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

ROBERT L. WIRTZ, Plaintiff-Appellant, v. DAVID and DIANA GILLOGLY, individually and as a marital community; DENNIS and MELINDA GILLOGLY, individually and as a marital community, Defendants-Respondents.	Court Of Appeals Case No. 37708-0-II Cowlitz County Case No. 06-2-00432-0 APPELLANT'S REPLY BRIEF

APPELLANT'S REPLY BRIEF

Appeal from the Original Judgement of the Superior Court of the State of Washington for the County of Cowlitz

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I. The Court Must Consider All Facts In The Light Favorable To Mr Wirtz

In this appeal from the grant of summary judgment, the court must consider all facts and reasonable inferences in the light most favorable to Mr. Wirtz. *Clark v. Baines*, 150 Wash.2d 905, 910, 84 P.3d 245, 248 (2004); *see, also,* Wirtz Br., p. 20-21. The moving party, in this case the defendants, bear the burden of proving that there is an absence of a genuine issue of material fact and that they are entitled to judgment as a matter of law. CR 56; *Kennedy v. Sea-Land Service, Inc.,* 62 Wn. App. 839, 856, 816 P.2d 75, 84 (1991). Defendants David and Diana Gillogly accept this statement of the standard of review. Resp. Br. 6.

Defendants, however, ignore the standard as well as their agreement with the statement of the standard. Defendants' brief is incorrectly based on a premise that key facts are viewed in the light most favorable to defendants. The brief also incorrectly ignores defendants' obligation to present facts in support of their argument and simply resorts to calling Mr. Wirtz's facts incorrect without reference to supporting documents. Both tactics are wrong.

As to defendants' propensity to view the facts in the light most favorable to defendants, defendants represent, through Mr. David

Gillogly's testimony, that Mr. Wirtz had prior tree falling experience. Resp. Br. 2. Not only is David Gillogly's testimony on this subject hearsay, it also stands in stark contrast to Mr. Wirtz's first hand testimony that he did not have prior relevant experience. Wirtz. Br. 5. Indeed, as Mr. Wirtz has identified, defendants knew Mr. Wirtz had no prior experience in falling trees. Wirtz Br. 12. This court is required to assume and/or infer that Mr. Wirtz had no prior pertinent work experience.

A second example of defendants incorrectly presenting the facts in their favor relates to the possibility that the tree would fall towards Mr. Wirtz and/or reach Mr. Wirtz's location. Defendant represents that Mr. Wirtz knew the tree would fall towards him and reach him. Resp. Br. 3-4. Mr. Wirtz specifically testified that he was not aware that the tree would fall towards him (Wirtz Dep. 41:16-18), he was unsure of the direction the tree would fall (Wirtz Dep. 44:13-24) and was unsure whether the tree would reach him if the tree did fall in his direction (Wirtz Dep. 44:13-17). *See,* Wirtz Br. 13. Indeed, Dennis Gillogly, the certified tree faller and the expert in this situation, did not believe that the tree would reach Mr. Wirtz when it fell. Dennis Dep. 63:8-10; Wirtz Br. 12-13. Based on the conflicting testimony, this court must assume/infer that Mr. Wirtz *did not*

know that the tree would fall towards him and *did not* know that it would reach him if it did fall towards him.

Defendants ignore their obligation to demonstrate the absence of a genuine issue of material fact. Rather, defendants state, in blanket form, that they "object to plaintiff's 'summary of facts' and 'statement of facts' as they contain inappropriate argument and misrepresentations." Resp. Br. 1. Defendants do not identify *any* inappropriate argument or misrepresentation. Defendants then leave it to this court it search the record for support of defendants' blanket statement. The court should not engage in the futile search of the record. Rather, the court should, as required, accept Mr. Wirtz's fully supported factual statements and draw all inferences in Mr. Wirtz's favor.

II. Mr. Wirtz's Status as an Invitee or Licensee is Critical.

Defendants' initial argument, indeed, the first line of defendants' argument, is that the trial court and this court may resolve this matter at the summary judgment stage without determining whether Mr. Wirtz was an invitee or a licensee when he was injured. Defendants state **"it is not 'Critical' to Determine Whether Plaintiff was an Invitee or Licensee."** Resp. Br. 6 (emphasis in original). In one fell swoop of a pen, or, more

appropriately, several strokes on a computer keyboard, defendants attempt to turn Washington law of premises liability upside down. Defendants blatantly attempt to reverse the years of effort Washington courts have invested in protecting the distinctions in premises liability law between invitees, licensees and trespassers. This court should reject defendants' efforts to rewrite Washington premises liability law.

