80156-8

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

Jolie Schonder
Respondent,

vs.

DEBORAH THOEN and JOHN DOE THOEN, husband and wife, TONIC WATERS, INC., a Washington Corp., ECHO LUNDEBERG and JOHN DOE LUNDEBERG, husband and wife, dba ECHO LUNDEBERG PERMANENT COSMETICS,

Appellants

Cause #24739-2-III

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
SPOKANE COUNTY

BRIEF OF APPELLANT

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AMENDED BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The testimony of Defendant and Defendant's witness should not have been precluded regarding the industry standard of providing information to and getting signed acknowledgments from one about to undergo permanent cosmetic procedures.

2. The testimony of Defendant and Defendant's witness should not have been precluded regarding the fact that they did in fact provide said information to Plaintiff and did in fact obtain Plaintiff's signature on said forms.

3. The testimony of Defendant and Defendant's witness should not have been precluded regarding the fact that said forms were kept at Defendant witness' shop and disappeared about the same time, Plaintiff, who was an employee of witness left that job.

4. The Defendant should not have been precluded from offering her proposed exhibits (which were unsigned copies of the documents Defendant and Defendant's witness would have testified were signed by the Plaintiff) in furtherance of Defendant's claim of Plaintiff's Assumption of the Risk.

5. By precluding the above evidence the court ruled that it was too prejudicial to Plaintiff. The withholding of said evidence from the jury was just as prejudicial to the Defendant.

6. All the precluded evidence would have been helpful to the jury as the finder of fact and should have been allowed as such.

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STATEMENT OF THE CASE

Respondent/Appellant Echo Lundeberg agreed to train Defendant Deb Thoen on a permanent cosmetic procedure. RP, p. 18, lines 23 to 25. The Plaintiff/Respondent Jolie Schonder agreed to be a test subject for the training. RP, p. 5, lines 11-17. Ms. Schonder was displeased with the completed procedure, and claimed that Deb Thoen with Echo Lundeberg in attendance went out of the lip-line and caused scarring as a result. RP, p. 7, lines 12-15. Through Discovery, Defendant let it be known that her defense was based on the fact that Plaintiff was thoroughly informed by way of written materials and verbal instruction prior to the procedure of all the risks attendant to permanent cosmetics. RP, p. 18, lines 16 to 20. Defendant maintained that disclosure is part of every permanent cosmetics procedure and that Defendant and Ms Thoen, prior to the procedure, disclosed all the possible risks. RP, p. 18, lines 4 to 20. Part of said disclosure was having the Plaintiff sign printed materials acknowledging that she was aware of the risks or permanent cosmetics. RP, p. 18, lines 16 to 20. Defendant further alleged that this documentation was placed in a file labeled with Plaintiff's name and kept at the business premises of Ms. Thoen. RP, p. 19 lines 15 to 20. Defendant was unable to provide copies of this documentation in response to Plaintiff's Request for Documents because the Plaintiff's file was missing from Ms. Thoen's business premises. RP, p.19, lines 15 to 20. Defendant did though provide unsigned documents which were

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identical to the missing ones. RP, p. 17, lines 9 to p. 18 line 1.

Further, it was Defendant's intent to testify as to the disclosure and the signing of the risk documentation at trial and to offer unsigned copies of same as evidence. RP, p. 19, lines 23 to p. 20, line 1. It was also Defendant's intent to bring out, through cross examination of Ms Thoen, listed as Plaintiff's witness, that Plaintiff worked for Ms Thoen at the time of the procedure; had keys to the business premises; had access to the files where business records were kept; and finally that at the time the Plaintiff left the employ of Ms. Thoen her file disappeared as well. RP, p.19, lines 15 to 20.

Counsel for Plaintiff objected to the Defendant and any witnesses from testifying about the missing file as well as any testimony about the disclosure to Plaintiff about the risks and to preclude Defendant from entering into evidence unsigned copies of the disclosure documents that the Plaintiff was alleged to have signed. RP, p.17 lines 8 to p. 20, line 25. The objection was heard as a preliminary matter at trial and the lower Court ruled that the jury would not be allowed to hear any of the testimony about disclosure of risk, the missing file or be allowed to see the unsigned documents. RP, p. 21, lines 1 to p. 22, line 9. The Defendant took exception to that ruling and so now seeks review of this Court of the lower Courts ruling and requests that judgment be set aside and that a new trial be ordered allowing said testimony that was originally precluded. RP, p. 24, lines 9 to 15.

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ARGUMENT

At common law, assumption of the risk , like contributory negligence operated as a total bar to recovery. *ITT Ravonier, Inc. v. Puget Sound Freight Lines*, 722 P2d 1310, 44 Wn. App. 368 (Wn. App., 1986) (citing *Skarpness v. Port of Seattle*, 326 P2d 747, 52 Wn. 2d 490 (1958)). Throughout the years, the doctrine evolved to what it is today. The assumption of the risk doctrine is now divided into four classifications: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Scott v. Pacific West Mt. Resort*, 834 P2d 6, 119 Wash. 2d 484 (1992) citing *Shorter v. Drury*, 695 P2d 116, 103 Wash. 2d 645, *cert. denied*, 474 US 827, 106 S.Ct. 86 (1985).

