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I. ASSIGNMENTS OF ERROR

A. First Assignment of Error.

The trial court erred in concluding that whether Mr. Wirtz was an invitee or a licensee was immaterial to a resolution of the motion for summary judgment.

B. Second Assignment of Error.

The trial court erred in granting David and Diana Gillogly's motion for summary judgment on the basis that Mr. Wirtz assumed the risk of a tree falling on him.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether Mr. Wirtz Was an Invitee or a Licensee Is Critical.

Mr. Wirtz status as an invitee rather than a licensee determines the standard of care the defendants owed to him while he was removing trees from property belonging to David and Diana Gillogly.

B. The Facts Do Not Establish a Primary Assumption of the Risk Defense.

The trial court incorrectly concluded that Mr. Wirtz, a person with no tree falling experience, assumed the risk that defendants David and Dennis Gillogly, experienced tree fallers, would cause a tree with a barber

chair split to fall unexpectedly and injure Mr. Wirtz. The facts of this case simply do not satisfy a primary assumption of the risk by Mr. Wirtz.

III. STATEMENT OF THE CASE

A. Summary of Facts.

On February 23, 2003, Mr. Wirtz, at the request of David Gillogly and his son, Dennis Gillogly, was working on property belonging to defendants David and Diana Gillogly. David Gillogly had requested that Dennis Gillogly clear trees on David and Diana Gillogly's property and invited Dennis Gillogly to request Mr. Wirtz assistance. David Gillogly asked that his son and Mr. Wirtz clear the trees because David Gillogly would not pay an expert to clear the trees.

Mr. Wirtz, a person with no experience or knowledge in timber falling, watched, from a safe distance, as defendant Dennis Gillogly fell three trees under the direction of David Gillogly. As Dennis Gillogly prepared to down a fourth tree under David Gillogly's instruction David and Dennis Gillogly placed the untrained and unaware Mr. Wirtz in harms way. The Gilloglys needed the tree to "fall up" a 20 degree slope. They placed a cable on the tree and attached the cable to a base tree with a come along (ratchet). The Gilloglys then, briefly, instructed Mr. Wirtz on

operation of the ratchet, placed him by the base tree and suggested a direction for him to run if the tree they were cutting fell normally but unexpectedly towards Mr. Wirtz. David and Dennis Gillogly, in their experience, intended that the tree would not fall towards or endanger Mr. Wirtz. They were so comfortable in their expert assessment of the situation that they did not offer Mr. Wirtz any safety equipment, determine whether Mr. Wirtz was stationed outside of harms way, or warn him of any dangers.

David Gillogly moved to safety and Dennis Gillogly began cutting the tree. The tree, unexpectedly split dangerously up the middle (barber chaired). The Gilloglys were aware that this development significantly increased the risk associated with proceeding with their efforts. The Gilloglys did not discuss this problem, or the increased danger it presented, with Mr. Wirtz. They did not tell Mr. Wirtz that two of David Gillogly's friends were killed while falling trees that split in a similar manner. They did not warn Mr. Wirtz that the barber chair split made it almost impossible for them (or anybody) to predict the direction the tree would fall, the speed with which it would fall, how it would fall or when it would fall. In short, they did not warn a completely inexperienced

individual of the risks which they knew were associated with falling a tree and the significantly increased risk of falling a barber chaired tree. They also did not warn Mr. Wirtz that David Gillogly previously fell a tree on his house when it twisted while falling and landed in an unintended location. Simply put, The Gilloglys, who had prior experience in falling trees, the dangers associated with doing so, and the significantly increased danger of a barber chaired tree did not share any of that information, or protective equipment, with Mr. Wirtz.

After the tree barber chaired, Dennis Gillogly, at David Gillogly's instruction, continued to fall the tree. Suddenly, the tree snapped well above the cut, at the location of the cable. The broken tree fell quickly, much quicker than a sawed tree. The tree twisted as it fell and did not fall where, or as, he Gilloglys had intended or anticipated. A possibility of which Mr. Wirtz was not aware. The tree fell directly towards Mr. Wirtz, struck him before he could move, knocked him unconscious and fractured his skull.

B. Statement of Facts.

1. The Participants, Their Experience and Their Duties.

a. Robert Wirtz.

Mr. Wirtz's employment history did not involve tree falling or brush clean up. Prior to assisting on The Defendants' property, Mr. Wirtz' work history included (1) fund raising for Pepperdine University (CR 16; Wirtz Dep. 7:9-19), (2) selling horse racing programs at Hollywood Park (Wirtz Dep. 8:17-9:9), (3) valet parking (Wirtz Dep. 10:1-4); (4) office work at a trust company (Wirtz Dep. 11:1-6) and (5) other temporary jobs (Wirtz Dep. 12:1-4). He then worked for Northwest Interpretive Association at a bookstore as a subcontractor for the Forest Service (Wirtz Dep 12:15-24) and Durocher Trucking in accounts receivable and as a dispatcher. Wirtz Dep. 15:21-16:3. For the year prior to February 23, 2003, Mr. Wirtz was unemployed. Wirtz Dep. 19:22-20:2.

