions and that exception is also present here. The appellant's suggestion that Mr. Placek may not have inspected the trees as he has testified, or appellant's more specific contention that Mr. Placek did not conduct an adequate inspection, falls within this exception and creates another separate grounds upon which to affirm the trial court.

It is well settled under Washington law that a landowner is under no duty to protect an employee of an independent contractor from the negligence of his own employer.

“The general rule is that the owner of premises owes to the servant of the independent contractor employed to perform work on his premises the duty to avoid endangering him by his own negligence or affirmative act, but owes no duty to protect him from the negligence of his own master.”

***Hennig v. Crosby Group***, 116 Wn.2d 131, 133-134, 802 P.2d 790 (1991).

The above rule has been rigorously applied in the case of injuries to workers at residential properties. See ***Smith v. Meyers*** 90 Wn.App. 89, 950 P.2d 1018 (1998) and ***Rogers v. Irving*** 85 Wn.App. 455, 933 P.2d 1060 (1997).

***Stimus v. Hagstrom*** 88 Wn.App. 286, 944 P.2d 1076 (1997),

cited above touches on this issue. In that case, a roofer was standing on a patio cover which gave way due to dry rot. The homeowner had instructed a co-worker of the plaintiff to check for dry rot in all areas. The court fashioned the issue by stating:

“The issue in this case is the nature of the duty owing from the Hagstroms as the possessors of the property to Ms. Stimus and her workers as business invitees on the property for the purpose of roofing the Hagstroms’ house. In other words, what was the extent of the duty the Hagstroms owed to their roofers in terms of the inspection the Hagstroms were required to perform and the extent of the warning, if any, the Hagstroms were required to give the roofers.”

*Stimus* at page 294. After framing the issue in the above manner, the court concluded that the employer and its worker’s were hired to inspect for the very dry rot that led to the injuries and were in a better position than the homeowner’s to find any dangerous conditions related to their job. Therefore, there was no duty on the defendant’s part to separately inspect for a hazardous condition the independent contractor was hired to inspect for and correct.

The instant case is very similar. Here the respondent’s employer, Mr. Placek and Bill’s Maintenance Company were specifically hired to among other things, inspect for diseased or hazardous trees on the property. They were in a far superior position over the individual unit

owners to look for and find the very hazard that lead to the plaintiff's injury and it was their job to do so. If Mr. Placek or his company did not inspect the property as appellant suggests or did so in a negligent or inadequate fashion and as a result, the plaintiff was injured, there is no liability on respondent's part for the failings of the appellant's own employer. As noted in *Epperly v. Seattle* 65 Wn.2d 777, 787, 399 P.2d 591 (1965), "...the plaintiff must obtain relief here within the framework of the Industrial Insurance Law". See also, *Golding v. United Homes Corp.* 6 Wn.App 707, 495 P.2d 1040 (1972).

## VI. CONCLUSION

A landowner typically owes a duty to a business invitee to inspect their property for hazardous conditions the invitee does not know of and is not likely to observe on their own. To the extent that duty may have existed in this case, it was fulfilled. It is undisputed that the respondent had regular visual inspections made of the tree in question performed by its landscape maintenance company and these inspections revealed nothing about the tree that would have lead the respondent to believe it was potentially hazardous. No case from this or any other state has held that the duty to inspect can only be fulfilled by an arborist or a "competent tree

practitioner”. A layman’s inspection is all that is required.

Appellant’s arborist, Mr. Baker, has conceded that the defects he found in the stump were not visible at all prior to the tree’s failure without a basal inspection by a trained arborist. The only possible hint of trouble that might have existed before the tree’s failure is Mr. Baker’s “suspicion” that there may have been some die-back in the crown of the tree. But he freely admitted it was possible that condition did not exist at all. The undisputed evidence in this case is that it did not or at least was not observable. The appellant did not notice any such issue. Mr. Placek did not notice any such issue. None of the 225 unit owners have come forward indicating they noticed any issues with the tree. Indeed, not a single witness who actually saw the tree before it fell has been identified by the appellant that has said there were any visible signs of distress with this tree. There simply wasn’t any or they were not significant enough or visible enough to raise any concerns.

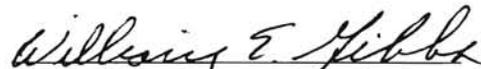
If the court assumes that there were visible signs of distress and the inspections Mr. Placek was hired to perform were not actually performed or were negligently performed by him, then the appellant is in some ways in a worse position. The respondents owed no duty at all under

Washington law to the appellant to protect him from his employer's negligence or malfeasance. Mr. Placek was charged with the task of inspecting the subject tree for hazardous conditions. If he did not do so or did so improperly, there is no liability at all on the respondent's part for an injury to Mr. Placek's employee, the appellant.

It is respectfully submitted that the order of the trial court dismissing this action should be affirmed. This is a case where the appropriate relief afforded to the appellant falls within the framework of the Industrial Insurance Law and not within the framework of a premises liability claim.

Dated this 18th day of March, 2014.

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