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NO. 72859-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CHRISTOPHER PARSONS,
Appellant,

V.

ESTATE OF HELEN PARSONS, deceased, by
THEODORE H. PARSONS III, and LAURA
E. HOEXTER as co-Personal Representatives
For the Estate of Helen Parsons,
Respondent.

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COURT OF APPEALS
STATE OF WASHINGTON

E

APPELLANT'S REPLY BRIEF

Charles S. Hamilton, III, WSBA #5648
Attorney for Appellant
7016 35th Avenue NE
Seattle, WA 98115-5917
206-623-6619

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I. RESTATEMENT OF THE CASE

At the risk of overstating by restating the facts of the case, Christopher Parsons, Appellant, provides what is hoped is a useful synopsis.

On April 4, 2011, Christopher Parsons was badly injured when he fell from the roof of the Parsons Estate property known as the “ranch house” CP 145. The house belonged to the Estate of Helen Parsons, his grandmother. Id. Theodore Parsons III was, and is, personal representative of the Estate. CP37-38. The parties seem to agree that Christopher Parsons was both caretaker and tenant for the Estate. CP 124. The fall from the roof occurred while Christopher Parsons was attempting to patch, with a tarp, a portion of the roof which was leaking into the living quarters below. CP 145.

The ranch house roof had fallen into a state of disrepair in 2006 when trees had fallen upon the roof. CP 145. Theodore Parsons, III, knew about the damaged roof. A couple of weeks before the fall, Christopher Parsons, as he had done previously, again asked Theodore Parsons to arrange for repair of the roof. CP 145. The response of the personal representative of the Estate was that Christopher Parsons should fix the roof himself. CP 145. Although he was described as a caretaker,

Christopher Parsons was not hired as a roofer. CP 145. He was not paid as a roofer. There is no evidence warranting the inference that he had the skills of a roofer.

There was some confusion, which will not be dispelled by the briefing, regarding the identity of the parties in the case. Plaintiff sued the Estate of Helen Parsons and Theodore Parsons, III, the personal representative. The answer to the complaint is captioned, "Answer and Affirmative Defenses of Defendant Parsons". CP 4. In this reply Appellant refers to both parties as "Defendants".

The evidence offered by the Defendants indicates that Theodore Parsons, III, was not only the personal representative of the Estate of Helen Parsons, but he was also the trustee of a trust created for Christopher Parsons, a trustee who has been parsimonious in the face of Christopher Parsons' injuries. CP 37,144-145. The relevance of the trust relates to a reason why Christopher Parsons, the ward of the trust, could not pay for the repair of the roof or vacate the leaking ranch-house, theories offered by Defendants as alternatives to climbing the roof to make repairs to Defendant's premises which were being damaged by the leaks from the roof. *Respondent's Brief*, pp.46-47.

**II. The trial court erred when it failed to grant Appellant's oral
motion to amend the Complaint**

Although the timing and manner of the motion to amend the Complaint in this case were not exemplary, the clarity of the legal relationship, the relevance of the legal theory and the purpose of the motion were clear to Court and counsel. However, Christopher Parsons does not abandon his argument that the evidence introduced by the Defendants put at issue the duties of the personal representative, thereby obviating any need to amend the complaint in order challenge Defendant's theories of non-liability.

Washington courts have been consistent in holding that delay in a motion to amend, without more, is an insufficient basis for denial of a motion to amend a complaint. *Herron v. Tribune Publishing Co.*, 108 Wn. 2d 162, 736 P. 2d 249 (1997). That being the case, and if delay without more was the basis for the trial Court's ruling, the ruling would constitute an abuse of discretion.

The trial date for the case was in February of 2015. The order granting summary judgment was entered on November 21, 2014. The only reason offered by Defendants for denial of the motion lay with a bald claim that, "a breach of duty cause of action would have required different discovery including, separate interrogatories and requests for production,

different experts, and different questions during Christopher Parsons' deposition". *Respondent's Brief*, p.20. That list of discovery techniques, without more, was substance-free. Neither actual prejudice, nor surprise, nor apprehension about a delay in the trial date, was proffered as a serious concern.

