NO. 43024-0-II

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

SHIRLEY BARRET,

Appellant,

LOWE'S HIW, INC., aka LOWE'S, a business entity, and JEFF, aka JOHN MCDOWELL, individually

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge

APPELLANT'S OPENING BRIEF

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ORIGINAL

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A. INTRODUCTION

Shirley Barrett was a tractor-trailer driver. She brought suit against respondents/defendants after she was seriously injured when a Lowe's manager caused loaded boxes to fall on her.

Defendant/Respondent brought a motion for Summary Judgment in the trial court asserting Ms. Barrett's claim was barred under the assumption of risk doctrine. The court granted the defense motion for summary judgment. Plaintiff brought a motion for reconsideration. The trial court denied plaintiff's reconsideration. This appeal followed.

B. ASSIGNMENTS OF ERROR

1. The trial court misapplied the doctrine of assumption of risk.

2. The trial court wrongly granted defendants' motion for summary judgment.

Issues Relating To The Assignment Of Error

1. Did the trial court improperly apply the affirmative defense of implied primary assumption of risk to the facts of this case?

2. Did material disputed facts exist at summary judgment?

3. Did the court err in granting defendants' Motion for Summary Judgment?

C. STATEMENT OF THE CASE

1. *Factual Summary*

Plaintiff Shirley Barrett was a long haul tractor-trailer driver. CP 60-61. In August 2006 Ms. Barrett delivered a semi-trailer of store merchandise from a Lowe's warehouse in Cheyenne, Wyoming to a Lowe's store in Longview, WA. CP 61, 83.

Ms. Barret picked up the trailer in Cheyenne, Wyoming. CP 61. She did not observe the Wyoming-based Lowe's employees loading the trailer. CP 118. The trailer is delivered to the driver as a sealed unit. *Id.*

Lowe's "seals" their trucks at their Wyoming site by placing three numbered metal bands/locks on the outside of the trailer door. CP 61, 119. Ms. Barrett's employer, Interstate Distributing, also has their driver place an additional padlock on the back trailer door. CP 61.

Ms. Barrett drove the trailer from Cheyenne, WY to Longview, WA. CP 61-62. The Lowe's store in Longview, WA was a new store. CP

121. It was the first time plaintiff had delivered to the Longview store. CP 62.

It was Lowe's responsibility to unload the freight at the Longview store. CP 116, 117. Only Lowe's personnel with proper authority at the local delivery site can remove the Lowe's door seals. Defendant Mr. McDowell was lead receiver for Lowe's. CP 136. McDowell cut the Lowe's seals/locks. CP 121.

Prior to unloading, the trailer must be backed down a specified truck bay and be flush with the loading dock platform. There is a downward slope in the docking bay. CP 62, 122.

After the rear trailer door seals/lock were removed by McDowell, Ms. Barrett began to back the trailer down the sloped bay to the dock platform. Prior to final backing up against the loading dock platform, the trailer doors must be opened and latched to the sides of the trailer. CP 123. During backing Ms. Barrett stopped the trailer five to ten feet from the loading dock platform. CP 62, 123. It was a little further up the slope than she would typically stop in order to latch the open doors to the side of the trailer. *Id.* A cement wall adjacent to the bay prevented latching the doors to the side of the trailer if the trailer was too close to the platform. *Id.*

Ms. Barrett started to unlatch and open the rear trailer doors. After opening the right rear door, she felt resistance against the left door that felt like weight against the door. CP 62. She surmised the trailer's contents had shifted during the trip. CP 124. Ms. Barrett closed and re-latched both doors. CP 124. She went for help.

Prior to opening the trailer's doors, Ms. Barrett had also removed Interstate's padlock off the back doors. CP 130. She placed the padlock on the truck "bumper". CP 130. The bumper is a piece of angle iron that runs across the back of the trailer below the level of the truck bed. *Id.*

Mr. McDowell came back outside in response to Barrett's request for help. He jumped down into the truck bay, and went to the back of the trailer. CP 89. Ms. Barrett was standing back a good five feet from McDowell so she would not be in the way. CP 89, 125. Mr. McDowell first opened the right side door and some light boxes fell out the right side. CP 126-127.

