

NO. 72715-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARJORIE N. GRAY, by and through her Durable Power of Attorney
Agent, JAMES S. GRAY

Appellants,

v.

BROADVIEW DEVELOPMENT ASSOCIATIONS II, a Washington
limited partnership, d/b/a IDA CULVER HOUSE BROADVIEW;
BROADVIEW DEVELOPMENT ASSOCIATIONS, INC., a Washington
corporation; and ERA LIVING, LLC, a Washington corporation, jointly
and severally liable,

Respondents.

RESPONDENTS' OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESPONSES TO ASSIGNMENTS OF ERROR.....2

III. COUNTER-STATEMENT OF THE CASE.....2

IV. ARGUMENT.....6

 A. The Standard of Review is *De Novo*.....6

 B. The Trial Court Properly Applied the Doctrine
 of Implied Primary Assumption of Risk as a Complete
 Bar to Recovery.....7

 1. The Risk of Injury While Boarding the Van
 Was Inherent and Necessary to Participation
 in a Scenic Van Ride.....8

 2. Gray’s Choice to Encounter the Steps was
 (1) Voluntary; and (2) Made with Knowledge of
 Reasonable Alternative Courses of Action.....11

 a. Gray had full subjective understanding
 of the risk presented by the passenger
 van steps.....13

 b. Gray Was Aware of Reasonable
 Alternative Courses of Action.....15

 3. The Trial Court Properly Distinguished This Case
 From Those Applying Contributory Negligence.....16

 C. The Trial Court Properly Declined to Address
 the Restatement (Second) of Torts §343A.....22

 D. Retirement Communities Do Not Owe an Elevated
 Duty to Senior Independent Living Tenants.....23

E.	The Trial Court Properly Declined to Find That a Duty Attached to Ida Culver House Based on the Gratuitous Promises Allegedly Made to Gray's Daughter.....	26
V.	CONCLUSION.....	29

TABLE OF AUTHORITIES

CASES

<i>Brown v. MacPherson's, Inc.</i> , 86 Wn.2d 293, 545 P.2d 13 (1975).....	26, 28
<i>Degel v. Majestic Mobile Manor, Inc.</i> , 129 Wn.2d 43, 914 P.2d 728 (1996).....	18
<i>Dorr v. Big Creek Wood Prods.</i> , 84 Wn. App. 420, 927 P.2d 1148 (1996).....	19
<i>Dudley v. Victor Lynn Lines, Inc.</i> , 48 N.J. Super. 457, 138 A.2d 53 (1958), <i>rev'd on other grounds</i> , 32 N.J. 479, 161 A.2d 479 (1960).....	27
<i>Erie v. White</i> , 92 Wn. App. 297, 966 P.2d 342 (1998), <i>review denied</i> , 137 Wn.2d 1022, 980 P.2d 1280 (1999).....	7, 12, 13, 15
<i>Fair v. United States</i> , 234 F.2d 288 (5th Cir. 1956).....	27
<i>Foster v. Carter</i> , 49 Wn. App. 340, 742 P.2d 1257 (1987).....	10
<i>Green v. A.P.C.</i> , 136 Wn.2d 87, 960 P.2d 912 (1998).....	6
<i>Halvorsen v. Ferguson</i> , 46 Wn. App. 708, 735 P.2d 675 (1986), <i>review denied</i> , 108 Wn.2d 1008 (1987).....	6
<i>Harting v. Barton</i> , 101 Wn. App. 954, 6 P.3d 91 (2000), <i>review denied</i> , 142 Wn.2d 1019, 16 P.3d 1266 (2001).....	21
<i>Hash v. Children's Orthopedic Hosp. & Medical Ctr.</i> , 49 Wn. App. 130, 741 P.2d 584 (1987), <i>aff'd</i> , 110 Wn.2d 912, 757 P.2d 507 (1988).....	6

<i>Kirk v. Wash. State Univ.</i> , 109 Wn.2d 448, 746 P.2d 285 (1987).....	9, 11
<i>Klein v. RD Werner Co.</i> , 98 Wn.2d 316, 654 P.2d 94 (1982).....	12
<i>Leyendecker v. Cousins</i> , 53 Wn. App. 769, 770 P.2d 675 (1989), <i>review denied</i> , 113 Wn.2d 781 P.2d 1320.....	19, 20
<i>Maynard v. Sisters of Providence</i> , 72 Wn. App. 878, 866 P.2d 1272 (1994).....	20, 21
<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788, 64 P.3d 22 (2003).....	6
<i>Mucsi v. Graoch Assocs. P'ship # 12</i> , 144 Wn.2d 847, 31 P.3d 684 (2001).....	21
<i>Phillips v. Kaiser Aluminum</i> , 74 Wn. App. 741, 875 P. 2d 1228 (1994).....	25
<i>Redding v. Va. Mason Med. Ctr.</i> , 75 Wn. App. 424, 878 P.2d 483 (1994).....	7
<i>Ridge v. Kladnick</i> , 42 Wn. App. 785, 713 P.2d 1131 (1986), <i>review denied</i> , 106 Wn.2d 1011.....	8, 9, 10
<i>Roth v. Kay</i> , 35 Wn. App. 1, 664 P.2d 1299 (1983), <i>review denied</i> , 100 Wn.2d 1026.....	27
<i>Scott v. Pac. W. Mt. Resort</i> , 119 Wn.2d 484, 834 P.2d 6 (1992).....	8, 9
<i>Sheridan v. Aetna Cas. & Sur. Co.</i> , 3 Wn.2d 423, 100 P.2d 1024 (1940).....	26

