

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 OF THE ESTATE OF HELEN PARSONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY

RESPONDENT'S BRIEF

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I. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Whether the trial court properly exercised its discretion when it denied appellant Christopher Parsons oral motion at the summary judgment hearing to amend his complaint to add a cause of action against Theodore H. Parsons, III (hereinafter Ted Parsons), the personal representative of the respondent Estate of Helen Parsons, Deceased (hereinafter "Estate") when (1) Christopher Parsons pled his cause of action as a personal injury action, (2) the first time the issue of Ted Parsons fiduciary duties came up in Christopher Parsons' response brief to the motion for summary judgment and (3) the oral motion was procedurally out of order.

B. Whether the trial court properly granted the Estate's motion for summary judgment dismissal when (1) the Estate was not Christopher Parsons' employer, (2) the Estate owed no common law duty to Christopher Parsons because he possessed and controlled the property, (3) the alleged dangerous condition was open and obvious, (4) the Estate was not a general contractor, and (5) Christopher Parsons assumed the risk of climbing to the roof knowing he could possibly slip.

II. STATEMENT OF THE CASE

A. Introduction

This case concerns Appellant Christopher Parsons' fall from the roof of house he had lived in for over twenty years rent free as its caretaker. At the time of the accident, Christopher Parsons had climbed onto the roof to replace a tarp that had blown off which is something he had done frequently over the twenty years of his occupancy. The house is located on approximately 13 acres in Woodinville, Washington (the Ranch House).

The Ranch House was the residence of Helen Parsons who died in 1990. CP 37 ¶ 4. Helen Parsons was the grandmother of brothers Christopher Parsons and Ted Parsons. *Id.* Helen Parsons' son and father of the brothers, Theodore H. Parsons, Jr., became the executor of Helen Parson's Estate. Mr. Parsons, Jr. died in September 1999 and the brothers' mother, Phyllis Parsons, became the executor his estate. *Id.*

Phyllis Parsons died in November 2006. CP 37 ¶ 5. Her will created a trust for Christopher Parsons's inheritance from his parents' estates and she named Ted Parsons as the trustee to administer the funds to Christopher Parsons. *Id.* In 2008, Ted Parsons was appointed the personal representative of the Estate of

Helen Parsons, Deceased, as well as the personal representative of his parent's respective estates. CP 37-38 ¶ 6. Ted Parsons resides in Anchorage, Alaska and has lived there since 1982. CP 37 ¶ 3. He is a retired pilot for Alaska Airlines. *Id.*

In September 2011, Christopher Parsons moved to have Ted Parsons removed as the personal representative of the Estate and have a special administrator appointed. CP 38 ¶ 7. This matter was eventually resolved with the appointment of attorney Laura E. Hoexter as co-personal representative of the Estate. *Id.* On October 28, 2011, both personal representatives executed a Personal Representative's Deed deeding the Ranch House to the Estate. CP 38 ¶ 8, CP 43-47.

Currently, Ted Parsons is the sole personal representative of the Estate. CP 38 ¶ 9. When Christopher Parsons filed the underlying personal injury lawsuit, Ms. Hoexter had herself removed as co-personal representative in October 2013. *Id.*

B. Christopher Parsons Living at Ranch House and his Accident

Christopher Parsons moved to the Ranch House in 1991 when he was 31 years old with the permission of his father, Theodore H. Parsons, Jr. CP 64, lines 15-22. Christopher Parsons

lived there to provide a presence and to keep people from dumping on the property. CP 64, lines 15-22, CP 65, lines 1-19. Christopher Parsons lived in the Ranch House by himself and rent free. CP 65, lines 20-23, CP 66, lines 6-9, CP 67 lines 8-11. The utilities and property taxes were paid by his father. CP 40 lines 12-18. Christopher Parsons was responsible to mow the lawn and provide caretaking for the ground and residence and keep trespassers off the property. CP 67, lines 12-21.

Christopher Parsons and his father had a plan to renovate the ground and the house and eventually sell the lower part of the acreage and build homes. CP 65 lines 4-19. However, this plan ended in 1999 when Theodore H. Parsons, Jr. died. *Id.*

When his father died, Christopher Parsons continued to reside at the Ranch House rent free while the taxes and utilities were paid by his father's estate. CP 68, lines 6-15. After his mother Phyllis Parsons died in 2006, the taxes and utilities continued to be paid by one of his parent's estates. CP 68, lines 16-25, CP 69 lines 1-21. When Ted Parsons became personal representative of the Estate and of his parents' estates, Christopher Parsons continued to reside at the Ranch House rent free and he maintained the property. CP 69, lines 18-21.

Christopher Parsons had skills to maintain the Ranch House because he was a carpenter. CP 103, lines 9-21. For a number of years, Christopher Parsons ran a fence building business with his father. CP 62, lines 15-25, CP 63, lines 1-9. Christopher Parsons did all the fence building work himself. CP 64, lines 9-12. After his father died and in the years leading up to his accident, Christopher Parsons worked as a day laborer in the construction industry working for various friends doing everything from excavation work to footings, foundations and framing. CP 55, lines 4-25, CP 56, lines 21-25, CP 57, lines 1-16. Christopher Parsons also did general landscaping on job sites for his construction industry friends. CP 60, lines 9-25, CP 61, lines 1 -10. He was paid between \$200 to \$250 a day for his labor. CP 57, lines 6 -25, CP 58, lines 7-25, CP 59, line 1.

The roof of the Ranch House leaked even before the December 2006 storm that downed trees onto the roof of the Ranch House as alleged in Christopher Parsons' complaint. CP 2, ¶ 3.2, CP 74, lines 5-14. Consequently, prior to the December 2006 storm, Christopher Parsons had to climb onto the roof occasionally and make general repairs by patching, applying tarps and replacing shingles. CP 74, lines 22-25, CP 75, lines 8-18. Christopher

Parsons paid for the shingles and tarps himself without any reimbursement from the Estate. CP 75, lines 19-24. And, the roof was covered with moss. CP 72, lines 18-25, CP 73, lines 1-14, CP 74, lines 9- 21, CP 107, CP 114. Christopher Parsons knew that moss was slippery when it was wet but occasionally got onto the roof in the winter to make repairs. CP 75, lines 8-25, CP 76, lines 1-5 & lines 16-18. However, Christopher Parsons would not attempt going onto the roof if he thought it was too dangerous. CP 76, lines 6-10. Christopher Parsons never slipped and fell off the roof prior to his accident in April 2011. CP 76, lines 11-15. The Ranch House was in a “livable” condition prior to the storm in December 2006 and had electricity and running water. CP 75, lines 9-21.

