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Court of Appeals
Division I
State of Washington

NO. 72715-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

REPLY BRIEF OF APPELLANTS

Jeff B. Crollard, WSBA No. 15561
CROLLARD LAW OFFICE, PLLC
1904 Third Avenue, Suite 1030
Seattle, WA 98101-1170
Phone: (206) 623-3333
Fax: (206) 623-3838
Email: jbc@crollardlaw.com
Attorney for Appellants

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I. INTRODUCTION

Ida Culver House Broadview serves the elderly and has duties it wants to ignore, but cannot, as its failure to take measures to protect Marjorie Gray increased the risk of foreseeable harm. Mrs. Gray fell on ICHB's bus steps three times. Genuine issues of material fact exist over whether her decision to use the steps was a voluntary choice, making summary judgment and implied primary assumption of risk inappropriate.

II. REPLY TO COUNTER-STATEMENT OF THE CASE

In its Counter-Statement of the Case, Ida Culver House Broadview ("ICHB") focuses on 84 year old Marjorie Gray's alleged "independence" and doesn't mention ICHB's duties towards her. Nothing in ICHB's Residency Agreement required Mrs. Gray to be able to ascend or descend stairs or steps without staff assistance. CP 46, ¶ 8; CP 149, ¶ 3. Given her prior falls on the bus steps, her need to use a walker because of poor balance, CP 148, ¶3, and Nurse Kramer's promises that the staff would use the lift when boarding Mrs. Gray, ICHB was on notice that the steps were risky for Mrs. Gray, and that a lift or other assistance was needed.

ICHB characterizes itself as a "retirement community" and Mrs. Gray as a retiree, someone no longer wanting the burden of maintaining a home. Response at 2-3. ICHB is far more than just that. As a Continuing Care Retirement Center it is in the business of providing a wide range of

housing and services to the elderly and disabled. CP 59-62, 250. ICHB knows that residents such as Mrs. Gray will likely have increasing needs. Joanne Kramer, ICHB's Wellness Clinic nurse, said ICHB monitors the residents to determine when it is no longer safe to remain on independent living status. CP 74-75. ICHB knows its clientele include a number of elderly or disabled people with mobility, balance or strength problems who would be at an unreasonable risk of harm if they boarded via the steps of the bus. That is why one of ICHB's buses has a flat, no-step entry, and the other has a lift for wheelchair users and standing residents, such as Mrs. Gray. Response at 3, fn. 1.

The court below ruled that Mrs. Gray's choice to climb the bus steps was "voluntary" because Mrs. Gray knew the steps and "had other options available to her (the lift, a request for assistance, or decline to participate)." CP 199:25-26. Response at 5. For a choice to be *voluntary*, the plaintiff must choose the risk "despite knowing of a reasonable alternative course of action." *Erie v. White*, 92 Wn.App 297, 304, 966 P.2d 342 (1998). There is no factual basis in the record to support the court's conclusion that "a request for assistance" was an option reasonably available to Mrs. Gray. Rarely did Paula Gray see more than one ICHB employee handling the boarding of *all* residents. CP 150, ¶8. Nurse Kramer confirmed that ICHB used just 1 aide to board the residents. CP

68:10 to 69:7. When the driver was busy at the lift, ICHB did *not* provide other staff assistance or spotters at the steps. CP 150, ¶8. Requesting assistance wasn't an option that existed for Mrs. Gray, so it wasn't a "reasonable alternative course of action."

When Roseann was the driver, the lift also wasn't a "reasonable alternative course of action." The court's decision is contradictory on this point. On the one hand, the court found there was evidence that Roseann "acted in a brusque, dismissive manner with ICHB residents," and it would have been difficult for Mrs. Gray to ask for the lift, *if not offered to her*. CP 198:21-23. The Court found that the second and third prongs of Restatement (Second) of Torts § 343 were met, namely, that ICHB should have expected Mrs. Gray would *not protect herself* against the danger by asking for the lift; and ICHB failed to exercise care to protect Mrs. Gray from the danger of a fall on the bus steps. CP 198:25 – 199:2. By the court's analysis, that means ICHB should have *offered* Mrs. Gray the lift.

On the other hand, the court held that Mrs. Gray's choice to climb the bus steps was knowing and *voluntary*, because she knew the risks of the stairs, and "had other options available to her"—including the lift, and to request assistance. CP 199:25-26. The court doesn't reconcile its holding that Mrs. Gray's actions were voluntary with its first conclusion that the evidence showed Mrs. Gray would have been too intimidated (the

court says “uncomfortable”) to ask for the lift when Roseann was the driver, and that ICHB should have taken care to protect Mrs. Gray.

