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JUN 25 2012

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DIVISION III
STATE OF WASHINGTON
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No. 306364

LIZABETH JESSEE
Appellant/Plaintiff,

v.

CITY OF DAYTON, a local governmental entity,
Respondent/Defendant.

BRIEF OF RESPONDENT

EVANS, CRAVEN & LACKIE, P.S.
Michael E. McFarland Jr., WSBA #23000
Markus W. Louvier, WSBA #39319
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Spokane, WA 99201-0910
(509) 455-5200
ATTORNEYS FOR RESPONDENT

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A. INTRODUCTION

Plaintiff/Appellant Lizabeth Jessee ("Ms. Jessee") sued the City of Dayton ("Dayton") after falling while descending the staircase at the "Old Fire House" in Dayton, Washington. Ms. Jessee verbally acknowledged her recognition of the allegedly dangerous condition of the stairs prior to ascending them and again prior to her descent of those stairs. She subsequently testified that she was well-aware of the alleged danger which she now claims caused her fall. Despite her knowledge of the allegedly dangerous condition, she voluntarily chose to proceed up the stairs, and later down them.

The trial court properly dismissed Ms. Jessee's claims based upon Dayton's arguments that (1) Dayton could not be held liable for dangerous conditions on the land that were known to Ms. Jessee, and (2) the doctrine of implied primary assumption of risk barred Ms. Jessee's claims where she had knowledge of the allegedly dangerous condition and elected to proceed up the stairs irrespective of that knowledge.

B. ASSIGNMENTS OF ERROR

Dayton does not assign any error to the trial court. The trial court correctly concluded that Ms. Jessee's claims were deficient under principles of premises liability and/or barred by implied primary assumption of risk.

C. STATEMENT OF THE CASE

On May 15, 2008, Ms. Jessee fell while descending the stairs of the "Old Fire House" in Dayton Washington. CP 1-4. Ms. Jessee filed a personal injury lawsuit against the City of Dayton seeking recovery for her alleged injuries. *Id.* The sole cause of action against Dayton was one of negligence, premised upon Dayton's duties as a landowner. CP 3.

On the date of Ms. Jessee's fall, Columbia County was performing a joint exercise at the Old Fire House. CP 26-27. At the time of her fall, Ms. Jessee was employed by non-party Walla Walla County Emergency Management. CP 23. After the exercise was completed, a meeting was held in the "operations center" at the Old Fire House. CP 30-32. The operations center sits at the top of a wooden staircase in the Old Fire House. CP 50, 55-56. At the base of the staircase there are two concrete-slab steps. CP 55-56. Ms. Jessee described the scene as follows:

Upon approaching the cement landing while going into the meeting I noted that the slabs were very tall and that there was no hand rail (though the flight of stairs after the landing did have a hand rail). I had some difficulty going up these two steps.

CP 51-52.

Dale Grogan, a Walla Walla County Emergency Management employee, witnessed Ms. Jessee's fall. CP 53-54. Mr. Grogan recalled that prior to ascending the stairs, Ms. Jessee commented to other meeting

attendees that the "stairs look unsafe and that there was no handrail for the poured blocks." CP 53. Ms. Jessee likewise remarked: "This place sure isn't ADA-compliant." *Id.*; CP 44-45. Ms. Jessee subsequently testified that she had difficulty ascending the concrete-slab steps because they were taller than "normal" and lacked a handrail. CP 42-43.

The meeting took place in the operations center. CP 53. After the meeting, Ms. Jessee sought to descend the stairs to leave the building. CP 53-54. Ms. Jessee again noticed that the concrete-slab steps "seemed taller than normal stairs." CP 46. She descended the wooden staircase and then stepped down onto the first concrete-slab step. CP 51. As she stepped down, her left ankle turned inward and "popped," causing her to lose her balance and fall to the floor. CP 51. Ms. Jessee testified that the cause of her fall was the height of the stairs and the absence of a handrail. CP 49.