<i>Simpson v. May</i> , 5 Wn. App. 214, 486 P.2d 336 (1971), <i>review denied</i> , 79 Wn.2d 1009.....	13
<i>Sjogren v. Props. of the Pac. N.W.</i> , 118 Wn. App. 144, 75 P.3d 592 (2003)	21
<i>Tincani v. Inland Empire Zoological Soc’y</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	11, 17, 18
<i>United States v. Gavagan</i> , 280 F.2d 319 (5th Cir. 1960).....	27
<i>Webstad v. Stortini</i> , 83 Wn. App. 857, 924 P.2d 940 (1996), <i>review denied</i> , 131 Wn.2d 1016, 936 P.2d 416 (1997).....	28
<i>Wirtz v. Gillogly</i> , 152 Wn. App. 1, 216 P.3d 416 (2009).....	11
<i>Zook v. Baier</i> , 9 Wn. App. 708, 514 P.2d 923 (1973).....	15

STATUTES AND REGULATIONS

RCW 18.51.010(3).....	23
WAC 388-110-020.....	23

OTHER AUTHORITY

Restatement (Second) of Torts §496E.....	22, 23
Restatement (Second) of Torts §343A.....	21-23

I. INTRODUCTION

Appellant Marjorie Gray (Gray) was an 83-year-old independent living tenant at Ida Culver House Broadview (Ida Culver House) who enjoyed taking scenic van rides. On these planned leisure activities, tenants can choose to board using the Ida Culver House van's steps or lift. Gray's discovery responses verify that she knew she could ask to use the lift and risked falling if she did not. Her family continually reminded her to never take the steps and, instead, to ask for the lift while boarding the van. She had allegedly fallen twice on the van steps prior to the incident at issue in this case. Nevertheless, in October 2010, while boarding the van for a scenic ride, Gray "just tried taking the stairs" because asking to use the lift "made [her] feel like [she] was imposing." Clerk's Papers (CP) at 54. She fell and was injured.

The trial court properly dismissed Gray's claims on summary judgment, ruling that she impliedly assumed the risk by electing to use the van's steps. Considering Gray's knowledge of the risk and reasonable alternatives, her actions demonstrated a willingness to relieve Ida Culver House of its duties as a premises owner. Because the trial court's grant of summary judgment dismissal was well-considered and firmly grounded in precedent, this Court should affirm the trial court's ruling.

II. RESPONSES TO ASSIGNMENTS OF ERROR

1. To apply implied primary assumption of risk, the assumption must be (1) voluntary; and (2) the participant must have reasonable alternatives. Did the trial court correctly apply the implied primary assumption of risk doctrine where (1) Gray was aware of the risk of using the steps because she had fallen in the past; and (2) she had reasonable alternatives such as asking to use the van lift or not participating in the scenic van ride?

2. In Washington, the doctrine of gratuitous promises generally applies to *imperiled* plaintiffs such as those in danger from an avalanche. However, the gratuitous promise doctrine does not apply when a plaintiff causes her own danger or is in a position to act on her own behalf. Here, Gray put herself at risk by taking the van steps. Did the trial court properly decline to hold Ida Culver House liable for the alleged gratuitous promises made to Gray's daughter?

III. COUNTER-STATEMENT OF THE CASE

Ida Culver House is a retirement community in the Seattle area. CP at 241:18-19. Ida Culver House offers residents variable levels of care, depending on the type of tenancy the resident chooses. CP at 241:18-20. Gray, an 83-year-old retiree, resided at Ida Culver House under an "independent living" arrangement. CP at 3:8-9; 241:19-21. As

such, Gray contracted for services that presumed she was able to live independently, but did not want the burden of maintaining her own home. CP at 43-49 (Independent Living Residency Agreement); 241:20-23. By entering into an independent living arrangement, Gray was affirming that she was able to physically and mentally participate in the planned activities of daily living. *Id.*

Ida Culver House offers its independent living tenants regular outings to community and cultural events, which includes group transportation. CP at 3:14-19. In her Complaint, Gray alleges that, prior to October 2010, she fell twice while attempting to board the Ida Culver House van.¹ CP at 4:15-5:7. Gray's daughter, Paula, then asked Ida Culver House to use the lift when boarding her mother in the van. CP at 4:18-19. Due to these prior falls, Gray was on notice that the van steps presented a fall risk for her.

On 10/27/10, Gray decided to take advantage of an organized outing consisting of a scenic ride on the Ida Culver House van. CP at 54; 242:2-3. Gray declined to ask for the lift and instead used the steps. CP at 242:6. She fell and was injured. CP at 242:7.