"The common law classifications of entrants as invitees, licensees, or trespassers" continues to be "determinative of the standard of care owed by an owner or occupier of land." *Younce v. Ferguson*, 106 Wash.2d 658, 659, 724 P.2d 991, 991-92 (1986). Washington has steadfastly rejected a unified "reasonable care" standard of premises liability and in *Younce* "reaffirm[ed] use of common law classifications to determine the duty of care owed by an owner or occupier of land." *Id.* at 662-63, 725 P.2d at 993; *see, also, Tincani v. Inland Empire Zoological Society*, 124 Wash.2d 121, 128, 875 P.2d 621, 624 (1994); *Ford v. Red Lion Inns*, 67 Wash.App. 766, 769, 840 P.2d 198, 200 (1993); *Anderson v. Weslo, Inc.*, 79 Wash.App. 829, 834, 906 P.2d 336 (1995).[1]

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[1]Defendants' effort to rely on *Christensen v. Weyerhaeuser Timber Co.*, 16 Wash.2d 424, 133 P.2d 797 (1943) (Resp. Br. 6) is misplaced. In *Memel v. Reimer*, 85 Wash.2d 685, 538 P.2d 517, the court specifically rejected the *Christensen* standard. *Id.* at 688, 538 P.2d at 519.

Clearly, under Washington law and absent a wholesale rejection of the longstanding law, Mr. Wirtz's status as an invitee or licensee is critical to this case. As there is, at a minimum, a genuine issue of material fact as to whether Mr. Wirtz was an invitee or a licensee at the time of his injury, summary judgment is inappropriate unless defendants demonstrate that they satisfied their duty to Mr. Wirtz as an invitee.

III. Defendants Breached Their Duty of Care to Mr. Wirtz.

A. Defendants Breached Their Duty to Mr. Wirtz as an Invitee.

As Mr. Wirtz established in his opening brief, and defendants do not seriously contest, Mr. Wirtz was an invitee for the purpose of determining the duty defendants owed to him when he was injured.[2] The standard of care owed to an invitee is identified in Mr. Wirtz's opening brief. Wirtz Br. 25-26. In summary, the possessor must (1) conduct dangerous activities with reasonable care for the safety of the invitee; and (2) make reasonable efforts to discover a dangerous condition and repair the condition or warn the invitee of the condition. *Scott v. Pacific West Mountain Resort*, 119 Wash.2d 484, 500, 834 P.2d 6, 14-15 (1992); 2

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[2]Defendants' reliance on *Best v. Estate of Brumbaugh*, 93 Wash.App. 1022, 198 WL 838831 (1998) is misplaced because *Best* is not a published opinion. RCW 2.06.040.

Restatement of Torts, § 343. Mr Wirtz has argued that defendants' failed to meet the standard owed to an invitee for either a dangerous activity or a dangerous condition. Wirtz Br. 25-30. Defendants have not successfully refuted this argument and summary judgment was not appropriate.

"The fact that a danger is generally known to the claimant does not necessarily insulate the possessor from liability." *Ford*, 67 Wash.App. at 770-71, 840 P.2d at 201. If the owner of the land "*should anticipate the harm despite [claimant's] knowledge or obviousness*" of the danger, then the owner must protect the invitee. *Id.* (citation omitted, emphasis in original). "There are some situations in which there is a duty to protect an invitee *against even known dangers,* where the possessor *should anticipate harm to the invitee notwithstanding such knowledge.*" *Id., quoting, Jarr v. Seeco Constr. Co.*, 35 Wash.App. 324, 327, 666 P.2d 392 (1983) (emphasis in *Ford*). The land owner must "use reasonable care with respect to conditions on the premises which pose an unreasonable risk of harm." *Id.* at 772, 840 P.2d at 202.

