

NO. 45763-6-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

DANIEL P. FRY,

Appellant.

v.

IRENE KETTNER d/b/a COUNTRY ROAD ESTATES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This matter arises from injuries sustained by appellant Daniel Fry when he fell from the roof of his home January 28, 2012. He filed suit against Respondent Irene Kettner, *dba* Country Road Estates, in Pierce County Superior Court, alleging her negligence for failing to trim branches from trees in and about the property thereby resulting in damage to his roof when branches fell due to inclement weather.

Judge Jack Nevin of Pierce County Superior Court granted Ms. Kettner's motion for summary judgment, finding that she breached no duty owed to Mr. Fry, nor was any act or omission of Ms. Kettner a proximate cause of Mr. Fry's injuries, and that Mr. Fry assumed the risk of his injuries when he climbed onto his roof.

II. ISSUES PRESENTED FOR REVIEW

Whether the trial court properly granted Ms. Kettner's motion for summary judgment, where:

- a. Neither the governing lease nor the community rules committed her to trimming trees in and around Mr. Fry's property;
- b. Mr. Fry cannot establish by admissible evidence that a falling tree branch caused his fall from the roof of his home;

c. Mr. Fry's act of climbing 12 feet on to this roof was a superseding cause, and not a foreseeable act, given the limited duty alleged in this case; and

d. There is no proximate cause because the act of climbing on his roof a week and half after falling branches allegedly damaged the roof is too remote from the alleged omission of Ms. Kettner.

III. STATEMENT OF THE CASE

A. Mr. Fry filed suit against Ms. Kettner after he fell off the roof of his home to inspect storm damage.

Respondent Irene Kettner is the owner and manager of Country Road Estates, a five-acre parcel containing 16 lots located at 206 Street Court E. and 92nd Avenue E. in Graham, Washington. CP 251. Plaintiff's lawsuit alleges injuries when he fell from the roof of his house, located on Lot No. 6 of County Road Estates, commonly known as 9317 206th Street Court E., Graham, Washington. CP 36, 58. Plaintiff alleges that he fell on January 28, 2012 after inspecting his roof for a possible leak. CP 37-38. He alleges that the leak was caused by falling tree branches that fell a week and half earlier from trees in and around Lot No. 6. Ms. Kettner is liable to him for his personal injuries due to her failure to trim these tree branches pursuant to the terms of the lease. CP 38. However, Ms. Kettner at no time assumed a duty to trim trees at the demand of Mr. Fry or any other lessee. CP 252.

B. Ms. Kettner had Country Road Estates developed in 1980 from forested rural land in Graham, Washington.

Irene Kettner developed Country Road Estates beginning in 1980 from forested rural land in Graham, Washington. The 16 lots are heavily wooded, including mostly conifer (Evergreen fir trees) with a few deciduous trees. CP 251. The reality of living in a rural forested area is that tree branches fall from time to time. CP 48, 251-252. However, other than Mr. Fry, no other lessee at Country Road Estates has complained that falling branches had damaged their home. CP 252. Contrary to the allegations of the complaint, neither the lease nor the governing park rules require Irene Kettner to trim tree branches at the demand of lessees like Mr. Fry.

While called a trailer park, most of the homes located on the lots at Country Road Estates are modular homes, such as Mr. Fry's. Of the 16 lots, Irene Kettner rents only the lots in 14 of them. In the case with Mr. Fry, he owns title to his own home, and merely rents the lot on which the home sits. CP 251.

C. Mr. Fry knowingly assumed the responsibility to maintain the lot.

Mr. Fry and Ms. Kettner began negotiations with regard to Lot 6 in June of 2007. CP 64-65. The parties entered into the lease on July 1, 2007. CP 63. The lease specifically incorporates community guidelines,

which are entitled the Country Road Estates Manufactured Housing Community Guidelines. CP 94, 97-110. Mr. Fry walked the lot before entering into the lease and was aware of the trees in and about the property. CP 63. Photographs of Lot No. 6 show the many trees in around Mr. Fry's and neighboring lots. CP 112. At the time he signed the lease, he was also aware of the notices contained within the community rules. CP 64-65. The notices specifically advise that the park had been subject to storms in the past resulting in falling tree limbs. One notice from January of 1997 advises as follows:

TREES: Because of the holiday blast many limbs from trees have fallen. A tree service checked trees for removal. If at any time you see that a tree may endanger your home, please call and I will consult the tree service.

CP 105.

Mr. Fry also signed the Park Rules and Regulations on June 15, 2007. CP 66-67. These rules expressly require at Paragraph 4: "Tenants must properly maintain their home and lot." The park provided the space, sewer and water hook up. The incoming tenant assumed responsibility for care of their home and yard.

Given the reality that tree branches fall in forested rural areas, there is no commitment within the lease or the community park rules to trim branches. Rather, the Park makes a commitment to ensure that the trees are healthy and not diseased, and Ms. Kettner has had trees inspected

by certified arborists, including Dennis Tompkins, who inspected the trees in the park in February of 2009. CP 53. At the same time, Ms. Kettner does not prohibit lessees from trimming tree branches in their own lots. CP 252. (Kettner Declaration ¶ 5). Mr. Fry took advantage of this, and trimmed overhanging tree branches in 2008 or 2009 before the subject incident. CP 71-72.