¹ Both parties have used "bus" and "van" interchangeably to refer to Ida Culver House's 2002 Ford Passenger van which is equipped with a Rincon S-Series transit use (ADA) wheelchair and standee lift. Consistent with the product's name, the lift is designed to accommodate standing passengers. CP at 19:3-8.

Gray admits that her family “reminded [her] all the time to never take the stairs on the bus. . . . After each fall, everyone in the family reminded [her] to take the lift and not the stairs.” CP at 54. It is undisputed that when she asked for the lift, it was offered to her. However, according to Gray, “[s]ometimes, I would not want to bother the driver to take me on the lift and if they didn’t offer, then I just tried taking the stairs. Many times the driver would not offer the lift and I would have to ask, which made me feel like I was imposing.” *Id.*

Gray filed this action against Ida Culver House, claiming that, as an invitee, Ida Culver House had a duty to provide her with vehicles free from foreseeable risks and dangers. CP at 7:3-8. Gray also alleges common law negligence. CP at 8:6-13. Ida Culver House specifically pled assumption of risk as an affirmative defense. CP at 253:16-21.

Ida Culver House moved for summary judgment on the grounds that (1) Gray had full knowledge and awareness of the risks of her conduct and chose to assume those risks and proceed at her own peril; and (2) the alleged condition that caused her injuries qualifies as an “open and obvious” condition from which Ida Culver House had no duty to warn or protect. CP at 16-39.

The trial court granted Ida Culver House’s motion for summary judgment. CP at 196-200. Although the trial court held that summary

judgment was not warranted based on premises liability alone, the court applied implied primary assumption of risk which is a complete bar to recovery. CP at 199:1-200:4. The court reasoned, “[u]nlike all the cases cited by Plaintiff, here Ms. Gray encountered the precise risks she saw. There was nothing hidden or not obvious. She knew precisely what risks she faced because she had both successfully and unsuccessfully negotiated the steps in the past.” CP at 199:23-25. The court further recognized that Gray “had other options available to her (the lift, a request for assistance, or decline to participate). . . . [T]here is nothing to suggest she did not voluntarily choose to walk the steps of the [Ida Culver House] bus.” CP at 199:25-200:3. Consequently, the court held that “as a matter of law, Ms. Gray assumed the risk and cannot recover.” CP at 200:3-4.

Gray then filed a motion for reconsideration of the trial court’s ruling, contending that the trial court applied the “wrong” assumption of risk doctrine. CP at 201-14. After calling for responsive briefing from Ida Culver House, the trial court denied Gray’s motion for reconsideration. CP at 235-36. Gray now appeals (1) the trial court’s order granting summary judgment dismissal to Ida Culver House; and (2) the trial court’s order denying her reconsideration. CP at 237-38.

IV. ARGUMENT

a. The Standard of Review Is *De Novo*.

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party (here, Respondent Ida Culver House) is entitled to summary judgment as a matter of law, and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); *Green v. A.P.C.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988).

Likewise, a nonmoving party (Gray) attempting to resist a summary judgment “may not rely on speculation [or] argumentative assertions that unresolved factual matters remain,” rather “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987).

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Redding v. Va. Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

b. The Trial Court Properly Applied the Doctrine of Implied Primary Assumption of Risk as a Complete Bar to Recovery.

Assumption of risk is a defense arising out of the plaintiff's choice to voluntarily encounter a known risk. WPI 13. There are four types of assumption of risk: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable. *Erie v. White*, 92 Wn. App. 297, 302, 966 P.2d 342 (1998), *review denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999).

Both implied reasonable and unreasonable assumption of risk are nothing more than alternative names for contributory negligence. *Id.* Because they have been subsumed by contributory negligence, they have not survived as independent affirmative defenses. Express assumption of risk requires a formal written or oral expression of willingness to assume the risk in question. *Id.* at 302-03. Because there was no formal expression by Gray, express assumption of risk does not apply in this case. However, despite the adoption of contributory negligence, "primary

implied assumption of risk remains a complete bar to recovery.”² *Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 497, 834 P.2d 6 (1992). The court below correctly held that implied primary assumption of risk operated as a complete bar to Gray’s claims. CP at 196-200.

1. The Risk of Injury While Boarding the Van Was Inherent and Necessary to Participation in a Scenic Van Ride.

Implied primary assumption of risk arises when a plaintiff impliedly consents to relieve a defendant of his duty regarding known risks of a given activity. *Scott*, 119 Wn.2d at 497. The doctrine operates to bar a plaintiff from recovering for damages where evidence shows that the plaintiff voluntarily assumed risks that are inherent and necessary to participation in the activity. *Id.* at 500-01; *Ridge v. Kladnick*, 42 Wn. App. 785, 788, 713 P.2d 1131 (1986), *review denied*, 106 Wn.2d 1011 (Division I affirming judgment in favor of defendant where plaintiff assumed the inherent and necessary risks of roller-skating); WPI 13.03.³

² The cases use the terms “implied primary” and “primary implied” interchangeably. This brief utilizes the term “implied primary” assumption of risk in keeping with WPI 13.03.

³ WPI 13.03 Assumption of Risk – Implied Primary:

It is a defense to an action for [personal injury] that the [person injured] impliedly assumed a specific risk of harm.

