

**FILED**

MAY 01 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 306194

WASHINGTON STATE

COURT OF APPEALS

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JOSEPH SCHOENMAKERS, Appellant

v.

CHRISTIAN PATRICK BAGDON AND JANE DOE  
BAGDON, d/b/a DOOR TO DOOR STORE, a sole  
proprietorship

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**APPELLANT'S BRIEF**

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(509) 663-0635

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Section 343 of the Restatement (Second) of Torts

**I. ASSIGNMENTS OF ERROR**

No.1: Did the trial court err in granting Summary Judgment on the issue of assumption of risk? This issue is reviewed de novo as a question of law. **Hayden v. Mutual of Enumclaw Ins. Co.**, 141 Wash.2d 55, 63, 64, 1 P.3d 1167 (2000).

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

No. 1: Did the trial court error in finding, as a matter of law that Joseph Schoenmakers conduct amounted to an “implied primary assumption of risk” thereby constituting a complete bar to recovery, rather than a “implied unreasonable assumption of the risk” factor to consider in contributory negligence?

**II. IDENTITY OF APPELLANT**

The Petitioner is Joseph Schoenmakers, the Plaintiff below.

**III. STATEMENT OF THE CASE**

Plaintiff Joseph Schoenmakers brought an action for negligence against the Defendant, Christian Bagdon. **CP 1-4**. The Defendant moved

for summary judgment of dismissal alleging the doctrine of assumption of risk. **(CP 12-27)**.

In the court's Memorandum decision dated November 9, 2011, Judge Bridges opined that he believed that Joseph Schoenmakers' claim was barred by the doctrine of "implied primary assumption of risk." **(See Appendix A)**

#### **IV. STATEMENT OF FACTS**

From approximately 1992 to 1997, Joe Schoenmakers worked for Christian Bagdon d/b/a Door to Door as an employee. He was classified as a salesman. **(CP 212)**. During that time he did installs. He did work in the shop. **(CP 212)**. In approximately 1997, Christian Bagdon decided that he could no longer pay Schoenmakers wages, so he began working for Christian Bagdon as an independent contractor. **(CP 212)**. He got a general contractor's license to operate "The Installer" in 1997. **(CP 212)**.

The oral contract Chris Bagdon and he agreed to was:

- 1) Schoenmakers would get 5% commission for any sales he made for Door-to-Door merchandise;

- 2) Bagdon agreed he would pay Schoenmakers cell phone, transportation expenses, and insurance on his personal truck; and
- 3) Bagdon said that he would put Schoenmakers on the Door-to-Door health insurance.

**(CP 212).** For about a year after Schoenmakers became a “independent contractor” he also had use of a Door-to-Door gas credit card. Although the above oral agreement, Chris Bagdon breached that agreement in many respects, always resulting in Schoenmakers not getting the compensation and benefits promised. Certain parts of this oral agreement would end up memorialized in writing (by way of invoices and checks, etc.) **(CP 212).**

Even after Schoenmakers became an “independent contractor” Chris Bagdon had credit with various vendors, and Schoenmakers had authority to order merchandise for customers on Chris Bagdon’s credit. Schoenmakers still had his own desk inside the store. **(CP 213).**

Even after Schoenmakers started working as an independent contractor, Bagdon would still sometimes take off for a week and leave him in charge of the business. **(CP 213)** Schoenmakers would also come

in the store every morning. **(CP 213)**. Normally Chris Bagdon would take off to go have breakfast while Schoenmakers manned the store. Schoenmakers would answer the phone and take messages for Chris Bagdon. **(CP 213)**. If customers called and wanted to purchase any items in the store, Schoenmakers would give them a quote. If a customer came in to purchase something Schoenmakers would take the customer's money and write out an invoice. **(CP 213)**. In fact, at times Schoenmakers would give a customer change out of his own pocket, because Chris Bagdon didn't keep enough change in the store. Chris Bagdon would say that he would pay Schoenmakers back later, but Bagdon would often "forget."  
**(CP 213)**.