Mr. McDowell then opened the left door. Ms. Barrett saw some large boxes behind the left door being held back by a type of nylon strapping. CP 63. After setting the smaller boxes off to the right, Mr.

McDowell then climbed up onto the end of the bed of the trailer. CP 127, 137. The bed of the trailer sits several feet off the ground.

Mr. McDowell then began to cut the strapping tape restraining the boxes with a box cutter type knife. While Mr. McDowell was attempting to cut the strap, Ms. Barrett asked him "Are you sure you want to do that?" CP 92 . Mr. McDowell assured Ms. Barrett that "It will be okay". CP 92, 132.

Ms. Barrett stood back out of the way while Mr. McDowell attempted to cut the strapping. The cutting was very, very slow. CP 128. After about ten minutes of cutting Mr. McDowell addressed Ms. Barrett. CP 90, 128. She could not hear him so she moved closer to him. CP 133. When she was close enough to hear him, Mr. McDowell asked her if she had a knife. Ms. Barrett responded to McDowell she was not allowed to have a knife. CP 128.

Ms. Barrett then backed up from that conversation. While backing up from that conversation, in the same direction from where she had come, she noticed Interstate's padlock on the ground. CP 90, 91. The lock had, apparently, fallen off the bumper. Ms. Barrett quickly bent down to pick

up the lock. CP 129. Before doing so she looked up to make sure that Mr. McDowell had not cut through the strapping. CP 90, 128-29.

In the second or so it took Ms. Barrett to pick up the lock Mr. McDowell yelled, "look out". CP 92, 129. Ms. Barrett did not have time to get out of the way and some heavy boxes held by the strapping cord fell on top of her, severely injuring her.

After being hit by the falling freight Mr. McDowell remarked that the Lowe's warehouse in Wyoming was noted for throwing freight into the trailer and that several other drivers had been injured due to falling freight. CP 64.

2. Procedural History

On November 18, 2011 the parties argued defendants' summary judgment motion. On the record at oral argument the court reasoned that the assumption of risk concept requires a full subjective understanding of the presence and nature of the specific risk. 11/18/11 RP at 16. The court further reasoned that focus of the defense is on the knowledge and mindset of the plaintiff and didn't see any material issues of fact. *Id.*, at 17. The court granted defendants' summary judgment motion.

Plaintiff moved for reconsideration. The court entered a written Order on Motion for Reconsideration denying reconsideration. CP 192. The court order provided, in part, that "While primary assumption of risk has been severely limited in its application in Washington, it does apply to this situation." CP 193.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN HOLDING, AS A MATTER OF LAW, ASSUMPTION OF RISK (WHICH BARS ANY RECOVERY) APPLIED IN THIS CASE.

Summary judgments are questions of law, which are subject to de novo review. *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). The appellate court engages in the same inquiry as the trial court. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002).

Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56. The facts and reasonable inferences therefrom are construed most favorably to the non-moving party. *Korslund v. Dyncorp Tri-Cities Servs. Inc.,* 156 Wn.2d 168, 177, 125 P.3d 119 (2005).

In the State of Washington the general rubric `assumption of risk' applies to a cluster of different concepts. Four varieties of assumption of risk operate in Washington: (1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable assumption of risk. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010)(citations omitted).

Express and implied primary assumption of risk, types one and two, are affirmative defenses that bar any plaintiff recovery. *See, Scott v. Pacific West Mt. Resort,* 119 Wn.2d 484, 497-98 ,834 P.2d 6 (1992); *Shorter v. Drury,* 103 Wn.2d 645, 695 P.2d 116 (1985).

Implied reasonable and unreasonable assumption of risk, types three and four, are nothing but alternative names for contributory negligence. *Scott v. Pacific W. Mt. Resort*, 119 Wn.2d at 497.

Express and implied primary assumption of risk

Express assumption of risk is a form of consent or waiver. It is not a form of negligence. *Shorter v. Drury*, 103 Wn.2d 645, 656, 695 P.2d 116, *cert. denied*, 474 U.S. 827 (1985). With express assumption of risk the plaintiff consents by an affirmatively demonstrated, and presumably

bargained upon, express agreement. *Kirk v. WSU*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987).

