

FILED

MAY 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 306194

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOSEPH SCHOENMAKERS,

Appellant,

v.

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

Respondent

RESPONDENTS' BRIEF

Theodore M. Miller, WSBA #39069
Attorney for Respondents

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I. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

No. 1: Whether the trial court correctly concluded that summary judgment in favor of the defendants was proper on the grounds that Appellant assumed the risk of operating a table saw that he had known for fourteen (14) years lacked a saw guard.

II. STATEMENT OF THE CASE

Factual History¹

This case arises from an incident on November 15, 2006, when the Appellant, Joseph Schoenmakers (Schoenmakers), was at The Door to Door Store's, owned and operated by Chris Bagdon (collectively referred to as Door to Door Store unless otherwise indicated), shop when he injured his right thumb while using a table saw. CP 216. He subsequently sought medical care which resulted in the partial amputation of his thumb. CP 51.

On November 15, 2006, Schoemakers was an independent contractor for The Door To Door Store. CP 35 and CP 20. The Door to Door Store installs interior and exterior doors. Schoenmakers had worked for The Door to Door Store as a paid employee between 1992 and 1997.

¹ Respondents accept as true, for purposes of arguing this appeal only, the facts asserted by Schoenmakers as contained in his deposition testimony and declaration. Acceptance of these facts for the limited purpose of this appeal or motion for summary judgment is not an admission or agreement with the allegations made by Schoenmakers.

CP 34. After 1997, Schoenmakers continued as an independent contractor installing doors for The Door to Door Store including on November 15, 2006 when this accident took place. CP 36. In addition to doing work for The Door to Door Store, Schoenmakers would also do work for independent homeowners. CP 37.

During his time as an independent contractor, Schoenmakers would continue to use tools in the shop, including the table saw in question. CP 39. Schoenmakers states that The Door To Door Store had the table saw in question since it opened twenty-five years earlier. CP 40 and CP 216. Schoenmakers indicates that he had used the saw in question on a daily basis since he started with The Door to Door Store. CP 40 and 216. He had used the table saw to cut such things as plastic, cardboard, aluminum, and wood. CP 49-50 and 59-60. The saw consists of a table about 5x8 feet that has a 10-inch circular saw off to the left side of the table. CP 41-42. The safety guard is a clear piece of plastic that goes over the spinning circular blade to prevent a person's fingers or hands from getting cut by the blade and to prevent material from flying into the worker's face. CP 45 and 216. Schoenmakers had previously had a board that he was cutting on the saw kick back and hit him in the hand. CP 50. Furthermore, Schoenmakers had seen marks on the wall behind the saw where the "kick-backs" had hit the wall. CP 50.

Schoenmakers knew that the saw had a safety guard for it but that it was not installed on November 15, 2006. CP 44-45, 46-47, 55, 56. Schoenmakers states that he had not seen the saw guard on the saw in question since 1985. CP 47 and 216. Schoenmakers had never read the owner's manual for the table saw, nor had he asked to. CP 54. Schoenmakers knew that the lack of a saw guard was a dangerous condition but continued to use the saw. CP 52, 57-58, and 216. Furthermore, Schoenmakers discussed with Bagdon before November 15, 2006, the fact that the saw needed a guard on it. CP 54-55, 216, 217. The first conversation that Appellant claims he had with Bagdon about the need for the saw guard occurred at some point prior to 1997. CP 217. Schoenmakers knew that the safety guard over the saw blade would prevent injury by preventing his hand from being able to touch the spinning circular saw blade. CP 52 and 216. Schoenmakers states that he had a working relationship with Bagdon that consisted of him doing uncompensated work for Bagdon in exchange for continued Door to Door merchandise installations and "in exchange for me [Schoenmakers] using his shop and tools free of charge." CP at 214.

On November 15, 2006, Schoenmakers entered The Door to Door shop area at approximately 6:30 p.m., after the shop was closed for the night, to make a sawhorse and to cut rubber insulation for a installation

that he was doing. CP 40 and 216. Schoenmakers had been drinking beer before returning to the shop to use the saw. CP 61 and 216.

Schoenmakers claims that there were no other people in the shop. CP 40-41. Schoenmakers admits that he could have used a razor knife to safely cut the insulation instead of the table saw. CP 59 and 217. While Schoenmakers was pushing the rubber insulation across the spinning metal blade of the saw, the material was gripped by the blade which pulled his thumb into the spinning blade. CP 48 and 216. The saw cut the tip of Schoenmakers' right thumb. *Id.* The tip of his thumb was later amputated at the hospital. CP 51.