So even though Schoenmakers was working under his own license, Schoenmakers still did a lot of work for Bagdon for which he never got paid. **(CP 213)**. So Schoenmakers was acting like an employee in some respects although his compensation in part was treated like an independent contractor. **(CP 213)**. Schoenmakers was still assisting Christian Bagdon. Most of the installation work Schoenmakers did from 1997 on was for Door-to-Door customers. **(CP 213)**. The customer would purchase the merchandise from Door-to-Door. **(CP 213)**. Then Schoenmakers would

do the installation of the door or other merchandise for that Door-to-Door customer. **(CP 214).**

Often the installation would require some alterations to make it fit the individual home. **(CP 214).** Schoenmakers would work on the alterations at the Door-to-Door shop primarily with Door-to-Door equipment. It was the same equipment Schoenmakers worked with when he was an employee on the Door-to-Door payroll. **(CP 214).**

Schoenmakers had been using tools in the Door-to-Door shop since when he was a salesman. **(CP 214).** Even after Schoenmakers became an “independent contractor,” Chris Bagdon would have him come back to run doors for jobs that weren’t even Schoenmakers jobs. Schoenmakers had a key to the store. **(CP 214).**

On other occasions, Chris Bagdon would ask Schoenmakers to come back and complete jobs other Door-to-Door employees had not finished so that Schoenmakers could then deliver the merchandise out to the job site. **(CP 214).** So in essence Chris Bagdon and Schoenmakers had a working relationship that consisted of Schoenmakers doing extra uncompensated work for Bagdon at times in exchange for continued Door-to-Door merchandise installs and in exchange for Schoenmakers using Bagdon’s shop and tools free of charge. **(CP 214).**

On the day of the incident on November 15, 2006, Schoenmakers was installing storm shutters for a customer in Chelan. **(CP 214)**. That customer had purchased the merchandise from Door-to-Door. Schoenmakers took the order for Door-to-Door at his desk in the Door-to-Door store, Schoenmakers had to call around to find the shutters. **(CP 214)**. In fact Schoenmakers used the cell phone Chris Bagdon had provided him. **(CP 214)**. Chris Bagdon paid that cell phone bill for Schoenmakers until well after his thumb accident. (About a year after Schoenmakers' accident, Schoenmakers started paying that cell phone himself, but his number didn't change.) **(CP 214)**.

Schoenmakers found a manufacturer back East and ordered the shutters for that Door-to-Door customer. **(CP 214)**. Schoenmakers gave the customer an estimate and faxed it on Chris Bagdon's fax machine at the store to the customer's architect. **(CP 214-215)**. The estimate included the merchandise and the installation on Door-to-Door letterhead. **(CP 215)**. When the merchandise came in, Schoenmakers called from Door-to-Door store to set up a delivery time. Schoenmakers delivered the doors on a Saturday using a Door-to-Door truck. **(CP 215)**.

The delivery was later billed by the Door-to-Door store to that customer. **(CP 215)**. For the shipping Chris Bagdon billed the customer

approximately \$2,000.00 for shipping charges. **(CP 215)**. Schoenmakers got paid nothing for his labor for the delivery of the merchandise, although Chris Bagdon billed the customer an additional \$500.00 for Schoenmakers labor in delivering the merchandise. **(CP 215)**.

Later Schoenmakers went up to the site in Chelan to make sure that the threshold plates around the perimeter of the building had been properly completed so that Schoenmakers could install the aluminum shutters for that customer. **(CP 215)**. (A couple of weeks after the thumb accident, Schoenmakers did install the shutters with the help of Terry McGraw, a Door-to-Door employee.) **(CP 215)**.

On page 4 of the Memorandum, Defendant suggests that only \$29,150.00 of Schoenmakers' gross receipts came from Door-to-Door customers. **(CP 215)**. Actually that suggestion is misleading and inaccurate because the only installs that are labeled as "Door-to-Door" are those that Bagdon billed the customer directly from Schoenmakers' work. **(CP 215)**. In other words, many of the customers listed on the 115 pages of invoices had purchased the merchandise at Door-to-Door and then Schoenmakers installed the merchandise for the customers. **(CP 215)**. Although Schoenmakers was supposed to bill the customers directly, sometimes Chris Bagdon billed the customers behind Schoenmakers back,

and so Schoenmakers listed those services to as billed from him to Door-to-Door on the invoices to recoup what Chris Bagdon in essence embezzled from Schoenmakers. **(CP 215)**. So to say that only \$29,150.00 of Schoenmakers gross came from Door-to-Door customers is not accurate at all. **(CP 216)**.