D. ARGUMENT

1. Standard of Review.

On appeal of a summary judgment order, the proper standard of review is de novo, and thus, the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 34, 1 P.3d 1124, 1127 (2000). Summary judgment is appropriate where there are no genuine issues of material fact. CR 56. "Factual issues may be decided as a matter of law when reasonable minds could reach but

one conclusion or when the factual dispute is so remote it is not material." *Weaver v. Spokane County*, 275 P.3d 1184, 1187 (Div.3, 2012).

"A judgment appealed from may be affirmed upon any theory established by the pleadings and proof even if on a ground different from that expressly relied on below." *Stratton v. U.S. Bulk Carriers, Inc.*, 3 Wash.App. 790, 796-797, 478 P.2d 253, 257 (Div.1, 1970). See Also, *Herron Northwest, Inc. v. Danskin*, 78 Wash.2d 500, 501, 476 P.2d 702, 703 (1971) ("It is the rule, of course, that the trial court can be sustained on any theory within the pleadings and the proof.")

The trial court's Order Granting Defendant's Motion for Reconsideration and Motion for Summary Judgment should be upheld for two reasons: (1) the City of Dayton is not liable for harm caused by an allegedly dangerous condition known to Ms. Jessee, and (2) Ms. Jessee's claims are barred by implied primary assumption of risk because she had knowledge of the allegedly dangerous condition and elected to proceed up the stairs despite that knowledge. In addition, this Court should affirm the trial court because Ms. Jessee failed to offer any proof that Dayton had knowledge of the alleged dangerousness of the stairs in question.

2. Landowner Liability to Invitees.

Under Washington law, a landowner's duty of care to persons on the land is governed by the entrant's common law status as an invitee,

licensee or trespasser. *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996). Where facts regarding the entrance of land are undisputed, the status of an entrant as an invitee or licensee is a question of law for the court. *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wash.2d 644, 648-49, 414 P.2d 773 (1966). Whether Ms. Jessee was a licensee or an invitee, her subjective knowledge regarding the "danger" of the stairs precludes her negligence claim against Dayton.

a. Ms. Jessee Was A "Licensee."¹

Washington applies the "economic benefit" test to distinguish between invitees and other entrants upon land. *Id.* To qualify as a business visitor, an individual must enter the premises for a purpose connected with the business in which the owner or occupant is engaged. *Id.* "To determine whether an entrant is a licensee or invitee, the ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social." *Afoa v. Port of Seattle*, 160 Wash.App. 234, 248-249,

¹ Ms. Jessee argues that Dayton "agreed that Ms. Jessee was an invitee." *Appellant's Brief*, pg. 5. This is not accurate. Dayton merely argued that for summary judgment purposes, whether Ms. Jessee was a licensee or invitee was immaterial. More importantly, since this review is de novo, this Court can determine whether Ms. Jessee was a licensee or an invitee.

247 P.3d 482 (2011), *citing*, *Beebe v. Moses*, 113 Wash.App. 464, 467–68, 54 P.3d 188 (2002).

In the present case, Ms. Jessee was acting in the own furtherance of her own business (that of her employer, Walla Walla County). Ms. Jessee was asked to observe and evaluate the emergency exercise in question. CP 28, 29. Ms. Jessee was asked by non-party *Columbia County* to observe the exercise. CP 30. Ms. Jessee does not dispute that at the time of the exercise, she was "at work or performing the duties associated with [her] job." CP 27. Ms. Jessee was present at the Old Fire Station with her co-worker, Dale Grogan. CP 26-27. Ms. Jessee asked Mr. Grogan to write a witness statement regarding the event. CP 49. Mr. Grogan stated that he and Ms. Jessee were "exercise participants" at the After Action meeting. *Id.*

Ms. Jessee drafted and signed a letter in support of her Labor and Industries claim. CP 35. In doing so, Ms. Jessee was attempting to be as truthful and accurate as possible. CP 36. In the letter, Ms. Jessee explained the incident as follows: "On May 15, 2005, I traveled to Dayton WA in my capacity of Emergency Management Technician for Walla Walla County Emergency Management. I was there to assist in evaluation of [sic] full-scale emergency management exercise with a scenario involving a shooting at the local high school." CP 52. Ms. Jessee does not

know if any of the persons present at the after action meeting were employees of the City of Dayton. CP 37. Based upon these facts, Ms. Jessee was a licensee at the time of her fall.