D. Mr. Fry cannot establish that the alleged roof leak was caused by falling braches from the storm on January 19, 2012.

Mr. Fry testified that he heard numerous tree branches fall as a result of a storm that occurred some time prior to his injury in January of 2012. CP 73. The Seattle-Tacoma area was in fact struck by a severe winter storm on January 19, 2012. CP 48; 252-253. There was widespread storm damage in the Pierce County area. Dennis Tompkins attests to having been called out to inspect tree damage from several clients in the Puget Sound in Pierce County. In fact, from his home in Bonney Lake, he recalls hearing the sound of tree branches snapping due to the wind and snow throughout the night. CP 48.

Mr. Fry was aware that tree branches struck his home during the night, but he was not aware of damage to the northeast end of the roof where his satellite dish was mounted and where he fell a week and half

later. CP 79-80. He observed damage to the fascia on the opposite end of the house and damage to a storm gutter. CP 77-78. He testified:

A. Okay. The night I observed, I didn't observe any damage to the roof until after. It was --I observed during the -- just prior to me going up on the roof, I had already seen the damage to this corner right here, to the southeast corner.

Q. (By Mr. Sutherland) the opposite side.

A. Yeah. I had noticed that because it was on the driveway side. ...

CP 77-78.

Mr. Fry then testified:

Q. Okay. When did you become aware of leaks?

A. When I started seeing damage to the interior side of the house.

Q. Okay. Did that manifest itself as water stains to the ceiling?

A. Yes.

Q. And how much time elapsed between when the tree branches fell and when you observed water stains to the interior?

A. I have no idea of an exact time?

Q. Okay. Was it more than a day?

A. Yes.

Q. More than --

A. It was after everything was melting . . .

Q. --than a week?

Okay. How long was snow present at the time?

A. I can only give you an approximation of what I think it is.

Q. Okay. Go ahead.

A. so two weeks.

Q. So snow was around for quite a while.

A. Yes.

Q. So after the snow melted, you observed stains in the interior of your house.

A. Yes.

CP 81-82.

Meanwhile, Mr. Fry at no time advised Ms. Kettner that branches had struck his home and damaged his roof. CP 253.

E. Fry fell from the northeast edge the roof while examining a satellite dish.

Mr. Fry fell from the northeast end of the house where a service had attached a satellite dish near the peak of his roof years earlier in approximately 2007. CP 114, 92. The service had placed the dish near the edge of the roof. CP 89, 114. Mr. Fry confirmed the location of the satellite dish during his deposition by marking the locations on a photograph of the northeast end of his house, including a diagram of location of satellite dish and point of Mr. Fry's fall from the roof. CP 114.

Mr. Fry was home on January 28, 2012. CP 82-83. Sometime prior to that he noticed a water stain in a bathroom on the northeast end of the house. CP 116. Sometime between 3:30 and 5:00 in the afternoon, he grabbed an extension ladder and placed it on the west side of this house near the southwest corner. CP 84-86. He climbed approximately twelve feet to his roof and then walked up the pitch of the roof. CP 86. He then walked nearly the length of the roof to the northeast edge. CP 114, 118. (photograph of house showing position of ladder). Mr. Fry testified that he was aware that by climbing on his roof, that he could fall and injure himself. CP 87-88. He walked over to where he approximated the area of the leak and began to inspect the satellite dish. CP 88-89.

There, he observed what he thought was damage to the satellite dish. He saw a green moss-like substance on the satellite arm. CP 335. The satellite dish on the roof was similar but not the same as the one now positioned on the side of the house. CP 120, 335.

During his deposition, Mr. Fry could not be specific as to how he fell from the roof. He denies having put his weight on the satellite dish. CP 90. He did touch the satellite dish, and then it just suddenly fell over the edge. CP 90-91. Without knowing why, Mr. Fry testified that he followed it over the edge, falling head first, and suffering numerous fractures of the bones of his left and right arms. Mr. Fry testified:

A: I had just gotten off the ladder. I walked over to where the leak—were. I approximated the leak was. Started heading over in that direction. I noticed that the dish antenna had some damage on it. I went over to look at the dish antenna. When I went to check the dish antenna, the dish antenna give way, and I went off. That's as much as I can tell you.

CP 88. Mr. Fry had no knowledge as to the precise mechanism of his fall, but it appears that he fell out of surprise that the antennae fell rather than reliance on the antennae to support him. Mr. Fry acknowledged that he did not examine the base of the antenna dish before he fell.

After the incident, the dish was removed. Mr. Fry's friend and licensed contractor Chad Sandwick performed temporary repairs to the roof. CP 59-61. It is also clear from the record that Mr. Sandwick had performed other repairs to Mr. Fry's home.

IV. SUMMARY OF THE ARGUMENT

In reviewing the trial court's decision to award summary judgment, this court must affirm the decision of the court on any basis supported by the record. The record establishes no basis for Mr. Fry's assertion that Ms. Kettner assumed a duty to him to trim branches in and around his property. Even if the court finds such a duty, Mr. Fry in effect speculates that tree branches that fell on January 19, 2012, resulting in a roof leak that he inspected approximately a week and a half later on January 28, 2012. Mr. Fry also fails to show legal causation in that his fall from the

roof is too remote from the alleged failure to trim tree branches to establish proximate cause. His decision to climb a ladder onto his roof a week and half after it was allegedly damaged by falling branches, walk to the edge of the roof to inspect a damaged satellite dish antenna, and then fall for an unspecified reason, is also the superseding cause of the injury. Finally, Mr. Fry's claims are barred by the doctrine of implied primary assumption of risk, as he knowingly assumed the risk of falling by climbing onto his roof.