In this case, defendants had a duty to protect Mr. Wirtz from a danger they knew and recognized–a tree they were cutting falling on Mr. Wirtz because Mr. Wirtz was in a location of defendants' choosing and

direction. *See, e.g. Dorr v. Big Creek Wood Products, Inc.*, 84 Wash.App 420, 927 P.2d 1152 (1996). Additionally, this particular tree barber-chaired. Defendants admit that this development made the situation more problematic and dangerous. For unknown reasons, however, defendants failed to warn or inform Mr. Wirtz that their actions had significantly increased the likelihood or possibility that the tree would fall unexpectedly in an unexpected manner, twist unexpectedly and fall in an unexpected direction. In short, defendants did not "use reasonable care with respect to conditions on the premises which posed an unreasonable risk of harm" to Mr. Wirtz. Consequently, defendants are responsible to Mr. Wirtz, their invitee, for the injuries he sustained. Summary judgment was not appropriate.

B. Defendants Breached Their Duty to Mr. Wirtz as a Licensee.

Mr. Wirtz believes that the evidence supports a finding that he was an invitee when he was injured. Should the court determine, however, that he was a licensee, defendants still failed to fulfill their duty to Mr. Wirtz.

In *Potts v. Amis*, 62 Wash.2d 777, 384 P.2d 825 (1963), the court announced the standard of care owed to a licensee when the property owner is engaged in an *activity*. The standard is that the property owner

"has a duty to exercise reasonable care to avoid injuring a person who is on the land with his permission and of whose presence he is, or should be, aware." *Id.* at 787, 384 P.2d at 831. In *Memel v. Reimer*, 85 Wash.2d 685, 538 P.2d 517 (1975) the court extended this reasonableness standard to the duty owed to a licensee for a *condition* on the owner's property. *Id.* at 688-89, 538 P.2d at 519. In *Memel*, the court imposed "a duty to exercise reasonable care where this is a known dangerous condition on the property and the occupier can reasonably anticipate that his licensee will not discover or realize the risks. Under these circumstances, the landowner can fulfill his duty by either making the condition safe or by warning his licensee of the condition and its inherent risks." *Id.* At 689, 538 P.2d at 519.

Assuming that Mr. Wirtz was a licensee, defendants breached the reasonableness standard of care owed to Mr. Wirtz. A jury could easily conclude that defendants' actions in attaching a come-along to a tree and pulling the tree towards a tree at which they stationed Mr. Wirtz was not reasonable. A jury could easily conclude that leaving Mr. Wirtz in that location, and instructing him to continue to rachet the tree towards himself after the tree barber-chaired, was not reasonable. It was especially

unreasonable in light of the fact that Mr. Wirtz had no prior tree falling experience and did not recognize the increased danger while defendants had significant adverse experience with barber-chaired trees and recognized the significantly increased danger which the barber-chaired tree presented. A jury could conclude that it was unreasonable for defendants not to warn Mr. Wirtz of the increased danger they had created and instruct him to move away from the base tree while Dennis Gillogly operated the saw. The simple warning or instruction of the experienced woodsmen would have protected Mr. Wirtz. It was unreasonable under the circumstances for defendants not to provide the warning and offer the instruction. Defendants did not warn the licensee of the condition/activity and the inherent risks of remaining in his location and continuing the activity. Defendants breached their duty of care to Mr. Wirtz, their licensee.

IV. Plaintiff's Claim Is Not Barred by Primary Assumption of the Risk.

Mr. Wirtz and defendant agree that the only "assumption of the risk" argument in play is "implied primary assumption of the risk." Wirtz Br. 34; Resp. Br. 12. Under implied primary assumption of the risk, the **defendant** must show that the plaintiff "knowingly and voluntarily chose

to encounter the risk. Thus, [t]he 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." *Erie v. White*, 92 Wash.App. 297, 303, 966 P.2d 342, 345 (1998); Wirtz. Br. 34-35. Defendants do not expressly accept this as a proper statement of the doctrine, but they do not offer a contrary or contrasting statement of the doctrine.

Mr. Wirtz, in his principal brief, explains in great detail how defendants failed to carry their burden of proving implied primary assumption of the risk. Defendants do not directly respond to the argument. Rather, defendants simply recite facts from other cases and say, without support or analysis, that Mr. Wirtz's case is more like a situation in which the court found implied primary assumption of the risk than like a case where the court did not find implied primary assumption of the risk. This court should reject the unsupported attempt to analogize Mr. Wirtz's situation to radically different factual situations.