A person impliedly assumes a risk of harm if that person knows of the specific risk associated with [a course of conduct] [an activity], understands its nature, voluntarily chooses to accept the risk by engaging in that [conduct] [activity], and impliedly consents to relieve

Implied primary assumption of risk often arises in the context of sports or other leisure and amusement activities.

While summary judgment is not proper where the premises owner's negligence creates additional harms outside of those inherent in the activity, the court below correctly found that Ida Culver House did not create any additional risks. *See, e.g., Scott*, 119 Wn.2d at 503-04 (holding that summary judgment was not proper where ski school's negligence created additional risks); *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 457-58, 746 P.2d 285 (1987) (holding that implied primary assumption of risk was not applicable to those risks that were not voluntarily encountered and inherent in the sport of cheerleading). *But see* CP at 199:20-21 ("Here, there are no other risks. The risks that Plaintiff encountered were the steep steps that might cause her to fall.").

Because Ida Culver House did not create any risks other than those associated with taking a scenic van ride (such as boarding the van), this case is analogous to *Ridge*, 42 Wn. App. at 785. There, an injured skater appealed a judgment in favor of defendants. Division I affirmed. *Id.* at

the defendant of a duty of care owed to the person in relation to the specific risk.

[A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct [to avoid the harm] [or] [to exercise or protect a right or privilege] because of the defendant's negligence.]

786. Ridge was injured while playing a game called “Shoot-The-Duck/Wipe Out” at a roller-skating rink. The court recognized that “[t]hose who participate in sports or amusements are taken to assume known risks of being hurt, although they are not deemed to have consented to unsportsmanlike rule violations, which are not part of the game.” *Id.* at 788. In that case, the jury properly found that assumption of risk operated as a complete bar to recovery where the skater voluntarily participated in the activity and encountered its known risks. *Id.* at 788-89.

This case is similarly analogous to *Foster v. Carter*, 49 Wn. App. 340, 742 P.2d 1257 (1987). There, a boy was injured during a game involving BB guns. Affirming the trial court’s grant of summary judgment, Division I held that the injured boy “assumed the risk of any injury by these respondents.” *Id.* at 346.

As in *Ridge* and *Foster*, Gray was injured during a voluntary amusement activity – a scenic van ride provided by Ida Culver House. Significantly, boarding the van (whether by the steps or the lift) was inherent and necessary to the scenic van ride. Gray could not participate in the scenic van ride without first boarding. She was aware of the risks associated with boarding the van and proceeded with the activity at her own peril. More significantly, she chose to encounter the steps in the face of the reasonable alternative to ask for the lift.

The Court of Appeals' decision in *Wirtz v. Gillogly*, 152 Wn. App. 1, 216 P.3d 416 (2009), is also instructive. There, the Court of Appeals affirmed summary judgment on behalf of the defendant, applying implied primary assumption of risk as a complete bar to recovery. *Id.* at 2-3. The injured plaintiff knowingly and voluntarily assisted in a tree-felling project while refusing to wear a hardhat. He could have worn a hardhat or walked away from the project at any time. *Id.* at 10-11. The court held that "reasonable minds could not differ about whether [the plaintiff] knowingly and voluntarily assumed the risk inherent in felling trees." *Id.* at 9. As in *Wirtz*, Gray knowingly and voluntarily assumed the risk of encountering the steps despite the reasonable alternative of asking to use the lift or not participate in the scenic outing.

2. Gray's Choice to Encounter the Steps was (1) Voluntary; and (2) Made with Knowledge of Reasonable Alternative Courses of Action.

Implied primary assumption of risk applies where the plaintiff impliedly consents to relieve the defendant of an obligation or duty to act. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 144, 875 P.2d 621 (1994). The plaintiff must have full subjective understanding of the presence and nature of the risk and choose to encounter it anyway. *Kirk*, 109 Wn.2d at 453.

In order to satisfy the knowledge requirement, the plaintiff must have knowledge of and appreciate the specific risk that caused the injury. *Erie*, 92 Wn. App. at 303. The evidence must show that the injured person knew of the subjective defect causing his or her injuries before the assumption of risk doctrine applies. *Klein v. RD Werner Co.*, 98 Wn.2d 316, 319, 654 P.2d 94 (1982). “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*, 92 Wn. App. at 304 (emphasis added) (italics in original). Knowledge and voluntariness are ripe for summary determination where reasonable minds could not differ. *Id.* at 303.

In this case, the trial court properly determined that Gray knowingly and voluntarily assumed the risk of climbing the van steps despite reasonable alternatives, such as using the lift. Under the knowledge prong, the trial court held that “[t]here was nothing hidden or not obvious. She knew precisely what risks she faced because she had both successfully and unsuccessfully negotiated the steps in the past.” CP at 199:22-25. Under the reasonable alternatives prong, the trial court held that “[s]he had other options available to her (the lift, a request for assistance, or decline to participate).” CP at 199:25-26. Under these circumstances, reasonable minds could not differ regarding the

voluntariness of Gray's actions and awareness of the reasonably available alternatives. See *Simpson v. May*, 5 Wn. App. 214, 486 P.2d 336 (1971), review denied, 79 Wn.2d 1009 ("The plaintiff will not be heard to say that he did not comprehend a risk which must have been quite clear and obvious to him." (quoting W. Prosser, *The Law of Torts* at 462 (3d ed. 1964))). Accordingly, the trial court's ruling dismissing the claims against Ida Culver House should be affirmed.

a. Gray had full subjective understanding of the risk presented by the passenger van steps.