V. ARGUMENT

A. **The trial court properly applied summary judgment standards in dismissing the case.**

“[T]he standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Smith v. Safeco Ins., Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) (internal quotation and citation omitted). *See also Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion”). In deciding the propriety of a summary judgment order, the appellate court is to perform the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

CR 56(c) provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

CR 56(c). The purpose of a motion for summary judgment is to avoid useless trials on issues that cannot be factually supported, or, if factually supported, could not, as a matter of law, lead to an outcome favorable to the non-moving party. *Burris v. General Ins. Co. of America*, 16 Wn. App. 73, 75, 553 P.2d 125 (1976). The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact, however, if the moving party shows there is no genuine issue for trial, the inquiry shifts to the party opposing summary judgment. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

It is well recognized that an appellate court may uphold the trial court's ruling on appeal on "any basis supported by the record." *Stieneke v. Russi*, 145 Wn. App. 544, 559-60, 190 P.3d 60 (2008). "[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wash.2d 193, 200-01, 770 P.2d 1027

(1989), *cert. denied*, 493 U.S. 814, 110 S. Ct. 61, 107 L. Ed. 2d 29 (1989); see also *Northwest Collectors, Inc. v. Enders*, 74 Wash.2d 585, 595, 446 P.2d 200 (1968) (“[t]he trial court can be sustained on any ground within the proof.”); *Kirkpatrick v. Dept. Of Labor and Indust.*, 48 Wash.2d 51, 53, 290 P.2d 979 (1955) (“Where a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition”).

The trial court granted summary judgment on all grounds raised by Ms. Kettner in the summary judgment. CP 350. She argued (1) that she breached no duty owed to Mr. Fry as the lessee of the property on which his home was situated; (2) Mr. Fry cannot establish cause in fact or legal causation; (3) that Mr. Fry’s negligence in climbing his roof was a superseding cause of his injuries; and (4) Mr. Fry’s case is barred by the doctrine of implied primary assumption of risk. CP 121-140. Any of these grounds will support this court in affirming the trial court.

B. Ms. Kettner breached no duty owed to Mr. Fry as he knowingly leased property in a wooded area that had a history of falling tree limbs.

In any negligence action, the plaintiff must prove duty, breach, harm and proximate cause. *Ford v. Red Lion Inns*, 67 Wn. App. 766, 769, 840 P.2d 198 (1992). The burden of establishing a duty of care is on the party claiming that it exists. *Brown v. Hauge*, 105 Wn. App. 800, 804, 21

P.3d 716 (2001). The contract defines the extent of the duty when a landlord's duty arises out of a covenant. *Tucker v. Hayford*, 118 Wn. App. 246, 251, 75 P.3d 980 (2003). Here, the complaint does not delineate a cause of action beyond a reference to a breach of a contractual duty as the basis for the tort claim. CP 36. Mr. Fry cites to the language in the contract incorporating the community rules and regulations which in turn state that the park will consult an arborist if a tenant believes the tree should be trimmed or removed. However, the park rules at no time commit the Park to trimming tree branches. In fact, the opposite is true, the Park rules on which plaintiff bases his claims state the tenant will "maintain the home and lot.". CP 230. Nowhere do the lease or park rules state that lessees cannot trim tree branches that overhang their leased lots. CP 252. Mr. Fry was apparently aware of this as he has trimmed branches overhanging his lot.

Under Washington law, a landlord may be liable in tort to a lessee for breach of duties arising under (1) a contract (2) the traditional common law landlord liability; and (3) the Uniform Residential Landlord Tenant Act. *See Tucker v. Hayford*, 118 Wn. App. 246, 75 P.3d 980 (2003). No legal authority in Washington imposed duties such as claimed here under the common law or by statute. Neither the Residential Landlord Tenant Act, RCW 59.18 *et seq.*, nor the Manufactured/Mobile Home Residential

Landlord Tenant Act, RCW 59.20 *et seq.*, impose a duty to trim trees on and around lots, especially where the trees stand in a forested rural area.

As to the tort claims arising under contract, Washington courts apply the Restatement: “A tenant may recover for personal injuries caused by the landlord's breach of a repair covenant in the lease if the unrepaired defect created an unreasonable risk of harm to the tenant.”

The Restatement (Second) of Torts Section 357 (1965) provides the lessor of land is liable if (a) the lessor has contracted to keep the land in repair; (b) the disrepair creates an unreasonable risk that the performance of the lessor's agreement would have prevented; and (c) the lessor fails to exercise reasonable care in performing the agreement. *Tucker*, 118 Wn. App. at 251; *Brown v. Hauge*, 105 Wn. App. 800, 804 21 P.3d 716 (2001). Again, the contract defines the extent of the duty when the duty arises out of a covenant. *Id.* Moreover, the record does not show that trimming branches would have avoided the alleged damage to Mr. Fry's roof.