The motion to amend to add a legal theory addressed the discretion of the Court; but the explanation for denial, does not clearly establish reasons for the exercise of that discretion. Exercise of discretion without explanation of the reasons for the exercise is a breach of that exercise. *Watson v. Emard*, 165 Wn. App. 691, 702, 267 P.3d 1048 (2011). Respondents cite the *Oliver* case as supporting their position. *Oliver v. Flow Intern*, 137 Wn. App. 655, 155 P.3d. 140 (2006). In that case, the reviewing court found that undue delay in a motion to amend a complaint until a week after a summary judgment decision was made should be denied because of an evidentiary showing of actual prejudice to the non-movant justified denial of the motion. *Id.* at 664. That court went beyond that finding to address the proposed amendment and found that the proposed amendment would be futile. *Id.* at 664. In the present case, no issue of futility of amendment was addressed; and the recitation of the possibility of prejudice in this case did not constitute a showing of actual prejudice.

Defendants rely also upon a case concerned, not with amendment to add a legal theory but rather with an attempt to add a new party. *Ensley v. Mollmann*, 155 Wn. App. 744, 230 P.3d. 599 (2010). As noted in Appellant's original brief, amendments to add legal theories in a case are treated substantially more generously than are amendments to add new parties. *Stansfield v. Douglas County*, 146 Wn. 2d116, 43 P. 3d 498 (2002).

III. The claims of breach of duty of the Personal

Representative, Theodore Parsons, III, were not what is described as a "red herring".

As indicated in Appellant's brief, and more importantly in movant's evidentiary materials, the import of the legal relationship, or lack of one, between Theodore Parsons, III, and Christopher Parsons, was central to the motion for summary judgment. The Declaration of Theodore Parsons, III, introduced his status as personal representative of the Parsons Estate. CP 36-38. Although a fiduciary relationship was not critical to the arguments raised by Christopher Parsons, that kind of relationship should not lightly be dismissed. The duties upon which Appellant relied were the statutory duties owed the Estate and Christopher Parsons by Theodore Parsons, III as a personal representative. Although those duties may be considered fiduciary, and properly so, the fiduciary aspect was not the

gravamen of the argument, which related to the negligence of the Defendants in a personal injury action, a legal and not an equitable tundra action. The statutory duties of the personal representative operated as one source for the argument that the rights and duties of control and possession of the “ranch house” gave rise to claims of negligence in this case.

The status of Theodore Parsons as personal representative, independent of suggestions of his fiduciary duties owed Christopher Parsons, implicates his statutory duties of care owed both the premises and Christopher Parsons. That statute provides:

“It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate. The Personal Representative shall be authorized in his or her own name to maintain and prosecute such actions as pertains to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.”

RCW 11.48.010.

Additionally, the personal representative has a paramount right to the possession and management of the estate. The Personal Representative has *“a right to the immediate possession of all real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the Court to the heirs or devisees, and shall keep in tenable repair all houses, buildings, and fixtures thereon, which are under his or her control”*. (Emphasis added). RCW 11.48.020.

The statutory provenance of the personal representative’s duties is clear. It is submitted that the trier of fact must assess the extent of the statutory duty of the personal representative within the factual situation described in this case and as presented by Theodore Parsons, III and Christopher Parsons.

IV. The right to control activities on the premises generated a duty of care owed Christopher Parsons under premises liability theory.

By evicting Christopher Parsons from the ranch house the Defendants asserted judicially a paramount right of possession over the “ranch house”. CP 122-126. This assertion is supported by statute conferring on the personal representative the paramount right of

possession and the obligation to maintain the properties of the Estate.

RCW 11.48.010 and 11.48.020.

Whether Theodore Parsons had “actual possession”, by living at the ranch house, is of little moment in the course of this action. The role of actual possession in this controversy is subordinate to the question of who had the paramount right and duty to possess and control the property. Failure to exercise that right does not eradicate the right or the duty to exercise the right.

The parties seem to agree that a “possessor” of land can be subject to liability or harm to an invitee caused by a condition on the land “but only if, (a) he knows of or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against danger.”