ICHB and the court base their conclusions on Mrs. Gray’s one page statement written in October 2011. ICHB quotes the statement as though Mrs. Gray was writing specifically about the October 27, 2010 fall. Response at 1, 3. That is not the case. The statement does not contain enough information about any specific fall to conclude that it shows Mrs. Gray voluntarily choose to climb the bus steps on October 27, 2010. Mrs. Gray’s statement does NOT say, for example, whether Roseann offered her the lift, or gave her a reasonable opportunity to ask for the lift, or if she offered other assistance. It is highly unlikely that any of those occurred. ICHB does not even attempt to contravene Appellants’ description of Roseann as brusque and rushed. CP 152, ¶14.

ICHB wrongly asserts “It is undisputed that when she [Mrs. Gray] asked for the lift, it was offered to her.” Response at 4. This *is* disputed. Mrs. Gray’s statement says: “Many times the driver would not offer the lift and I would have to ask, which made me feel like I was imposing.” CP 54. Her sentence does *not* say the drivers always offered or used the lift when she asked. That is ICHB’s interpretation based on inferences drawn in the light most favorable to itself. There is a different reasonable inference, favorable to Appellants that sometimes the drivers didn’t agree

to use the lift. There is something underlying Mrs. Gray's statement that she felt like she was "imposing" when she asked for the lift. Probably some drivers—Roseann and a few others—were *not* accommodating. Paula Gray said that typically 2 or 3 residents were boarded via the lift, but it varied by driver, and "Rosanne in particular seemed always in a rush and would load only 1 or at most 2 residents via the lift." CP 150, ¶9. Paula's observations of Roseann were not challenged by ICHB. And since Mrs. Gray wrote: "Every time I have been offered the lift, I have taken it" CP 54, it is safe to conclude Roseann did NOT offer the lift to her on October 27, 2010.

Paula Gray explained that ICHB's provision of just one employee for the outings limited residents' choice when boarding. It was worse with Roseann. ICHB did not even attempt to rebut these observations by Paula:

Loading the residents via the lift clearly was a time consuming process, and I have seen Roseann's exasperation when she had to use the lift. Ida Culver set up the situation where by providing only one employee to perform all the tasks, it obviously was a bother to the driver to ask him or her to do something they didn't plan to do. The residents didn't really have a choice with some drivers, particularly Roseann. I have seen Roseann motion with her arms to the group of gathered residents and point and tell them to "line up" at the bus's front entry. They obey. I've even seen Roseann push and lift my father—who can weight bear but not use his right arm and leg—up the steep steps of the bus, rather than keep him in his wheelchair and use the lift. When I questioned her about it, she said "he's fine" and continued with what she was doing. Roseann is a very intimidating person. CP 157, ¶29.

Note that Roseann continued to push and lift Paula’s father up the steps rather than board him using the lift and his wheelchair, as Paula in effect was asking Roseann to do. Paula backed off because “Roseann is a very intimidating person.” A reasonable inference, given the inadequate staffing, and Roseann’s demeanor, is that Roseann would have been just as dismissive of a request by Mrs. Gray to use the lift, and that Mrs. Gray would feel intimidated by Roseann. Lacking a “reasonable alternative course of action” on October 27, 2010, Mrs. Gray’s decision to use the steps that day cannot be said to have been a voluntary choice.¹

III. LEGAL ARGUMENT

A. The Restatement (Second) of Torts § 343 and § 343A Created Protective Duties for ICHB that Mrs. Gray Did Not Waive.

ICHB claims that Mrs. Gray asserts the Restatement (Second) of Torts § 343A creates an additional duty that “would somehow survive implied primary assumption of risk’s complete bar on recovery.” Response at 22-23. That is not Mrs. Gray’s position. Appellants realize that IF implied primary assumption of risk does apply, then it would be a

¹ The court below also said that Mrs. Gray had the option to “decline to participate” in the scenic outings. CP 199:25. These outings were one of the few activities at ICBH that Mrs. Gray could still share with her husband of 60 years, Paul Gray. It gave them great pleasure. CP 148, ¶ 4. This would not be a reasonable demand of Mrs. Gray, nor is it how the modern cases have interpreted these situations. *See* Appellants’ Opening Brief at 39. Moreover, such an outcome is unnecessary. The bus had a safe alternate method for boarding Mrs. Gray—the lift, which ICHB had promised to use.

complete bar to recovery. Mrs. Gray's position is that the doctrine of implied primary assumption of risk does *not apply* in this case for two reasons: (1) Mrs. Gray did **not** consent to relieving ICHB of its duties to her regarding the risk created by the steep steps on ICHB's bus; and (2) her decision to use the steps that October 27th was **not** a voluntary choice.