Here, the record does not specify that Irene Kettner assumed a duty to trim trees. She only committed to consult an arborist about the health of those trees and the record confirms that is what she did. The February 2009 arborist report from Dennis Thompkins states that all trees within the park are healthy. CP 53. Clearly, tree branches fall from conifer and

other species, but that is a fact of life in rural forested areas.

Moreover, this case does not involve a personal injury resulting directly from a falling tree branch. Rather, plaintiff's assumption is the tree branch damaged the base of a satellite dish and thereby caused a slow leak in the roof of his home that in turn caused him to climb on his roof to investigate which in turn led to his fall. Plaintiff cannot show that falling branches had injured anyone in or around the park. In fact, this is the first instance where falling branches ever allegedly damaged a home at the Park. Not committing to trim trees on demand, as opposed to the commitment to monitor the health of trees, is not an unreasonable policy.

Nor was the condition latent or hidden at the time Mr. Fry entered into the lease with Ms. Kettner. CP 64-65. At a minimum, the rules and regulations which he cites, contain a notice dated January 1997 notifying defendants of a holiday storm that caused many limbs from trees to fall. CP 105. The notice states that a tree service checked trees for removal at that time. Mr. Fry certainly knew of the trees in and around his property. There was nothing hidden about any risk posed by the trees. And there is nothing within the rules or contract that would have limited Mr. Fry's ability to trim overhanging branches if he deemed them a danger to his property.

Mr. Fry's submission of the Declaration of Christina Hanson does not change this result. CP 311. Ms. Hanson relays a notice from Ms. Kettner regarding removal of tree limbs of some unknown lessee that occurred in 2013, after the subject incident. Mr. Fry fell on January 28, 2012. The parties agree that the storm of January of 2012 had been a watershed event, damaging trees throughout the Seattle-Tacoma area. Decisions to clear limbs after that event must be considered a remedial measure and are therefore inadmissible evidence. ER 407. It is of no relevance to Mr. Fry that Ms. Kettner would have committed in a single instance to clear a tree limb for a lessee after January of 2012 where the tree limb was a clear and present danger to that lessee's home.

C. Mr. Fry cannot show cause in fact or legal causation.

To establish her claim of negligence against each of the defendants, plaintiff has the burden of proving (1) duty; (2) breach of duty; (3) proximate cause; and (4) damages. *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 951 P.2d 749 (1998); *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Proximate cause contains two separate elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Legal causation is a more fluid concept; it "is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." *Id.* (citing *Hartley*,

103 Wn.2d at 779); *Cunningham v. State*, 61 Wn. App. 562, 570, 811 P.2d 225 (1991); *Tae Kim v. Budget Rent-A-Car Systems, Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001). “Legal cause ‘involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact’; *i.e.*, whether considerations of logic, common sense, justice, policy and precedent favor finding liability.” *Hartley*, 103 Wn.2d at 779 (emphasis in original). The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *Schooley*, 134 Wn.2d. at 478-79.

1. Mr. Fry cannot show that falling branches caused him to fall

Cause-in-fact is “a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.” 6 Washington Practice: Washington Pattern Jury Instructions: Civil 15.01, at 181 (2005). Cause-in-fact is generally a question for the jury. *Schooley*, 134 Wash.2d at 478. But on summary judgment, the court reviews the record to determine whether the plaintiff has offered sufficient admissible evidence, which if proved, would support sufficient allegations of material fact to warrant sending the case to a jury. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 308, 151 P.3d 201 (2006).

Mr. Fry must show cause in fact by admissible evidence, but he has failed in his deposition and pleadings to establish the causal link here. *See Tae Kim*, 143 Wn.2d at 205. Here, plaintiff can only speculate as to cause in fact. He climbed up on the roof because he had a water stain on the ceiling of this master bathroom. He can only guess that a branch that fell on January 19, 2012, nine days before his injury, damaged a satellite dish and caused the roof to leak and the water stain. Plaintiff then adds conjecture to speculation by testifying to a vague relationship between perceived moss on the arm of the satellite dish and his fall.

Mr. Fry denies that he was holding on to the dish at the time of his fall. It fell over the side of the roof and he followed it, but he cannot otherwise relate his fall to the satellite dish. CP 88, 90-91.

2. Mr. Fry's own negligence is a superseding cause.

The concept of intervening or superseding causes is an intervening act that cuts off the negligence of one defendant by breaking the chain of causation.

If a new, independent act breaks the chain of causation, the original negligence is no longer a proximate cause of the injury and the defendant is not liable for the injury. *Riojas [v. Grant County Pub. Util. Dist.]*, 117 Wn. App. 694, 697, 72 P.3d 1093 (2003), review denied, 151 Wn.2d 1006, 87 P.3d 1184 (2004)]. A superseding cause is an occurrence that intervenes so as to relieve the actor from liability for harm to another for which his antecedent negligence is a substantial cause. Restatement (Second) of Torts §440.

[I]f in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, there is no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm.

Restatement (Second) of Torts § 440, cmt. b. *See also Travis v. Bohannon*, 128 Wn. App. 231, 241, 115 P.3d 342, 347 (2005).