In *Memel v. Reimer*, 85 Wash.2d 685, 538 P.2d 517 (1975), the Washington Supreme Court adopted the Restatement (Second) of Torts § 342 to define a landowner's responsibility to licensees for dangerous conditions on the land. That section provides:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he [or she] fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

Restatement (Second) of Torts § 342 (1965), *quoted in Memel*, 85 Wash.2d at 689, 538 P.2d 517; *Younce v. Ferguson*, 106 Wash.2d at 667-68, 724 P.2d 991.

The duties in Restatement (Second) of Torts § 342 turn on the respective knowledge of landowner and licensee. First, the landowner

must know, or have reason to know, about a hidden danger created by a natural condition. In *Memel*, the Court described the extent of the duty arising from this knowledge.

We are not requiring that the occupier either prepare a safe place, or that he [or she] affirmatively seek out and discover hidden dangers. What we do impose is a duty to exercise reasonable care where there is a known dangerous condition on the property and the occupier can reasonably anticipate that [the] licensee will not discover or realize the risks. Under these circumstances, the landowner can fulfill his [or her] duty by either making the condition safe or by warning [the] licensee of the condition and its inherent risks.

Memel, 85 Wash.2d at 689, 538 P.2d 517.

Second, the licensee must not know, or have reason to know, about the dangers presented by a natural condition.

[E]ven though a dangerous condition is concealed and not obvious, and the possessor has given the licensee no warning, if the licensee is in fact fully aware of the condition and the risk, there is no liability to him [or her].

Restatement (Second) of Torts § 342, comment *l*.

A licensee's full understanding that a condition is dangerous ends any liability of the landowner for the condition. *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d 121, 133-134, 875 P.2d 621 (1994). In *Dorr v. Big Creek Wood Products, Inc.*, 84 Wash.App. 420, 428, 927 P.2d

1148 (1996), the Court cited the following comment to the Restatement (Second) of Torts:

a. Assumption of risk by licensee. The licensee is not entitled to enter the land of another except in so far as he is privileged to do so by the possessor's consent. Therefore, the mere fact that the possessor has consented to his entry gives him no right to expect that the possessor will change the method in which he conducts his activity so as to secure the licensee's safety. If he knows of the nature of the activities conducted upon the land and the manner in which they are conducted, he has all that he is entitled to expect, that is, an opportunity for an intelligent choice as to whether or not the advantage to be gained by coming on the land is sufficient to justify him in incurring the risks involved.

Restatement (Second) of Torts, § 341, comment a, p. 207-08.

As set forth above, Ms. Jessee had a full understanding of the allegedly dangerous condition of the stairs prior to using the same. As such, Dayton is not subject to liability for the existence of the allegedly dangerous condition.

b. Even If Ms. Jessee Was An "Invitee," Her Subjective Knowledge Of The "Hazard" Precludes Her Claim.

In *Kamla v. Space Needle Corp.*, 147 Wash.2d 114, 52 P.3d 472 (2002), the Supreme Court of Washington adopted Restatement (Second) of Torts Sections 343 and 343A, which read as follows:

§ 343 Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A "(Known or Obvious Dangers)" states:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on 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, landowner liability to an invitee who knows of the danger in question attaches if – but only if – invitees would be expected not to discover or realize the danger, or would fail to protect themselves against it despite knowledge of the danger. *Suriano v. Sears, Roebuck & Co.*, 117 Wash.App. 819, 826-27, 72 P.3d 1097 (Div.3, 2003) (quoting *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash.2d 121, 139, 875 P.2d 621 (1994), quoting, Restatement (Second) of Torts Section 343A(1)).

A possessor of land has a duty to protect an invitee against a danger known to the invitee only where the possessor should anticipate harm to the invitee notwithstanding the invitee's knowledge of the harm. *Kinney v. Space Needle Corp.*, 121 Wash.App. 242, 249–50, 85 P.3d 918 (Div.1, 2004). "Generally, a landowner is not liable to an invitee for dangers that are obvious." *Mucsi v. Graoch Associates Ltd. Partnership No. 12*, 144 Wash.2d 847, 860, 31 P.3d 684 (2001). It is only in "limited circumstances" when a landowner must "protect invitees even from known or obvious dangers. This occurs when a possessor 'should anticipate the harm despite such knowledge or obviousness.'" *Tincani*, 124 Wash.2d at 139 (quoting Restatement (Second) of Torts, § 343A(1)). Under this rule, a landowner is liable when an invitee could be expected to be distracted and fail to notice the obvious risk or to be unmindful of what he or she has noticed because the benefit of encountering the risk outweighs the cost of avoiding it. Restatement (Second) of Torts, § 343A cmt. f.