Erie v. White is instructive to an analysis of the knowledge prong. In *Erie*, the defendant, White, hired Erie to cut a tree and supplied him with pole climbing equipment. 92 Wn. App. at 299-300. While in the tree, Erie accidentally cut through a safety strap of the equipment, fell, and was injured. *Id.* at 301. Erie sued White for negligently supplying him with pole climbing equipment instead of tree climbing equipment. *Id.* The court found that Erie knew and appreciated the risk when he looked at the pole climbing equipment and realized that the equipment did not have the steel enforced strap required for using a chainsaw in a tree. *Id.* at 306. The court also found that Erie had a reasonable alternative course of action – he could have gone to the rental store to obtain the proper equipment or declined to cut the tree altogether. *Id.* The court granted summary

judgment in favor of White because reasonable minds could not differ regarding whether Erie knowingly and voluntarily assumed the risk of injury by using the pole climbing equipment. *Id.*

Here, Gray had subjective knowledge of the specific risk of using the van steps, as evidenced by her signed statement regarding the fall in question:

This was my 3rd recent fall on the stairs of the scenic bus ride trip. This was the 2nd time I had to be in the hospital for the injury. From my first fall to my 3rd fall, Paula told staff, Joanne, that I could only board the bus by taking the lift. She and Jimmy reminded me all the time to never take the stairs on the bus.

After each fall, everyone in the family reminded me to take the lift and not the stairs. I hate falling and always seem to get significant injuries to my skin when I fall. I would NEVER refuse a ride on the lift over taking the stairs. The stairs are higher than normal and hard for me to climb up.

Sometimes, I would not want to bother the driver to take me on the lift and if they didn't offer, then I just tried taking the stairs. Many times the driver would not offer the lift and I would have to ask, which made me feel like I was imposing.

After the 2nd fall, I think I was offered the lift more often since Paula had talked to Joanne again to make sure I did not take the stairs. Every time I have been offered the lift, I have taken it.

CP at 54 (emphasis added).

Gray acknowledged that she all but expected to get injured when she attempted to walk up the Ida Culver House van steps, and yet she

assumed this risk nonetheless. Like the plaintiff in *Erie*, Gray demonstrated her knowledge of risk by admitting to - and even describing in detail - what would happen when she tried to walk up the van steps. Also like the plaintiff in *Erie*, Gray knew of the specific danger presented by using the steps. She nonetheless proceeded and was injured. Based on her own allegations, as well as her responses to discovery, Gray cannot dispute that she “appreciated the specific risk” that caused her injury. *See Erie*, 92 Wn. App. at 306.

b. Gray Was Aware of Reasonable Alternative Courses of Action.

Whether a plaintiff voluntarily encounters a risk depends on whether she elects to encounter it despite knowing of a reasonable alternative course of action. *Zook v. Baier*, 9 Wn. App. 708, 716, 514 P.2d 923 (1973); Restatement (Second) of Torts §496E. In order for assumption of risk to bar recovery, the plaintiff “must have had a reasonable opportunity to act differently or proceed on an alternative course that would have avoided the danger.” *Id.*

The requirement of subjective knowledge is what separates assumption of risk and contributory negligence. *See Erie*, 92 Wn. App. at 305. The plaintiff must have subjective knowledge of not only the risk, but also of an opportunity to act differently, prevent the risk, or proceed on an

alternative course to “avoid the danger.” *Id.* While contributory negligence turns on what the plaintiff should have known, assumption of risk turns on what the plaintiff did know. *Id.*

In this case, reasonable minds cannot differ regarding whether Gray knew all the facts a reasonable person would have known, and thus appreciated the condition of the van steps. It is undisputed that Gray was an independent living resident throughout all of her alleged falls, and consequently held herself out to be “physically and mentally capable of traversing a normal path to safety without the physical assistance of another person.” CP at 46. Although she may have felt some personal reluctance to *bothering* the driver to place her on the lift, Gray admits that when she asked, she was always offered the lift. CP at 54. Gray possessed both knowledge of the risk and knowledge of a reasonable alternative course of action. Accordingly, the trial court properly applied implied primary assumption of risk as a complete bar to Gray’s recovery.

3. The Trial Court Properly Distinguished This Case From Those Applying Contributory Negligence.

Gray contends that the trial court erred by applying implied primary assumption of risk as a complete bar to recovery. Instead, Gray claims that the court should have, at most, applied implied reasonable or unreasonable assumption of risk which opens the door to contributory

negligence. The trial court, however, correctly applied implied primary assumption of risk as a complete bar to recovery where the risk to Gray involved “steps that might cause her to fall.” CP at 199:20-21. The court recognized that “there are no other risks.” CP 199:20. By acknowledging this point, the trial court demonstrated a keen understanding of the difference between implied primary assumption of risk and contributory negligence. Namely, assumption of risk is a complete bar to recovery where the premises owner creates no additional risk outside of what is knowingly encountered as part of the activity.