The second variety, implied primary assumption of risk and the type at issue in this case, also is based on consent but without "the additional ceremonial and evidentiary weight of an express agreement". *Kirk,* at 453. In cases of implied primary assumption of risk, the plaintiff engages in conduct from which it is implied that plaintiff consents to relieve the defendant of a duty the defendant would otherwise have." *Erie v. White*, 92 Wn. App. 297, 966 P.2d 342 *review denied*, 137 Wn.2d 1022 (1999).

Express assumption of risk and implied primary assumption of risk raise the same question: Did the plaintiff consent, before the accident or injury, to the negation of a duty that the defendant would otherwise have owed to the plaintiff? If yes, and the defendant has no duty, there can be no breach and hence no negligence. *Erie v. White*, at 302. The classic example of implied primary assumption of risk applies in sports-related cases. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 144, 875 P.2d 621 (1994).

Implied reasonable and unreasonable assumption of risk

In contrast, implied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of a risk that has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. *Leyendecker v. Cousins*, 53 Wn. App. 769, 774, 770 P.2d 675 (1989) *review denied* 113 Wn.2d 1018 (1989). In such cases plaintiff's conduct is not truly consensual, but is a form of contributory negligence in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk. *Leyendecker,* 53 Wn. App. at 777.

Implied *unreasonable* assumption of risk focuses on the objective unreasonableness of the plaintiff's conduct in assuming the risk and is subsumed under contributory negligence. *Kirk,* 109 Wn.2d at 454. As a type of contributory negligence this form of assumption of risk has no independent significance in Washington and merely acts as a damage reducing factor. *Ridge v. Kladnick*, 42 Wn. App. 785, 787, 713 P.2d 1131, *review denied,* 106 Wn.2d 1011 (1986).

Implied *reasonable* assumption of risk contemplates a situation in which the plaintiff assumed the risk but acted reasonably in doing so. It

appears the Legislature does not consider reasonable assumption of risk as a damage reducing factor which accords with the view of some commentators that if a person acts reasonably, that person's conduct is, ipso facto, not negligent. *Leyndecker*, 53 Wn. App. at 774, Fn. 2; *See,* RCW 4.22.015 (definition of fault).[1]

a. Voluntarily encountering a risk vs. relieving or negating the duty of another.

The most frequent misapplication of assumption of risk occurs in the area of implied assumption of risk.[2] *Prosser and Keeton on Torts*, 5th Ed., Sec. 68, p. 484-85. Not every encountering of a known specific risk constitutes an application of the doctrine of implied primary assumption of

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[1] The definition of "fault" includes unreasonable assumption of risk but does not mention "reasonable" assumption of risk. RCW 4.22.015.

[2] At least two things are commonly said about the doctrine of assumption of risk. The first is that it is a frequent cause of confusion. *See, e.g., Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 64, 68, 63 S.Ct. 444 (1943)(Frankfurter, J., concurring) ("The phrase `assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas."). The second thing that is said of assumption of risk is that it is not well liked, particularly in recent times. *See, e.g., Blackburn v. Dorta*, 348 So.2d 287, 289 (Fla. 1977) (Blackburn) ("assumption of risk is not a favored defense") cited in *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 505 (8th Cir. 1988).

risk which bars recovery. There is a difference between knowingly encountering a risk and knowingly encountering a risk that relieves a duty of care another would normally owe.

As Prosser explains:

> There must be some manifestation of consent to relieve the defendant from the obligation of reasonable conduct. It is not every deliberate encountering of a known danger which is reasonably to be interpreted as evidence of such consent. The jaywalker who dashes into the street in the middle of the block, in the path of a stream of cars driven in excess of the speed limit, certainly does not manifest consent that they shall thereafter use no care and run him down. On the contrary, he is insisting that once they see him they shall take reasonable precautions for his safety; and while this may certainly be contributory negligence, it is not necessarily assumption of risk.
>
> But even though his conduct may appear to indicate consent, the risk will not be taken to be assumed if it appears from his words or from the facts of the situation, that he does not in fact consent to relieve the defendant of the obligation to protect him.

Prosser, supra, at 490.