In *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 496, 834 P.2d 6 (1992), the Washington Supreme Court addressed the inter-relationship between assumption of risk and a landowner's duties:

Implied primary assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks. It is important to carefully define the scope of the assumption, i.e., what risks were impliedly assumed and which remain as a potential basis for liability.

The Court explained this further in its discussion of *Kirk v. WSU*, 109 Wash.2d 448, 746 P.2d 285 (1987), stating in *Scott, id.* at 498:

Although the plaintiff in *Kirk* did assume the risks inherent in the sport of cheerleading, she did not assume the risks caused by the university's negligent provision of dangerous facilities or improper instruction or supervision. Those were not risks "inherent" in the sport. Hence, in a primary sense, she did not "assume the risk" and relieve defendants of those duties.

The *Scott* Court, *id.* at 500, indicated where the analysis must begin:

To determine whether summary judgment was properly granted to the ski resort operator, it is essential to define what duties the ski resort owed to Justin and what risks were assumed by Justin.

In the present case, the analysis begins with a determination of ICHB's duties toward Mrs. Gray, and next examines which, if any, of

those duties were later assumed by Mrs. Gray. Appellants started with the Restatement (Second) of Torts § 343 and §343A, *see* Opening Brief at 15 to 25, as the Court did in *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 138-39, 875 P.2d 621 (1994).

Mrs. Gray's argument can be summarized as follows:

1. Restatement (Second) of Torts § 343.

Marjorie Gray had two prior injury falls on the steps of one of ICHB's buses, a heart attack in September 2010, and needed to ambulate with a walker because of poor balance. ICHB was on notice of these facts and had promised to use the lift. Prior to her October 2010 fall, ICHB knew its bus steps posed an unreasonable risk of harm *to Mrs. Gray*. ICHB was also on notice that *if* the bus's lift was not offered to her, ICHB could anticipate that Mrs. Gray would "fail to protect" herself and try to use the steps because she would want to go on the trip with her husband.

Because the steps posed an unreasonable risk of harm to Ms. Gray, and she could be expected to not protect herself, Restatement (Second) of Torts § 343 creates a duty of reasonable care to protect her from the risk of falling on the bus steps. Its duty was to provide "safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances." Restatement § 343, comment b; *Tincani, id.* at 139.

ICHB also knew that Mrs. Gray would use the lift *if offered* to her. CP 54, 96, 157. Warning Mrs. Gray to *not* use the steps, and offering her the lift or other help, were the minimum duties for ICHB under §343.

Nothing in the record shows that Mrs. Gray consented to relieve ICHB of its duty to warn her or to offer her the lift or assistance. Nor had Paula Gray consented to relieve ICHB of these duties; she was trying to get ICHB to *fulfill* its promises to use the lift. CP 151, ¶10; CP 152, ¶16; CP 155. ¶25. Mrs. Gray's statement shows that she *wanted* the ICHB drivers to offer her the lift, because otherwise, it made her feel like she was imposing. CP 54. Alice Semingson's expert testimony explains how requesting the lift would be very difficult for a woman of Mrs. Gray's age, living in a facility setting, with a harried, brusque employee. CP 136-37, ¶14, 15. That is not stereotyping; it is relevant to a determination of the "safeguards or warnings as may be reasonably necessary for the invitee's protection under the circumstances."

2. Restatement (Second) of Torts § 343A.

Restatement (Second) of Torts § 343A(1) provides that:

(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.

Tincani, id. at 139. In *Degel v. Majestic Mobile Manor, Inc.* 129 Wn.2d 43, 50, 914 P.2d 728 (1996), this is described as an *additional duty* “if the landlord should have anticipated the harm despite the tenant's knowledge of the danger or despite the obvious nature of the danger.”