Restatement (Second) of Torts, Section 343 (1965). Defendants argue that this rule applies only to one in actual possession of the land.

(Respondent’s Brief pp. 32-34). However, Washington case law does not address this duty as exclusive to one in actual possession. Rather, the rule “is predicated upon the occupancy, ownership, control, possession, or special use of such premises. The existence of one or more of these is

sufficient to give rise to a duty to exercise reasonable care”. *Gildon v. Simon Property Group, Inc.*, 158 Wn. 2d 483, 145 P. 3d 1196, 1203 (2006), citing 65A C.J.S., Premises Liability, Sect. 381 (2000).

The Restatement of Torts (Second) describes an exception to the general duty of the possessor of land: the “known or obvious” exception. That exception states, “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 of obviousness.” Restatement (Second) of Torts, Section 343A (1) (1965). The comments to that exception include a “distraction” exception wherein a possessor should anticipate harm because he has reason to suspect that his invitees’ attention may be distracted so that he would not discover the condition despite its obviousness or will forget what he has discovered and fail to protect against it. Restatement (Second) of Torts, Section 343A, (f) (1965). A second exception to the open and obvious concept is triggered when the possessor has “reason to anticipate or expect that the invitee will proceed to encounter an open and obvious danger because to a reasonable person in the invitee’s position the advantages of doing so outweigh the apparent risk.” Restatement (2d) of Torts, 343(A), (f) (1965). Application of the Restatement sections and exceptions, based upon the evidence

presented, should be reviewed by the trier of fact. Whether the roof condition presented a danger in the first place, and secondarily, whether such a danger was open and obvious, are jury questions. Equally, a jury should weigh the “distractibility” and the “subjective advantage” exceptions set out in the Restatement.

V. The duty owed Christopher Parsons by Respondents, was not vitiated by the claim that either the personal representative of the Estate or the Estate was a “homeowner”

Considerable length of Respondent’s Brief is devoted to the argument that a homeowner building a home for his own personal benefit is analogous to the Parsons relationship. Respondent’s Brief, pp 2 3-31, citing *Rogers v. Irving*, 85 Wn. App. 155, 933 P. 2d 1060 (1997). At relevant times neither the personal representative nor the Estate was a homeowner whose building or maintenance house of the “ranch house” was for personal benefit.

The Rogers case indicates that where one is building a home for his personal benefit and who hires independent contractors with greater skills to perform work on the home, that home-owner should not be considered an “employer” under WISHA definition for purposes of applying WISHA workplace safety regulations covering a skilled

independent contractor. *Rogers v. Irving*, 85 Wn. App. 155, 933 P.2d 1060 (1997). In *Rogers*, the Defendant purchased real estate with the intent to build his home. Id. 457. The Court of Appeals found that Irving was not an employer because the work site was created for Irving's own personal benefit and because he relied on what is described as skilled independent contractors to perform the jobs at the residence where the injury occurred. That case inquired whether a duty of care was owed under WISHA regulations, thus depending upon the statutory definition of employer. Christopher Parsons continues to argue that the "ranch house" in question was not maintained for the sole personal benefit of the Respondents, and that the Estate and personal representative did owe a duty of care to a tenant, and "caretaker", living on premises which were required to be maintained in the course of movement toward closing on the Estate and business of selling of the "ranch house", duties owed Christopher Parsons and other heirs of the Estate. There is no showing that the Defendants relied upon the superior skills of Christopher Parsons in maintaining the condition of the ranch house roof. The Respondent's argument that "the Estate has no construction training and would be in an even worse position to enforce safety requirements than the Defendant in *Rogers*" is unsupported by evidence.

If Respondents may not be considered as employers, their own arguments and evidence establish them as occupying a landlord-tenant relationship. This being the case, the question arises whether Washington's Residential Landlord/Tenant Act, Chapter 59.18 RCW, enacted in 1973, applies to the relationship. As noted below, the Residential Landlord/Tenant Act does not expressly exempt whatever relationship existed between Christopher Parsons and the Estate and personal representative of the Estate.