The Defendant in the case at bar alleges that Plaintiff was fully informed of the risks of permanent cosmetics and after being informed executed a release that was in effect an "express" assumption of the risk release. RP, p. 18, lines 16-20. Even if the Court finds that there was not enough evidence to find an "express" assumption of the risk, Defendant asserts that there was more then enough information provided to Plaintiff such that the circumstances allowed for a finding of an "implied primary" assumption of the risk. RP, p. 18, lines 16 to p. 19, line 12.

In order to rely on this defense, the Defendant 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. *Erie v. White*, 92 Wn. App. at 303 (quoting

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Kirk v. Wash. State Univ, 109 Wn.2d at 453; (citing *Wagenblast v. Odessa Sch. Dist. No.*, 105-157-166J, 110 Wn.2d 845, 858, 758 P.2d 968 (1988)). In other words, the evidence must show that the plaintiff had knowledge of the risk, appreciated and understood its nature, and voluntarily chose to take it. Id. (citing *Shorter*, 103 Wn.2d at 656; *Martin v. Kidwiler*, 71 Wn.2d 47, 49, 426 P.2d 489 (1967); *Bailey v. Safeway Stores, Inc.*, 55 Wn.2d 728, 731, 349 P.2d 1077 (1960)). Knowledge and voluntariness are questions of fact for the jury, except when reasonable minds could not differ. *Id.* (citing *Alston v. Blythe*, 88 Wn. App. at 34). If the Defendant is not even allowed to provide evidence to the jury of assumption of the risk then she can never prove these things to the jury.

A plaintiff knowingly assumes a risk if, at the time of the decision, he or she actually and subjectively knew all the facts that a reasonable person in the defendant's position would know and disclose, or all facts that a reasonable person in the plaintiff's position would want to know and consider. *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. at 720. Thus the test is subjective, asking whether the plaintiff in fact understood the risk, as opposed to whether a reasonable person of ordinary prudence would understand the risk. Id. (citing *Shorter*, 103 Wn.2d at 656-57). The plaintiff must "be aware of more than just the generalized risk of {his or her} activities; there must be proof {he or she} knew of and appreciated the specific hazard which caused the injury." Id. at 720-21 (alteration in original) (quoting *Shorter*, 103 Wn.2d at 657;

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citing *Klein v. R.D. Werner Co., Inc.*, 98 Wn.2d 316, 319, 654 P.2d 94 (1982); *Martin v. Kidwiler*, 71 Wn.2d at 49-50; Restatement (Second) of Torts sec. 496 D cmt. b). A plaintiff voluntarily assumes a risk if he or she elects to take it despite knowing of a reasonable alternate course of action. Id. at 721 (citing *Zook v. Baier*, 9 Wn. App. 708, 716, 514 P.2d 923 (1973); Restatement (Second) of Torts sec. 496 E). The plaintiff "must have had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger." Id. (quoting *Zook*, 9 Wn. App. at 716).

In the case at bar, the Defendant could not introduce any of her evidence on assumption of the risk EVEN THOUGH IT EXISTED (because of the lower Court's ruling). RP, p. 21, lines 25 to p. 22, line 9. Therefore, the jury, as finder of fact, could not consider assumption of the risk as a defense. A trial court may submit this defense to the jury if substantial evidence in the record supports it. *Klein*, 98 Wn.2d at 318 (citing *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 866, 567 P.2d 218 (1977)); *Dorr v. Big Creek Wood Prods., Inc.*, , 84 Wn. App. at 430. The lower Court should have allowed the evidence of assumption of the risk to be introduced and then decided if, as a matter of law, there was enough evidence to support submitting it to the jury.

The lower Court instead determined that allowing the evidence of assumption of risk where there is no tangible evidence other than Defendant's statement would be improper. RP, p. 21,

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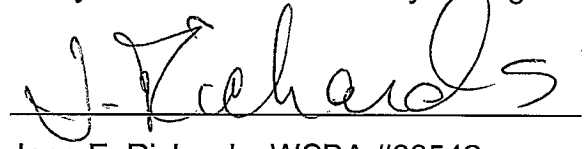
lines 21 to 24. Defendant avers that the preclusion of any evidence of assumption of the risk was more prejudicial to Defendant than allowing it would be prejudicial to the Plaintiff.

CONCLUSION

WHEREAS, Defendant asks this court to overturn/vacate the jury decision and remand this matter back to the lower court for a new trial allowing the testimony of Ms. Thoen and Lundeberg in the area of Assumption and the Risk and the introduction of evidence by way of Assumption of the Risk documents.

Respectfully Submitted this17th day of August 2006.



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CERTIFICATE OF DELIVERY

Pursuant to RCW 9A.72.085, the undersigned hereby certified under penalty of perjury under the laws of the state of Washington that on the 17th day of August, 2006 the foregoing Amended Brief of Appellant was delivered to the following person in the manner indicated:

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