

37708-0
No. 36333-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

ROBERT L. WIRTZ,)
)
Appellant,)
)
v.)
)
DAVID and DIANA GILLOGLY,)
individually and as a marital community;)
DENNIS and MELINDA GILLOGLY,)
individually and as a marital community,)
)
Respondents.)

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPT. OF JUSTICE
Cowlitz County
Circuit Court Case No.
06-2-00432-0

RESPONDENTS' BRIEF

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I. ASSIGNMENTS OF ERROR AND ISSUES

Defendant accepts plaintiff's statement of his assignments of error and issues. Defendant disagrees, however, with the contention that plaintiff's status on the property is determinative. Plaintiff's injury occurred while he was engaged in an activity on the land and rules pertaining to the conditions of the land do not apply.

II. STATEMENT OF THE CASE

A. Statement of Facts

Defendants object to plaintiff's "summary of facts" and "statement of facts" as they contain inappropriate argument and misrepresentations. Following is defendant's restatement of the pertinent facts. (Because all evidence before the trial court was contained in deposition excerpts, citations are to original pages of the pertinent depositions which were submitted as exhibits to the summary judgment memos.)

At the time of the accident giving rise to this suit plaintiff, Robert Wirtz, was living with defendant Dennis Gillogly, the son of David and Diana Gillogly. (Wirtz Depo, p. 20) Wirtz had been acquainted with the Gilloglys for about 15 years. (Wirtz Depo, p. 86) Defendant Dennis Gillogly asked Wirtz to help out with a tree cutting project on the property

of defendants David and Diana Gillogly, and Mr. Wirtz agreed. (Wirtz Depo, p. 20-21) Wirtz agreed to help out as a favor and did not receive any payment. (Wirtz Depo, p. 35-36)

Plaintiff asserts that Mr. Wirtz had no pertinent work experience or training, but David Gillogly testified he asked Mr. Wirtz about his experience as follows:

“Q. Did you talk to him, when he first showed up the first day he came out to help work with these trees, about his experience cutting firewood, stacking firewood, burning burn piles or cutting trees?

A. Yes.

Q. What did you talk to him about?

A. I asked him if he ever cut trees down before. He said, no, just what him and Dennis had done at Allen's place. He had said he had drug limbs before and thrown them in a burn pile. He knew how to haul rounds and stack rounds. I said, okay.
(Deposition of David Gillogly, p. 10-11)

Wirtz testified he had not done any tree cutting work in the past. (Wirtz Depo, p.21) Wirtz helped out for a couple of days before the accident occurred by stacking wood. (Wirtz Depo, p.24-25) On the day of

the accident, David Gillogly asked Mr. Wirtz to assist in falling a tree.

(Wirtz Depo, p. 36)

Plaintiff asserts he was unaware of the risk of the tree falling towards him. However, plaintiff testified he appreciated the possibility the tree could reach where he was standing. (Wirtz Depo, p. 45) Plaintiff's knowledge of the risk that the tree could fall towards him is clear from the following deposition testimony.

“Q. When you were operating the winch or the come-along, as you call it, you were pulling the tree toward where you were located, correct?”

A. Yes.

Q. Isn't it correct that you knew at that point that the tree could fall in the direction you were pulling it?

A. Yes.

Q. You had an escape route planned in that eventuality, correct?

A. Yes.

Q. Wouldn't it also be correct that you knew that if you slipped, for example, or fell for some reason as the tree was coming down, you might not be able to get out of the way?

A. Yes.

Q. So would it be correct that you knew there was some risk in performing the work you were performing?

A. Yes, but at the same time I felt safe.
(Wirtz Depo, p. 86)

Plaintiff's subjective understanding of the risk involved is established solely from his testimony and is therefore not subject to dispute.

Defendants object to plaintiff's statement of facts in that plaintiff repeatedly claims he was "required" to stay in a position which subjected him to risk. However, he testified he helped out as a favor and was not required to be there at all. The transcript excerpts cited by plaintiff do not support the claim that he was required to remain in that position. In addition, plaintiff's summary repeatedly states the tree fell "unexpectedly" toward the plaintiff, even though he testified he expected the tree to fall in his direction.