Although the Respondents have admitted that Christopher Parsons was a "caretaker" of the Estate, they appear to ignore that role as affecting their description of him either as employee of the Estate or tenant of same.

VI. The Defendants occupied the status of landlord to their tenant, Christopher Parsons.

In their brief, the Defendants' appear to agree that their status in relation to Christopher Parsons is that of landlord to tenant. Christopher Parsons was evicted from the premises based upon a judicial pleading that Mr. Parsons was a "tenant at will". Respondent's Brief, p. 29; CCP 124. Their predicate "notice to vacate" characterizes Christopher Parsons as a tenant from month to month. CP 128. In either event, there is an assumption, and admission, that the Estate and Theodore Parsons III enjoyed the status of landlord. Should statutory provisions of

Washington's Residential Landlord -Tenant Act, Chapter 59.18 RCW, apply in these circumstances, then the statutory duties of the landlord would apply. Only one express exemption from the Act approaches application of the Act to this case:

“Occupancy by the employee of a landlord whose right to occupy is conditioned on employment in or about the premises”

RCW 59.18.040 (8). If the Defendants insist correctly that Christopher Parsons was not an employee of the Defendants, then his status as tenant was not excluded as an exemption from the Act. Should the Act be found to embrace the Parsons relationship, then the landlord's statutory duties require that the landlord satisfy responsibilities for maintaining the “roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components in reasonably good repair so as to be usable and capable of resisting any and all forces and loads to which they may be subjected.” RCW 59.18.060 (2). Under the Act, the landlord's duties also include maintenance and reasonable repair of “common areas”, and the maintaining of the building unit in “reasonably weather tight condition.” RCW 59.18.060 (1) (3), and (8). It would seem to be reasonably clear that were the Residential Landlord-Tenant Act

to apply to the circumstances of this case, then the statutory duties outlined above were breached by the defendants-landlord. Whether statutorily or under the common law, a landlord has a duty to maintain premises “in reasonably good repair”. *Lincoln v. Farnkoff*, 26 Wn. App. 717, 613 P.2d. 1212 (1980).

VII. The defendants occupied the status of land-owner with paramount right of possession and control

The issue of foreseeability under Washington tort law may arise with regard to the question of whether a duty of care exists on the part of one with some degree of interest in real property, as well as to the question of the scope of that duty. *McKown v. Simon Property Group, Inc.*, 182 Wn.2d. 752, 762, 344 P.3d. 661 (2015). Issues relating to the scope of a duty ordinarily involve a question for the trier of fact, *Id.* 762; *IWAI v.State*, 129 Wn. 2d 84, 915 P.2d 1089 (1996). Once a duty is found to exist on the part of a defendant, the concept of foreseeability implicates the scope of that duty. The concept of foreseeability requires that the injury sustained, “...*must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the Defendant.*” *Christen v. Lee*, 113 Wn.2d. 479, 492, 780 P.2d. 1307 (1989). Washington courts have indicated that the duty to use ordinary care is generally bounded by the foreseeable range of danger. *Burkhart v.*

Harrod, 110 Wn.2d. 381, 395, 755 P.2d. 759 (1988). In the present case, the duty which is implicated is that of the duty of the personal representative, or the duty of an employer, or the duty of a landlord, or the duty of an owner or possessor of land. The Defendants knew the condition of the roof and directed to Christopher Parsons to make repairs on the roof. The issue of foreseeability presents a jury question as to whether the defendants could reasonably anticipate that a fall from the roof resided within the field of danger which would attend the repairing of the roof.

The Defendants claim that the danger of falling from their roof was an open and obvious danger. Respondent's Brief, pp 38-41. Whether the roof posed an open and obvious danger should be a jury question; the evidence actually presented does not allow a court to find that reasonable minds could not differ on the issue of dangerousness. The *McKown* case, noted above, addresses issues regarding the foreseeability of commission of criminal acts by a third party in the context of assigning, or declining to assign, liability to the owner of a business. Although that danger may be more remote than any danger applicable to Christopher Parsons, the calculation of foreseeability should provide the same analytical lens.