For example, *In Re Tenney*, 58 Wn. App. 394, 783 P.2d 632 (1989), the deceased was riding his motorcycle along a road that was obstructed in part by heavy trucks waiting to unload grain. The undisputed facts were that the motorcyclist turned to look at a rider behind him and then turned directly in front of an oncoming vehicle that struck and killed him. The court noted that while causation is a question of fact for a jury, when the facts are not in dispute, causation may be decided as a matter of law, and, that viewing the light most favorably to the decedent's representative, the acts of the decedent superseded the negligence of the grain elevator operator.

Mr. Fry's actions in this matter are a superseding cause because they are unforeseeable from the perspective of the alleged duty assumed by Ms. Kettner. *Tae Kim v. Budget Rent-A-Car Systems, Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001); *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989); *Jones v. Leon*, 3 Wn. App. 916, 478 P.2d 778 (1970). While foreseeability is normally an issue for the jury, it will be decided as a

matter of law where reasonable minds cannot differ. *Christen*, 113 Wn.2d at 492; *Jones*, 3 Wn. App. at 924. Foreseeability is directly related to the duty owed. As the Supreme Court made clear in *Christen*:

The concept of foreseeability limits the scope of the duty owed. We have held that in order to establish foreseeability “the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.” (Cite omitted). The limitation imposed thereby is important because, as the court has previously observed, “a negligent act should have some end to its legal consequences.” (Citation omitted).

113 Wn.2d at 492.

Foreseeability is also determined by the extraordinary nature of the intervening act. *Jones*, 3 Wn. App. at 924 (“The test to be applied in determining foreseeability of intervening acts of a third person is whether such occurrences are so highly extraordinary or improbable as to be wholly beyond the range of expectability”).

In *Jones*, the court considered the intervening act of an armed assailant in shooting the plaintiff while a patron at defendant nightclub. While the duty of a drinking establishment includes protecting patrons from foreseeable criminal assaults, the evidence on record was not sufficient to raise issues of fact for the jury’s consideration and a directed verdict was therefore proper. *Id.* at 924-27. In that case the duty was not triggered even though the assailant had a reputation for a violent temper,

had slapped his former girlfriend two weeks prior to the shooting, and had threatened to kill her. *Id.* 925. Though plaintiff argued, as Respondent does here, that these acts brought the assailant's action within the realm of reasonable foreseeability, the court rejected the argument, finding that defendant would have not had sufficient notice of the threat in time to prevent it and therefore the assailant's act was a superseding cause.

Consider the case alleged by Mr. Fry in the case at bar:

- (1) The alleged duty is to trim tree branches;
 - (2) Sometime around January 19, 2012, tree branches broke and damaged Mr. Fry's satellite antennae;
 - (3) Mr. Fry then noticed a water stain on a bathroom roof some days after the branches fell;
 - (4) A week and half after the branches fell, Mr. Fry climbs a ladder 12 feet on to this roof to investigate the water leak;
 - (5) Mr. Fry walks to the very edge of the roof to inspect supposed damage to his satellite antennae;
 - (6) Upon inspection, the satellite dish falls off, and for some reason, Mr. Fry follows it; and
 - (7) At no time before his fall, was Ms. Kettner advised that tree branches fell on Mr. Fry's roof or that his roof had been damaged.
- CP 253.

The duty that Ms. Kettner allegedly assumed was a duty to trim tree branches that threatened plaintiff's home. Mr. Fry's fall is far removed from the alleged failure to perform this duty. There is no case law that finds that a voluntary act of a plaintiff placing himself in danger to inspect property damages is a foreseeable consequence of a defendant's breach of duty of care towards that property.

Mr. Fry's reliance on *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 255 P.2d 360 (1953) is misplaced because he fails to account for the broad duty at issue there. *McLeod* involved a sexual assault of a school girl on school premises. The school district has a very well defined duty to protect its students from the acts of third parties. *Id.* at 319-20. With that duty in mind, the school's failure to adequately supervise its students and secure a dark store room where the assault occurred was within the general field of danger created by the school district's failure to perform its duty to protect plaintiff. *Id.* at 322.

In *McLeod* the defendant owed a duty to protect the student but the student was injured by a criminal assault. Here, at most, the duty is to prevent branches from falling on Mr. Fry's home, not to prevent him from climbing up on his roof and falling.

The Washington Supreme Court opinion in *Cook v. Seidenverg*, 36 Wn.2d 256, 217 P.2d 799 (1950) also provides an instructive analysis for

the case at bar. In *Cook*, the mother of a minor child sued for burns caused by a space heater. Plaintiffs alleged that the space heater was only necessary because of the defendant landlord's failure to provide heating as required by ordinance and by a warranty of habitability. *Id.* at 257. In upholding a demurer to the plaintiffs' complaints, the court held:

By 'intervening act or force' we are not referring to the mere act of the mother in obtaining and utilizing a portable electric heater. That act may be regarded as part of a natural and continuance sequence resulting from respondents' failure to provide heat. But we know that there must have been some additional and further act or force in operation here, since the normal use of such electrical appliances rarely results in accidents of this kind. The pleadings are silent as to exactly how the accident occurred, and so we are not informed as to the precise nature of the intervening act or force. But we do know that it must have been due either to the negligence of the mother in placing the heater in a position of danger, or in knowingly using a defective heater, or in failing to supervise the child's use of the heater; or the act of the child, independent of any negligence, in coming in too close proximity to the heater; or a latent defects in the heater which caused the child's clothes to ignite, or some other intervening circumstance of like nature.