In December 2006 a severe storm caused two or three trees to fall onto the roof of the house causing damage. CP 69, lines 22-25, CP 79, lines 1-15. Christopher Parsons was there when an adjuster came to look at the damage and took photos. CP 69, lines 22-25, CP 70, lines 1-15, CP 72, lines 18-25, CP 73, lines 1-14, CP 107-118. A tree company was hired to remove the trees and put tarps on the roof. CP 77, lines 4-10. After the storm, the tarps had to be replaced every four or six months depending on weather and need and Christopher Parsons would climb onto the

roof and replace them. CP 77, lines 11-22, CP 78, lines 3-8, CP 70, lines 5-9.

Also over the years, Christopher Parsons had asked Ted Parsons about the Estate hiring a professional to repair the roof and Ted Parson's response was always "fix it yourself." CP 84, lines 15-25, CP 85, lines 1-20. Christopher Parsons recalled at his deposition that the last such conversation was about two weeks before his fall. *Id.* However, he had previously filed a declaration signed under the penalty of perjury that claimed that it was "early 2011" that he had asked Ted Parsons to hire a professional to repair the roof. CP 93, lines 13-25, CP 94, lines 1-2, CP 119-120

On the day of his accident, April 4, 2011, Christopher Parsons had decided to climb onto the roof and replace a tarp that had blown off, something he had done numerous times in the past. CP 83, lines 17-25, CP 86, lines 6-25. At that time the Ranch House had electricity but no running water. CP 60, lines 4-6. The roof had been leaking for a week but the Christopher Parsons wanted to wait to replace the tarp until he thought is was safe to climb onto the roof. CP 87, lines 13-25, CP 88, lines 1-10. Consequently, he thought it would be safe to climb onto the roof since the day was dry and it had not rained in a while. CP 86, lines

11-15. The roof of the Ranch House had a slight peak but Christopher Parsons did not think that climbing onto the roof of the ranch house was dangerous because he had done it so many times in the past:

Q. Did you, I guess, prior to going up on the roof that day, did you know that just being on the slanted surface of the roof, that there was always a possibility that you could fall?

A. I didn't feel it was that dangerous.

Q. Okay.

A. The angle, the pitch of the roof, it wasn't -- it's a very flat-pitched roof. Not a very steep pitch, I should say.

Q. You said you didn't feel it was that dangerous. Did you feel there was any danger in going up on the roof?

A. I had done it so many times, I didn't even think about it. It's just something that I did, to help to try to maintain the integrity of the interior structure.

CP 88, lines 21-25, CP 89, lines 1- 9.

Christopher Parsons used a ladder to climb the eight feet to the roof and then walked up to the peak of the roof. CP 89, lines 10-25, CP 90, lines 1-2. Christopher Parsons was near the peak of the roof when he miss-stepped and rolled down the roof and fell off the edge to the ground. CP 90, lines 3-15. Christopher Parsons

was not wearing a safety harness when he fell. CP 91, lines 1-15. Christopher Parsons landed on concrete and lay on the ground overnight until a friend, John Burt, found him. CP 91, lines 23-25, CP 92, lines 1-4, & lines 10-20. Christopher Parsons had allowed John Burt to move his motor home and trailer onto the Ranch House property sometime in 2006 or 2007 and reside there rent free until the two had a falling out and Christopher Parsons wanted John Burt off the property. CP 79, lines 9-24, CP 80, 2-61, CP 81, lines 1-21, CP 106.

Christopher Parsons moved away from the ranch house in late July or early August 2011 to stay with friends because the house was uncomfortable and he has not lived there since. CP 99, lines 4-25. However, though Christopher Parsons had moved from the Ranch House, he refused to turn over possession of the property to the Estate and in July 2012, the Estate filed an ejectment proceeding. CP 98, lines 3-23, CP 99, line 25, CP 100, lines 1-14. The ejectment petition alleged that the Christopher Parsons was a "tenant at will." CP 39-40, ¶ 12, CP 122-127. The Estate wanted to sell the property, make a distribution of the estate pursuant to the will and close the probate. CP 39-40 ¶ 12. Christopher Parsons did not contest the proceeding and an order of

default was entered. CP 39-40 ¶ 12. Christopher Parsons was formally ejected from the property in November 2012 by a county detective. CP 98, lines 3-23.

Christopher Parsons claims he is a direct heir under the Estate of Helen Parson. CP 94, lines 14-21. Though Christopher Parsons was not living on the property at the time of the ejection, he forced the Estate to legally eject him because he did not want to give up any ownership interest he had in the property and wanted to renovate the property prior to selling it:

Q. So then if you had moved off the property in August or July/August of 2011, then why was there a formal eviction proceeding?

A. I didn't want to relinquish my rights to be there because I'm a direct -- I'm a direct heir, and I didn't want to relinquish my rights of just departing after 21 years. And I was hoping that we would be able to go through with my father's original wishes and plans, which was to renovate the homes and grounds and then sell it at a point where it was fixed up, instead of just dumping it for whatever they sold it for. I wanted to fix everything up. I was hoping we might be able to mend the fences. And Michael was helping me with that. Thinking of the future, in other words.

CP 99, line 1, CP 100, lines 14.

The Ranch House property sold to a third party in May, 2014. CP 40 ¶ 13. Christopher Parsons is an indirect heir under

the Estate being that the Estate's direct heirs were Helen Parson's children all of whom are deceased. *Id.*

C. Procedural History

On September 12, 2013, Christopher Parsons filed a personal injury lawsuit against the Estate. CP 1-3. He alleged four different theories of liability against the Estate:

1. The Estate was plaintiff's employer as defined by RCW 49.17.020(4) and violated numerous WACs by forcing plaintiff to repair the roof himself and by not providing plaintiff with appropriate safety protocols and tools to effectively repair the roof;
2. The Estate is liable to plaintiff under the common law premises liability;
3. The Estate is a general contractor and had a non-delegable specific duty to ensure compliance with all WISHA regulations and failed to do so; and
4. The Estate is liable to plaintiff under the common law safe workplace duty.

