

45763-6-II
NO. ~~455763-6-II~~

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DANIEL P. FRY, a single person

Appellant

v.

IRENE KETTNER, d/b/a COUNTRY ROAD ESTATES

Respondent

BRIEF OF APPELLANT

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DIVISION II
JAN 14 2013
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I. STATEMENT OF THE CASE

In 2007, Daniel Fry was considering the purchase of a manufactured home that was offered for sale on a lot at Country Road Estates, a park in Eastern Pierce County that leased lot space to owners of manufactured homes. Irene Kettner, who owned and operated the park, showed the lot to plaintiff and they had discussions concerning his renting at the development. (CP 280-281) Leading up to signing the lease agreement, defendant personally discussed the terms of the lease with him. At one point, because the entire development had many trees, Fry inquired as to who performed routine pruning and maintenance on the trees. Kettner assured him that she had the trees periodically inspected and maintained by a tree service. (CP 281) As late as 2013 the landlord confirmed this policy of maintaining the trees in correspondence to another tenant in the park, Christina Hanson, a neighbor of Daniel Fry, who had complained about dangerous limbs overhanging a structure on her lot. (CP 311-315)

The lease agreement consisted of a formal two-page year to year site rental lease. The lease referred to and incorporated "Rules and Regulations" prepared by the owner in separate documents. The lease granted the owner to modify any of the Rules and Regulations on 30-days notice. Defendant provided Daniel with a packet of notices so

amending the Rules and Regulations that she had from time to time sent out before 2007; after signing the lease that year, plaintiff received additional notices of changes to the Rules and Regulations from time to time. (CP 281)

In 2009 Fry sought permission from Kettner to trim some tree branches that had grown to the point that they blocked access to his driveway. Fry gave conditional permission, limiting the amount to be trimmed, and arranged for her property manager to supervise the trimming. (CP 282)

In 2009 a large branch fell from a tree on Fry's lot and damaged his utility shed. He wrote to Kettner in September advising of this damage and requesting that other limbs that appeared to be dead be trimmed before they damaged his home. He was particularly concerned about several branches on two fir trees located close to his home that, because of the limbs' size and height above ground, he believed posed a hazard to his home. Defendant did not respond. (CP 282)

In December, 2009, the plaintiff again directed a letter to defendant addressing several issues that included a renewed request that tree pruning be undertaken. The defendant responded by declining to undertake any pruning citing a notice she had sent in May, 2000, advising tenants that dangerous trees are periodically checked. Her response advised that

she had had the premises checked by an arborist in February, 2009, and that all the trees were healthy, except one that required pruning. She explained her decision was based on her opinion that "...it is normal" for branches to fall and that the only way to prevent this would be to clear cut the entire development. (CP 282)

In January, 2012, at night during a winter storm, the plaintiff heard objects hit his roof. He investigated and determined that large tree limbs, including the ones that overhung his roof and which prompted him to request pruning, had fallen; damage to the fascia on the side of the roof adjacent to the satellite antenna was apparent. Shortly thereafter, he noticed water stains on the interior cathedral ceiling near the location of the antenna. The roof had never previously leaked. (CP 282-283)

On January 28, 2012³, a week and half later, he decided to investigate the source of the leak by climbing onto the roof. He placed an extension ladder against the building, secured it by wires, and climbed onto the roof. The roof, which has a very gradual slope, is constructed from three-tab asphalt shingles that have a gritty surface. He was wearing tennis shoes, was under no impairment, and could easily walk up to the area where the leaks apparently originated in the vicinity of the satellite dish. The dish itself on visible inspection did not show apparent damage, but he could see remnants of the mossy lichen characteristic of most of the

branches in the area smeared on a portion of the dish parabola. Based on impact damage to the fascia, and its proximity to the dish, he concluded that the same branch had fallen, hit the dish, and then gone on to damage the fascia. (CP 284-285)

To further inspect the area of the satellite dish he grabbed the dish and bent down. The dish suddenly swiveled and pivoted, causing him to lose his balance and fall off the side of the roof, suffering severe and permanent injuries. (CP 284-285)

A friend of plaintiff, Chad Sandwick, subsequently inspected the dish; Mr. Sandwick's declaration describing the dish relates that it remained secured to the roof by only a portion of one of the several lag screws used originally to fix it in place. He filled the resultant holes with caulk as an interim repair measure. Mr. Sandwick, who has been employed as a roof skylight installer for the last 15 years, confirms in his declaration that the plaintiff's roof has a very shallow pitch that presents no need for special safety gear and otherwise poses no particular danger to walk on. (CP 316-319).