In our opinion, any of these circumstances must, under the facts of this case, be held to be a superseding cause of harm

...

Id. at 263. Here, as in *Cook*, Mr. Fry alleges that the landlord failed to perform a duty required by law. Like *Cook*, Mr. Fry cannot explain how his fall from the roof exactly happened. But here, the facts weigh even more strongly toward dismissal as a matter of law because the very act of

climbing up on a pitched roof presents a clear risk of falling, whereas the placement of a heater does not, without more, present a risk of injury. And like *Cook*, the failure to provide a service, such as trimming branches, is superseded by Mr. Fry's act of climbing on to his roof to check on a supposed leak whether the leak was caused by a falling branch or not.

3. Even assuming cause in fact, there is no legal causation

The court determines legal causation as a matter of law. *Tae Kim v. Budget Rent-A-Car Systems, Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001). Applying concepts of legal causation is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. In determining proximate cause, the court's focus is on "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or unsubstantial to impose liability." The inquiry depends upon "mixed considerations of logic, common sense, justice, policy and precedent." *Tae Kim*, 143 Wn.2d at 204. The Supreme Court in *Tae Kim* also noted that "at a minimum, the remoteness in time between the criminal act (stealing an automobile) and the injury is dispositive to the question of legal cause. *Id.* at 205.

Defendant's duty, if any, was limited to the responsibility to trim trees. From that prospective, the act of plaintiff climbing up on his roof to investigate the cause of a roof leak is entirely outside the scope of that

duty, and is not a foreseeable consequence of the breach of that duty. Plaintiff would have the court impose liability where the alleged failure to trim tree branches, results in falling limbs, that allegedly causes damage to the support of a satellite dish on the roof of his house, that in turn results in a slow leak, that induces plaintiff days later to grab a ladder and climb up on his roof, then walk to the edge near the roof peak, then somehow fall over when the satellite dish falls over.

The omission of defendant and the injury claimed by plaintiff are simply too remote from one other. The injury was not a foreseeable consequence from defendant's perspective, even assuming a breach of duty. As a matter of law, there is no proximate cause.

D. Plaintiff's claim is barred by implied primary assumption of the risk.

There are four varieties of assumption of the risk, including "implied primary." *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). If established, implied primary assumption of the risk is a complete bar to recovery because a plaintiff's consent to assume such risk negates any duty that a defendant would otherwise owe. *Id.*; see also *Alston v. Blythe*, 88 Wn. App. 26, 33, 943 P.2d 692 (1997); *Dorr v. Big Creek Wood Prods., Inc.*, 84 Wn. App. 420, 425, 927 P.2d 1148 (1996). To establish implied primary assumption of the risk, the evidence must show that "plaintiff (1) had full subjective understanding (2) of the

presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” *Gregoire*, 170 Wn.2d at 636. Implied primary assumption of the risk applies “where a plaintiff has impliedly consented . . . to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks.” *Scott By and Through Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 497, 834 P.2d 6 (1992) (emphasis in original).

Division Two has provided a summary of the knowledge and voluntariness elements of implied primary assumption of the risk:

Whether a plaintiff decides *knowingly* to encounter a risk turns on whether he or she, at the time of decision, *actually and subjectively* knew all facts that a reasonable person in the defendant’s shoes would know and disclose, or, concomitantly, **all facts that a reasonable person in the plaintiff’s shoes would want to know and consider**. Thus, the test is a subjective one: Whether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk. The plaintiff must be aware of more than just the generalized risk of [his or her] activities; there must be proof [he or she] knew of and appreciated the specific hazard which caused the injury.

. . . .

Whether a plaintiff decides *voluntarily* to encounter a risk depends on whether he or she elects to encounter it despite knowing of a reasonable alternative course of action. Thus, Division One has said that in order for assumption of risk to bar recovery, **the plaintiff must have had a reasonable opportunity to act differently or proceed on an alternate course** that would have avoided the danger.

Erie v. White, 92 Wn. App. 297, 303-04, 966 P.2d 342 (1998) (bolded emphasis added; internal quotes and citations omitted).

Washington courts have determined that where a plaintiff knows as much (or more) than a defendant regarding a specific risk, and then proceeds to voluntarily encounter that risk despite the plaintiff's "demand for its removal," implied primary assumption of the risk will bar the claim.

See id. With respect to the element of voluntariness, the *Erie* court stated:

Since the basis of assumption of risk is the plaintiff's willingness to accept the risk, take his chances, and look out for himself, his choice in doing so must be a voluntary one. If the plaintiff's words or conduct make it clear that he refuses to accept the risk, he does not assume it. **The plaintiff's mere protest against the risk and demand for its removal or for protection against it will not necessarily and conclusively prevent his subsequent acceptance of the risk, if he then proceeds voluntarily into a situation which exposes him to it.** Such conduct normally indicates that he does not stand on his objection, and has in fact consented, although reluctantly, to accept the danger and look for himself.

Id. at 305 (quoting Restatement (Second) of Torts § 496E cmt. a; emphasis added).