According to Washington Labor and Industries, The Door to Door Store have never been cited for any workplace safety issues, including any citations concerning improper use or maintenance of the table saw in question. CP 64-65.

Between 2002 and 2011, Schoenmakers had gross receipts from all customers totaling \$644,495.06. CP 197. During that same period, Schoenmakers' gross receipts from The Door to Door Store were \$29,150.00, less than 5% of gross receipts. CP 110-113.

Procedural History

Schoenmakers filed his Complaint on November 12, 2009, alleging that The Door to Door Store were negligent in maintaining the table saw. CP 1-4. The Door to Door Store's Answer and Affirmative Defenses was filed on August 22, 2011. CP 7-11. The Door to Door Store alleged in their Answer and Affirmative Defenses, among other defenses, that Schoenmakers assumed the risk of using the table saw on November 15, 2006. CP 8-9.

On September 9, 2011, The Door to Door Store filed their Motion for Summary Judgment based on (1) the fact that the Restatement (Second) of Torts §388 does not require a duty to warn of the open and obvious dangers of chattels that are provided to a person to use, and (2) Schoenmakers assumed the risk of the table saw that he knew to be dangerous. CP 12-27.

On October 3, 2011, in response to The Door to Door Store's motion, declarations from Joseph Schoenmakers (CP 212-238) and Julie Anderson (CP 210-211) were filed.

On October 7, 2011, The Door to Door Store filed their reply to Schoenmakers' opposition to The Door to Door Store's motion for summary judgment. CP 237-250.

On October 11, 2011, the trial court heard oral argument and entered a written order granting, in part, The Door to Door Store, motion

for summary judgment. CP 417-420. The trial court denied The Door to Door Store's summary judgment request based on Restatement (Second) of Torts §388 (lack of duty), but did grant summary judgment on the grounds that Schoenmakers assumed the risk of operating the table saw on November 15, 2006, when he used the table saw without a guard. No transcript or recording of this motion hearing was made.

On October 21, 2011, Schoenmakers filed his request that the trial court reconsider its order entering summary judgment in favor of The Door to Door Store. CP 422, 423-430. Schoenmakers requested that the court reconsider its ruling that (1) this is a premises liability case, and (2) that the trial court erred granting summary judgment on the grounds that Schoenmakers had an implied primary assumption of risk. Schoenmakers contended that Schoenmakers had instead engaged in an unreasonable assumption of risk thus making it a decision for the jury to decide under a contributory fault analysis rather than a complete bar to recover as ordered by the trial court.

On November 3, 2011, The Door to Door Store again submitted that the trial court correctly determined that Schoenmakers assumed the risk of using the table saw in question and it was a complete bar to any recovery. 433-452.

On November 7, 2011, the trial court issued a memorandum opinion denying Schoenmakers's request for reconsideration. CP 454-455.

On January 11, 2012, a formal order, incorporating the trial court's memorandum opinion, was entered denying Schoenmakers' request for reconsideration.

On February 10, 2012, Schoenmakers filed his notice of appeal with this Court. CP 456-461.

III. ARGUMENT

A. Trial court correctly held that the Appellant had (1) a full subjective understanding of the presence and nature of the specific risk (i.e., the risk of operating the table saw without the saw guard), (2) he voluntarily chose to encounter the risk of using the table saw without the guard, (3) the Appellant had a reasonable opportunity to act differently or could have avoided the danger of using the saw on November 15, 2006, and (4) that reasonable minds could not differ as to the voluntariness of his actions.

The trial court was correct in its determination that under the doctrine of implied primary assumption of risk that Schoenmakers knowingly and voluntarily chose to encounter the risk of using the table saw without the hood guard when he used the saw on November 15, 2006. As such, the trial court should be affirmed.

Schoenmakers contends that the underlying facts show that this case is not a primary assumption of risk case which serves as a complete bar to recovery, but rather an unreasonable assumption of risk case thereby

making the case a contributory fault analysis thus requiring a jury determination. The gist of Schoenmakers' argument is stated as, "[t]he fact that Schoenmakers continued to use it [the table saw] 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 a jury to consider in assigning Schoenmakers a percentage of contributory negligence and does not serve as a complete bar to recover." Appellant's Brief at 16-17. Essentially, Schoenmakers argues that he only accepted the risk of using the table saw, but he did not assume the risk of using the table saw without the safety guard on it. This argument defies both common sense and the applicable law in this area.