On the day of the incident on November 15, 2006, Schoenmakers had gone to Door-to-Door about 6:30 p.m. to cut a piece of insulation so that it would fit the application for the Chelan shutters installation. **(CP 216)**. Schoenmakers was also making another sawhorse for the job he was working on. Schoenmakers used the table saw to manufacture the sawhorse. Then Schoenmakers used the Door-to-Door table saw to cut the insulation. **(CP 216)**.

Earlier that day at approximately 3:00 p.m. Schoenmakers had had one 12 ounce beer with his lunch. **(CP 216)**. Schoenmakers did not have any more alcohol the rest of the day. **(CP 216)**.

On the day of the incident, when Schoenmakers was pushing the insulation through the blade, the blade grabbed the product and pulled his thumb into the blade. **(CP 216)**. Schoenmakers right thumb was badly cut. **(CP 216)**. Schoenmakers was taken to the emergency room, and later that night he had an operation which resulted in the partial amputation of

his right thumb. **(CP 216)**. The table saw had a ten-inch blade on it.

Schoenmakers had used that particular saw many times in the past. **(CP 216)**.

Schoenmakers believed that the saw had been there since the day Door-to-Door opened in the 1980's. **(CP 216)**. Since the day Schoenmakers started working there he used that particular saw on almost a daily basis. **(CP 216)**. The table saw had a guard that was supposed to be on it. **(CP 216)**. The purpose of the guard was to keep a person's fingers or hand from getting cut by the blade and to keep material from flying into a worker's face. **(CP 216)**. Chris Bagdon didn't want the guard put on because he said it was a nuisance and he didn't want it put on. He thought it cut down on productivity. The guard had never been on the saw since the Door-to-Door store opened in approximately 1985. **(CP 216)**.

The hood guard had anti kickback device on it that would have prevented the kickblade of the board had it been on the circular saw. **(CP 217)**. At sometime prior to 1997, when Schoenmakers was working as a "salesman", for Door-to-Door, there was a kickback incident with that saw and Schoenmakers hurt his hand. **(CP 217)**. Chris Bagdon pleaded with Schoenmakers not to go to the doctor because Bagdon didn't want it on

the L&I report. (CP 217). At that time, Bagdon and Schoenmakers again discussed the hood guard issue and Chris Bagdon again refused to put the hood guard on the circular saw. (CP 217). Bagdon didn't want Schoenmakers to put it on there either. Bagdon felt that it was a waste of time. (CP 217).

Although Schoenmakers admitted in deposition that he could have used a razor knife to cut each little strip, he also explained that he had never done it that way (he used the circular table saw) and that Schoenmakers would have damaged the insulation trying to cut it with a razor knife. (CP 217).

Schoenmakers never complained to Chris Bagdon about the lack of the guard on the saw because Chris was not the type of person to have anyone tell him anything regarding his shop. (CP 217). Chris told Schoenmakers that the guard was supposed to be there, but he wasn't going to put it on. (CP 217). Schoenmakers had tried previously to discuss the saw guard issue, but Chris Bagdon was not open to the conversation. (CP 217). Bagdon had access to all of the equipment, and he made the decisions about the maintenance of the equipment. (CP 217).

The saw was used for all types of materials - - aluminum, wood, cardboard, plastic, and rubber. (CP 217). Pursuant to WISHA rules that

type of saw is supposed to have a safety guard on it. Had the guard been on the saw that day of the incident it would have prevented Schoenmakers hand from being pulled into the blade. (CP 217).

As a result of this accident Schoenmakers suffered a partial amputation of his right thumb, medical expenses, pain and suffering, and a loss of productivity because Schoenmakers is right handed, the injured thumb makes it difficult for him to do certain types of work with his hands. Schoenmakers thumb is deformed and he still has pain in that thumb. (CP 217-218).

After his thumb accident, Bagdon told Schoenmakers that he had switched insurance companies so Schoenmakers had “no coverage.” (CP 218). Bagdon owns the Door-to-Door property. (CP 210).

## V. ARGUMENT

A. The assumption of risk doctrine does not bar recovery in this case because “unreasonable assumption of the risk” is subsumed under the contributory negligence statutes.

Under the traditional Prosser and Keeton analysis, the assumption of risk doctrine is divided into four classifications: 1) express; 2) implied primary; 3) implied reasonable; and 4) implied unreasonable. Shorter v. Drury, 103 Wn.2d 645, 655, 695 P.2d 116, cert. denied, 474 U.S. 827 (1985).