CP 2-3, ¶s 3.7 – 3.10

On February 20, 2014, Christopher Parsons' filed a Confirmation of Joinder of Parties, Claims and Defenses. CP 171-172. He did not indicate that there would be any amendment to the complaint. *Id.* On September 3, 2014, the lower court issued an Order Amending the Case Schedule which reset the trial date to February 9, 2015 with the discovery cutoff being December 22,

2014. CP 176-177. On October 22, 2014, the Estate filed its motion for summary judgment dismissal. CP 11-34. On November 17, 2014, Christopher Parsons filed his opposition to the motion alleging for the first time that the “personal representative owed a fiduciary level of care to Christopher Parsons, as heir, and as ward of a trust.” CP 139-140.

On November 21, 2014, the trial court heard the Estate’s motion for summary judgment. Both parties presented argument and the court granted the Estate’s motion. CP 153-154. However, after granting the motion, Christopher Parsons’ counsel orally moved for leave to amend the complaint to add a claim for Ted Parsons’ duty and breach. CP 153- 154. CP 197, lines 9-22. The trial court denied the motion as being procedurally out of order. CP 153-154, CP 197, lines 23-24. Nonetheless, in discussing its ruling granting the summary judgment motion, the trial court noted that the case in front of it was a personal injury action and not an action against a fiduciary for waste:

Well, this is certainly a very fact-specific case, and there's going to be no actual case law that is going to apply to this set of facts. It's very peculiar. There appears to be many back stories to the case that aren't relevant to the situation at hand. I can only surmise it would appear that maybe Mr. Christopher Parsons would have an action against the personal

representative who happens to be his brother, for waste of the asset. On the other hand, perhaps -- and again, none of this is relevant to the personal injury action -- perhaps there was an acknowledgement that this was a case of a house that was a teardown house that ultimately the value was going to be in subdivision of the land. But, again, none of that is before the Court. I agree that there is no -- this is not a TEDRA action. This is not a breach of fiduciary duties action. It is a personal injury action, and that is how the Court is now analyzing it.

CP 195, lines 8-25, CP 196, line 1.

On December 2, 2014, Christopher Parsons' filed Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment CP 155-164. However, due to Christopher Parsons' procedural error, the motion was not presented to the trial court for consideration. CP 174-175. In the meantime, on December 18, 2014, Christopher Parsons' filed his Notice of Appeal to the Court of Appeals. CP 166-170.

III. MOTION TO STRIKE

The Estate moves to strike from the record Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment located at CP 155-164. This motion was not considered by the trial court due to a procedural error and Christopher Parsons did not assign any error in this appeal to the trial court not considering the motion. Accordingly, this motion is not properly before the Court of Appeals.

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion When It Denied Appellant's Oral Motion to Amend His Complaint to Add a Claim Against Theodore H. Parsons, III for Breach of Fiduciary Duties

1. Standard of Review

A trial court's decision to grant leave to amend the pleadings is reviewed for an abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); *M.A. Mortenson Co. Inc. v. Timberline Software Corp.*, 93 Wn. App. 819, 837-38, 70 P.2d 803 (Div. 1 1999). A trial court's decision regarding a motion for leave to amend a pleading will not be "disturbed on appeal except for a manifest abuse of discretion or a failure to exercise discretion." *Del Guzzi Constr. Co., Inc. v. Global Northwest LTD., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (trial court's denial of a motion to amend made one week before a motion for summary judgment hearing was not a manifest abuse of discretion or failure to exercise discretion.).

2. The Trial Court Properly Exercised Discretion When It Denied Appellant's Oral Motion To Amend The Complaint And Should Not Be Disturbed On Appeal

Civil Rule 15(a) provides in relevant part that a party may amend his pleading "only by leave of court or by written consent of

the adverse party; and leave shall be freely given when justice so requires.” CR 15(a). Civil Rule 15(a) provides that a motion must be filed along with a copy of the proposed amended pleading. *Id.*, 7(b), *See also Doyle v. Planned Parenthood of Seattle-King Cty., Inc.*, 31 Wn. App. 126, 130-31, 639 P.2d 240 (Div. 1 1982). Furthermore, King County Local Rules require that a non dispositive motion be filed and served six court days before the hearing. KCLR 7(4)(A). A response to motion is allowed by the nonmoving party and is to be filed by noon two court days before when the motion is going to be heard. KCLR 7(4)(D).

A trial court can consider several factors in determining whether to grant or deny a motion to amend a pleading. If the motion to amend is made after the adverse granting of a summary judgment motion such as in the case at bar, “the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.” *Doyle* at 130-31, *Ensley v. Mollmann*, 155 Wn. App. 744, 759, 230 P.3d 599 (Div. 1 2010). In addition, the trial court can consider whether the amendment is futile, unfairly prejudicial, and will cause undue delay. *Wilson*, 137 Wn.2d at 505-06.

In reviewing the case law, it is evident that an untimely motion to amend is disfavored by the Appellate Court. For instance, in *Doyle*, following a summary judgment dismissal, the plaintiff sought to amend the complaint to add a new theory of liability which was denied by the trial court. *Id.* at 128-29. On review, the Court of Appeals affirmed the lower court's denial of motion to amend as being untimely due to the motion for summary judgment ruling and the lack of legal support for the proposed new theory of liability. *Doyle*, 31 Wn. App. at 132.

In *Ensley*, 155 Wn. App 744, the plaintiff moved to amend his complaint to add a new party over two years after his original complaint was filed, seven months after summary judgment, two months before the scheduled trial date and two weeks before the discovery cutoff. *Id.* at 759. The Appellate Court concluded that the trial court properly denied the plaintiff's motion to amend his complaint as being untimely. *Id.*

In *Wilson v. Horsley*, 137 Wn.2d 500, 974 P.2d 316 (1999), the Washington Supreme Court ruled that the trial court did not abuse its discretion when it did not allow a defendant leave to amend its answer to assert new defenses and a counterclaim following a Mandatory Arbitration for which a trial de novo was

requested. *Id.* at 507-508. The Court noted that the trial court's reasons for the denial were persuasive including the fact that the defendant had waited until the "eve of trial" to request the amendment having known of the factual basis to support the amendment since the arbitration hearing. *Id.*

Division 2 of the Court of Appeals was faced with a similar issue of an untimely motion to amend in *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn.App. 872, 155 P.3d 952 (Div. 2 2007). In *Haselwood*, the Court of Appeals found that the trial court did not abuse its discretion when it denied a party leave to amend its counterclaim. *Id.* at 890-91. The Court noted that the party waited to amend its pleadings until after suffering an adverse ruling on summary judgment "even though nearly one and one-half years elapsed between the time [the party] filed its answer and counterclaim and the trial court granted summary judgment to the [other party.]" *Id.* at 890. Furthermore, the Court highlighted the fact that "[a]llowing [the party] to pursue entirely new theories of liability at this state would prejudice the other parties' interests in promptly resolving the claims." *Id.*

In *Oliver v. Flow International Corp.*, 137 Wn. App. 655, 155 P.3d 140 (Div. 1 2007), the Court of Appeals affirmed the lower

court's denial of a motion to amend the complaint made one week after the court granted defendant's motion for summary judgment where the amendment would have prejudiced the nonmoving party because of new round of discovery would have been necessary. *Id.* at 664.