The *Erie* court applied § 496E and upheld the trial court's dismissal of a claim where a tree-cutter used arguably unsafe equipment but knew of the risk **prior** to using that equipment. *Erie*, 92 Wn. App. at 300-01, 306. As stated by the *Erie* court:

In this case, reasonable minds could not differ on whether Erie knew all facts a reasonable person would have known, and thus appreciated the specific risk; he himself testified that when he looked at the equipment, he realized it was pole-climbing equipment that did not have the steel-reinforced safety strap needed when using a chain saw high in a tree. Nor could reasonable minds differ on whether Erie had reasonable alternative courses of action; it is indisputable that he could have gone to a rental store for the right kind of equipment, required White to do that, or simply declined to proceed.

Id. at 306.

Recent authority further establishes the *Erie* approach where implied primary assumption of the risk will bar claims when a person knows specific risks and voluntarily accepts them. *Jessee v. City Council of Dayton*, 173 Wn. App 410, 293 P.3d 1290 (2013). In *Jessee*, a worker for the Walla Walla County emergency maintenance department attended a “joint emergency management exercise” put on by Columbia County and the City of Dayton. *Id.* at 1291. As part of the worker’s evaluation, she was expected to join an “after action review” on the second floor of Dayton’s “Old Fire Station.” *Id.* The stairs at the Old Fire Station were not compliant with building code, including the absence of a handrail. *Id.* Additionally, near the stairs was a grate with a large hole and protruding bolts. *Id.* Before navigating the stairs, the worker verbally described to others various particular problems she perceived regarding the “unsafe”

stairs before she climbed them. When she descended the stairs, she fell and sustained injuries. *Id.*

After reviewing authority on assumption of the risk, the *Jessee* court applied the two-part test for implied primary assumption of the risk, *i.e.*, subjective knowledge and voluntariness. With respect to subjective knowledge, the court noted the worker's own comments on the specific dangers of the stairs and her admitted trouble balancing on the ascension. *Id.* at 1293. With respect to voluntariness, the *Jessee* court looked to § 496E:

The concept of voluntariness required that the City show that Ms. Jessee elected to encounter [the risk] despite knowing of a reasonable alternative course of action. A plaintiff's actions are voluntary if she voices concern about a risk, but ultimately accepts the risk. **A plaintiff's actions are voluntary when she feels compelled by outside considerations to take the risk.** The *Restatement* gives two examples of this. In one, a plaintiff knows that a house is dangerous, but rents it anyway because she cannot find or afford another. In the second, a plaintiff knows that the defendant's car has faulty brakes, but asks the defendant to drive her to the hospital because she is badly bleeding. In both examples, the plaintiff voluntarily assumes the risk.

The facts here are even more compelling than these examples. Ms. Jessee voluntarily assumed the risk inherent in the Old Fire Station's stairs. She voiced concern about the stairs, but she went up them anyway. Ms. Jessee suggests that her choice was involuntary because she was at work, was expected to attend the meeting, and did not choose the meeting place. However, these were her concerns. The City did not impose them on her.

Id. (bolded emphasis added).

Thus, as Division Three made clear in *Jessee*, where an individual has full subjective understanding of the risk involved and voluntarily assumes the risk even if arguably “compelled by outside considerations,” Washington courts will dismiss claims on the basis of implied primary assumption of the risk.

With respect to the secondary element of implied primary assumption of the risk, *i.e.*, the plaintiff’s voluntariness, “A plaintiff’s actions are voluntary if she voices concern about a risk, but ultimately accepts the risk.” *Jessee*, 293 P.3d at 1293. “In order that the assumption of a risk bar an injured person from recovery, the injured plaintiff must have had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger.” *Zook v. Baier*, 9 Wn. App. 708, 716, 514 P.2d 923, 930 (1973).

The issue before this court turns on what is meant by a subjective understanding of the risks. The courts frame the issue in terms of actual or subjective understanding of “all facts that a reasonable person in the plaintiff’s shoes would want to know and consider.” *Erie v. White*, 92 Wn. App. 297, 303, 966 P.2d 342 (1998). Before climbing onto his roof, he observed a water stain on a bathroom ceiling directly below the base of the satellite dish on the roof. CP 116, 127. He climbed 12 feet up on the roof knowing he could fall. CP 86-88. His roof had a pitch that required

him to walk still higher after stepping onto the roof from the ladder. CP 86, 114. The pitch is estimated at five inches of rise for every foot. CP 317.¹ The roof had no railing or fall prevention measures. He observed damage to the satellite dish before he walked to the edge of the roof. CP 88. Mr. Fry then knowingly walked to the edge of his house to the satellite dish. CP 88, 114.