The defendant filed a motion for summary judgment on a variety of grounds. (CP 8-30). It was granted on January 3, 2014.

II. ASSIGNMENT OF ERROR

The trial court erred in granting summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Were there genuine issues of material fact that the landlord assumed the duty to maintain the trees on Daniel Fry's rented lot so that summary judgment was inappropriate??
2. Were there genuine issues of material fact that the landlord failed to maintain the trees on Daniel Fry's lot so that summary judgment was inappropriate?
3. Was there sufficient evidence for a jury to conclude without speculation that damage to the Daniel Fry's roof was caused by a falling tree branch?
4. Was defendant entitled to summary judgment on the issue of contributory negligence?
5. Was the injury sustained by Daniel Fry foreseeable by the landlord's failure to maintain the trees on his lot?
6. Did Daniel Fry assume the risk that concealed damage to his roof caused by the falling limb would cause him to fall?

IV. SUMMARY OF THE ARGUMENT

On review of summary judgment, the facts are viewed in the light most favorable to the nonmoving party. CR 56; *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Review is *de novo*, with the appellate court engaging in the same inquiry as the trial court. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 1030 (1982). Utilizing this scope and standard of review, appellant raised multiple genuine issues of material fact that foreclosed summary disposition, including issues related to whether the landlord assumed the obligation to prune

and maintain trees on his lot, whether she in fact exercised reasonable care to discharge those duties, and whether the branch that damaged the appellant's roof created the hazardous condition that precipitated his fall. Moreover, contributory negligence on the part of plaintiff could not justify summary judgment because of well-settled decisional law the effect that questions of contributory negligence are to be decided by the jury. Nor does the doctrine of assumption of risk bar the plaintiff's claim because the risk—that concealed damage to the roof caused by a limb could cause him to fall—was not within the ambit of known risks that climbing onto an otherwise apparently safe roof entails.

V. ARGUMENT

1. APPELLANT PRESENTED FACTS SUFFICIENT TO RAISE A FACT QUESTION AS TO WHETHER RESPONDENT ASSUMED A DUTY TO PLAINTIFF UNDER THE LEASE AGREEMENT TO MAINTAIN TREES IN HER MOBILE HOME PARK SO THAT THEY DID NOT CONSTITUTE AN UNREASONABLE DANGER TO THE PLAINTIFF OR HIS PROPERTY.

A lessor of real property may be liable to a tenant for injuries due to the landlord's breach of a covenant to repair the premises if the unrepaired defect creates an unreasonable risk of harm to the tenant. *Brown v. Hauge*, 105 Wn.App. 800, 21 P.3d 716 (2001). It is said that the liability is not contractual, but rather that it sounds in tort based on the fact that

the lease agreement gives the landlord the ability to make the repairs and control over them. *Teglo v. Porter*, 65 Wn.2d 772, 399 P.2d 519 (1965). The threshold issue, therefore, is whether a covenant existed obliging the defendant to maintain the trees in a condition that did not pose an unreasonable danger to the plaintiff.

In this case, the rental agreement consisted not only of a formal Manufactured Home Lot One-year Rental Agreement signed by the landlord and tenant at the inception of the lease, but also a set of Rules and Regulations that the lease agreement gives the landlord authority to modify on thirty days notice. (CP 286-310). The landlord liberally availed herself of the opportunity to make periodic modifications of the Rules and Regulations and it is these, and the actual course of conduct between this landlord and the plaintiff, that demonstrate her intent to maintain the trees.

Initially, on inquiry by Fry at the time he was considering renting from her, Kettner expressly represented to him that she maintained the trees. (CP 281).

Furthermore, various of the notices of change to the Rules and Regulations prepared by defendant alluded to the landlord's continuing intent to provide for maintenance to the trees. One such Notice of

Change to Regulations circulated by the landlord in May, 2000¹ informed tenants that dangerous trees in the development are checked periodically and the owner determines whether to remove. (CP 260) Another, in 1997, advises tenants that they must notify the landlord if they believe a tree endangers their home, and that upon receipt of such notification the landlord will consult a tree service. (CP 264)

That is why when, in 2009, tree branches adjoining the plaintiff's driveway had grown to the point where pruning was needed for continuing access, he contacted the landlord rather than just proceeding to cut them back. Defendant at that time gave limited permission to trim the branches, but then supervised the process through her Manager, Brian Teitsel. (CP 282) Mr. Teitsel is identified in defendant's discovery response as the defendant's Manager. Declaration of Douglas J. Kaukl.