Rather than compare this case to radically different factual situations, this court must analyze the facts of this case in light of the legal standards announced in those cases. With this done, it is clear that,

viewing the facts in the light most favorable to Mr. Wirtz, defendants did not carry their burden of establishing implied primary assumption of the risk as a matter of law.

Turning to the *Erie* elements, Mr. Wirtz did not subjectively understand or knowingly encounter the risk of a barber-chaired tree falling in an unpredictable manner and landing on Mr. Wirtz. There is no doubt that defendants understood the risk associated with continuing to fall this tree after it barber-chaired. A prior barber-chaired tree had killed their friends and a different tree had fallen on David's house. David Gillogly testified that, as a result of the barber-chair split, the tree **did not** fall steady and straight but instead twisted and turned as it fell. Because it fell in this manner due to the barber-chair split, the tree consequently fell more towards Mr. Wirtz than the experts had expected. Wirtz. Br. 15. If the tree had fallen steady and straight, as the experts expected from a tree that had not barber-chaired, then the tree would not have struck Mr. Wirtz. *Id.*

In short, even assuming that Mr. Wirtz has some subjective understanding that the tree, before barber-chairing, might fall in his direction and might reach him, he did not have, and, because defendants admittedly did not inform Mr. Wirtz of the increased risk, could not have

had, a subjective understanding that defendants had significantly increased that risk by proceeding with **their** plan **after** the tree barber-chaired. Defendants cannot satisfy the first element of implied primary assumption of the risk.

Mr. Wirtz was not aware of the specific risk of the barber-chaired tree falling at an unexpected time at an unexpected speed in an unexpected manner. Defendants were fully aware of this possibility. They elected, however, to keep Mr. Wirtz in the dark and not disclose significant information to Mr. Wirtz. Mr. Wirtz has identified the information that a reasonable person would have shared with Mr. Wirtz to inform Mr. Wirtz of the specific risk he faced after the tree split. Wirtz Br. 37-38. Defendant does not offer contradictory arguments or facts in this regard. Without a doubt, Mr. Wirtz did not have possession of all facts which a reasonable person would have liked or need to know and consider. Defendants have not met their burden of demonstrating the absence of a genuine issue of material fact such as to entitle defendants to summary judgment based on implied primary assumption of the risk.

Finally, Mr. Wirtz did not, and could not have, **voluntarily** elected to encounter the risk of the barber-chaired tree. As Mr. Wirtz was entirely

un-experienced in falling trees (let alone barber-chaired trees) and defendants intentionally withheld their knowledge of the increased risk presented by the barber-chaired tree, Mr. Wirtz could not voluntarily chose to encounter the risk of the tree falling in an unexpected manner at an unexpected rate in an unexpected direction. *See,* Wirtz Br. 38-39. Defendants failed to meet any of the three required elements of primary assumption of the risk and summary judgment was not appropriate. *See, also, Tincani v. Inland Empire Zoological Society*, 124 Wash.2d 121, 144, 875 P.2d 621, 633-34 (1994) (implied primary assumption of the risk *does not* include assumption of the risk that the property owner, through his negligence, will make the activity or event *more* dangerous) (emphasis added).

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V. Conclusion

Defendants did not meet their obligation to demonstrate the absence of a genuine issue of material fact and their entitlement to summary judgment based on implied primary assumption of the risk. Summary judgment was not appropriate. This court should reverse and remand the case as to all defendants for trial.

Dated: December 8, 2008

Smith & Fjelstad

By: _____
Kerry M. L. Smith
WSB No. 18778
Of Attorneys for Mr. Wirtz

CERTIFICATE OF FILING

I certify that on December 8, 2008, I filed the original of this **APPELLANT'S REPLY BRIEF** with the Court of Appeals Administrator at the following address:

Washington State Court of Appeals
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CERTIFICATE OF SERVICE

I certify that on December 8, 2008, I served a true copy of this **APPELLANT'S REPLY BRIEF** on:

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DATED this 8th day of December, 2008.

SMITH & FJELSTAD

By: _____
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