The analysis by Prosser and Keeton is consistent with Washington's adoption of comparative negligence. The statutory scheme abrogated the assumption of risk defense with regard to that form of assumption of risk where the plaintiff's conduct is contributorily negligent. *Shorter v. Drury*, 103 Wn.2d 645, 654-55,

695 P.2d 116, *cert. denied*, 474 U.S. 827 (1985); *Leyendecker v. Cousins*, 53 Wn. App. at 774.

In Washington it is recognized that "[I]n most situations, a plaintiff who has voluntarily encountered a known specific risk has, at worst, merely failed to use ordinary care for his or her own safety, and an instruction on contributory negligence is all that is necessary and appropriate." *Dorr v. Big Creek Wood Products*, 84 Wn. App. 420, 426, 927 P.2d 1148 (1996).

The doctrine of implied primary assumption of risk exists but occupies a "narrow niche" and must be "boxed in and carefully watched" because it has an expansive tendency to reintroduce the complete bar to recovery into territory now staked out by statute as the domain of comparative negligence. *Id.* at 425-426; *see also, Lascheid v. City of Kennewick*, 137 Wn. App. 633, 641, 154 P.3d 307 (2007)(doctrine of assumption of risk is narrowly construed because it is a complete bar to recovery).

In Washington case law consent relieving another of a duty typically arises from 1) voluntary participation in an activity which carries some inherent amount of risk, 2) an informed willingness to

assume particularized risks, and 3) antecedent or circumstances which show antecedent consent or which demonstrate a willingness to relieve another of a duty, often in advance of engaging in the particular activity. *See, Wirtz v. Gillogly*, 152 Wn. App. 1, 8-9, 216 P.3d 416 (2009)(active participation in tree felling project where plaintiff participated using a ratchet); *Erie v. White*, 92 Wn. App. 297, 966 P.2d 342 *review denied*, 137 Wn.2d 1022 (1999)(tree cutter consented to risk when agreeing to use wrong home-owner supplied equipment); *Ridge v. Kladnick*, 42 Wn. App. 785, 713 P.2d 1131, *review denied,* 106 Wn.2d 1011 (1986)(plaintiff assumed the risk of injury in roller skating game called "shoot-the-duck/wipe-out" where the rules were being followed); *Foster v. Carter,* 49 Wn. App. 340, 742 P.2d 1257 (1987)(boys playing bb gun game and one boy shot in eye); *Taylor v. Baseball Club*, 132 Wn. App. 32, 130 P.3d 835 (2006)(baseball fan watching pitching warm-up hit by errant throw); *Shorter v. Drury*, 103 Wn.2d 645, 656, 695 P.2d 116, *cert. denied*, 474 U.S. 827 (1985)(express assumption of risk in a medical release).

Facts falling short of a manifestation of consent to relieve or negate a duty of another constitute, at most, contributory negligence--a damage-reducing consideration. In such cases, plaintiff typically encounters a known risk, unwisely or not, that has already been created by the negligence of a defendant.

In *Leyendecker v. Cousins*, for example, plaintiff logger had walked into the turning tail rotor of a helicopter that was present as part of a "hot refueling" operation. Leyender had emerged from the woods, approached the helicopter from behind, observed the spinning tail rotor, appreciated the risk posed thereby, walked past the rotor and then, for whatever reason, turned back around and walked back into the spinning rotor. *Leyendecker*, at 775. The trial court found that Leyendecker's conduct constituted "primary" assumption of risk, thus barring his claim and granted defendants' motion for summary judgment. Division Two found the trial court erred in granting defendants' motion for summary judgment. From the facts it was evident plaintiff appreciated the risk and voluntarily walked into the spinning helicopter blade. In reversing the trial court the appellate court found the record devoid

of any evidence tending to prove antecedent consent to relieve the defendants of any duty to plaintiff. *Id.*

In *Alston v. Bythe* 88 Wn. App. 26, 943 P.2d 692 (1997) plaintiff crossed a street, perhaps waved on by a stopped vehicle, and was hit by a vehicle in the adjacent lane. The appellate court ruled the trial court erred by giving an assumption of risk instruction. The instruction provided that defendants had a defense if plaintiff knew of a specific risk associated with crossing the street, understood that risk, and voluntarily chose to cross anyway. The court reasoned that the "the evidence showed nothing more than arguable contributory negligence" and the instruction contravened Washington's comparative negligence scheme. *Id.* at 35.