In *Tincani*, the trial court had not addressed the Zoo’s duty under §343A. ICHB claims that §343A is irrelevant when there’s a finding of implied primary assumption of risk, Response at 28, but the Court in *Tincani* held that Restatement (Second) of Torts §343A “is the appropriate standard for duties to invitees for known or obvious dangers.” *Id.* at 139. Under the §343A analysis, the Zoo’s duty to its young visitors becomes more clear. The Zoo extended an invitation to its young visitors to explore the grounds, but without adequate warnings on side trails that led to dangerous conditions, and without enforcing its adult supervision policy. *Tincani*, a 15 year old boy, knowingly and voluntarily assumed a risk of harm when he descended the cliff for the second time. The Zoo didn’t create the cliff, but by failing to take these protective steps, the Zoo increased the foreseeable risk that its patrons, especially young ones, would expose themselves to dangerous conditions. The Zoo should have anticipated harm from the cliff despite its obvious dangerousness. *Id.* at 141, 144-45. *Tincani*’s assumption of risk or negligence “did not relieve the Zoo of those duties it owed to him.” *Id.* at 145.

Mrs. Gray's case has pertinent parallels with *Tincani*. In her case, the steps on the bus were obvious, and for her they were risky. She knew about the risks, as Tincani knew. ICHB knew that Mrs. Gray had fallen before on the steps and was likely not to protect herself if she wasn't offered the lift, or other assistance, or at least warned. Likewise, the Zoo should have taken affirmative steps to protect its young patrons. The Zoo extended invitations to young patrons; ICHB markets itself to an elderly clientele. Both groups are generally less able to protect themselves from dangers than are others, which impacts the duty of each entity under Restatement §343 and §343A.

The Zoo needed to enforce its chaperone policy; ICHB needed to adopt and enforce a safety communication policy. Whatever the protective measures were, they needed to be communicated to the staff. Nurse Kramer testified that if she made a safety recommendation to the aides, she would "hope they take that under consideration." She would not follow-up with the supervisor of the bus drivers, and ICHB had no process to inform her whether her recommendations were followed. CP 86-87. Alice Semingson, RNC, Appellants' expert, who has managed facilities like ICHB for decades, found Ms. Kramer and ICHB's approach well below the standards of a reasonable assisted living/independent living facility catering to the elderly. CP 135, ¶ 11; CP 132-33, ¶ 8.

Mrs. Gray did not assume the risks caused by ICHB's improper training or supervision of its staff, the insufficient staffing on bus outings, or its poor communication systems. She did not relieve ICHB of its duties under Restatement § 343 and § 343A. Poor management is not an "inherent" risk of scenic bus outings. In *Kirk v. WSU*, the cheerleader assumed the risks inherent in the sport of cheerleading, "but she did not assume the risks caused by the university's negligent provision of dangerous facilities or *improper instruction or supervision*. Those were not risks 'inherent' in the sport." *Scott, id.* at 498. (italics added).

Nurse Kramer promised Paula Gray the staff would use the lift, and ICHB used the lift while Paula was watching, giving Paula a false sense of security. This "increased the foreseeable risk" to Mrs. Gray, because Paula otherwise would have taken independent action to protect her mother. The finding by the court below that "there [were] no other risks," CP 199:20, is wrong. ICHB increased the risk of injury by not taking protective measures for Mrs. Gray when it knew she was at risk and likely would not protect herself, and its promises to Paula kept Mrs. Gray from receiving help from Paula she otherwise would have gotten.²

² ICHB also raises the red herring that Mrs. Gray is asking the Court to establish a "senior living duty" that would amount to imposing strict liability on retirement communities, leading to exorbitant costs that eventually will price their tenants out of housing. Response at 24-25. There's no basis for such fear mongering. Appellants' point is that the type of clientele a business serves is relevant to the protections one may need to put in

B. The Court Below Improperly Barred Mrs. Gray’s Claim Under the Implied Primary Assumption of Risk Doctrine, Whereas, at Most, There Was Contributory Negligence.

1. Injury on the bus steps was NOT a risk inherent or necessary to boarding the bus or going on a scenic outing because the bus also had a lift.

In the seminal decision of *Scott v. Pacific West Mountain Resort*, the Court held that “Implied primary assumption of the risk means the plaintiff assumes the dangers that are *inherent in* and *necessary to* the particular sport or activity.” 119 Wn.2d *id* at 500-01 (italics added). *Scott* said “A classic example of primary assumption of risk occurs in sports cases. One who participates in sports “assumes the risks” which are inherent in the sport. . . . A defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport.” *Scott, id.* at 497-98 (citations omitted).