In premises liability cases, a landowner owes an individual a duty of care based on that individual's status on the land. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d. 121, 128, 875 P.2d. 621 (1994). A

tenant is an invitee. *Mucsi v. Graoch Associates LP* 12, 144 Wn.2d. 847, 855, 31 P.3d. 684 (2001). The Defendants agree that Christopher Parsons was an invitee of the Estate. The landowner's duty to an invitee is as stated:

"A landowner is subject to liability for harm caused to his tenants by a condition on the land if the landowner (a) knows or by an exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to tenants; (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect the tenant against danger."
Mucsi, supra. 855-856.

Whether a duty of care owed by a landowner or occupier of land exists in this case is a legal issue. However, the scope of that duty, as observed in *Mucsi*, supra, and as regards all three liability-imposing components, should be interrogated by the trier of fact.

The duty of reasonable care requires the landowner to inspect for dangerous conditions, "...followed by such repairs, safeguards, or warning as may be reasonably necessary for a tenant's protection under the circumstances". *Mucsi*, supra, at 856. Theodore Parsons' disregard for

the condition of the roof, and the safety of Christopher Parsons, coupled with the instruction that Christopher Parsons fix the roof himself, should be reviewed by the trier of fact, in assessing whether that “landowner” satisfied that affirmative duty of inspection and repair.

VIII. The issue of “known or obvious danger” is a question for the trier of fact

The Defendants claim that Christopher Parsons, by climbing the roof of the “ranch house” voluntarily exposed himself to a known and obvious danger. *Respondent’s Brief* pp. 35-41. That defense is based upon the proposition that the Defendants, as owners of property in a premises liability case, owe no duty of care to an invitee when the danger “is known or obvious”. For this proposition, the Defendants rely upon the Restatement (Second) of Torts, section 343A (1), cited in *Tincani v. Inland Empire Zoological Society*, 124 Wn. 2d. 121, 139, 875 P2d. 621 (1994). In the present case, however, the Defendants knew of the problems posed by the leaking roof. The Defendants, through Theodore Parsons, III told Christopher Parsons to fix the roof himself. Were the dangerous condition to be obvious and known to the Defendants, the direction that he make the repair warrants the inference that no appreciable danger existed or that Defendants encouraged his exposure to that known and obvious danger. Neither position offers shelter from liability.

The Defendants have generated a material issue of disputed fact as to whether they satisfied their duty to take reasonable precautions to attend to the protection of Christopher Parsons, as tenant or as caretaker. Even when the undisputed evidence reveals the open and obvious nature of the risk of climbing on the roof, the landowner retains a duty to keep the premises in a reasonably safe condition so as to avoid foreseeable harms to that invitee. *W. Page Keeton, Prosser and Keeton on the Law of Torts*, Section 61, at 69 (5th Ed. Supp. 1988). That treatise notes: “Nor may the obvious danger bar recovery where the invitee is forced, as a practical matter, to encounter a known and obvious risk in order to perform his job.” *Id.* at 69. The appellants have insisted that Christopher Parsons was a tenant and “caretaker”. At the very least, it is submitted that the trier of fact should review the question of whether Christopher Parsons voluntarily exposed himself to what may have been a known or obvious danger and whether that exposure occurred as Christopher Parsons was undertaking one of his responsibilities as caretaker of ranch house premises. An extension of the Defendants’ theory of non-liability would require Christopher Parsons to forego repairing the roof, thereby augmenting injury and damage to the Defendant’s premises which the Defendants were obligated to maintain in the course of their work toward closing of the Estate. If the actual conditions obtaining at the time of the

fall constituted an open and obvious danger, cognizable both to landowner and invitee, would shape the extent of the duty owed; that shared opinion should not nullify the landowner's affirmative duty of inspection and repair of that condition of the roof. *Mucsi v. Groch Associates Ltd. Partnership No. 12*, 144 Wn. 2d 847,856, 31 P.3d 634 (2001).