1. Assumption of Risk Analysis vs. Contributory Fault Analysis

Under applicable case law, assumption of risk has four facets: (1) express assumption of risk; (2) implied primary assumption of risk; (3) implied reasonable assumption of risk; and (4) implied unreasonable assumption of risk. *Alston v Blythe*, 88 Wn. App. 26, 32, 943 P.2d 692 citing *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 P.2d 621 (1994); *Scott By and Throught Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 496, 834 P.2d 6 (1992); *Kirk v. Washington State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987); *Shorter v. Drury*, 103 Wn.2d 645, 655, 695 P.2d 116 (1985).

In express and implied primary assumption of risk, the plaintiff's consent negates a duty that the defendant would otherwise have owed to the plaintiff, and thus there can be no negligence.² *Alston*, 88 Wn. App. at 33. The focus of the inquiry is “not on the *plaintiff's* duty to exercise reasonable care for his or her own safety, but rather on the *defendant's* duty to exercise ordinary care for the safety of others.” *Id.* To invoke assumption of risk doctrine, “[t]he evidence must show that the plaintiff (1) had full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter that risk.” *Kirk*, 109 Wn.2d at 453. Courts have also summarized it as the plaintiff “must have knowledge of the risk, appreciate and understand its nature, and voluntarily chose to incur it.” *Shorter*, 103 Wn.2d at 656. “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.” *Erie v. White*, 92 Wn. App 297, 304, 966 P.2d 342 (1998). Voluntariness and knowledge are questions of fact for a jury except where reasonable minds could not differ. *Id.* at 303.

² With express assumption of risk the plaintiff states in so many words that he or she consents to relieve the defendant of a duty he or she would otherwise have. With implied primary assumption of risk, the plaintiff engages in other kinds of conduct from which consent is then implied. *Alston*, Wn. App. at 33. In the record, there is nothing to show that Schoenmakers ever verbally agreed or consented to using the table saw in question without the guard. Instead, he demonstrated through nearly daily use of the saw over a fourteen year period that he consented to using the saw without the guard.

In order to define the scope of the plaintiff's consent, the court must identify the duties that the defendant would have had in the absence of the assumption of risk doctrine, and then segregate those duties into "(a) those (if any) which the plaintiff consented to negate, and (b) those (if any) which the defendant retained." *Alston*, 88 Wn. App. at 34. The scope of consent may be decided as a matter of law if the evidence is such that reasonable minds could not differ. *Id.*

Implied reasonable and implied unreasonable assumption of risk involve a contributory fault analysis that focuses on the "plaintiff's duty to exercise ordinary care for his or her own safety." *Alston*, 88 Wn. App. at 32.

2. In deciding whether to use assumption of risk analysis or contributory fault analysis, the determining factor is the plaintiff's subjective knowledge of the risk involved.

In making the determination whether to follow a true assumption of risk analysis or a contributory fault analysis, the courts have noted that the determinative factor is the requirement of subjective knowledge: did the plaintiff *in fact* understand the risk? *Erie v. White*, 92 Wn. App. 297, 304, 966 P.2d 342 (Div 2 1998). If the answer is yes, then it is an assumption of risk case. If the answer is no, the plaintiff did not have full subjective understanding of the risk, the proper analysis is under a contributory fault analysis. *Id.* The court further stated, "[t]he plaintiff's mere protest against the risk and the 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.” *Id.* at 305.

The facts and analysis of the *Erie* case are particularly helpful to the case *sub judice*, as that case presents a similar claim of negligence with analogous facts. In *Erie*, the plaintiff sued the defendant for negligently supplying pole climbing equipment. In that case, the defendant hired the plaintiff to cut a tree. On the first day of the job, the plaintiff supplied his own tree-climbing equipment (he had rented it) and climbed up the tree and did his cutting. Tree-climbing equipment has steel reinforced in the straps that the climber uses to secure himself to the tree so as to prevent a chain saw from severing the strap while the climber is in the air. Pole-climbing equipment, on the other hand, is simply a leather strap that has no reinforcement and is thus much more likely to be cut with a chain saw. On the second day of the job, the plaintiff did not return with tree-climbing equipment as he returned the equipment he had rented for use on the first day of the job. The defendant had a set of pole-climbing equipment that he offered to let the plaintiff use on that second day. The plaintiff, despite his knowledge that the pole-climbing equipment was dangerous to use, agreed to use the pole-climbing equipment the defendant offered him. When asked at his deposition, the plaintiff stated, “I figured it would be safe enough for me to just get in there and get the job done and get out of there, get my hundred bucks, and go home.” *Erie*, 92 Wn. App. at 301. As fate would have it, the plaintiff went up the tree with the pole-