Gray relies on *Tincani*, arguing that contributory negligence rather than implied primary assumption of risk applies here. In *Tincani*, a group of teenagers wandered off the main trail at a zoo during a school field trip. One of them wound up on a rock outcropping and eventually fell 20 feet. The case turned on a landowner’s duty to warn an invitee or licensee of the hidden danger posed by a natural condition. The *Tincani* court ultimately applied implied *unreasonable* assumption of risk, which falls under contributory negligence. 124 Wn.2d at 143. The court specifically noted that the risk of injury while “rock climbing” was not inherent and necessary to a visit to the zoo. *Id.* at 144.

In this case, however, boarding the van was inherent and necessary to the scenic van tour - Gray could not have participated in the tour

without boarding the van. She either had to ask to board using the lift or climb the steps. While the student in *Tincani* voluntarily chose to encounter a risk created by the Zoo's negligence (an unfenced rock outcropping), Gray voluntarily chose to encounter a risk inherent in the activity in which she was choosing to participate. *See id.* at 145. Consequently, while *Tincani* falls under contributory negligence, this case falls under implied primary assumption of risk which is a complete bar to recovery.

Relying on *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 914 P.2d 728 (1996), Gray contends that contributory negligence applies in this case. There, the court did not even discuss assumption of risk, much less distinguish between implied primary assumption of risk and other categories that fall under contributory negligence. *Id.* In that case, a child slid down an embankment and into a river while playing at a playground dangerously close to the body of water. *Id.* at 45. Gray notes that the mobile home owner could have put a fence between the children's play area and the steep embankment to protect children from the risk of the nearby stream. Here, however, the trial court recognized that "there [were] no other risks." CP at 199:20. In other words, there was no swift stream or unfenced steep rock outcropping. Accordingly, Gray's reliance on *Tincani* and *Degel* is misplaced.

Dorr v. Big Creek Wood Prods., 84 Wn. App. 420, 425-26, 927 P.2d 1148 (1996), is similarly unpersuasive. There, the premises owner's agent motioned for the invitee to move forward into the zone of danger, and he was subsequently struck by a falling branch. *Id.* at 423. The *Dorr* court recognized that the premises owner's "duty of reasonable care for Dorr's safety arose only if [its agent's] activities created a risk that Dorr did not know of and could not be expected to discover[.]" *Id.* at 427. Because the actions of the premises owner's agent created a risk to the invitee beyond the scope of his knowledge, the case fell within contributory negligence. In contrast, Gray was well aware of the risk that she encountered. *Dorr* is inapposite.

Gray asserts that, at most, contributory negligence should reduce her claim, relying on *Leyendecker v. Cousins*, 53 Wn. App. 769, 770 P.2d 675 (1989), *review denied*, 113 Wn.2d 1015-1022, 781 P.2d 1320. In that case, a logger was injured when he walked next to the spinning rotor of a helicopter, then inexplicably walked back into it and was seriously injured. *Id.* at 771. The Court of Appeals reversed the trial court's grant of summary judgment to the defendant, holding that principles of contributory negligence applied as opposed to implied primary assumption of risk. *Id.* at 775.

Two critical facts distinguish *Leyendecker* from the case at hand. First, the plaintiff could not remember the accident, which renders a determination of his knowledge and voluntariness challenging. Second, the court recognized that “it appears that finding a spinning tail rotor in close proximity to the trail’s head was entirely unexpected[.]” *Id.* This is simply not the sort of circumstances contemplated by the doctrine of implied primary assumption of risk. Whereas Gray’s affirmative decision to climb the steps in the face of a known risk and reasonable alternatives evinces a willingness to relieve Ida Culver House of its duties to her, no such evidence existed in the *Leyendecker* record.

In support of her claim that contributory negligence applies in this case, Gray also cites *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 866 P.2d 1272 (1994). There, the Court of Appeals reversed summary judgment against a man who fell in an icy hospital parking lot while visiting his sick wife. *Id.* at 879-880. Gray’s reliance on *Maynard* is misguided where reasonable minds could not disagree that Gray had reasonable alternative courses of actions. True, a reasonable person in the position of the injured plaintiff in *Maynard* would likely have proceeded to encounter the danger of walking across the icy parking lot because the advantages of doing so would have outweighed the obvious risk. In this case, however, there was simply no advantage to taking the steps.

Although Gray did not want to inconvenience the van driver by asking to use the lift, it was an option readily available to her. She knew that taking the lift would prevent her from falling on the steps, and she had successfully used the lift in the past. Unlike the circumstances in *Maynard*, a reasonable person would not take the steps over the lift because the advantages of the steps did not outweigh the risk. More significantly, however, is that the Court of Appeals in *Maynard* did not analyze assumption of risk or even cite it other than to mention it in passing while quoting the Restatement (Second) of Torts §343A(1), cmt. f. Accordingly, *Maynard* does not support Gray's assertion that contributory negligence rather than implied primary assumption of risk is applicable here.