In *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994) the court held that, as a matter of law, a nearly fifteen year old boy with a school group who fell from a rock outcropping after veering off the main pathway and voluntarily climbing the rocks simply did not involve the application of implied express assumption of risk. *See also,*

Yurkovich v. Rose, 68 Wn. App. 643, 847 P.2d 925 (1993) *review denied*, 121 Wn.2d 1029 (1993)(no error in refusing to give defendants' proposed assumption of risk jury instruction where student school bus rider who crossed road was hit and killed).

b. There are no facts manifesting consent or waiver by Ms. Barrett that relieved defendants of their duty of care or negated their duty of care.

Ms. Barrett was a business invitee and was owed a duty of care.[3] Mr. McDowell was not exercising due care when he cut strapping holding back boxes which could easily fall, and especially when the trailer was not even backed up to the dock.

Ms. Barrett was trying to be careful. She initially stood back while McDowell attempted to cut the strapping. From experience, she was aware of a potential risk of falling freight. Stepping forward in no way relieved Mr. McDowell of his duty of care. Plaintiff only stepped forward, wisely or not, in response to a question asked by Mr. McDowell which she could not hear.

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[3] In this case it has been uncontested that Barrett was a business invitee and was owed a duty of reasonable care. *See*, *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

Stepping forward actually heightened McDowell's duty of care toward Ms. Barrett because she had come that much closer to him. After answering McDowell's question, Mr. Barrett stepped back. In the process of stepping back, she bent to pick up her fallen lock. She was still exercising caution. Before bending down she looked up to see how far McDowell had gotten in his cutting. CP 90, 128-29. McDowell was well aware of Barrett's proximity because he yelled "look out" . CP 92, 129.

Barrett's stepping forward under the facts presented here simply can not reasonably be construed as relieving McDowell of his duty of care. Like *Leyendecker* there are no facts that imply antecedent consent to relieve McDowell of a duty of care.

In the present case defendants argued, and the trial court accepted the argument, that assumption of risk applied because plaintiff 1) knew of a specific risk, 2) understood that risk, and 3) voluntarily chose to encounter it. CP 33-35; RP 16-17.

This very same argument was made in *Alston,* and was rejected. In *Alston* plaintiff pedestrian was crossing the street. Defendants argued that they had a defense and Alston could not recover if Alston 1) knew of a specific risk with crossing the street, 2) understood that risk, and 3)

voluntarily chose to cross anyway. *Alston,* at 35. The court ruled that "[G]iven that the evidence showed nothing more than arguable contributory negligence, this contravened Washington's comparative negligence scheme". *Id.*

This very same argument was advanced at summary judgment in the present case and relied upon by the trial court. It was rejected in *Alston* and should be rejected here.

It is also significant in the present case that neither defendants nor the trial court addressed the need to conclude that plaintiff's action consented to relieve defendant of, or waived, defendants' duty of care to the plaintiff. The court focused solely on Ms. Barrett's subjective awareness of the risk, without any reference the central legal issue of how or why those facts constituted consent or waiver sufficient to divest Mr. McDowell of his duty of care--the very heart of the inquiry whether implied assumption of risk applies. It betrays a lack of understanding about the application of the assumption of risk defense.

Barrett's arguable negligence in failing to be careful for herself did not mean she willingly consented to freeing McDowell from his need to be careful toward her.

In addition, the entire factual setting of the present case, like *Leyendecker*, evidences no facts that plaintiff sought to relieve defendants of a duty of care. Plaintiff never consented to unload the truck or assist with unloading in any way. She never consented to cut the strapping, never endorsed the idea of cutting the strapping, and never participated in the cutting of the strapping. She never participated in, or intended to participate in, the unloading of the trailer. She did not even attempt to open the doors on her own. Plaintiff sought out help when she felt resistance against the back doors.

In a factually similar case, a Georgia appellate court in *Little Rapids v. McCamy,* 218 Ga. App. 111, 114, 460 S.E. 2d 800 (1995) held that boxes which fell on a driver who had agreed to help unload a trailer full of merchandise did not support defendant's motion for directed verdict based on assumption of risk.