In the matter at hand, the trial court denied Christopher Parsons' oral motion to amend his complaint to add a claim against Ted Parsons for breach of fiduciary duty because it was "procedurally out of order." However, from a review of the hearing transcript, it is evident in her ruling that the trial court considered Christopher Parsons' claims of breach of duty made in his response brief and at the hearing. CP 195, lines 9-25, CP 196, line 1. Nonetheless, Christopher Parsons' assertions of breach of fiduciary duty claim had no place in the personal injury action in front the trial court:

MR. HAMILTON: And I appreciate what the Court is doing. Are you making any rulings regarding the status and effect of the fact of Ted Parsons being a personal representative of the estate?

THE COURT: No -- in what way?

MR. HAMILTON: Well, again, it's my position that that is the duty.

THE COURT: Yeah, I don't think that that was quite in this case. I think that that should have been pled as an action against the fiduciary. And that the Complaint –

MR. HAMILTON: Well, at this time I would move for a leave to amend the complaint before any written order is entered.

THE COURT: I think that's procedurally out of order, and I'm going to deny that motion.

“Procedurally out of order” can encompass many things. Christopher Parsons filed his lawsuit in September 2013 and thus had one year to ask for leave to amend his complaint to assert a new theory of liability prior to the Estate’s filing of its motion for summary judgment in October 2014. Even after receiving the motion for summary judgment, Christopher Parsons could have filed a motion to amend the complaint as required by CR 15(a) to assert the breach of duty claim at any time prior to the summary judgment hearing or note the motion for the same day as the summary judgment hearing. None of this was done. Rather, after the court granted summary judgment, Christopher Parsons moved to amend his complaint to assert the new claim. Notably, the discovery cutoff was one month away and the trial date was February 9, 2015. If the untimely motion would have been granted, it would have greatly prejudiced the Estate in its

preparation for trial. Also, damages for “waste” of an asset are not personal injury damages and the amendment would be futile. Like the Courts in *Doyle*, *Ensley*, *Wilson*, and *Haselwood*, this Court should affirm trial court’s decision to deny Christopher Parsons’ motion for being procedurally out of order by being untimely.

In addition, Christopher Parsons proposed amendment was not a new theory of liability against the Estate as owner of the Ranch House as was pled in the complaint, but a new theory of liability against Ted Parsons as personal representative of the Estate. It was also a theory of liability against Ted Parsons as Personal Representative of the Estate of Phyllis Parsons which is not a party in this lawsuit.

Moreover, the claim for breach of fiduciary duty is a completely separate and distinct claim from that of a personal injury action. Like in *Oliver*, 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.

The timing of the motion to amend the complaint is relevant. Christopher Parsons should have exercised due diligence and moved to amend his complaint before the trial court considered

the summary judgment motion. The trial court did not do an outright refusal to consider the issue, but exercised her discretion in denying the motion which this Court should affirm.

B. The Fiduciary Duties of Theodore H. Parsons, III Were Not An Issue In This Lawsuit And Are Nothing More Than A Red Herring

Christopher Parsons argues extensively throughout his appeals brief that Ted Parsons breached his duties to maintain “habitability” of the premises and maintenance of a “tenantable” premises. However, this issue was not pled in the complaint so it was not discussed in the Estate’s moving brief.

Indeed, to file a summary judgment motion and to prove there was no material issue of fact, the Estate had to accept Christopher Parsons’ alleged facts and deposition testimony as true. CP 12, fn 1. Christopher Parsons pled and testified that a storm damaged the roof, he asked for it to be prepared by professionals, Ted Parsons told him to fix it himself, and when attempting to do so, he fell and suffered personal injuries. Christopher Parsons’ pled four theories of liability as to why the Estate, as owner of the Ranch House, was liable. The reasons as to why the roof was in the condition it was in or why the roof was

never repaired were not relevant to issues as pled and thus were not addressed by the Estate.

If Christopher Parsons thought he had standing to bring a claim for breach of fiduciary duties (he is only an indirect heir, not a direct heir CP 40 ¶ 13) he should have brought the action in the probate court that was administering the estate of Helen Parsons and or the estate of Phyllis Parsons. The trial court considered the argument but ultimately found that the breach of fiduciary claim was not pled. CP 195, lines 8-25, CP 196, lines 1.

Furthermore, Christopher Parsons' assertion that the issue of breach of fiduciary duties was "intrinsic to the claims and defenses" and "were placed in controversy by the defendant-movant's evidence" are without merit. "A party who does not plead a cause of action or theory of recovery 'cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.'" *Karlberg v. Otten*, 167 Wn.App 522, 530, 280 P.3d 1123 (Div. 1 2012) quoting *Dewey v. Tacoma School District No. 10*, 95 Wn.App. 18, 26, 974 P.2d 847 (Div. 2 1999). This is exactly what Christopher Parsons is attempting to do: he is trying to finesse his personal injury lawsuit into a TEDRA action and should not be allowed by this Court.

C. The Trial Court Properly Granted Summary Judgment Dismissal Because There Were No Material Facts At Issue and The Roof Condition was Open and Obvious

1. Standard of Review

In reviewing an order of summary judgment, the Appellate Court engages in the same inquiry as the trial court; summary judgment will be affirmed where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

2. The Estate Was Not Christopher Parsons Employer Under WISHA Or Common Law And Owed No Duty To Maintain A Safe Workplace

Christopher Parsons alleged that there was an “employer-employee” relationship between the Estate and himself because he was the “caretaker” of the Ranch House. He claimed a violation of workplace safety regulations under WISHA and the common law. Nonetheless, Christopher Parsons reliance on WISHA and the common law is misplaced.

An employer as defined by Washington’s Industrial Health and Safety Act (WISHA). RCW 49.17.020(4) states, in part, that an employer is:

any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons

RCW 49.17.020(4) (emphasis added)

The Estate does not fall under the definition of “employer.” Rather, the Estate owned the Ranch House and was thus a homeowner. CP 37 ¶ 4, CP 38 ¶ 8. The law is well established in Washington that homeowners are not “employers” subject to the requirements under WISHA. *Rogers v. Irving*, 85 Wn. App. 455, 933 P.2d 1060 (Div. 1 1997).