III. ARGUMENT OF RESPONDENT

A. Summary of Argument¹

The trial court was correct in its conclusion that plaintiff's status as an invitee or licensee is not determinative. Plaintiff's injury occurred while he was participating, along with the defendants, in the activity of cutting down a tree. The property owners' duty of care with respect to activities is the same whether the plaintiff is an invitee or a licensee. The possessor of property has a general duty of reasonable care to protect licensees or invitees "only if he should expect that they will not discover or realize the danger." This language is contained in the Restatement of Law of Torts (2nd) §341A, dealing with the duty to invitees and also in Restatement of Tort (2nd) §341, dealing with the duty to licensees. In this case, plaintiff realized the risk of being struck by a tree when he voluntarily agreed to operate a winch to pull the falling tree in his direction. Plaintiff assumed the risk of the precise injury he sustained. This is a classic example of primary implied assumption of the risk which negates any duty the defendants had.

¹ Although this brief is submitted on behalf of David and Diana Gillogly, the arguments of these respondents' apply with equal force to respondents' Dennis and Melinda Gillogly.

B. Standard of Review

Defendants accept plaintiff's statement concerning the standard for review of summary judgment decisions.

C. Respondent's Argument**1. It is not "Critical" to Determine Whether Plaintiff was an Invitee or Licensee.**

The distinction between a licensee and an invitee is important with respect to injuries caused by a condition on the property, but it is less important where the injury was caused by an activity. This distinction in the law was made clear in *Potts v. Amis*, 62 Wash.2d 777, 384 P.2d 825 (1963). In *Potts*, the plaintiff, a social guest at the defendant's home, was struck by a golf club while the defendant was demonstrating a golf swing. The court considered the general rule that the possessor of the land is only obligated to avoid willful or wanton injury to a licensee and considered certain exceptions to that rule as described by the court in *Christenson v. Weyerhaeuser*, 16 Wash.2d 424, 133 P.2d 797 (1943). One of the exceptions applied where the injury was caused by the possessor's activities. The court in *Potts* evaluated a number of prior cases along with

the views of legal scholars and commentators and then stated:

“We hold that, an owner or occupier of land 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.” 62 Wash.2d at 787, 384 P.2d at 831.

Immediately before stating that holding, the court quoted favorably from *Sherman v. Seattle*, 57 Wash.2d 233, 356 P.2d 316 (1960) the following “. . . we think that regardless of respondent’s status – be it that of an invitee, licensee, or trespasser – appellant owed him the duty to use reasonable care.”

That the duty is the same, regardless of the plaintiff’s status on the land was reinforced by the Supreme Court in *Laudermilk v. Carpenter*, 78 Wash.2d 92, 457 P.2d 1004 (1969). The question in *Laudermilk* was whether the trial court was correct in applying a reasonable care standard where a child was injured by a smoldering fire on the defendant’s property.

The court summarized its earlier decision in *Potts* thus:

“After a thorough analysis of the cases and tests dealing with the liability of landowners to invitees, licensees, and trespassers, Justice Rosselini pointed out that almost invariably when liability has been denied it is in cases involving injury as a result of some defect in or condition of the premises, and that the

consensus of opinions seem to be where the activities of a defendant are involved, the test should be one of reasonable care under the circumstances.”

The Restatement rules dealing with the duty of a landowner to invitees and licensees with respect to activities on the land are nearly identical. With respect to invitees, Section 341A states:

“A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry out his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.” Restatement of Law of Torts (2d) §341A.

With respect to the duty owed to licensees, Section 341 states:

A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, (a) he should expect that they will not discover or realize the danger, and (b) they do not know or have reason to know of the possessor’s activities and of the risk involved.

With respect to the key question involved in this case, i.e., whether the plaintiff discovered and realized the danger, the two rules are identical.

The trial court in this case correctly understood that a duty of

reasonable care applied to the property owner's activity on the land, and that the duty was negated when the plaintiff understood and assumed the risk of that activity.