In this case, the Defendant alleges that Schoenmakers' conduct constituted "implied primary" assumption of risk. Plaintiff disagrees with the Defendant's categorization. Implied primary assumption of 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. Scott v. Pacific West Mt. Resort, 119 Wn.2d 484, 497, 834 P.2d 6 (1992).

Implied primary assumption of risk remains a complete bar to recovery. This is because implied primary assumption occurs when the plaintiff has impliedly consented to assume a duty. If the defendant does not have the duty, there can be no breach and hence no negligence. Scott, 119 Wn.2d at 497.

The court in Scott explained a classic example of primary assumption of risk occurs in sports cases, where one who participates in sports "assumes the risks" which are inherent in the sport. Scott, 119

Wn.2d at 498. “To the extent that the plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence.” Scott, 119 Wn.2d at 498. This type of assumption acts as a complete bar to recovery. Scott, 119 Wn.2d at 498.

A defendant does not have a duty to protect a sports participant from dangers which are inherent and normal part of a sport. Scott, 119 Wn.2d at 498.

In Scott, the Washington State Supreme Court reviewed the facts in the Kirk v. WSU, 109 Wn.2d 448, 746 P.2d 285 (1987) case, and observed that while Kirk did assume the risks, interest in the sport of cheerleading, she did not assume the risks caused by the university’s negligent provision of dangerous facilities or improper instruction or supervision. Those were not risks “inherent” in the sport. Scott, 109 Wn.2d at 498-99. Kirk did not, therefore, “assume the risk” and relieve defendant of those duties. Scott, 109 Wn.2d at 499, discussing Kirk.

The court in Scott reasoned that “to the extent she continued to practice (on a dangerous surface, without instruction) she [Kirk] may have ‘unreasonably assumed the risk’ i.e., have been contributorily negligent.” This unreasonable assumption of the risk is assumption in the secondary sense, which does not bar all recovery. Scott, 119 Wn.2d at 499.

See also Leyendecker v. Cousins, 53 Wn. App. 769, 773-74, P.2d 675, review denied, 113 Wn.2d 1018 (1989) (primary assumption of risk remains a complete bar to recovery even after the adoption of comparative negligence, whereas with implied reasonable and unreasonable assumption of risk, plaintiff's conduct is not truly consensual, but plaintiff's conduct constitutes a form of contributory negligence. The negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk.)

In Scott, there was evidence that the ski race course was laid out in a unnecessarily dangerous manner that was not obvious to a young novice ski-racing student. "While participants in sports are generally told to have impliedly assumed the risks inherent in the sport, such assumption of risk does not preclude recovery for negligent acts which unduly enhance such risks." Scott, 119 Wn.2d at 501.

The court in Scott reversed the summary judgment order, finding that while the Plaintiff "did assume the risks inherent in the sport (primary assumption of risk) he did not assume the alleged negligence of the operator." The court held that the doctrine of implied unreasonable assumption of risk was subsumed in comparative negligence law, and any

contributory negligence by the plaintiff would “reduce, rather than bar, [the plaintiff’s] recovery.” (Emphasis added.) Scott, 119 Wn.2d at 503.

In Tincani v. Inland Empire, 124 Wn.2d 121, 875 P.2d 621 (1994), the court held that the “assumption of risk” doctrine did not bar recovery based on § 343A; rather it acted as a damage-reducing fact based on comparative negligence. Tincani, 124 Wn.2d at 145. The jury’s verdict in that case indicated that the jury had concluded that Tincani, a 14 year old boy, voluntarily chose to encounter a risk created by the Zoo’s negligence. This type of assumption of the risk is called “unreasonable assumption of the risk.” Tincani, 124 Wn.2d at 145. “Unreasonable assumption of the risk retains no independent significance from contributory negligence after Washington’s adoption of comparative negligence.” Tincani, 124 Wn.2d at 145, citing, Scott v. Pacific W. Mt. Resort, 119 Wn.2d 484, 499, 834 P.2d 6 (1992).

The court in Tincani explained that “such assumption of risk does not bar all recovery because the jury may apportion the percentage of fault attributable to each responsible party.” Tincani, 124 Wn.2d at 145, quoting Scott, 119 Wn.2d at 499. The court in Tincani therefore agreed with the Court of Appeals that Tincani’s assumption of risk did not bar recovery. Tincani, 124 Wn.2d at 145.