In the instant case, it is absolutely undisputed that Ms. Jessee was aware of the "danger" or "risk" at issue. As such, even assuming she was an invitee, the only question was whether Dayton should have anticipated the fall despite Ms. Jessee's knowledge of the risk. There is no evidence in the record to so much as suggest that Dayton should have known that invitees would be harmed despite knowledge of the risk and the

obviousness of the same. The stairs at the Old Fire House have existed for decades. Nonetheless, Ms. Jessee failed to produce any evidence that Dayton was aware of a single person who had fallen on the concrete-slab steps prior to Ms. Jessee's fall.

A possessor of land is simply not liable to invitees for harm caused to them by a condition on the land whose danger is known or obvious to the invitee, unless the possessor should anticipate the harm despite such knowledge or obviousness. *Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wash.App. 243, 250, 125 P.3d 141 (Div.3, 2005). Ms. Jessee did not produce any evidence that the City should have anticipated her fall despite her knowledge of the obvious "danger" at issue. Accordingly, summary judgment was proper.

3. Ms. Jessee's Assumption Of The Risk Bars Her Claim.

There are four types of assumption of risk: (1) express assumption of risk; (2) implied primary assumption of risk; (3) implied reasonable assumption of risk; and (4) implied unreasonable assumption of risk. *Erie v. White*, 92 Wash.App. 297, 302, 966 P.2d 342, 344-345 (Div.2, 1998). While the third (implied reasonable) and fourth (implied unreasonable) types of assumption of risk operate as forms of contributory negligence, the first (express) and second (implied primary) operate "to the negation of a duty that the defendant would have otherwise owed to the plaintiff." *Id.*

In other words, express or implied primary assumption of risk "bar any recovery based on the duty that was negated" by the assumption of the risk. *Id.* Implied primary assumption of risk obviates any duty, and without a duty, there can be no actionable negligence. *Lascheid v. City of Kennewick*, 137 Wash.App. 633, 640-641, 154 P.3d 307 (2007).

Both express and implied primary assumption of risk are based upon a plaintiff's identification of known risks, and agreement to encounter the same. *Erie*, at 302. An express assumption of risk occurs by an affirmative expression of consent, while implied primary assumption is based upon consent, but without a specific statement or written agreement. In either case, the 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 the risk. *Id.*

The case *Wirtz v. Gillogly*, 152 Wash.App. 1, 216 P.3d 416 (2009) is instructive in its application of implied primary assumption of risk. In *Wirtz*, the plaintiff agreed to assist the defendants in the felling of a tree. While doing so, the tree fell on the plaintiff's head, causing severe personal injuries. The plaintiff alleged that the defendants were negligent in: (1) allowing him to remove trees without safety equipment, (2) failing to provide him with safety equipment, (3) creating/maintaining dangerous conditions on their property, (4) failing to exercise ordinary care for him,

(5) failing to provide him with appropriate training for felling trees on their property. *Id. at 4-5*. In applying the three *Erie* factors, *supra*, the Court of Appeals found that the plaintiff (1-2) observed the tree-felling process and the safety gear utilized during the same, (3) participated in the process anyway. The plaintiff's claims were dismissed with prejudice based upon his implied primary assumption of the risk.

Ms. Jessee argues that implied primary assumption of risk does not apply to her claims because: (a) she did not fully appreciate the nature of the risk, and (b) her assumption of the risk was not "voluntary." Neither argument is persuasive.

a. Ms. Jessee Appreciated The Nature Of The Risk.