In ICHB’s brief one of its sections is titled: “The Risk of Injury While Boarding the Van Was Inherent and Necessary to Participation in a Scenic Van Ride.” Response at 8. This is patently not true. There are NO risks of injury inherent to boarding the van. The vehicle had two ways to board it: the steps in front or the lift in back. The steps posed a risk of

place. The impetuosity of youth was an important factor in *Tincani*. In *Degel*, if the mobile home park hadn’t permitted children, it’s doubtful the Court would have felt the need for a fence between the housing area and the stream bank. Interestingly, ICHB describes its tenants here, which includes Marjorie Gray, as “society’s most vulnerable senior citizens” and “the most defenseless members of the senior population” Response at 25. Granted that’s a rhetorical flourish, but Appellants actually are trying to help ICHB’s tenants be safer, and a little less vulnerable and defenseless.

injury for Mrs. Gray, but the lift did not. It's never been asserted by either party that the lift is unsafe. Nor has it ever been claimed that boarding via the steps was necessary or inherent to participate in the outing. Some residents no doubt have wheelchairs, instability, or weakness that makes the steps impossible. The lift should be used for them. Or, if it's more convenient, ICHB could use its other bus, which has only a "no step" entry, and thus is safe for everyone.

The real risk of injury while boarding the bus comes from ICHB's decision to provide only one employee to perform all the tasks necessary to load and conduct the outing. Given how time consuming it is to use the lift (Paula Gray estimated about 2 to 7 minutes for the process, per resident, CP 150, ¶7), it's understandable a solo employee would want to use the lift as little as possible. Also, an employee busy at the lift can't assist a resident at the steps. That's not a risk inherent to boarding the bus; it's a risk created by a management decision about staffing. ICHB should have anticipated the harm that could likely occur on the relatively steep bus steps, and take appropriate action to protect its residents like Mrs. Gray, whether by warnings, an additional aide to help, or using its bus with the "no-step" entry.

Mrs. Gray's case is readily distinguishable from the true implied primary assumption of risk cases. If one engages in a "B-B gun war" and

consents to pointing and shooting guns at each other, there are inherent and unavoidable risks of injury that one assumes, as in *Foster v. Carter*, 49 Wn.App. 340, 742 P.2d 1257 (1987). Likewise, if you agree to participate in a roller skating game where everyone tries to wipe each other out, the court will rightly find that you've agreed to accept the risks inherent and necessarily part of the game. *Ridge v. Kladnick*, 42 Wn.App. 785, 713 P.2d 1131, *review denied* 106 Wn.2d 1011 (1986). There is little similarity between these cases and Mrs. Gray's. Her activity was going on scenic bus outings, *not* climbing bus steps, just as in *Tincani* the teenager came to the Zoo for a field trip, not for rock climbing. *Tincani, id.* at 145. These were not scenic bus outings to the Sudan or Syria.

Mrs. Gray's case is also clearly distinguishable from *Wirtz v. Gillogly*, 152 Wn.App. 1, 216 P.3d 416 (2009). In that case, described in Appellant's Opening Brief at 41-42, before the plaintiff was hit by the branch of a tree that was being felled, he was warned 3 times that day he should wear a helmet, and was told he could stop and leave. He refused the offers of a helmet and stayed. He then sued for not being given a helmet. *If* Mrs. Gray had been offered the lift for the October 27, 2010 bus outing, or assistance up the steps, or warned by Roseann to NOT go up the steps, but she refused and insisted on using the steps, then her case would be more like *Wirtz*. But it's not. These cases are inapplicable.

2. Mrs. Gray's decision to use the steps was NOT a voluntary choice as she did not have reasonably available alternatives.

The key error in ICHB's argument, and the court's decision below, is the claim that reasonable minds *cannot differ* on whether Mrs. Gray *voluntarily choose* to climb the bus steps. Response at 12-13; CP 199:26 – 200:4. Mrs. Gray's statement shows that her clear preference was to use the lift. Given the unchallenged evidence as to the type of driver Roseann was, and the hectic setting ICHB created by providing only 1 employee to load 8 to 12 residents into the bus, reasonable minds definitely can differ on whether there were reasonable alternatives to the steps available to Mrs. Gray that day, and thus whether her choice was voluntary. ICHB does not know *why* Mrs. Gray attempted to climb the bus steps on October 27, 2010. Roseann's incident report says: "Marjorie proceeded up the bus steps. After the first step her legs became weak and she called for me to help her." CP 121. This doesn't tell us *why* Mrs. Gray tried the steps, or if she'd been warned or offered the lift, which is unlikely given Roseann.