From documents produced by defendant in response to Requests for Production, it appears that she retained an arborist in February, 2009, to inspect the premises and whose written report confirms that he recommended a tree pruning service to the defendant for several trees in the development "where tenants had some concerns." Because defendant has not provided any proof of following through on this recommendation

¹ Although several Notices of Change antedated the lease agreement, all were provided by defendant to plaintiff at signing as a part of the collective notices of change that constituted the controlling Rules and Regulations that were incorporated in the lease agreement. Declaration of Daniel Fry. (CP 281).

to employ a pruning service, it must be inferred that she did not. Another document produced, an invoice from a tree service, shows that in May, 2013, she had six fir trees removed, another topped, pruned 10 limbs from one tree and 8 from another. (CP 320-326).

As shown by the Declaration of Christina Hanson, another tenant at Country Road Estates, Irene Kettner's own interpretation of the Rules and Regulations is that she will in fact trim or prune trees that have branches that pose a danger to homes in the community. The defendant's letter to Christina Hanson, in response to a request that branches endanger the tenant's outbuilding be trimmed, denies the pruning request until her tree service conducts the periodic inspection because the branches do not overhang the tenant's home. Mrs. Kettner expressly cites in justification for this policy the May 1, 2000, notices of change to Rules and Regulations sent in January, 1997, and May, 2000, that advise tenants to report trees that may endanger their homes, and that she regularly consults a tree service for maintenance of dangerous or unwanted trees.

If, as the defendant contends, she has never undertaken to prune trees at this development, and that tenants are freely at liberty to do so themselves, one would think that she would so advise tenants who request she perform the maintenance, such as the plaintiff and Christina Hanson, of that fact. However, none of the materials before the Court, including those

submitted by the landlord, set forth that position. The notices of change to the Rules and Regulations, as well as correspondence directed by defendant to the plaintiff and Christina Hanson in response to their respective requests that tree be trimmed, merely restate the defendant's practice of having periodic inspections of the park to determine what tree maintenance is required.

There is a genuine issue of fact presented, therefore, as to whether the defendant agreed to assume responsibility for the continuing pruning and maintenance of the many trees she allows to remain in her development. A trier of fact, weighing defendant's claim that she has never undertaken to do pruning against testimony from the plaintiff that at the inception of his lease she represented that she conducted periodic professional inspections of the trees and performed maintenance deemed necessary, her published Rules and Regulations to the same effect, her interpretation and application of the same Rules and Regulations as expressed to tenant Christina Hanson that pruning of trees posing a danger to home would be done, and her actual performance of this type of pruning all could easily persuade a trier of fact that the obligation to maintain the trees was in fact this landlord's duty under the lease. This controversy alone renders the case inappropriate for summary judgment.

2. THE LANDLORE FAILED TO PERFORM HER COVENANT TO MAINTAIN THE TREES IN A CONDITION THAT DID NOT POSE UNREASONABLE RISK TO THE PLAINTIFF.

Once it is determined that a legal duty existed, then it is a question for the trier of fact whether the defendant has exercised reasonable care to protect against that harm. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 p.2d 621 (1994). The landlord offers no proof that she undertook any steps to maintain any of the trees at Country Road Estates, at least during the 6-year period following plaintiff's moving in. On these facts, a jury could easily determine that a breach of the applicable standard had occurred through the landlord's inaction.

3. THERE IS ABUNDANT EVIDENCE FROM WHICH THE JURY COULD CONCLUDE THAT A FALLING BRANCH CAUSED DAMAGE TO THE PLAINTIFF'S ROOF, AND THAT HIS INJURY WAS DIRECTLY CAUSED BY THAT DAMAGE.

The defendant asserts that no evidence supports the plaintiff's contention that a falling branch caused damage to his roof which, in turn, directly led to his injury, and that his allegation that a branch fell and struck and loosened the satellite dish is purely speculative.