Implied primary assumption of risk requires a showing that the plaintiff had a full subjective understanding of the presence and nature of the risk, and chose to encounter it despite that understanding. *Wirtz v. Gillogly*, 152 Wash.App. 1, 8-9, 216 P.3d 416, 420 (Div.2, 2009). The plaintiff must have knowledge of the risk, appreciate its nature, and voluntarily choose to encounter it. *Martin v. Kidwiler*, 71 Wash.2d 47, 49-50, 426 P.2d 489 (1967). The test is a subjective one: whether the plaintiff in fact understood the risk, not whether the reasonable person would have understood the risk. *Erie v. White*, 92 Wash.App. 297, 966 P.2d 342 (Div.2, 1998).

Appreciation of the risk inherent in stairs was described in *Dilauro*

v. *One Bala Avenue Associates*, 615 A.2d 90, 94 (Pa.Super. 1992):

The present case is analogous to *Carrender, supra*. Appellant admitted that he was concerned that the stairs were dangerously steep and that he should proceed with caution. Nevertheless, appellant proceeded voluntarily down the center of the stairwell, rather than opt for the reasonably safe alternative course down the side of the stairwell while holding onto the handrail. Simply, appellees did not owe appellant a duty to protect him from the “obviously” steep stairs or, in other words, appellant assumed the risk of descending down the center of the stairs. Cf., *Carrender*, 503 Pa. at 189, 469 A.2d at 125; *Malinder v. Jenkins Elevator and Machine Co.*, 371 Pa.Super. 414, 538 A.2d 509 (1988); *Ott v. Unclaimed Freight Co.*, 395 Pa.Super. 483, 577 A.2d 894 (1990).

Rickey v. Boden, 421 A.2d 539 (R.I., 1980) is also on point:

In light of these facts and circumstances, we conclude that Lillian knew of the condition and structure of the stairs and that as a matter of law she knowingly assumed the ordinary risks associated with walking on the narrow portion of the treads, including the chance that she might slip and fall because of inadequate footing on the narrow portion of the treads. Cf. *Gatti v. World Wide Health Studios of Lake Charles, Inc.*, 323 So.2d 819, 822 (La.App.1975) (plaintiff charged as matter of law with assuming ordinary risks attending use of steam room with wet floor, which risks included chance of slip and fall); *Birdsall v. Counts*, 450 S.W.2d 136, 140-41 (Tex.Civ.App.1970) (plaintiff charged as matter of law with assuming ordinary risks attending use of stairway without handrail and in absence of adequate lighting, which risks included chance of slip and fall).

See also, Lake v. Atlanta Landmarks, Inc., 257 Ga.App. 195, 197, 570 S.E.2d 638 (2002) (“[Plaintiff] was aware of the amount of light in the theater. She had already walked upstairs to get to her seat and then walked down several more stairs before she fell. Moreover, if she thought it was too dark for her to walk down the stairs, it was incumbent upon her ... to inquire about alternatives.”); *Gray v. Oliver*, 242 Ga.App. 533, 535, 530 S.E.2d 241 (2000) (“[W]here, as here, the plaintiff had as much knowledge of the hazard as did the owner, plaintiff assumes the risk as to the known condition by voluntarily acting in the face of such knowledge.”); *Roberts v. Gardens Servs., Inc.*, 182 Ga.App. 573, 573, 356 S.E.2d 669 (1987) (“[I]t is uncontroverted that appellant had climbed the same stairs only moments before her fall. Appellant was thus aware of the lighting conditions and this awareness constituted equal knowledge on her part of any hazard presented by inadequate lighting.”).

Prior to utilizing the stairs in question, Ms. Jessee acknowledged the precise "dangerous" conditions of the stairs that she alleges caused her to fall, commenting that the stairs appeared "unsafe" and that there was no handrail. CP 146-147. Ms. Jessee's exact words were: "Boy, these don't look very safe." CP 148.