In *Rogers*, defendant Irving was a carpenter who purchased real estate with the intent to build his home. *Id.* at 457. Irving personally performed a number of tasks related to building the home but for jobs outside his expertise, such as plumbing, heating and roofing, he hired independent contractors. *Id.* at 458. To install the roof, Irving hired a roofing contractor who employed plaintiff Rogers to construct the roof. *Id.* at 458. Irving neither inspected the work of the roofing contractor nor paid attention to what kind of safety equipment they used. *Id.* Irving “was on the job site often,

but only to take care of details unrelated to construction of the roof.”

Id.

While working on the roof of the garage, Rogers slipped off the roof and fell 12 – 14 feet to the ground and suffered serious injuries. *Id.* Citing WISHA standards, Rogers sued Irving for “negligently failing to ensure that safety equipment was used by the roofers.” *Id.* at 458-459. Identical to the matter at bar, Rogers claimed, and Irving denied, that Irving was an “employer” under WISHA. *Id.* at 459.

Rogers argued that “employers” must ensure that proper safety equipment is provided to employees and required by WISHA. *Id.* at 458. Rogers argued that if Irving were an “employer,” his failure to see to the provision of safety equipment constituted a violation of his statutory duty to Rogers, even though Rogers was an independent contractor. *Id.* at 459. In response, Irving did not argue that there were no safety violations. *Id.* at 461. Instead he argued that the term “‘employer’ does not include a homeowner who for his own personal benefit employs independent contractors to perform various jobs on the residence,” and as a result, he did not owe Rogers a duty to comply with safety

regulations. *Id.* The trial court agreed with Irving and dismissed Rogers's claims. *Id.* at 458.

On appeal, the Court of Appeals affirmed the trial court's ruling that Irving was not an "employer" as defined by statute. The Appellate Court analyzed the meaning of employer in the statutory definition and concluded that the "Legislature intended "employer" to be synonymous with 'business entity', whatever form that entity might take-person, firm, corporation, partnership, business trust, or legal representative." *Id.* at 462. Since the statute did not define "business" or "business entity," the Court of Appeals looked at Black's Law Dictionary for the definition of business as "[employment, occupation, profession, or commercial activity engaged in for gain or livelihood." *Id.*

Since Irving was building his own home, he was not engaging in an activity for gain or livelihood and was not an "employer." Since Irving was not an employer, he did not owe Rogers a duty of care under WISHA.

Homeowners, not being business enterprises, are typically ill-equipped to assume the duties that Rogers' interpretation of "employer" would impose upon them. They are unlikely to know how to provide features such as fall arrest systems, or how to contract for indemnity. Not only would they incur exposure to suit from employees of independent

contractors, they would also become potentially liable for payment of fees to the Department of Labor and Industries. **In the absence of an unambiguous indication from the Legislature that it intended to include home building and repair projects under WISHA, we hold that the definition of “employer” in RCW 49.17.020(3) does not include a homeowner contracting for work done on his personal residence.**

Id. at 463 (emphasis added).

Likewise in the case at bar, the Estate is not a “business” but a homeowner. The Ranch House was the personal residence of Helen Parsons and upon her death, became part of her Estate. CP 37 ¶ 4. During the 20 years before the accident, the Ranch House remained a residential home and Christopher Parsons was allowed to live on the property and be its caretaker. CP 38-39 ¶ 10, Christopher Parsons lived in the ranch house by himself and the Estate never supervised the “caretaking” work of the plaintiff. *Id.* Indeed, Ted Parsons lives in Alaska and the last time prior to Christopher Parsons’ fall that he was at the Ranch House was in December of 2006 following the storm that damaged the roof. CP 38 ¶ 3, CP 69, lines 22-25, CP 70, lines 1-5. Over the 20 years that he lived at the Ranch House, Christopher Parson decided when to climb onto the roof to replace the tarps and how to replace them. CP 75, lines 1-25, CP 76, lines 1-18, CP 77, lines 16-22.

Christopher Parsons was allowed to live on the property to provide him with a place to live and the “caretaking” was incidental. CP 38-39 ¶ 10. The Estate did not consider Christopher Parsons an “employee” and never provided him with a 1099 for the value of his services for caretaking. *Id.*

Unlike Christopher Parsons who worked as a carpenter and in the construction industry, the Estate has no construction training and would be in an even worse position to enforce safety requirements than the defendant in *Rogers*. CP 103, lines 9-21, CP 60, lines 9-25, CP 64, lines 9-12, CP 61, lines 1-10. Consequently, the Estate owed Christopher Parsons no statutory duty of care since the Estate was not Christopher Parsons’ employer.

Christopher Parsons claims that *Rogers* is inapplicable because Christopher Parsons was not an “independent contractor.” However, the fact that the plaintiff in *Rogers* was an independent contractor was not dispositive in the Court’s determination. Rather, the *Rogers* court reasoned that the plaintiff could not be an employee unless the defendant could first meet the definition of an employer. *Rogers*, 85 Wn. App. at 461. Consequently, since the

Estate was not “employer,” Christopher Parsons was not an employee.

Furthermore, in his response brief to the motion for summary judgment, Christopher Parsons expanded his common law premises liability claim and alleged he was tenant and the Estate was a landlord and violated duties owed. CP 136, lines 15-26, CP 137, lines 1-19. However, the only “tenancy” that Christopher Parsons had was that as a “tenant at will.” CP 39-40 ¶ 12; CP 122-127. And, as a “tenant at will”, there was no employer-employee relationship.

Washington courts have generally held that people who occupy residential property for an indefinite amount of time without any obligations to pay rent are tenants at will. *Najewitz v. City of Seattle*, 21 Wn.2d 656, 657-58, 152 P.2d 722 (1944). In *Najewitz*, the City of Seattle had an agreement wherein the plaintiff would act as the caretaker of certain parts of city property. The plaintiff moved into a house on this city property and was responsible to make improvements and provide general upkeep on the land. *Id.* In analyzing this agreement, the *Najewitz* court explicitly stated that this “created [a] relationship of landlord and tenant, not of employer

and employee.” *Id.* at 658. In reaching this conclusion, the court reasoned as follows:

[S]tripped of conclusions and argumentative allegations, [the Complaint] merely sets up an agreement of the occupancy of real property. All declarations and conclusions to the contrary cannot change the legal relationship of the parties established by the ultimate facts alleged.