If plaintiff's injury is construed as arising from a condition of defendant's property instead of an activity, plaintiff's status then may be important. In that event, defendants rely upon the arguments and authorities presented to the trial court which support the conclusion that plaintiff was in fact a licensee. In *Thomson v. Katzer*, 86 Wash.App. 280, 284-285, 936 P.2d 421 (1997), the court discussed the difference between an invitee and a licensee. The ultimate goal identified by the court was to differentiate (1) an entry made for business or economic purpose that benefits both the entrant and occupier, from (2) an entry made for purpose that either (a) benefits only the entrant or (b) is primarily familial or social. An entrant will not be a "business visitor" even when he or she confers an economic benefit, if there is no "real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates," or if the benefit is merely incidental to an entry that is primarily familial or social. *Best v. Estate of Brumbaugh*, 93 Wash.App. 1022, 198 Westlaw 838831 (1998).

In this case, plaintiff was helping the defendants with their tree clearing project as a favor. He was a family friend of the defendants and he was not paid for his work. Any benefit conferred by the plaintiff in assisting the defendants with their home improvement project was incidental to his social relationship with them. Plaintiff's status as a visitor on defendant's property was that of a licensee.

2. Defendant's did not Breach Their Duty of Care.

Plaintiff states the duty correctly at page 25 of his brief where he states:

A possessor of land is liable to invitees for physical harm the possessor causes through "his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it." (Quoting Restatement of Torts (2d) §341A.)

As pointed out above, this is essentially the same duty which would be owed plaintiff if he is held to be a licensee. *See Dorr v. Big Creek Wood Products, Inc.*, 84 Wash.App. 420, 927 P.2d 1148 (1996). The duty then is to carry on activities with reasonable care "if, but only if," the possessor should expect that the invitee or licensee will not discover or realize the danger.

The rule as set out by the court and in the Restatement, dovetails nicely with the implied primary assumption of risk which negates that duty. Stating the inverse of the rule, where the visitor to the land knows of the activity and the risk involved and yet chooses to accept the risk, the land owner has no duty to protect him from harm.

In this case, the plaintiff was not only aware of the activity, he participated in it. His task in the project was to pull the falling tree toward his location and to dodge out of the way when it ultimately fell. As sure as the night follows the day, the tree would fall towards Mr. Wirtz. That was his intent in continually tightening the ratchet to prevent the tree from falling the opposite direction.

Plaintiff argues he failed to fully appreciate the risk because he didn't know they could measure the height of the tree. That argument is nonsense because he obviously knew the tree would reach his location. That is why he planned an escape route. There is no evidence he was "required" to stay at that location despite the repeated use of that word in plaintiff's brief. There is no evidence the tree "unexpectedly" fell toward plaintiff. He obviously expected it and in fact planned for it.

The evidence concerning the "barber chair" split is immaterial.

Plaintiff claims that increased the possibility of the tree falling in an unintended direction. However, this tree fell in the intended direction.

**3. Plaintiff's Claim is Barred by his Implied
Primary Assumption of the Risk.**

The parties are in agreement that the defense relied upon by the defendants is that referred to as "implied primary assumption of the risk."

In *Erie v. White*, 92 Wash.App. 297, 966 P2d 342 (1998) the court applied this doctrine to relieve the defendant from any duty to protect the plaintiff from injury caused by inferior climbing equipment provided by defendant. The plaintiff had been hired by defendant to clear trees on defendant's property. Defendant promised to provide the climbing equipment which he obtained from an equipment rental company. However, the equipment was for pole climbing and not tree pruning. The important difference is that the leather straps which circumvent the pole are not reinforced with steel as they are with tree climbing equipment. The plaintiff's injury occurred when he inadvertently caused the strap to be cut, resulting in his fall from the tree. Because he was aware the equipment was wrong, he was held to have assumed the risk.

The court in *Erie* paraphrased the question asked in assumption of

the risk cases as follows:

“Did the plaintiff consent, before the accident or injury, to the negation of a duty that the defendant would otherwise have owed to the plaintiff?”

Here that question is answered: yes. Mr. Wirtz consented to operate a ratchet and cable system to cause the tree to fall in his direction, knowing that the tree could strike him. He therefore relieved the defendants of any duty to protect him from the falling tree, just as the plaintiff in *Erie* relieved the defendant of any duty to protect him from falling out of the tree.

There is no evidence in this case that Wirtz was compelled to act as he did. Defendants were not his employers. He acted voluntarily as a favor. There is no evidence he could not have simply refused to help. As pointed out by the court in *Erie*, the plaintiff had reasonable alternative courses of action available to him, and no reasonable juror could conclude his acts were not voluntary.