To establish implied primary assumption of risk, the defendant must prove the plaintiff "voluntarily chose to encounter the risk." *Kirk, id.* 109 Wn.2d at 453. To be *voluntary*, the plaintiff must choose the risk

“despite knowing of a reasonable alternative course of action.” *Erie, id.* 92 Wn.App at 297; *Zook v. Baier*, 9 Wn.App. 708, 716, 514 P.2d 923 (1973). Summary judgment is not appropriate when different inferences may be drawn from the *evidentiary facts* regarding *ultimate facts*, such as intent. *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). In a summary judgment motion, “facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party.” *Scott, id.* 119 Wn.2d at 503. The court below did the opposite in key areas, drawing inferences and filling in missing information from Mrs. Gray’s one page statement in the light most favorable to ICHB.

Appellants agree that Mrs. Gray had subjective knowledge of the possible danger presented by the steps, but a reasonable inference from the facts is that her choice to use the steps was *not voluntary*. This distinguishes her from the plaintiff in *Erie v. White*. In *Erie*, the plaintiff was hurt while cutting limbs from a tree. He was an experienced tree cutter. He was provided by the property owner a leather *non-reinforced* safety strap that actually is for pole climbing, not tree cutting. He knew the difference but decided to do the job anyway. His testimony:

A: I was looking at the equipment that White rented. I said, this is pole-climbing equipment, but I can work with it because I only had a couple hours of work left to do. I figured it would be safe enough for me to just get in there and get the job done and get out of there, get my hundred bucks, and go home. . . . Q: You actually

discussed that with Mr. White? A: Yes, I did. Q: You told him that you can make this work? A: Yep. Q: You accepted it? A: Yes, I did.

Erie, id. at 300-01. This is far different than Mrs. Gray's situation.

Mr. Erie and Mr. White didn't know each other prior to this job. Erie was the experienced cutter. White was relying upon Erie's assurance that the safety strap was adequate, and Erie voluntarily continued the job knowing the risk. ICHB, by contrast is a facility that provides services to the elderly; it had known 84 year old Mrs. Gray for several years, knew that she'd twice fallen on the bus steps, and had a heart attack the month before. There's no evidence of any ICHB staff talking to Mrs. Gray before the bus trip on October 27, 2010 and offering an alternative to the steps, or of Mrs. Gray telling them she was OK with using the steps. ICHB must prove that there actually was an alternative reasonably available to her that day, with Roseann as the driver. If the reasonable inferences from the facts are construed favorably for Mrs. Gray, they do not support summary judgment.³

³ ICHB also tries to distinguish Mrs. Gray's case from *Leyendecker v. Cousins*, 53 Wn.App. 769, 774, 770 P.2d 675, review denied 113 Wn.2d 1018 (1989). In that case, discussed at length in Appellants' Opening Brief at 32 – 35, the plaintiff knew that rotating helicopter blades were dangerous, and yet walked into one. The court said "the record is devoid of any evidence tending to prove antecedent consent to relieve the defendants of any duty they might have to." ICHB says two facts distinguish *Leyendecker* from Mrs. Gray: *Leyendecker* didn't remember the accident, and he was surprised to be hit by the copter blade. Response at 20. Actually, Mr. *Leyendecker* recalled a lot about the incident; he just didn't remember being struck. *Id.* at 771. Mrs.

3. Subjective knowledge of the danger, and voluntariness, is not always sufficient to create implied primary assumption of risk, if the landowner has also breached his duties under Restatement (Second) of Torts §343A.

In Tincani, the Court found that Tincani had full knowledge of the risks in descending the cliff once he tried a second descent of the cliff⁴ and also concluded that his actions were voluntary as he had other reasonable alternatives. See discussion in Appellants' Opening Brief at 28-29. In *Maynard v. Sisters of Providence*, 72 Wn.App. 878, 866 P.2d 1272 (1994), the plaintiff was injured on the icy parking lot not while returning to his car *but when he digressed to help another visitor*. The Court held: "Maynard's digression to try and assist another driver does not *ipso facto* relieve Providence of its duty, but is a consideration for a jury in determining comparative negligence." *Maynard, id.* at 884. In *Musci v. Graoch Assoc. Limited Partnership*, 144 Wn.2d 847, 31 P.3d 684 (2001), the tenant exited a side door onto a path obviously covered with snow and ice, yet the Court said: "The jury may deliberate as to whether Keeler's

Gray's statement, contrary to ICHB's repeated characterization of it as showing an affirmative decision on October 27, 2010 to climb the steps in the face of known risks and reasonable alternatives, is far from undisputed about the "voluntariness" of her actions.