After recognizing (and verbalizing) that the stairs were unsafe, Ms. Jessee proceeded up the stairs, again noting the "danger" of the stairs:

- Q. Tell me why you had difficulty or how it was that you had difficulty going up these two steps.
- A. They seemed quite tall and I looked around for a handrail to provide balance and support, and there was no handrail.
- Q. And what do you mean when you say the two steps seemed quite tall?
- A. They seemed taller than normal.
- Q. And when you say "normal," you mean than, quote, normal stairs?
- A. Correct.
- Q. And so when you talk about having difficulty going up these two steps, you were referring to the steps being taller than normal?
- A. Correct.
- Q. Which made it more difficult to step up then?
- A. Yes. And the second step seemed to be taller than the first step.
- Q. Okay.
- A. This one seemed taller than this one (indicating).
- Q. Okay. So why don't you -- well, when you say this one seemed taller, you're talking about the top concrete slab?
- A. Top concrete slab seemed to be taller in height than the first concrete slab.

CP 43-44.

Once Ms. Jessee arrived at the top of the stairs, she specifically

commented that the stairs "were not ADA complaint." CP 45. Then, when Ms. Jessee was descending the stairs, she again recognized the allegedly unsafe condition of the stairs:

Q. And is what you're writing there, is that as you were -- you walked down the stairs, you again thought to yourself that the stairs seemed tall?

A. Yes.

Q. And seemed taller than, quote, unquote, normal stairs?

A. Correct.

Q. And then when you got to or down towards the bottom of the wooden stairs, you looked around for a handrail?

A. Yes.

Q. Noticed there was not a handrail?

A. Correct.

CP 47.

Even as Ms. Jessee was taking her final step before her fall, she was fully aware of the "danger" she was encountering:

Q. And were you looking down at your foot because you were trying to exercise caution in stepping down these stairs?

A. Yes.

Q. And one of the reasons you were exercising caution in looking at your foot was because you knew there wasn't a handrail?

A. Yes.

Q. And you also knew that the cement stairs seemed taller than normal stairs?

A. Yes.

CP 143, 48

Notwithstanding the foregoing testimony, Ms. Jessee insists that based upon the testimony of her expert witness, Joellen Gill, she was a "naïve user" not capable of understanding the risk. *Appellant's Brief*, pgs. 11-12. Ms. Jessee, however, does not deny understanding the risk. In fact, Ms. Jessee did not submit any testimony to the trial court denying that she fully understood the nature and magnitude of the risk. CP 51-54. In addition, Ms. Jessee recognized the precise risks that she alleges caused her fall prior to ascending the stairs in the first instance (stair height, lack of a handrail). CP 46-51.

In an effort to avoid the preclusive effect of her full understanding of the nature of the risk in question, Ms. Jessee argues that prior to her fall, she was unaware of the "exposed bolts" and "hole in the grate" upon which Ms. Jessee allegedly landed after falling. *Appellant's Brief*, pg. 10. Ms. Jessee's argument in this regard misses the point, as neither the "bolts" nor the "hole in the grate" caused Ms. Jessee's fall. Indeed, as Ms. Jessee herself notes: "Ms. Jesse alleges that she would not have fallen if the height of the stairs were uniform, and/or if she had the use of a handrail to

descend the final two concrete-slab steps." *Appellant's Brief*, pg. 5. As Ms. Jessee notes, the bolts and the "hole in the grate" did not cause or contribute to her fall, making Ms. Jessee's purported lack of knowledge regarding those conditions immaterial to the assumption of risk issue. A defendant is not required to show that a plaintiff knew of each and every possible *injury* he or she might sustain as a result of his or her assumption of a risk. Instead, the doctrine of assumption of the risk applies when a plaintiff such as Ms. Jessee voluntarily encounters a risk of harm. In that regard, it is undisputed that Ms. Jessee knew of the risk that was before her (falling) and that she might be injured in some manner if she fell. Despite that knowledge, she elected to proceed. As a result, her claims are barred by implied primary assumption of risk.

b. Ms. Jessee's Ascent And Descent Of The Stairs Were Voluntary At All Times.

Whether a plaintiff has decided to voluntarily encounter a risk depends on whether he or she knows of a reasonable, alternative course of action. *Wirtz v. Gillogly*, 152 Wash.App. 1, 8-9, 216 P.3d 416, 420 (Div.2, 2009). In *Erie v. White*, 92 Wash.App. 297, 966 P.2d 342, the Court of Appeals quoted the Restatement of Torts as follows:

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.