IX. Defendants owed the duty of care owed by landlord to a tenant, Christopher Parsons.

The duties of the personal representative of an Estate include the duty to maintain the premises belonging to the Estate as well as having the authority to collect rents from the premises. RCW 11.48.020. The fact that the personal representative failed to collect rents in the form of monies does not intenerate the responsibilities of the personal representative but rather tends to erode a sense that the personal representative was performing his duties.

Washington appears to endorse the premise found in the *Restatements (Second) of Property (Landlord and Tenant)*, Section 17.6 (1977), which describes the landlord's liability for physical harm to a tenant caused by a dangerous condition existing before or after the tenant

has taken possession, if the landlord “has failed to exercise reasonable care to repair the condition and the condition is in violation of:

- (1) an implied warranty of habitability;
- (2) a duty created by statute or administrative regulation.

Lian v. Stalick, 115 Wn. App. 590, 595, 62 P.3d. 933 (2007); WPI 130.06.

Christopher Parsons submits that this duty of care is created, among others, by statutes relating to the responsibilities of the personal representative of an Estate. It is also urged statutory duties may derive from Washington’s Residential Landlord - Tenant Act, Chapter 59.18 RCW. The Act was enacted in 1973. It was intended to “modify the common law so as to require decent, safe, and sanitary housing”. *O’Brien v. Detty*, 19 Wn App. 620, 621, 622, 576 P.2d. 1334 (1978). Washington’s Residential Landlord - Tenant Act requires the landlord to maintain the “roofs, floors, walls, chimneys, fireplaces, foundations, and all other components in reasonably good repair so as to be usable and capable of resisting any and loads to which they may be subjected.” RCW59.18.060 (2).the duties include also maintenance and reasonable repair of “common areas” and the maintaining of a building unit in “reasonably weather-tight condition”. RCW 59.18.060(1), (3) and (8). The premises must substantially comply with any applicable code, statute, ordinance, or

regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance, or regulation could enforce as to the premises rented if such condition endangers or impairs the health or the safety of the tenant. RCW 59.18.060 (1), (2), (8).

The argument that the Act does not apply to the Parsons' circumstance because of any employer/employee relation is undermined by the insistence of the Defendants that Christopher Parsons was not an "employee" nor Defendants "employers". The Residential Landlord Tenant Act exempts from application of the Act circumstances in which "occupancy by an employee of a landlord whose right to occupy is conditioned upon employment in or about the premises." RCW 59.18.040 (a). The Defendants make no claim that Christopher Parsons' right to occupy the premises was conditioned upon his employment.

It has been held in Washington federal court proceedings, that the question of whether there is a code violation sufficient to create a substantial danger to health or safety is a question for the jury. *Pinckney v. Smith*, 484 Fed. Supp. 2d. 1177 (WD Wash. 2007).

Under the Residential Landlord and Tenant Act, there is a statutory warranty of habitability applicable to premises where a given condition endangers or impairs the health or safety of the tenant. RCW 59.18.060. By statute or under the common law, a landlord has a duty to maintain the

premises “in reasonably good repair”. *Lincoln v. Farnkoff*, 26 Wn. App. 717, 613 P. 2d 1212 (1980).

Under the Residential Landlord-Tenant Act, and the common law there is a statutory warranty of habitability applicable to premises where a given condition endangers or impairs the health or safety of the tenant. RCW 59.18.060.; *Landis & Landis Construction v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012).

X. Arguments relating to assumption of risk generate material issues of fact regarding the invitee’s consent to relieve defendants of their duty of care owed the premises and Christopher Parsons.

There are four kinds of defenses characterized as assumption of risk in Washington: (1) Express, (2) Implied Primary, (3) Unreasonable, (4) Implied Reasonable. *Barrett v. Lowe’s Home Centers, Inc.* 179 Wn. App. 1, 5, 324 P.3d. 688 (2013), *Gregoire v. City of Oak Harbor*, 170 Wn.2d. 628, 636, 244 P.3d. 924 (2010). Although the defendants, or Theodore Parsons, have not identified in answer to the Complaint, the kind of assumption of risk intended as an affirmative defense, it appears that their argument relates to the defense of implied primary assumption of risk. That defense requires Defendant’s proof that the plaintiff had knowledge of the presence and nature of a specific risk and voluntarily chose to encounter the risk. *Barrett*, supra p. 6. Knowledge and

voluntariness are questions of facts for the jury unless reasonable minds cannot differ in applying Christopher Parsons' facts to the defense of assumption of risk. *Id.* at 5.