Id.

In the present case, Christopher Parsons was the caretaker and had no obligation to pay rent. CP 38-39 ¶ 10. Like the situation in *Najewitz*, this was an agreement of occupancy and did not create an employer-employee relationship.

Christopher Parsons also argues that the Estate owed duties to him as under the common law’s safe workplace doctrine as a general contractor or landowner. First, there is no evidence that the Estate was a “general contractor” who had a nondelegable duty to ensure WISHA compliance. Under Washington’s contractor registration statute, RCW 18.27, a “general contractor” is defined as follows:

a contractor whose **business operations require the use of more than one building trade or craft upon a single job** or project or under a single building permit. A general contractor also includes one who superintends, or consults on, in whole or in part, work falling within the definition of a contractor.

RCW 18.27.010(5)

The Estate does not have “business operations” that use more than one building trade or craft upon a single job on real property. The Estate is a residential homeowner and thus the WISHA requirements do not apply to it. *Rogers*, 85 Wn. App. at 463.

Second, under the common law safe workplace doctrine, only landowners and general contractors that retain control over a work site have a duty to maintain safe common work areas. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 331–32, 582 P.2d 500 (1978). The common law safe workplace doctrine is not applicable because the Ranch House was not a “work site” nor did the Estate retain control over the premises as discussed in the next section.

The trial court was correct when it found that there was no employer-employee relationship which created a duty and the summary judgment dismissal should be affirmed.

3. The Estate Owed No Duty to Christopher Parsons Under Premises Liability.

Before analyzing the basis for common law premises liability against the Estate as a landowner or landlord, Christopher

Parsons has to satisfy the very first element necessary to prove his claim: that the Estate possessed the Ranch House property. This is because the “common law duty of care existing in premises liability law is incumbent on the *possessor* of the land.” *Coleman v. Hoffman*, 115 Wn.App. 853, 859, 64 P.3d 65 (2003) (emphasis as provided). In *Coleman*, the court reasoned that it is not title that gives rise to liability; rather, “[t]he critical point is the possession itself.” *Id.* at 860 (emphasis added).

Following the Restatement (Second) of Torts § 328E (1965), the *Coleman* court defined a possessor of land as:

(a) a person who is in occupation of the land with intent to control it **or**

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, **or**

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Id.

Christopher Parsons did meet this enormous hurdle at the trial court and here is where his premises liability claim fails. It is evident that the Estate did not possess or control the Ranch House property. While the Estate paid the electric bill and real estate

taxes, which the *Coleman* court stated could be evidence of control, that was all the Estate did for the twenty years that Christopher Parsons resided on the property. CP 68, lines 6-25, CP 69, lines 1-21. Christopher Parsons was in possession of the Ranch House and controlled what occurred on the property. CP 65, lines 20-23. Christopher Parsons decided what “maintenance” he would do on the property and paid for the materials like shingles and tarps. CP 74, lines 22-25, CP 75, lines 8-18, CP 75, lines 19-24.

Christopher Parsons allowed his buddy, John Burt, to reside on the property rent free for years without the consent of the Estate. CP 40 ¶ 11. It was only when the two had a falling out and plaintiff wanted John Burt off the property that the Estate had to get involved to evict John Burt because it had legal title. *Id.* ¶ 11, CP 79, lines 9-24, CP 80, lines 2-61, CP 81, lines 1-21, CP 106. Christopher Parsons also allowed a real estate developer at one time to post an advertising sign on the property and charged a fee as a lessor. CP 38-40 ¶ 10, CP 48.

Christopher Parsons claims that the Estate had the right to the possess the property pursuant to RCW 11.48.20. However, for premises liability, it is not the holding of title or right to possess

that determines liability, but rather it is the **actual** possession. *Coleman* at 860.

Christopher Parsons may claim that though he possessed the Ranch House property by living on it for 20 years, he never intended to control the property. However, his actions speak louder than words. Christopher Parsons claimed an ownership interest in the property since he is an heir. CP 94, lines 14-21. Despite the fact that Christopher Parsons claims he moved from the Ranch House in the summer of 2011, he still maintained possession and control of the property. CP 99, line 25, CP 100, lines 1-14. If the Estate had possession and control of the property, the Estate would not have had to seek court and law enforcement intervention by filing a formal ejection action to remove Christopher Parsons so it could be sold. *Id.*, CP 98, lines 3-23,

Accordingly it is without question that the Estate did not possess of the Ranch House at the time of Christopher Parsons fall and his premises liability claim fails. Indeed, the Estate did not even legally own the Ranch House property until October 28, 2011, six months after his accident, when a Personal Representative's deed was executed by the personal representatives deeding the property to the Estate. CP 38 ¶ 8.

Nonetheless, even if this Court determines the Estate did have possession of the property, Christopher Parsons still cannot prove his premises liability claim and the Court should affirm the trial court's dismissal. In negligence actions a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Coleman v. Hoffman*, 115 Wn.App. 853, 64 P.3d 65 (2003). Whether a defendant owes the plaintiff a duty of care is a question of law. *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 601, 20 P.3d 1003 (2001). In premises liability actions, a person's status determines the scope of the duty of care owed by the possessor of that property. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 125, 52 P.3d 472 (2002).

In this matter, even assuming for purposes argument only that Christopher Parsons was an invitee to whom the highest duty of care from a possessor of real estate is owed, his claim still fails. A landowner is not the guarantor of safety. *Geise v. Lee*, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975). A landowner's liability is limited by Restatement (Second) of Torts, § 343A(1) when the danger to an invitee is known or obvious:

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.

Restatement (Second) of Torts, § 343A(1) (emphasis added); see also *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (“this section of the Restatement is the appropriate standard for duties to invitees for known or obvious dangers.”).

And, as a tenant, Christopher Parsons does not have premises liability claim due to the Washington’s common law “latent defect” rule in which a landlord will be held liable to a tenant for harm caused only by “(1) latent or hidden defects in the leasehold, (2) that existed at the commencement of the leasehold, (3) of which the landlord had actual knowledge, (4) and of which the landlord failed to inform the tenant.” *Frobig v. Gordon*, 124 Wn. 732, 735, 881 P.2d 226 (1994); *Charlton v. Day Island Marina, Inc.* 46 Wn.App. 784, 790, 732 P.2d 1008 (Div. 2 1987). “The latent defect theory does not impose upon the landlord any duty to discover obscure defects or dangers. Nor does it impose any duty to repair a defective condition. Under the latent defect theory, the landlord is

liable only for failing to inform the tenant of known dangers which are not likely to be discovered by the tenant.” *Aspon v. Loomis*, 62 Wn.App. 818, 826-27, 816 P.2d 751 (Div. 1 1991)(citing *Flannery v. Nelson*, 59 Wn.2d 120, 123, 366 P.2d 329 (1961)).