There is no evidence in the trial court record suggesting that Ms. Jessee could not have simply refused to ascend the stairs in the first instance. There was no evidence presented that she was required to attend the meeting, nor was there any evidence that her employer was required to have representatives present at the meeting. While Ms. Jessee has argumentatively represented to this Court that she was "requested" to attend the meeting, and that Columbia County is "responsible" for providing emergency services to Dayton, such facts are not in the record. Moreover, even if she were "required" to attend the meeting by her employer, she could have made the decision to refuse to ascend the stairs. In addition, a second set of stairs leading to the same area existed, which were not utilized by Ms. Jessee. CP 186-187.

To the extent that Ms. Jessee argues that she was performing her job when the incident happened, and therefore her actions were involuntary, her argument is rejected by *Gillogly* and *Erie*. When an

individual recognizes the existence of a risk – whether in the course of their employment or otherwise – they maintain the free will to choose whether to encounter the risk. Under such circumstances, going forward despite the risk is deemed "voluntary," since the individual may simply "[decline] to proceed." See, *Erie*, 92 Wash.App. 297, 306, 966 P.2d 342, 347 (Div.2, 1998). In *Erie*, a tree removal worker realized he did not have proper safety equipment prior to climbing a tree. The court found that he had options to either decline to proceed, or go rent proper equipment. Thus, his decision to proceed was deemed voluntary. In *Gillogly*, 152 Wash.App. 1, an individual assisted in the process of cutting down trees and was injured in the process. While concerned about the safety of the process, the plaintiff continued to participate. His actions in doing so were deemed voluntary for purposes of the assumption of risk analysis.

Ms. Jessee argues that she was left with "no reasonable alternative" but to ascend and descend the stairs in question based upon *Home v. North Kitsap School Dist.*, 92 Wash.App. 709, 965 P.2d 1112 (Div.2, 1998). In *Home*, a football coach believed that players may be injured based upon an unsafe condition adjacent to a football field. He sought to protect the players by blocking the area, and was injured as a result. The coach in *Home* chose between injuries to his players or, potentially, himself. Ms. Jessee was not faced with such a situation, and therefore, *Home* is

inapplicable. Ms. Jessee's alternatives were to: not ascend the stairs or to seek alternate routes to the meeting, including the other available staircase.

4. Dayton Had No Notice of the Alleged Hazard.

Ms. Jessee's failure to provide the trial court evidence of constructive notice on the part of Dayton of the alleged hazard is a third basis upon which this Court may affirm the trial court's decision to grant Dayton's Motion for Summary Judgment and Motion for Reconsideration.

In premises liability cases, a plaintiff must show that the landowner had actual or constructive notice of the allegedly unsafe condition. *Wiltse v. Albertson's Inc.*, 116 Wash.2d 452, 460, 805 P.2d 793, *Pimentel v. Roundup Co.*, 100 Wash.2d 39, 40, 49, 666 P.2d 888 (1983). Ms. Jessee argues that the trial court erred in "fail[ing] to address" whether Dayton had constructive knowledge of the hazard in question. *Appellants' Brief*, pg. 7.

In the present case, there is no evidence whatsoever that the stairs in question caused anyone to fall in the past. There is no evidence that Dayton knew or should have known that the stairs were "dangerous," as they had been successfully used for many, many years without incident.

E. CONCLUSION

The trial court properly dismissed Ms. Jessee's claims based upon Dayton's arguments that (1) Dayton could not be held liable for dangerous

conditions on the land that were known to Ms. Jessee, and (2) the doctrine of implied primary assumption of risk barred Ms. Jessee's claims where she had knowledge of the allegedly dangerous condition and elected to proceed up the stairs irrespective of that knowledge.

RESPECTFULLY SUBMITTED this 25th day of June, 2012.

A handwritten signature in black ink, appearing to read "McFarland", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 25th day of June, 2012, a true and correct copy of the foregoing *Respondent's Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

M. Scott Wolfram
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Via Regular Mail	<input checked="" type="checkbox"/>
Via Certified Mail	<input type="checkbox"/>
Via Overnight Mail	<input type="checkbox"/>
Via Facsimile	<input checked="" type="checkbox"/>
Hand Delivered	<input type="checkbox"/>

Dated: 6/25/12


Brooke Johnson