Like *Maynard*, Gray cites *Mucsi v. Graoch Assocs. P'ship # 12*, 144 Wn.2d 847, 31 P.3d 684 (2001), and *Sjogren v. Props. of the Pac. N.W.*, 118 Wn. App. 144, 75 P.3d 592 (2003), despite the fact that neither court analyzed or applied the assumption of risk doctrine. This is significant. Assumption of risk is an affirmative defense that must be pled or will generally be deemed waived. CR 8(c); *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000), *review denied*, 142 Wn.2d 1019, 16 P.3d 1266 (2001). Because the courts in *Mucsi* and *Sjogren* did not consider

the affirmative defense of assumption of risk, the Restatement (Second) of Torts §343A analysis is inapplicable to the case at bar.

The trial court correctly distinguished this case, which falls under implied primary assumption of risk, from Gray's cited cases, which implicate only principles of contributory negligence. Gray's reading of these cases would sweep all assumption of risk cases into the contributory negligence field, obliterating implied primary assumption of risk's complete bar to recovery. There is simply no support for such an interpretation. Implied primary assumption of risk and contributory negligence are distinct affirmative defenses.

c. The Trial Court Properly Declined to Address the Restatement (Second) of Torts §343A.

Gray claims that “[t]he court’s holding below failed to analyze [Ida Culver House’s] additional duties under Restatement (Second) of Torts §343A, requiring a landowner to take affirmative steps to protect an invitee when the owner ‘should anticipate the harm despite such knowledge or obviousness.’” App. Op. Br. at 1-2. Gray claims that the court’s alleged failure to do so amounts to reversible error. *Id.* at 17. This assignment of error indicates a fundamental misunderstanding of the doctrine of implied primary assumption of risk. There is no support for Gray’s assertion that the Restatement (Second) of Torts §343A provides

an additional duty that would somehow survive implied primary assumption of risk's complete bar to recovery.

In this case, the trial court held that Ida Culver House was not entitled to summary judgment solely based on the premises liability claim. Nonetheless, Ida Culver House was entitled to summary dismissal of all claims against it where the doctrine of implied primary assumption of risk applied as a complete bar to recovery. CP at 196-200. Ida Culver House's duty under the Restatement (Second) of Torts §343 did not preclude summary judgment in the face of implied primary assumption of risk. Similarly, even if the court would have found a duty under section 343A, Gray could not have survived summary judgment because Gray's assumption of risk would have relieved Ida Culver House of its duty. Accordingly, the trial court properly declined to address section 343A.

d. Retirement Communities Do Not Owe an Elevated Duty to Senior Independent Living Tenants.

Under Washington law, independent living retirement communities are not regulated as if they were nursing homes. *See* RCW 18.51.010(3) (defining "nursing home" and recognizing that "[n]othing in this definition shall be construed to include any . . . institution which . . . give[s] only board, room and laundry to persons not in need of medical or nursing treatment or supervision . . ."); WAC 388-110-020 (excluding

from the definition of “assisted living facility” independent senior housing in continuing care retirement communities; defining “independence” as “free from the control of others and being able to assert one’s own will, personality and preferences.”). The purpose of Washington’s laws protecting nursing home residents and vulnerable adults is to regulate the care in these facilities to promote safe treatment. However, nothing contained in Washington statutes or case law expresses any intent to create a “senior living duty” to provide independent living tenants anything more than the reasonable care that is expected and owed to a business invitee.

Ida Culver House provides housing and services to its tenants in exchange for rent which establishes a business relationship. While Ida Culver House maintains a custodial relationship with its nursing home residents, such is not the case for independent living tenants.

Moreover, Gray’s age and mobility did not create a special relationship with Ida Culver House. Gray, by choice, was an independent living tenant able to care for herself and ambulate on her own. She has repeatedly alleged that Ida Culver House was responsible for proactively offering her the van lift before she had the chance to encounter the van’s steps. This allegation, however, misapprehends the duty owed to Gray under the circumstances. Gray, as an independent living tenant, was free to make her own choices, which included entering and exiting the Ida

Culver House vans for outings. The only duty Ida Culver House owed Gray was the duty to keep the premises reasonably safe and to warn of unknown, dangerous conditions on the property – the same duty it owed to any invitee getting on or off one of its passenger vans. *Phillips v. Kaiser Aluminum*, 74 Wn. App. 741, 748, 875 P. 2d 1228 (1994).

Washington law does not – and should not – hold independent living facilities to a higher duty of care than that owed to a business invitee. There is no support for such a heightened standard in any legislative or administrative enactments. Reading such a “senior living duty” into the law where none was intended would amount to making facilities such as Ida Culver House strictly liable for injuries to their senior tenants. With the cost of elder care already rising at an extraordinary rate, rendering independent living facilities the de facto insurers of their tenants would only operate to further increase these costs. Those who will eventually be priced out of adequate elder care will be society’s most vulnerable senior citizens. Because of these inevitable consequences, Gray’s implied “senior living duty” does violence to the letter and spirit of the statutes meant to protect the most defenseless members of the senior population.

e. The Trial Court Properly Declined to Find That a Duty Attached to Ida Culver House Based on the Gratuitous Promises Allegedly Made to Gray's Daughter.