The court in *Erie* contrasted the facts before it with those in *Dorr v. Big Creek Wood Products, supra*. In *Dorr*, the plaintiff was visiting his friend's logging site when he was struck by a “widow maker”, a large limb suspended in the trees above, which unexpectedly fell. The plaintiff in

Dorr was generally aware of the risk of being struck by falling limbs at logging sites and briefly inspected the trees above to see if there were any loose limbs. Not seeing any, he proceeded forward when called by the defendant. The court in *Erie* pointed out that if the plaintiff in *Dorr* had seen the loose limb and decided to risk walking under it, he would have assumed the risk. Since he wasn't aware of any widow makers from his inspection, he did not assume the risk (even though he could be found contributorily negligent).

As was found in *Erie*, the plaintiff here was specifically aware of the risk of being hit by the very tree which did hit him. The court in *Dorr* pointed out that the plaintiff would have assumed the risk if he had walked under a widow maker which he knew to be present. The acts of plaintiff Wirtz in pulling the tree toward his location is tantamount to walking under a known widow maker.

Plaintiff incorrectly emphasizes his lack of knowledge about the risk of a "barber chair" tree. However, there is no evidence the split in the tree trunk altered the risk which plaintiff already assumed. He understood the risk of being struck by a falling tree and he knew the tree would fall. This case does not involve other or different dangers which the plaintiff

was not aware of. *Kirk v. Washington State University*, 109 Wash.2d 448, 746 P2d 285 (1987), is therefore distinguishable on its facts. The danger in this case was not increased by the split in the tree. Mr. David Gillogly was asked:

“Question: Does that make it more dangerous?”

“Answer: No it doesn’t make it more dangerous. It just means you got to rethink your plan of attack to try to see what you could do to make it go the way you want it to go. (David Gillogly Depo., p. 43).”

David Gillogly described how two friends had been killed cutting a tree which split, but those circumstances were different. They were operating the saw and were struck by the split trunk as the split occurred. (David Gillogly Depo., p. 42). Plaintiff in this case was not exposed to that danger, and the danger of the tree falling on him was not increased.

Plaintiff’s criticism of the plan adopted to bring down this tree is of no help to his case. He was aware he could be hit. He could have refused to operate the ratchet. He could have moved away from that location after each adjustment of the cable. He could have suggested they connect to an

anchor tree further away from the tree to be cut. All of these suggestions, may be good hindsight advise, but they don't change the fact Mr. Wirtz knew what he was doing and understood the risk of being struck.

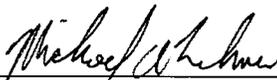
IV. CONCLUSION

The facts in this case present a classic example of implied primary assumption of risk. Plaintiff intentionally participated in an activity which he knew would cause the tree being cut to fall in his direction. He did so knowing he would need an escape plan to dodge out of the way of the falling tree and that if his escape plan didn't work, he could be struck. The duty of the defendant in these circumstances, to protect plaintiff from this activity exists "if, but only if" the plaintiff was unaware of the activity and the danger. Since plaintiff in this case was fully aware, defendants had no duty.

The trial court should be affirmed in all respects and the case should be dismissed with respect to all defendants.

DATED this 22nd day of October, 2008.

LEHNER & RODRIGUES, P.C.

By: 
Michael A. Lehner, WSB#14189
Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that the original and 1 copy of **RESPONDENTS' BRIEF** was filed with the State Court Administrator on October 22, 2008, by depositing the same in the United States mail in Portland, Oregon, enclosed in a sealed envelope with first-class postage thereon fully prepaid and addressed as follows:

Court Clerk
Washington Court of Appeals
Division II
950 Broadway, Ste. 300 MS TB-06
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I hereby certify that I served a true copy of the foregoing **RESPONDENTS' BRIEF** on:

Kerry M.L. Smith
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Attorney for Appellant

- by causing a full, true and correct copy thereof to be **MAILED** in a sealed, postage-paid enveloped, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below;
- By causing a full, true and correct copy thereof to be **HAND-DELIVERED** to the party, at the address listed above, which is the last-known address for the party's office, on the date set forth below;
- By causing a full, true and correct copy thereof to be **FAXED** to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

DATED this 22nd day of October, 2008.

LEHNER & RODRIGUES PC

By: Michael A. Lehner
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