The following are admissible facts that a jury would be entitled to consider:

- a. Large branches overhung the plaintiff's roof.
- b. Plaintiff heard the impact of something hitting his roof.

- c. Tree branches are susceptible to falling, particularly during inclement weather such as existed.
- d. Leaks soon appeared in the vicinity of the roof where the satellite dish was located.
- e. The roof had previously never leaked.
- f. A large broken branch, at least 20-feet in length, was discovered the next day leaning against a roof fascia that it had damaged and in close proximity to the site of the satellite dish.
- g. The specific branches that prompted plaintiff to request pruning, had in fact, fallen.
- h. The satellite dish had moss characteristic of nearby tree branches on it.
- i. The satellite dish, previously secured by lag screws, was completely loose and pivoted when pressure was placed on it.
- j. It is unlikely that a satellite dish or any similar object secured to a roof by multiple lag screws will spontaneously detach from the roof without application of some substantial external force.
- k. Subsequent inspection of the dish showed that all of the lag bolts were completely pulled out of their holes and the dish was attached only by a portion of one lag screw.
- l. The roof had a shallow pitch that presented no difficulty in securely walking and standing on it.
- m. The plaintiff was wearing apparel appropriate for climbing onto the roof, was not impaired by any substance, had no physical impairment, and in fact was athletic, in good shape, and actually had experience climbing mountains (CP 284).

It is hardly speculative to conclude from the foregoing that a tree branch fell, impacted and loosened the dish rendering it unstable. On the contrary, the foregoing builds a powerful circumstantial case that this is exactly what happened, and a jury could easily so conclude.

4. THE QUESTION OF WHETHER CONTRIBUTORY NEGLIGENCE BY PLAINTIFF SUPERSEDED THE DEFENDANT'S NEGLIGENCE IS OBVIOUSLY A JURY QUESTION.

Summary judgment could not have been granted on the basis of contributory negligence. Whether a person is contributorily negligent depends on whether he or she exercised that particular care for his or her own personal safety that a reasonable person would have used under the existing facts or circumstances. *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 412 P.2d 109 (1966). Whether particular conduct constituted contributory negligence is ordinarily a question of fact for the jury. *Young v. Caravan Corp.*, 99 Wn.2d 655, 553 P.2d 834 (1983). It cannot be said, as a matter of law, that merely using a ladder to climb up on something, in and of itself, constitutes contributory negligence as a matter of law.

5. DANIEL FRY'S INJURY WAS WITHIN THE AMBIT OF RISK POSED BY DEFENDANT'S NEGLIGENCE AND WAS THEREFORE FORSEEABLE FOR PURPOSES OF PROXIMATE CAUSATION.

Kettner's negligence in failing to trim the branch subsequently fell on plaintiff's home, as he predicted twice in writing to her, created the mechanism of his ultimate injury, but the was not so remote as to be unforeseeable.. The scope of proximate causation is not circumscribed by whether she actually did foresee that the branch would strike and loosen the satellite dish, directly leading to plaintiff's injury, because the test of

foreseeability is not whether harm of a particular kind was expectable. Instead, it is whether the actual harm experienced fell within a general field of danger which should have been anticipated. *McLeod v. Grant Cy. Sch. Dist. No. 128*, 42 Wn.2d 116, 255 P.2d 360 (1953). As early as 1940 the Washington Court explained that “foreseeability” does not require that the actual manner of harm be anticipated: “The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. *Berglund v. Spokane County*, 4 Wn.2d 309 at 319-320, 103 P.2d 355 (1940).

The general scope of danger posed by negligently failing to remove large branches that overhang a roof and present a danger of falling is obviously that they will fall and injure people or damage property and create a hazardous condition on the roof that people subsequently on the roof will encounter. A jury could easily find that a landlord, renting a lot in a heavily treed area and representing to prospective tenants that she alone will maintain and prune the trees, is charged with the knowledge that failure to maintain the premises would result in limbs falling and injuring her tenants or damaging their property. Foreseeability in this sense is plainly a jury question, foreclosing summary judgment. See, WPI 15.05.

6. IMPLIED PRIMARY ASSUMPTION OF THE RISK IS INAPPLICABLE AS A DEFENSE TO THE CASE AT BAR BECAUSE PLAINTIFF WAS UNAWARE OF THE RISK POSED BY CONCEALED DAMAGE TO THE ROOF AND THE CONCEALED DAMAGE WAS NOT INHERENTLY A RISK OF CLIMBING ON A ROOF.