In *McCamy* the plaintiff trucker elected to help upload a trailer of merchandise. Defendant argued that plaintiff knew there were loose boxes which could fall on him, yet walked within a distance so close that he was struck by the falling boxes. Plaintiff knew of the specific harm posed by loose boxes set on top of otherwise shrink-wrapped pallets. The pallets

had been loaded up to three inches of the trailer's ceiling. Plaintiff himself had told other unloaders to be careful because he "thought it was an unsafe load". *McCamy*, at 112. Plaintiff was inside the trailer and close enough to the pallet in question so that the top most boxes fell on his head and shoulders when the hand-operated forklift hit the lip of the trailer and dislodged the unrestrained boxes. "Plaintiff's proximity to this foreseeable hazard may be evidence of contributory or comparative negligence on the part of plaintiff, but it is not an assumption of risk." *McCamy* at 114.

McCamy is instructive because it recognized that knowledge of a specific risk in the relevant context and proximity thereto, did not constitute an assumption of risk even where the driver elected to participate in unloading the truck.

Under the logic employed by the trial court in the instant case, plaintiff McCamy would have been barred from recovery.

In the present case, the trial court made the classic mistake of over application that Prosser and Washington courts warn against. The court focused only on the knowledge of the specific risk foreseen by plaintiff and not on the more important question whether defendant was relieved of a duty of care.

2. THE EXISTENCE OF MATERIAL FACTS MADE SUMMARY JUDGMENT INAPPROPRIATE.

Defendants have a strict burden to show the absence of material facts at summary judgment. *Hash v. Children's Orthopedic Hospital*, 110 Wn.2d 912, 915, 757 P.2d 907 (1988). *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992). Here, the trial court erred in concluding there were no material facts by focusing solely on plaintiff's subjective awareness of risk.

In the present case there was a dispute whether there was any communication between Barrett and McDowell. Defendants deny there was any verbal interaction between Mr. McDowell and Ms. Barrett. In answers to interrogatories defendants claim "She (Ms. Barrett) did not warn Mr. McDowell that she had stepped forward". CP138. Ms. Barrett contends, as noted, she and McDowell specifically communicated about whether she had a knife. CP 128. In addition, McDowell yelled "look out" when the boxes started to fall. CP 92, 129.

A fact is "material" when the outcome of the litigation depends on it. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). The disputed fact of communication goes to whether McDowell was alerted to Barrett's presence more proximate to the trailer, and ultimately goes to issues of defendant's duties and consent.

Consent lies at the heart of both implied primary and express assumption of risk and it is important to define the scope of consent. This is done by identifying the duties the defendant would have in the absence of the doctrine of assumption of risk and segregating those into a) those which the plaintiff consented to negate, and b) those which the defendant retained. *Alston v. Blythe,* 88 Wn. App. at 34. Consent and the scope of consent are issues of fact for the jury, except when the evidence is such that reasonable minds could not differ. *Id.*; *Dorr*, at 431.

Defendants did not meet their burden to show the absence of disputed material facts. The disputed facts relating to communication relate to the material question of consent, which is integral to the question of what duties the plaintiff consented to negate and the defendant retained. Under the facts, reasonable

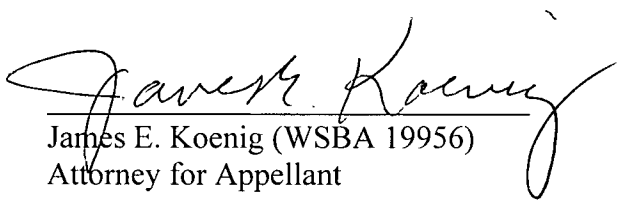
minds could differ on what facts occurred, and the legal import of found facts. The trial court erred in concluding there were no disputed material facts, and no reasonable minds could differ on the legal effect of the facts.

E. CONCLUSION

The trial court erred in granting defendant's Motion for Summary Judgment. For the reasons stated, this court should reverse the decision of the trial court granting summary judgment and remand the matter to the lower court for continued proceedings.

DATED this 14th day of June, 2012.

Respectfully submitted:



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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

SHIRLEY M. BARRET Appellant vs. LOWE'S HIW, INC., aka LOWE'S, a business entity, and JEFF, aka JOHN MCDOWELL, individually. Respondent.	COURT OF APPLEALS NO. 43024-0-II AFFIDAVIT OF SERVICE

I hereby declare under the penalty under the laws of the State of Washington that I have served a true and correct copy of the Plaintiff's Opening Brief of Appellant upon the individual(s) listed by the following means:

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