Analysis of the issue of implied primary assumption of risk involves inquiry into the question of whether Christopher Parsons consented to relieve the Estate and Theodore Parsons, III of the duty of care owed him as an invitee on the premises. Defendants respond that no duty at all arose out of the relationship. An example of the shrinking contours of the defense of doctrine of implied primary assumption of risk is found in a case where a young person was injured while skiing, and by going off the course and hitting a tow rope shack. *Scott v. P.W. Mountain Resort*, 119 Wn.2d. 484, 834, P.2d. 6 (1992). The fairly obvious risks of skiing and veering from the course were not found to be sufficiently egregious to warrant denial of recovery under the assumption of risk doctrine. Rather, the skier's aberrant behavior was addressed as an issue of comparative negligence. *Id.* at *Scott*, *Supra*.

One factor bearing upon application of the affirmative defense focuses on whether Christopher Parsons' evidence manifested an intent to relieve the defendants of their duties of care, for him and for the "ranch house". (*Barrett*, *supra*) This intent is negated by Christopher Parsons' request of his trustee, and personal representative, and property owner and

brother, that Theodore Parsons hire a professional roofer to fix the roof. Although Christopher Parsons indicated that he had climbed the roof on a number of occasions to fix the roof, his purpose was to maintain the integrity of the interior structure, thus serving the interests of the Defendants; and his injury producing venture was the result of the refusal to hire a roofer and the directive that Mr. Parsons should fix the roof himself. In this case, it is submitted that there exists a jury question as to whether climbing on the roof to fix the roof and to protect the structural integrity of the ranch house may confidently be considered a manifestation of Christopher Parsons' knowing and voluntary consent to relieve Theodore Parsons, III, of his duty to fix the roof and the duty to maintain the tenantable condition of the premises for the Estate. This consent must be subjective; an alternative reasonable-person or "objective" analysis would trigger instead issues of negligence and comparative fault. *Barrett, supra; Home v. North Kitsap School District*, 92 Wn. App.709, 721, 965 P. 2d 1112 (1995).

The defense of implied primary assumption of risk involves review of evidence of the injured party's consideration of alternative choices to the injury-causing activity, in this case Christopher Parsons' alternatives to fixing the roof by himself. *Home, supra*, 721. In this case, the Defendants argue, without supporting evidence, that Christopher Parsons could have

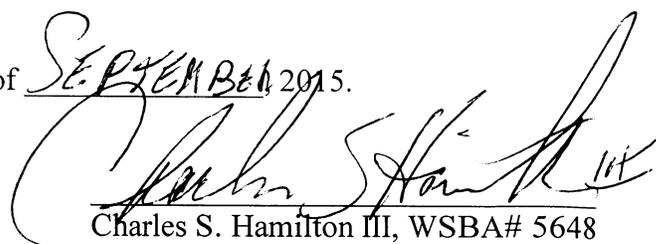
found a friend to do the work or that he could simply have abandoned the premises. (Respondent's Brief, pp.46-47). The dependence of Christopher Parsons upon the meager disbursements from his trust reduces those arguments to fantasy.

XI. Conclusion

Christopher Parsons submits that the responsibilities resident in the Respondent's paramount rights of possession, supervision, financial position, and the right and obligation to control activity occurring on the Estate premises gave rise to a duty of care owed him, and that the extent of that duty should be assessed by a jury. Failure to exercise the duty of care by the entity most capable of that exercise does not eviscerate the duty.

For the reasons set forth above, it is respectfully urged that the order granting summary judgement in this matter should be reversed and that this matter should be set for trial.

DATED this 27th day of SEPTEMBER, 2015.



Charles S. Hamilton III, WSBA# 5648
Attorney for Appellant