Gray claims that Ida Culver House promised her daughter that it would use the lift to board her, therefore creating an affirmative duty to act. In support of her position, Gray primarily relies on *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975). In that case, those injured by an avalanche alleged that the State had information regarding avalanche danger but failed to take proper action. The court held that one who undertakes to render aid or warn someone in danger must exercise reasonable care in his or her efforts. *Id.* at 299. But *Brown* is inapposite to the case at bar. *Brown* and the cases upon which it relies involve helpless plaintiffs. They are either unaware of impending life-threatening danger or require immediate rescue. Gray simply does not fit into that category of imperiled plaintiffs.

Here, Gray was an independent living tenant entitled to make her own choices. She was not helpless, and Ida Culver House was not tasked with making choices for her. The excursion was particularly voluntary where it involved taking a scenic van ride. She was most certainly not in need of “rescue” as were the other plaintiffs in *Brown* and its cited cases. Notably, *Brown* cited a number of cases involving truly imperiled plaintiffs. *See, e.g., Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wn.2d 423, 437-

39, 100 P.2d 1024 (1940) (defective elevator); *Dudley v. Victor Lynn Lines, Inc.*, 48 N.J. Super. 457, 138 A.2d 53 (1958), *rev'd on other grounds*, 32 N.J. 479, 161 A.2d 479 (1960) (heart attack resulting in death); *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960) (sinking ship resulting in death to all on board); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956) (murder perpetrated by released mental health patient). In other words, this line of cases was never intended to encompass a plaintiff who, voluntarily and knowingly, chose to take the steps rather than ask to use the lift because she preferred not to impose.

Gray also relies on *Roth v. Kay*, 35 Wn. App. 1, 664 P.2d 1299 (1983), *review denied*, 100 Wn.2d 1026, in which the Court of Appeals held that summary judgment was inappropriate where a doctor failed to file workers' compensation paperwork. In that case, a doctor's office promised it would file the paperwork even though, under the statute, it was the worker's responsibility to do so. *Roth* is inapposite to the case at bar. Because the plaintiff was told that the paperwork would be filed by the doctor's office, he was precluded from acting on his own behalf and filing his own paperwork. In this case, Ida Culver House allegedly told Gray's daughter that they would use the lift when loading her mother in the van. This gratuitous promise, however, did not preclude Gray from acting on

her own behalf and requesting the lift. On the contrary, Gray actually created her own peril by choosing to use the steps.

Instead, this case is more analogous to *Webstad v. Stortini*, 83 Wn. App. 857, 924 P.2d 940 (1996), *review denied*, 131 Wn.2d 1016, 936 P.2d 416 (1997). There, the court distinguished *Brown*'s holding that a man did not have a duty to seek help for his suicidal girlfriend who overdosed on pills in front of him. The court noted that the girlfriend's "voluntary willful choice to commit suicide created her peril and need for assistance." *Id.* at 870. For the purposes of the rescue doctrine established by *Brown*, the court recognized that no "special relationship" existed because Stortini did not create or increase the risk of harm to his girlfriend, induce her reliance, or prevent her from seeking assistance from others. The court, therefore, concluded that "Stortini and [his girlfriend] did not have a 'special relationship' giving rise to a duty for Stortini to protect her from herself." *Id.* at 876. Similarly, Gray's voluntary, willful, and knowing choice to climb the steps rather than use the lift created her own peril. The court accordingly acknowledged that *Brown* does not impose a duty where the plaintiff creates her own peril and has the opportunity to ask for assistance from others.

Notably, "protest against the risk and demand for its removal or for protection against it will not necessarily and conclusively prevent [a

plaintiff's] subsequent acceptance of the risk, if he then proceeds voluntarily into a situation which exposes him to it." Restatement (Second) of Torts §496E, cmt. a. Such protest followed by encountering the risk anyway "normally indicates that [the plaintiff] does not stand on his objection, and has in fact consented, although reluctantly, to accept the danger and look for himself." *Id.* The complaints of Gray (or her daughter) cannot overcome her subsequent assumption of risk in the face of known alternatives.

Gray has failed to cite any applicable law regarding promises to render aid to a person who has full knowledge of her circumstances and contractually undertook to make independent choices regarding her own course of action. There is simply no support for Gray's contention that promises allegedly made to her non-party daughter give rise to any affirmative duty to act.

V. CONCLUSION

Gray's actions in October 2010 evinced a desire to relieve Ida Culver House of its duties to her as an invitee. She voluntarily participated in a scenic van trip, knowing that boarding the van was an inherent and necessary part of attending the trip. Despite her knowledge of the danger that the van steps presented her, she declined to wait and ask

for the driver to use the lift. She had several alternative courses of action, including asking to use the lift or declining to participate at all.

Under Washington law, Gray's actions constitute an implied primary assumption of risk that operates as a complete bar to recovery. The trial court properly dismissed all claims against Ida Culver House on summary judgment. This Court should, therefore, affirm the trial court's grant of summary judgment to Ida Culver House.

Respectfully submitted,

DATED this 9 day of March, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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DATED this 9th day of March, 2015.



Sopheary Sanh, Legal Assistant

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