⁴ "Even if he had not appreciated the risk of falling while at the top of the outcropping, Tincani knew the cliff was dangerous when he climbed partway down. . . . [T]he jury had to have concluded that Tincani knew 'of the specific risk associated with climbing down the cliff' and 'understood the nature of this risk.' The jury reached the only reasonable conclusion: Tincani knew or had reason to know climbing down the cliff was dangerous." *Id.* at 137-38.

Corner breached its duty to its tenant, as well as whether Musci breached his duty to exercise reasonable care under the circumstances.” *Id.* at 862. In each of these cases the Court examined the actions of both the landowner and the invitee, and held that comparative negligence was the proper framework. In those cases the plaintiffs’ actions showed specific knowledge and a voluntary choice, whereas Mrs. Gray had knowledge but it is highly disputed whether her choice was voluntary. Summary judgment and the imposition of implied primary assumption of risk were improper in this case.

C. Promises Made by ICHB and Relied Upon by Mrs. Gray’s Family Do Create an Additional Basis for Liability.

ICHB says the common law doctrine of liability based upon gratuitously assuming a duty to warn or protect another is inapplicable because it only applies to “helpless plaintiffs” in immediate or impending life threatening danger, whereas Mrs. Gray was “independent” and “not helpless.” Response at 26. The case law makes no such distinction. In *Brown v. MacPherson’s Inc.*, 86 Wn.2d 293, 300, 545 P.2d 13 (1975) the case facts are too sparse to determine a timeline. One of the cases cited in *Brown* is *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wn.2d 423, 100 P.2d 1024 (1940). In *Sheridan*, the defendant insurance company voluntarily undertook to inspect and repair a hotel elevator and file periodic reports

with the city on its safety. The hotel owners relied on the defendant and did not themselves make inspections. This transpired over the course of 18 months. The reports were not made as required by ordinance (the full reports were not sent to the city) and the elevator malfunctioned, with the plaintiff falling 25 feet and being seriously injured. *Sheridan, id.* at 427, 435. Nothing in *Sheridan* or *Brown* required an immediate threat or said that if the *Sheridan* plaintiff had only fallen 5 or 10 feet, the common law duty of liability would be different.

The Court in *Sheridan* quoted what it called one of the leading cases, *Baird v. Shipman*, 132 Ill. 16, 23 N.E. 384 (1890), which held: “whoever undertakes a duty, and is clothed with authority to perform that duty, is responsible to the party injured for negligent imperfection in the discharge of such duty.” *Sheridan, id.* at 438. After extensive review of the cases, *Sheridan* held: “Having assumed the duty of inspection and reporting to the city, the appellant would be liable at common law to any one sustaining damages by reason of its neglect.” *Sheridan, id.* at 440.⁵

⁵ ICHB also says that *Roth v. Kay*, 35 Wn.App. 1, 664 P.2d 1299 (1983) is inapplicable, claiming that because the doctor’s office promised to file the worker’s compensation paperwork, the plaintiff “was precluded from acting on his own behalf and filing his own paperwork.” Response at 27. Those aren’t the facts. Roth testified that he “was under the impression from the things told to me by the staff person at the desk that Dr. Kay would file the claim form and that nothing more need be done by me.” *Roth, id.* at 2. He didn’t do anything because he didn’t think he needed to. He relied upon the promise by the doctor’s employee. *Roth* didn’t require that the plaintiff be “helpless” or faced with a life-threatening danger in order to find liability.

More recent cases have reached the same conclusion. In *Meneely v. S.R. Smith, Inc.*, 101 Wn.App. 845, 5 P.3d 49 (2000), an industry association, the National Spa and Pool Institute (NSPI), promulgated industry wide safety standards relied upon by pool and board manufacturers. After studies showed a particular pool and board combination was dangerous for some divers, NSPI did not change its standard and instead initiated a “steer up” program to address the risk. The Court found that by voluntarily assuming the responsibilities of the manufacturers for setting pool safety standards, NSPI had a duty to warn divers of the risk posed by this combination of board and pool. NSPI failed to exercise reasonable care in performing that duty. NSPI also attempted to distinguish its facts from *Brown v. MacPherson's, Inc.*, and argued that “the harm was not imminent and that its connection with the consumer was too attenuated to impose liability.” The Court found the argument “not persuasive.” The Court noted that “the connection between NSPI and Mr. Meneely was no more attenuated than in *Sheridan*, which *Brown* relied upon in its holding.” *Meneely, id.* at 859-60.