The doctrine of implied primary assumption of the risk does not bar this claim because the plaintiff in climbing onto his roof did so with the realization that he could fall. The reasoning underlying this variety of assumption of risk was explained in *Scott by and Through Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992):

Implied primary assumption of the 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...A classic example of primary assumption of the risk occurs in sports cases. One who participates in sports “assumes the risks” which are inherent in the sport. To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence...The doctrine of primary implied assumption of the risk can perhaps more accurately be described as a way to define a defendant’s duty. A defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of the sport.

119 Wn.2d 496-98, 834 P.2d at 26-30.

As the Court points out in *Scott*, it is important to carefully define the scope of the assumption. 119 Wn.2d at 497. Thus, in *Scott*, defendant was not relieved of liability because the injuries suffered by the 16-year old ski school student came about not due to normal risks inherent in ski-

ing, but because the practice course selected by the school had been negligently constructed in close proximity to a hazard that could not be seen by the skier in time to avoid a collision.

Similarly, in *Kirk v. WSU*, 109 Wn.2d 448, 746 P.2d 285 (1987), a college cheerleader was injured practicing cheerleading and claimed damages as the result of dangerous facilities and inadequate instruction or supervision. In denying the defense of primary implied assumption of risk, the Court reasoned that while the plaintiff had assumed the normal risks inherent in cheerleading, she had not assumed risks associated with dangerous facilities or inadequate supervision. The Court noted that to the extent she continued to participate on dangerous surface without instruction, she may have unreasonably assumed the risk, which is the same as contributorily negligent. In that case, the contributory negligence might reduce her damages, but not constitute a complete bar to recovery.

Since falling is *theoretically* possible to happen to anyone climbing up on anything, just like hyperextension injuries of the knee are *possible* during cheerleading activities. In climbing onto the roof, Daniel Fry accepted this possible, albeit extremely unlikely under the circumstances, risk because he was physically fit, fully capable of climbing up to the roof, and the roof itself posed no particularly overarching dangers due to its shallow pitch, high-friction surface, it being free from moisture, and his

physical condition and mountain climbing experience. It cannot be said, however, that he voluntarily assumed the risk that concealed damage tantamount to a trap awaited him on the roof, a hazard certainly not inherent in the risks a homeowner takes as a routine matter in climbing on the roof to inspect it for a leak. Very much like the plaintiffs in *Scott* and *Kirk*, the scope of his assumption of risk did not extend to hazards not generally part of the activity he was engaged in.

VI. CONCLUSION

The defendant expressly represented to him the during negotiations leading to his decision to rent, and in response to a direct inquiry as to who did the tree maintenance, that she periodically had tree inspectors inspect and maintain the trees. The defendant disputes this. However, she reiterated this undertaking in several parts of the Rules and Regulations she herself promulgated and which form a part of the lease agreement. There is proof that the defendant acknowledged her policy of maintaining trees to tenant Christina Hanson. Although the plaintiff repeatedly requested, in writing, that tree limbs posing a danger to his home be removed, the defendant's responses, when the landlord made them, did not as might be expected allude to the position that she now expresses that she has no obligation to do the maintenance and that the tenant may do so. These facts, and the resulting inferences, if viewed most favorably to the plaintiff as the

nonmoving party, would certainly allow a jury to conclude the existence of an obligation on the part of the landlord to trim, prune, or otherwise maintain the trees. This issue alone rendered the case inappropriate for summary disposition.

This Court should reverse the order granting summary judgment and remand for further proceedings.

RESPECTFULLY SUBMITTED this 14th day of March, 2014.


Douglas J. Kaukl WSBA #4718
Attorney for Plaintiff

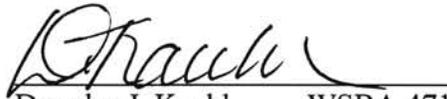
CERTIFICATE OF SERVICE

1. I am the attorney or record for appellant herein and make this declaration in that capacity and on my own personal knowledge.

2. On this date I deposited a true and correct copy of this document in the first class U.S. mail, postage prepaid, and duly addressed to counsel of record for respondent.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Puyallup, Washington, this March 14, 2014.


Douglas J. Kaukl WSBA 4718
Attorney for Appellant

[Faint, illegible markings or stamps]