climbing equipment and promptly cut through the strap and fell to the ground injuring himself.

Like the plaintiff in *Erie*, Schoenmakers fully understood the risks associated with his actions. Schoenmakers had (1) used the table saw without a guard nearly every day for *fourteen years* by the time of the accident, (2) he had told Mr. Bagdon that the saw needed a guard years before the accident in question, and (3) he knew that the guard would both help prevent a person's fingers or hand from getting cut by the blade and help prevent material from hitting the worker.

Also, as with the plaintiff in *Erie*, Schoenmakers voluntarily used the equipment that ended up injuring him. Schoenmakers makes clear in his declaration that he made a business decision to continue to do uncompensated work for The Door to Door Store in order to "use the shop and tools free of charge." That is precisely why Schoenmakers was at the shop at 6:30 p.m. on November 15, 2006 – to make a saw horse for himself and to cut insulation for an installation that he was doing as an independent contractor. As an independent contractor, Schoenmakers was free to simply walk away from doing any work with The Door to Door Store due to the supposed unsafe conditions that he observed, he was free to rent or buy his own table saw and equipment (again he wanted the free use of The Door to Door Store's tools and shop), or as he admitted in his deposition (CP 59) he could have done the cutting with a razor knife but he thought that would take too long. There can be no doubt from the

record before the court that Schoenmakers' actions in this case were completely voluntary.

Thus, the record in this case is clear that Schoenmakers had a full subjective knowledge of the dangers of the table saw without the guard and that he voluntarily chose to accept the risk of using the saw, primarily because he made a business decision to use The Door to Door Store's tools free of charge.

3. The cases relied upon by the Appellant when carefully analyzed do not support Appellant's contention that this is an unreasonable assumption of risk case.

Schoenmakers, in his brief, argues several cases in an attempt to show that Schoenmakers only assumed limited risk of using the table saw, not using the table saw without the guard.³ To support this argument, Schoenmakers cites several cases that deal with unreasonable assumption of risk. However, a close look at the facts of those cases show that this case is not a contributory fault analysis case.

An instructive case dealing with this issue and the distinction between the two theories is *Kirk v. WSU*, 109 Wn.2d 448, 746 P.2d 285 (1987). This case is relied upon by the *Scott* and *Tincani* courts (discussed in detail below) in formulating the decisions and distinctions between these two theories. In that case, the plaintiff was a cheerleader for WSU.

³ Again, as noted above this argument completely ignores the facts of the case. To Schoenmakers, using the Respondent's saw, according to him, meant using the saw without the guard as he had done almost daily for fourteen years.

One day, the team had planned to practice shoulder stands in a padded mat room, but were told that the room was unavailable for use. The team therefore moved to Martin Stadium to practice on the field, which was Astroturf. Faculty members associated with the team were aware that the Astroturf was a harder surface than the mat room, but this was never told to the cheerleaders. While practicing a shoulder stand, the plaintiff fell onto the hard Astroturf and injured herself. The facts show that the plaintiff was not aware of the dangers of the Astroturf.

The court went through the general descriptions of implied primary assumption of risk and of unreasonable assumption of risk. In describing unreasonable assumption of risk the court noted the following: “*Implied unreasonable* assumption of risk, by contrast, focuses not so much upon the duty and negligence of the defendant as upon the further issue of the objective unreasonableness of the plaintiff’s conduct in assuming the risk.” (emphasis added). *Kirk* at 454. The court then analyzed the facts and concluded that implied primary assumption of risk did not apply since the plaintiff only consented and agreed (therefore assumed) only the dangers inherent in cheerleading. The court found that she did not assume the dangers presented when the practice was moved outside to a harder surface than was normally used and the inadequate supervision by faculty members. Because of that, a comparative fault analysis was appropriate.