In *Mita v. Guardsmark, LLC*, 182 Wn.App. 76, 328 P.3d 962 (2014), an elderly man became disoriented outside a courthouse one cold winter evening after serving on jury duty. His son called the County and was assured the County would immediately send an officer to search for

his father. The son “reasonably relied upon this promise” and it induced him to forgo his own search efforts. In his vulnerable state, the father “reasonably relied on his immediate family members to find him, thereby establishing privity of reliance between him and [his son].” No officer was sent to search, and the 84 year old father froze to death. *Id.* at 967-68.

It is noteworthy that ICHB does **not** challenge or controvert Paula Gray’s sworn statements that Nurse Joanne Kramer twice promised Paula Gray that she would have the staff use the lift for boarding Mrs. Gray. CP 151, ¶10; CP 152, ¶16. ICHB also does not challenge Ms. Kramer’s status as an agent of ICHB with authority to bind ICHB with these promises. Ms. Kramer admitted in deposition that Paula’s memory about the conversations would be better than hers. CP 87:14 to 88:7. A “privity of reliance” existed between the elderly Marjorie Gray and her daughter Paula, who visited almost daily, and often was her representative with ICHB. CP 147-48, ¶2. ICHB is bound by its promises to Paula Gray.

ICHB does not challenge Paula Gray’s sworn statements that when she confronted Nurse Kramer after the second and third falls, Kramer expressed her frustration and said she “had emailed everyone.” CP 152, ¶16; CP 155, ¶25. It’s not surprising there was a breakdown. At her deposition, Ms. Kramer said that she does not follow-up and speak to the supervisor of the bus drivers, and ICHB had no process of informing her

whether her safety recommendations are followed. CP 86-87. Paula Gray did not know this. She reasonably relied upon the promises and refrained from protecting her mother: “I believed Joanne [Kramer] and relied on her promise. I thought that my mother would be safe and still be able to go on the scenic trips with my father, which they both loved.” CP 152, ¶17. “If I had known that Ms. Kramer and Ida Culver were *not* going to follow through with their promises, I would have done something to protect my mother, such as pay for a little additional staff time, or if necessary move them to a different facility.” CP 156, ¶26. The failure of Ms. Kramer and ICHB to exercise reasonable care in carrying out its promises, induced reliance by the Grays, increased the risk of harm to Marjorie Gray, and ICHB is therefore liable for her damages.

ICBH claims, however, that the case more analogous than those cited by Mrs. Gray is a suicide case, *Webstad v. Stortini*, 83 Wn.App. 857, 924 P.2d 940 (1996). In *Webstad*, the Court found that the boyfriend had no duty to protect the woman from herself, that he did not create or increase any risks, that he did not make promises *or induce any reliance*, that he did not prevent her from seeking assistance and that he did actually call for assistance. *Id.* at 875-76. *Webstad* is not analogous or applicable. In the present case, ICBH *has* duties as a landowner to its invitees, including to take reasonable steps to protect those it anticipates will fail to

protect themselves from known or obvious dangers. ICBH also did make promises, which Paula Gray reasonably relied upon, and which caused her to refrain from acting to protect her mother.

V. **CONCLUSION**

For the foregoing reasons, Appellants request that the summary judgment ruling be reversed, and Marjorie Gray allowed her day in court.

RESPECTFULLY SUBMITTED this 10th day of April, 2015.

CROLLARD LAW OFFICE, PLLC



Jeff B. Crollard, WSBA No. 15561

Attorney for Appellants

1904 Third Ave., Suite 1030

Seattle, WA 98101-1170

Phone: 206-623-3333

Fax: 206-623-3838

Email: jbc@crollardlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of April, 2015, I caused to be served a true and correct copy of the document(s) listed below to the individual(s) named below in the specific manner indicated:

Document(s) Served

I. Reply Brief of Appellants

Individual(s) Served

David J. Corey, WSBA No. 26683 Amber L. Pearce, WSBA No. 31626 Colin F. Kearns, WSBA No. 45282 FLOYD, PFLUEGER & RINGER P.S. 200 West Thomas Street, Suite 500 Seattle, WA 98119-4298 dcorey@floyd-ringer.com apearce@floyd-ringer.com ckearns@floyd-ringer.com Attorneys for Respondents	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Email per agreement <input type="checkbox"/> Federal Express
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DATED this 10 day of April, 2015 at Seattle, Washington.


Jeff B. Crollard