The record clearly shows Mr. Fry's subjective knowledge of the risk involved in climbing onto the roof, which created the risk that he could fall. It was not the satellite dish that caused the injury but the risk posed by walking to the edge of a steeped roof more than 12 feet off the ground to a spot he knew to be damaged. Mr. Fry's reliance on *Scott by and Through Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992) and *Kirk v. WSU*, 109 Wn.2d 448, 746 P.2d 285 (1987) is therefore misplaced. In *Scott*, the plaintiff, a minor, suffered injury when he skied into a shack located too close to a ski run and out of sight from the skier at the beginning of the run. *Scott*, 119 Wn.2d at 500. The plaintiff assumed the known risks of skiing but had no knowledge of the

¹ Mr. Fry attempts to minimize the risk posed by the steep roof, relying on Chad Sandwick's statement that the rise of the roof was only about five inches per 12 inches of run. This ignores the fact that the rise poses a risk not encountered in public walkways which limits the slope of a ramp at public entrances to one inch for every 12 inches of run. All other ramps are limited to one to 8 inches. CP 347. UBC § 3306(c) (1979). Plaintiff's roof would clearly not be considered a proper walking surface.

risk posed by the shack in proximity to the course and dangerous condition of the snow in that area.

Similarly, in *Kirk*, the plaintiff cheerleader was injured when she fell onto a hard surface while practicing a routine. She sued the university alleging negligence in the location of the practice and in the failure to provide adequate supervision. The Court agreed with plaintiff that the usual risks associated with cheerleading did not include the risks associated with the failure of the defendant to provide adequate facilities or supervision. *Kirk*, 109 Wn.2d at 448.

Scott and *Kirk* involve activities fundamentally different than the circumstance that Mr. Fry encountered. He knew he had climbed onto an unsecured roof. He knew the satellite dish sat by the edge of the roof. He knew he could fall from the roof. His deposition testimony makes clear that he knew the satellite dish was damaged. But the satellite dish is not intended to act as a fall prevention. Mr. Fry cannot have reasonably relied on the satellite dish to prevent his fall. Reasonable minds cannot differ that Mr. Fry had a subjective understanding of the risks that lead to his injury.

Mr. Fry's actions were also clearly voluntary. There was nothing urgent about his inspection of his roof as it was more than a week after the branches allegedly damaged the roof. See Appellant Br. P. 3. The

problem was a water stain on a bathroom ceiling, not a torrent of water flooding the house. CP 116. Meanwhile, Mr. Fry had a friend, Chad Sandwick, a licensed contractor, who he could call to inspect the roof and make repairs. Mr. Sandwick in fact made temporary repairs to the roof after plaintiff's injuries. CP 59-61, 316.

Thus, the circumstances here establish voluntariness far more than the circumstances described in *Jessee*, where the Court nevertheless determined voluntariness as a matter of law. 293 P.3d at 1293. In *Jessee*, the plaintiff's work obligations required her to climb the stairs down which she eventually fell. She knew of the defects in the stairs and assumed the risk when she descended down them. Here, nothing compelled Mr. Fry to climb a ladder onto an unsecure roof.

VI. CONCLUSION

Respondent Irene Kettner, dba Country Road Estates, requests this court affirm the superior court's order granting her motion for summary judgment. This court may do so on any one of five different grounds: (1) failure to show a duty; (2) failure to show cause in fact; (3) the superseding cause; (4) failure to show proximate cause; and (5) implied primary assumption of the risk.

First, neither the lease nor the community guidelines establish Mr. Fry's claim that Ms. Kettner committed to trimming tree branches at

his direction. Ms. Kettner obligated herself to have trees inspected for their general health, hiring the arborist Dennis Tompkins for an inspection of all the trees within Country Road Estates in 2009. Moreover, Mr. Fry knowingly moved to a heavily wooded area when he first entered into the lease with Ms. Kettner. He was advised that tree branches fall due to inclement weather. There was nothing within the lease or the community guidelines, that placed the burden on Ms. Kettner to cut every branch that Mr. Fry deemed a danger to his home.

Second, Mr. Fry establishes only that tree branches fell on or about January 19, 2012 and that approximately a week and half later he noticed a water stain in the downstairs bathroom. He infers that the falling branch damaged the satellite dish, which in turn created a leak in the roof by speculation and conjecture rather than any expert or factual analysis.

Third, even assuming some causal connection, Mr. Fry's act of climbing 12 feet onto a ladder onto his roof, walking to the very edge of his roof, before falling, is a superseding cause of his injury. Ms. Kettner assumed no duty to protect Mr. Kettner from falling from his roof — at most, she assumed the duty to trim branches that may pose a danger to his home. There is nothing foreseeable about his injury in light of Ms. Kettner's very limited duty.

Fourth, Mr. Fry cannot establish proximate cause. The concept of legal causation is granted in policy determination as to how far the consequences of a defendant act should extend. The inquiry depends upon mixed considerations of logic, common sense, justice, policy and precedent. Mr. Fry's fall remote in both time and in nature from the underlying alleged negligence of Ms. Kettner, is too remote to establish proximate cause in this case.

Finally, Mr. Fry knowingly assumed the risk of climbing the ladder to his roof, walking up a steep roof to the very edge, inspecting a satellite dish he suspected was damaged, and then, for some uncertain reason, falling. Mr. Fry had full subjective understanding of the risk involved in this even if his decision to encounter the risk were compelled by outside considerations.

For these reasons, the trial court correctly granted summary judgment and its decision should be affirmed.

Respectfully submitted this 11 day of April, 2014.

LEE SMART, P.S., INC.

By: 
Peter E. Sutherland, WSBA No. 17745
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on April 18, 2014, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. Douglas Kaukl
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DATED this 11 day of April, 2014 at Seattle, Washington.



Taniya T. Chai
Legal Assistant