In *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 599, 20 P.3d 1003 (Div. 1 2001), a tenant's guest tripped on uneven bricks in a parking strip utilized by the tenant for displaying his wares, a condition the Court described as “open and obvious.” *Id.* at 601. The issue was whether the landlord was liable for an injury suffered by a guest of its tenant. The Appellate Court applied the “latent defect” rule and affirmed the trial court’s dismissal of the guest’s suit, in part, based on its reasoning that the unevenness was not a hidden defect. *Id.*, at 603.

In *Charlton v. Day Island Marina, Inc.* 46 Wn.App. 784, 790, 732 P.2d 1008 (Div. 2 1987), the trial court dismissed wrongful death claims on behalf of guests of a tenant who were accidentally killed when exhaust fumes accumulated in a boathouse they went into. On appeal, the Appellate Court reasoned that a landlord can only be liable for injuries caused by latent defects actually known to the landlord. The Court held that the accumulation of exhaust fumes and the lack of adequate ventilation were obvious, not latent,

defects and thus the landlord had breached no duty to the tenant's guests.

In *Howard v. Horn*, 61 Wn.App. 520, 524-25, 810 P.2d 1387 (Div. 3 1991). *review denied*, 117 Wn.2d 1011 (1991), a tenant of a residential duplex tripped and fell on an uneven walkway to his residence. The tenant admitted that the unevenness of the cement was visible, but claimed that the landlord was negligent for failing to install a handrail. The trial court granted summary judgment dismissal of the tenant's negligence action. The Appellate Court upheld the dismissal, applying the rule that a landlord can only be liable for *latent* defects of which it has actual notice. The *Howard* court held that the "absence of a handrail and uneven concrete were clearly visible," and thus patent rather than latent defects and the landlord was not liable.

In the matter at hand, there is no "latent" defect. Christopher Parsons knew that climbing to the roof and walking on it could be dangerous. CP 88, lines 21-25, CP 89, lines 1-9. Indeed, he had been climbing onto the roof and replacing shingles and tarps for twenty years before his fall. CP 75, lines 1-25, CP 76, lines 1-18, CP 77, lines 16-22. Hence the "danger" was open and oblivious and the Estate had no duty to warn of the danger.

The law is well-established that “[w]here an alleged dangerous condition is both obvious and known to a plaintiff, the defendants owe no duty to warn of this condition.” *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 740, 150 P.3d 633, (Div. 2 2007), see also *Mucsi v. Graoch Associates, Ltd. Partnership No. 12*, 144 Wn.2d 847, 31 P.3d 684 (2001) (“A possessor or owner of land generally 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.”) Moreover, this principle is consistent with the Restatement’s position on the subject:

In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. **Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.**

Restatement (Second) of Torts § 343A, Comment

e.(Emphasis added)

While there is no specific pattern jury instruction on the issue of “open and obvious” conditions, the comment to WPI 120.06 “Duty to Business or Public Invitee—Activities or Condition of Premises” provides direction that the open and obvious nature of a condition should be considered in a premises liability action. The comment states that “[i]f it is alleged that the danger should have been readily apparent to the plaintiff, an instruction based on Restatement (Second) of Torts § 343A should be given. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 P.2d 621 (1994) (natural out-cropping of rock); *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 72 P.3d 1097 (Div. 3 2003)” (large advertising stanchion in aisle of store).” WPI 120.06 (5th Ed.) Comment. Here, there is no factual dispute as to whether the potential danger of climbing to the roof “should have been readily apparent to the plaintiff.” Christopher Parsons testified at his deposition that he knew he could fall from the roof and waited for dry weather when he thought it was safe to climb onto the roof. CP 86, lines 11-15.

Christopher Parsons also argues, without any citation to authority, that the roof of the Ranch House was a “common area”

and as a landlord, the Estate had an affirmative duty to maintain the common areas in a reasonably safe condition. This argue lacks merit.

In *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (Div. 3 2001) the court considered what constitutes a common area. In *Lian*, the plaintiff fell on steps outside of the plaintiff's own unit. The court concluded that the steps at issue were not part of a common area, as the stairs involved serviced only the plaintiff's apartment. *Id.* Therefore, the landlord did not have an affirmative obligation to maintain the steps involved in the plaintiff's fall. *Id.* at 473.

Much like *Lian*, the roof from which Christopher Parsons fell was not a common area—the roof from which he fell is not shared with any other unit. The Ranch House is a single residential dwelling that does not share roofs, stairs, or anything else with any other dwelling. The “tenancy” is for the entire property and, thus, there are no “common areas.”

Christopher Parsons also argues that the implied warranty of habitability applies as does the Residential Landlord Tenant Act. However, at most, Christopher Parsons was a tenant at will in a family residence. The implied warranty of habitability does not apply because there is no contract and Christopher Parsons could have moved out at any time. In addition, the Residential Landlord

Tenant Act also does not apply for the same reasons. *Najewitz v. City of Seattle*, 21 Wn.2d 656, 152 P.2d 722 (1944).

Christopher Parsons may argue that the last phrase of Section 343A(1) that states “unless the possessor should anticipate the harm despite such knowledge or obviousness” creates a duty upon the Estate. The factors that are considered in determining whether an owner should anticipate the harm despite a hazard’s obviousness are (a) distraction, (b) forgetfulness and (c) reasonable advantages to the invitee from encountering a known danger. *Tincani supra*, 124 Wn.2d at 139-140.

None of these factors are applicable here. It is evident from Christopher Parsons’ deposition testimony that he was not distracted and did not forget about a potential slipping hazard of the moss on the roof because he waited for a dry day to climb to the roof. CP 87, lines 13-25, CP 88, lines 1-10, CP 86, lines 11-15. Christopher Parsons voluntarily chose to encounter “the risk” of the roof because he wanted to replace the tarp that had blown off. He did not have to replace the tarp himself. He could have hired a construction friend to replace the tarp and sent the bill to the Estate or moved off the property to his own home or to his Winnebago which he owned. CP 101, lines 22-25, CP 102, lines 1-6.