The court in Tincani noted that “implied primary assumption of the risk” means that “the plaintiff assumes the dangers that are inherent in and necessary to the particular sport or activity.” Tincani, 124 Wn.2d at 143. Implied primary assumption of risk remains a complete bar to recovery. Tincani, 124 Wn.2d at 143.

By contrast, “unreasonable assumption of risk” means that a person voluntarily chooses to encounter a risk created by the possessor’s negligence. Tincani, 124 Wn.2d at 145. Here, using the table saw without the hood guard was not “implied primary” assumption of the risk because the lack of the hood guard was not a risk inherent in the activity - - i.e. using the saw. Rather it was a risk created by Bagdon in refusing to allow the piece of safety equipment mandated by WISHA. Bagdon created the risk by negligently refusing to keep the hood guard on the table saw. Schoenmakers specifically discussed the need for this safety device with Bagdon, and Bagdon refused to put that safety device on the saw.

Here, Schoenmakers assumed the risk of working with a table saw, which is inherently dangerous. He did not, however, assume the risk of working with a table saw without the proper safety equipment – i.e., the hood guard. The fact that Schoenmakers continued to use it despite the fact that Bagdon would not put on the guard may constitute “implied

unreasonable assumption of risk” as defined above, but his implied unreasonable assumption of risk is a factor for the jury to consider in assigning Schoenmakers a percentage of contributory negligence and does not act as a complete bar to recovery.

**B. Washington Courts have applied premises liability principles, Restatement (Second) of Torts § 343 and 343A to cases involving injury due to equipment.**

**Section 343A of the (Restatement (Second) of Torts** applies to an “activity” conducted on the premises as well as a condition of the land:

- (1) a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition of the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(Emphasis added.)

Thus, the Kinney v. Space Needle Corp., 121 Wn. App. 242, 85 P.3d 910 (Div I 2004) case applied 343A where the danger to the business invitee consisted of the “obvious hazards” including ladders, small platforms, a safety line without a line stop attached, and the hatch opening. The court in Kinney held that the trier of fact should have determined whether the Space Needle owed Kinney a common law duty as an invitee.

Other Washington cases have similarly applied “premises liability” under § 343A where pieces of equipment constituted the obvious danger on the premises:

In Afoa v. Port of Seattle, 160 Wn. App. 234 (Div I 2011), Afoa was injured while operating a vehicle. Afoa's vehicle brakes and steering failed, causing him to collide with a broken piece of equipment that had been left on the Port of Seattle tarmac. The piece of broken equipment fell on him, crushing his spine and leaving him a paraplegic. The court held that he was a business invitee under § 343 and that the trial court had erred in granting summary judgment in favor of the Defendant Port of Seattle.

In Jarr v. Seeco Construction Co., 35 Wn. App. 324 (Div I 1983) an invitee was injured when a pile of sheet rock leaning against a wall fell and injured the invitee during an open house. The court applied § 343 and reversed the trial court's decision granting summary judgment.

Thus, § 343A covers not only conditions of land, but also "activity" conducted on the premises, and Washington courts have applied § 343 and 343A even when the obvious danger consisted of dangerous equipment or materials on the Defendant's premises. So the fact that Schoenmakers was injured by a table saw, rather than by a condition of the land, does not preclude analysis under § 343A and 343. Under the analysis under 343A, Bagdon knew that Schoenmakers would continue to use the table saw without the hood guard.

Under these circumstances, Bagdon's negligence in refusing to allow the hood guard to be put on the table saw should be submitted to the jury.

The Honorable Judge John Bridges granted Summary Judgment on October 11, 2011, finding that Joseph Schoenmakers assumed the risk and that it operated as a complete bar to recovery.

## **VI. CONCLUSION**

There are questions of fact sufficient to go to the jury on three duties of care. The first is the care owed as an employer to an employee under WISHA for Bagdon's violations of a specific WAC pertaining to circular saws.

The second is the duty of care owed by an owner of a workplace to protect employees and independent contractors arising under the common law of Kinney and subsequent cases.