In *Scott v. Pacific West Mountain Resort*, the plaintiff was a twelve year old who was enrolled in a private ski class at the ski resort. The plaintiff was injured while on a slalom race course laid out by the private school owner at the direction of the ski resort. The plaintiff's parents had signed all appropriate waivers regarding assuming the risk of any injury while skiing. Witnesses to the accident noted that while skiing the course that the plaintiff appeared to have lost control and just as he left the course he appeared to be trying to avoid an unused tow-rope shack. However, he was unable to avoid the shack and hit a pole supporting the structure thereby sustaining serious injuries. The ski resort moved for summary judgment based on the language of the waiver and the trial court agreed and dismissed the suit. The court of appeals reversed and the Supreme Court upheld the appeals court on the theory that the plaintiff had assumed the risk of the dangers inherent in the sport of skiing but that the negligent layout of the course presented a hazard that the plaintiff did not know about thereby making this a contributory fault case. The court noted, "[a]n accident resulting from such conditions [colliding with an obvious stationary object because of difficult snow conditions] would ordinarily be due to risks 'inherent' in the sport of skiing. However, in this case, some of the evidence would support a conclusion that the race course was laid out in an unnecessarily dangerous manner *that was not obvious to a young*

novice ski-racing student.” (emphasis added). *Scott* at 501.

In *Tincani v. Inland Empire Zoological Society*, the plaintiff was a fourteen year old (actually one month shy of fifteen) student who was on a school field trip to the Zoo. In that case, the plaintiff and three friends were released by the chaperons to wander the Zoo on their own. They were not provided maps. The plaintiff and his group followed a path that they thought was the main trail. After encountering a series of forks in the trail and a sign that said “nature trail” the plaintiff went one direction and the other three another. The plaintiff attempted to go down a rock outcropping to rejoin the group when he jumped and slipped off the outcropping and fell 20 feet and suffered serious injuries. It is clear that what had happened was that the plaintiff had inadvertently taken the wrong path (an unmarked path) and ended up at the cliff. There were numerous signs and warnings in the park to “stay on the main trail.” Testimony was that there were no warnings to stay off that particular trail and there was no testimony that there were any barriers or other physical structures blocking this supposed path.

The Zoo argued that the plaintiff had assumed the risk of “rock climbing” when he attempted to climb down the cliff. However, the court rejected this argument as it noted that Tincani’s purpose in going to the Zoo was not to go “rock climbing.” The court stated that implied primary

assumption of risk applies where a plaintiff “has impliedly consented (often in advance of any negligence by the defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks.” *Tincani*, at 114 citing *Scottt*, at 497 (emphasis in original). The court found that the risk of serious injury while visiting the Zoo was not inherent and necessary in the activity of zoo fieldtrips. The court noted that the Zoo encouraged children to explore the park unattended or supervised and without adequate warnings or physical restrictions. Therefore, this was an unreasonable assumption of risk case. The court did note that the plaintiff did voluntarily encounter the risk created by the Zoo’s negligence in improperly marking and monitoring those on the trails.

Finally, in *Leyendecker v. Cousins*, 53 Wn. App. 796, 770 P.2d 675 (1989), the plaintiff was a logger who drove to the particular job site he was to be working at that day and parked his truck. He then took a trail into the woods where he cut trees. That day, the logs were to be hauled out by helicopter. The plaintiff finished his cutting for the day and took the trail back to the clearing where he parked his truck. When he arrived at the clearing, he noticed that a helicopter was in the spot where his truck had been (unbeknownst to the plaintiff his truck had been moved as he parked in the area where a landing and refueling zone for the helicopter

had been established). The helicopter had its main and tail rotor blades spinning and its engines on as it was undergoing a “hot” refueling. The plaintiff started to walk around the back of the helicopter to find his truck when he inexplicably turned around to walk the other direction and walked into the spinning tail rotor, thereby sustaining serious injury. The defendants moved for summary judgment for implied primary assumption of risk, which was granted by the trial court but reversed by the appeals court.

The appeals court noted that the record before the court showed that the plaintiff observed the spinning rotor blades, appreciated the risk that it posed, and voluntarily walked behind it sustaining injury. However, the court noted:

[T]he record is devoid of any evidence tending to prove his antecedent consent to relieve the defendants of any duty they might have to him because the risks of the conducting a hot refueling operation at the landing site. On the contrary, it appears that finding a spinning tail rotor in close proximity to the trail’s end was entirely unexpected, and that Leyendecker chose to risk coming into contact with it without defendants’ knowledge.