4. Christopher Parsons Assumed the Risk of Injury By Knowingly and Voluntarily Climbing to the Roof

In its answer, the Estate pled the affirmative defense of assumption of the risk as a complete bar to plaintiff's claims. Assuming the Estate owed a duty to Christopher Parsons for the sake of argument, pursuant to the doctrine of implied primary assumption of risk, when a plaintiff consents to the negation of a duty owed by the defendant, the defendant no longer owes that duty; there can be no breach of duty and therefore no claim for negligence. *Erie v. White*, 92 Wn. App. 297, 302, 966 P.2d 342 (1998), citing, *Scott v. Pacific Mountain Resort*, 119 Wn.2d 484, 497, 834 P.2d 6 (1992). "The assumption of risk in this form is really a principle of no duty, or no negligence, and so denies the existence of the underlying action." *Tincani*, 124 Wn.2d at 143. When implied primary assumption of risk applies, the doctrine completely bars any recovery by the plaintiff based upon the negated duty. *Erie*, 92 Wn. App. at 302. See also, *Tincani*, 124 Wn.2d at 143; *Scott*, 119 Wn.2d at 496-498.

The Washington Court of Appeals has delineated a three-part test for application of the implied primary assumption of risk doctrine:

To invoke assumption of risk, a defendant must show that the plaintiff knowingly and voluntarily chose to encounter the risk. Thus, '[t]he evidence must show that the plaintiff (1) had full subjective understanding, (2) of the presence and nature of a specific risk, and (3) voluntarily chose to encounter the risk.' Put another way, the plaintiff 'must have knowledge of the risk, appreciate and understand its nature, and voluntarily choose to incur it.'

Erie, 92 Wn. App. at 303.

Whether a plaintiff knowingly encounters a risk depends upon whether the plaintiff had actual and subjective access to all the facts a reasonable person in the shoes of the defendant would disclose and all the facts a reasonably prudent person in the position of the plaintiff would want to consider. *Erie*, at 303-304. The test is subjective: "[w]hether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk." *Id.* at 304. *Id.* Furthermore, to make a voluntary choice regarding exposure to the risk, the plaintiff must recognize and appreciate reasonable alternative courses of action. *Id.* Thus, in order for assumption of the risk to bar recovery, the plaintiff "must have had a reasonable opportunity to act differently or proceed on an alternative course that would have avoided the danger." *Id.* at 304 -305.

In situations where the plaintiff both knowingly and voluntarily assumes a certain risk, the plaintiff's assumption of the risk relieves the defendant of any duty to protect the plaintiff from the risk. This assumption of risk completely bars any recovery by the plaintiff, as opposed to providing an offset against damages as afforded by the doctrine of contributory negligence. While primary assumption of risk shifts the defendant's duty to the plaintiff, and therefore completely bars any recovery by the plaintiff, contributory negligence only reduces the damages available to the plaintiff.

Scott, 119 Wn.2d at 496.

The requirement of subjective knowledge is the factor which distinguishes assumption of risk from contributory negligence. *Erie*, 92 Wn. App. at 304, footnote 19.

Assumption of risk turns on what the plaintiff did know: Did he or she know all facts that a reasonable person in the defendant's shoes would have known? Contributory negligence turns on what the plaintiff should have known, or in alternative terms what a reasonable person in the plaintiff's shoes would have known, irrespective of what the plaintiff actually and subjectively knew.

Id.

However, this standard was considered by many courts as too subjective and should be tempered by reality and reasonableness.

In *Simpson v. May*, 5 Wn. App. 214, 486 P.2d 336 (1971), the court addressed and clarified the requirement that a plaintiff assume a risk that is "known and appreciated:"

Knowledge of the risk is the watchword of assumption of the risk. Under ordinary circumstances the plaintiff will not be taken to assume the risk of either activities or conditions of which he is ignorant. . . . At the same time, it is evident that a purely subjective standard opens a very wide door for the plaintiff who is willing to testify that he did not know or understand the risk; and there have been a good many cases in which the courts have said in effect that he is not to be believed, so that in effect something of an objective element enters the case, and the standard applied in fact does not differ greatly from that of the reasonable man. The plaintiff will not be heard to say that he did not comprehend a risk which must have been quite clear and obvious to him.

Simpson, 5 Wn. App. at 218-19.

In the matter at hand, reasonable minds cannot differ on whether Christopher Parsons knew all the facts a reasonable person would have known and thus appreciated the particular risk of climbing on a ladder to the roof and walking on the roof. Reasonable minds also cannot differ on whether he had other reasonable alternatives other than climbing to the roof. Christopher Parsons could have hired someone else to replace the tarp, not replace the tarp, or move off the property. Yet, he took none of

these actions and instead chose to climb onto the roof that particular day as he had done so many times before.

Accordingly, per the doctrine of primary implied assumption of the risk, the Estate's duty is negated and the Estate is not liable for any injury Christopher Parsons incurred by assuming the risk when he climbed to roof to replace a tarp.

IV. CONCLUSION

For all the reasons stated herein, the Estate requests that this Court affirm the trial court's ruling granting its motion for summary judgment dismissal. In addition, pursuant to RAP 14.2, the Estate seeks an award of costs for this appeal.

DATED this 29th day of July 2015

LAW OFFICES OF
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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 OF THE ESTATE OF HELEN PARSONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY

PROOF OF SERVICE OF RESPONDENT'S BRIEF

LAW OFFICES OF SWEENEY, HEIT & DIETZLER
By: Lisa A. Liekhus, WSBA #30205
Attorneys for Respondent
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2015 JUL 29 PM 3:40
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

1 ORIGINAL

Kristin Anderson declares, under penalty of perjury under the laws of the State of Washington, that the following is true.

1. I am employed by Law Offices of Sweeney, Heit, Dietzler, counsel of record for respondent the Estate of Helen Parsons, Deceased, by Theodore H. Parsons, III and Laura E. Hoexter, Co-Personal Representatives of the Estate of Helen Parsons. I am over the age of 18 years and not a party to this action.

2. On July 29, 2015, I arranged for the filing of the original and one copy of Respondent's Brief with the Court of Appeals, Division One, and served a copy of Respondent's Brief by ABC Delivery on this same day on the Appellant's counsel of record:

Charles S. Hamilton, III.
Attorney at Law
7016 35th Avenue NE
Seattle, WA 98115-5817

Date and Place of Execution: July 29, 2015 in Seattle, Washington.


Kristin Anderson