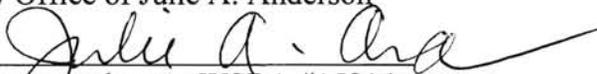
The third is the duty of care owed to invitees under the Restatement of Torts sections 343 and 343A, adopted as common law in Washington State, pertaining to a duty of care owed to invitees.

The court erred in granting summary judgment to the Defendant; where 1) premises liability includes activities and dangers caused by a possessor's equipment; and 2) Schoenmakers choice to continue to use the saw constituted "implied unreasonable" and not "implied primary" assumption of the risk. As such, "his implied unreasonable assumption of risk" does not constitute a complete bar to recovery, but rather only a damage-reducing factor for the jury to consider. The court should,

therefore, grant the Motion for Reconsideration and allow the matter to be set for trial on the merits.

Respectfully submitted on this 30<sup>th</sup> day of April, 2012.

Law Office of Julie A. Anderson

By: 

Julie A. Anderson, WSBA #15214

Attorney for Joseph Schoenmakers

**FILED**

MAY 01 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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In re  
JOSEPH SCHOENMAKERS,  
Appellant  
vs.  
CHRISTIAN P. BAGDON AND  
JANE DOE BAGDON, D/B/A  
DOOR TO DOOR STORE, A SOLE  
PROPRIETORSHIP  
DEFENDANTS

Appellate Court No. 306194  
Chelan Co. Case No. 09-2-  
01245-2

PROOF OF SERVICE

TO: THE CLERK OF THE ABOVE-NAMED COURT  
AND TO: THEODORE MILLER, ATTORNEY FOR DEFENDANTS

The undersigned declares: I am a resident of the State of Washington, over the age of eighteen years and not a party interested in the above-entitled action. On the 30<sup>th</sup> of April, 2012, I mailed by first-class mail the following documents:

- 1. Appellant's Brief
- 2. Proof of Service

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in the above-entitled action to the following:

Theodore Miller  
1191 Second Ave, Suite 500  
Seattle, WA 98101

Dated this 30<sup>th</sup> day of April, 2012.



Shari Tomaras

# APPENDIX A

Rec'd 11/14/11 Sgt.

Superior Court of the State of Washington  
For Chelan County

Lesley A. Allan, Judge  
Department 1  
T.W. Small, Judge  
Department 2



John E. Bridges, Judge  
Department 3  
Bart Vandegrift  
Court Commissioner

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November 9, 2011

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Mr. Theodore M. Miller  
Law Offices of Kelley J. Sweeney  
1191 Second Avenue, Suite 500  
Seattle, WA 98101

Re: Joseph W. Schoenmakers vs. Christian Patrick Bagdon, et al.  
Chelan County Cause #09-2-01245-2

Dear Ms. Anderson and Mr. Miller:

This case is before me today, without oral argument, on Plaintiff's Motion for Reconsideration of my decision granting Summary Judgment to Defendant on October 11, 2011. I have reviewed Plaintiff's Motion for Reconsideration as well as Plaintiff's Memorandum in Support of his motion. I have further reviewed Defendant's Response.

Ms. Anderson argues that Plaintiff's Motion for Reconsideration is based on CR 59(a)(8) and (9). With that background, Plaintiff submits that the Court should reconsider its conclusions that the facts of the case do not support a premises liability theory and that assumption of the risk bars Plaintiff's recovery herein. Mr. Miller has not filed a Motion for Reconsideration but

Appendix A

November 9, 2011

Page 2

he also requests that I now grant Defendant's Motion for Summary Judgment based on the Restatement of Torts (Second) Sec. 388.

First, I must decline Mr. Miller's invitation to grant Defendant's Motion on the Restatement grounds for procedural reasons inasmuch as Defendant has not filed a Motion for Reconsideration. After reviewing the arguments and the law, however, I also conclude, as I did at the Summary Judgment hearing, that the undisputed facts of this case do not support that the case should be decided on the basis of premises liability.

Counsel have eloquently argued the facets of the doctrine of assumption of risk and I have reviewed the cases referenced in the materials. After reviewing the law, I remain convinced that the facts of this case support the conclusion that Mr. Schoenmakers' claim is barred by the doctrine of implied primary assumption of risk. Based on what I perceive to be the substantially agreed-upon facts of the case, the doctrine of implied unreasonable assumption of risk is not applicable and, therefore, I must deny Plaintiff's Motion for Reconsideration.

Sincerely,



John Bridges

Judge

cc: Court File