Id. at 775. (Emphasis added). Thus, summary judgment was denied for implied primary assumption of risk and the case considered unreasonable assumption of risk, not simply because of the negligence by the defendant, but because the record was devoid of any evidence that showed consent on

the part of the plaintiff to the danger.

The facts in this case do not square with the underlying rationale laid out in the *Kirk*, *Scott*, and *Tincani* cases where a contributory fault analysis was used. This is not the situation in the *Kirk* case where the plaintiff was not warned of the hidden potential danger that the Astroturf posed. This is not the situation as in the *Scott* case where there was a hidden danger (a shack near the course that may not have been noticeable from the start of the course) that was unknown to the “young novice ski-racing student.” This is certainly not the situation as in the *Tincani* case where the negligence of the defendant literally led the plaintiff down the path to injury. In this case, the argument that Schoenmakers only consented to the use of the saw and did not consent to the use of the saw with the guard defies logic and common sense (not to mention the record before the court). The record before the court is absolutely clear and unequivocal that Schoenmakers was using a saw that he *knew* did not have a guard on it for almost 14 years. It is clear that he was *aware* of the dangers that the saw could pose if operated it with out the guard, but he continued to do so for over a decade. Finally, despite his knowledge of the potential risk and danger, on November 15, 2006, he *voluntarily* went to the shop to use the saw to cut materials for the next day’s installation. The record is clear that this was his decision, and his decision alone to use

that saw without the guard on November 15, 2006. Thus, summary judgment on implied primary assumption of risk was correct.

B. The issue whether this is a premises liability case under Restatement (Second) of Torts §343 and 343A is not properly before this court as summary judgment on this issue was denied by the trial court.

Schoenmakers presents an argument to this court, not listed as an assignment of error, that the proper analysis for this case is under a premises liability principle. This issue arises as The Door to Door Store's original motion for summary judgment argued in addition to assumption of risk, that under Restatement (Second) Torts §388, that one who furnishes dangerous chattels to another and the person is injured is not liable. The underlying rationale, to put it in its simplest form, is that individuals do not need to be warned of the obvious. In the course of that argument, case law is clear that dangerous chattel cases are not analyzed under a premises liability standard. That was mentioned to the trial court during the course of the arguments. The trial court agreed that a premise liability standard is not applicable in this case, but ultimately, ruled that summary judgment on §388 was not warranted.

As the record submitted on appeal shows, none of this appears in the record. The motion hearing where this was argued was not recorded

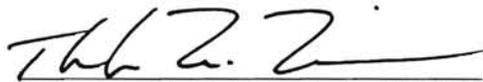
and a court reporter was not present. The trial court made the comment that this was not a premise liability case solely during the course of that argument. No final order to that effect was entered. Thus, there is no order from the trial court that is properly before this court to consider. Any ruling by the court of appeals on this would be an improper advisory opinion for the trial court. The context in which these arguments came up was in discussion of Restatement §388, grounds upon which the trial court denied summary judgment.

IV. CONCLUSION

For all the reasons stated herein, Schoenmakers voluntarily assumed the risk of using the table saw without the guard on November 15, 2006, thus creating a complete bar to recovery. As such, the trial court's granting summary judgment in favor of The Door to Door Store should be upheld. In addition, pursuant to RAP 14.2, the Respondents seek a award of costs for this appeal.

DATED this 29th day of May, 2012.

LAW OFFICES OF KELLEY J. SWEENEY



Theodore M. Miller, WSBA# 39069
Attorney for Respondents

PROOF OF SERVICE
No. 306194

I hereby certify that on May 29, 2012, I sent for filing the original ***Respondent's Brief*** and one copy, via Overnight Delivery, and addressed to the following:

Court of Appeals, Division III
State of Washington
500 N. Cedar St.
Spokane, WA 99201-1905

I further certify, that on May 29, 2012, I sent a true and correct copy of the ***Respondent's Brief***, via U.S. First-Class Mail, postage prepaid, addressed to the following:

Julie A. Anderson
25 N. Wenatchee Ave., Ste. 106
Wenatchee, WA 98801

DATED this 29th day of May, 2012 at Seattle, WA.



Nina Cordova
Legal Assistant to Theodore Miller