In February, 2003, Dennis Gillogly asked Mr. Wirtz to assist with a tree project at the residence of Dennis' father, David Gillogly. Wirtz Dep. 20:25-21:5. Mr. Wirtz had no prior experience. Wirtz Dep. 21:6-9. He does not recall prior experience falling trees. Wirtz Dep. 21:10-11. Prior to the date of the injury, Mr. Wirtz had worked on the tree project for

approximately three days in a seven day period. Wirtz Dep. 24:7-22. On the first day at the project he stacked wood. Wirtz Dep. 25:4-8. He stacked rounds that were eight to sixteen inches in diameter and 20 inches long. Wirtz Dep. 25:12-17. He worked with Dennis Gillogly and David Gillogly. Wirtz Dep. 26:3-11. Dennis Gillogly cut the wood into rounds while Mr. Wirtz stacked. Wirtz Dep. 27:6-14. Mr. Wirtz also hauled branches and cleaned up and burned debris. Wirtz Dep. 28:25-29:7. He did not operate a saw. Wirtz Dep. 28:6-7. The day of the injury was the first day the group had actually downed any trees on the property. Wirtz Dep. 27:22-28:5. Mr. Wirtz **did not** take down any trees. David Dep. 8:24-25. Mr. Wirtz is not a tree faller and does not know the proper procedure for safely cutting down trees. Wirtz Dep. 87:12-17.

b. David Gillogly.

Below, defendants portrayed Mr. Wirtz as a Gillogly family friend. The reality is that David Gillogly, the property owner, did not really know Mr. Wirtz until this tree incident. David Dep. 5:4-11. David Gillogly had no knowledge of Mr. Wirtz's work experience or training. David Dep. 5:18-20. David asked his son, Dennis, to take down some trees and Dennis asked if Mr. Wirtz could come along. David Gillogly agreed

because he could "always use an extra hand to haul the wood and stack it."
David Dep. 5:21-6:3. Mr. Wirtz was to haul and drag downed limbs, stack wood, burn wood, bring in the rounds and stack them. David Dep. 9:2024. Mr. Wirtz did not anticipate other activities. David Gillogly knew that Mr. Wirtz was coming to his property to help. He did not tell him not to come, did not tell him to go home and did not tell him not to assist. David Dep. 10:9-21. David Gillogly instructed Mr. Wirtz where to stack the wood. David Dep. 11:12-15. David selected the place to burn the debris. David Dep. 11:18-25. David started the fire. David Dep 12:7-8.

David Gillogly had contacted Champ's Tree Service about removing the trees but did not use that company to do so because he could not afford the price. David Dep. 6:18-7:12. His son and Mr. Wirtz could perform the same task for free and save him a great deal of money. The trees were dead and some of them were rotten. David Dep. 8:16-23. David Gillogly had prior experience cutting down trees both on his own property and on other property. David Dep. 19:8-17.

David Gillogly did not offer Mr. Wirtz a hard hat on the first day of work. David Dep. 14:25-15:2. Dennis Gillogly offered Mr. Wirtz a hard hat the second day. David Dep. 17:5-10. Dennis did not explain the

advantage or reasons for wearing a hard hat. David Dep. 18:3-5. David's only advise to Mr. Wirtz regarding the advantage of a hard hat was that it may assist if dead limbs fell from any trees due to the wind. David Dep. 18:6-9. David Gillogly did not, at any time during the project, wear a hard hat. David Dep. 19:5-7.

The record completely lacks any evidence that (1) David Gillogly warned Mr. Wirtz of the risk or danger of falling trees; or (2) the significantly increased risk or danger of a barber chair split in a tree.

c. Dennis Gillogly.

Dennis Gillogly was previously a seasonal fire fighter for the United States Forest Service. Dennis Dep. 7:20-24. He started in that position in 1999. Dennis Dep. 7:25-8:3. In that position he put out fires, dug fire lines, fell trees, fell hazard trees, fell live trees and fell trees on fire. Dennis Dep. 9:8-13. He had a week long course in falling trees. Dennis Dep. 10:20-11:4. Dennis Gillogly received a tree faller certification card. Dennis Dep. 13:12-17. Prior to this incident, Dennis Gillogly had attained the highest level of tree faller certification the Forest Service offered. Dennis Dep. 16:3-14. To obtain that level of certification, Dennis Gillogly had trained with a professional tree faller.

Dennis Dep. 16:22-17:8. He had also obtained training on the use, and risk and danger of using, cables and ratchets for falling trees. Dennis Dep. 19:24-20:24.

On the first day on the job at his father's place, Dennis bucked a couple of logs. David Gillogly told him what logs to cut and Mr. Wirtz helped stack the cut wood. Dennis Dep. 34:4-22. David also picked the spot to burn the debris. Dennis Dep. 36:6-13. Dennis and his father worked together to pick what would become firewood and what would burn in the burn pile. Dennis Dep. 36:21-37:8. Dennis did not suggest a hard hat to Mr. Wirtz because there was no overhead hazard. Dennis Dep. 35:17-21. Dennis agrees that Mr. Wirtz did not fall any trees and, until the last tree, any time a tree was downed he instructed Mr. Wirtz to stand on the driveway, out of the way. Dennis Dep. 43:1-19.

2. **A Broken and Dangerous Tree Falls Violently on Mr. Wirtz.**

Dennis cut down some trees on the second day of work. Dennis did not explain the process to Mr. Wirtz. David Dep. 19:18-20:6. David did not explain to Mr. Wirtz what Dennis was doing or why he was using a particular method. David Dep. 20:8-11. After the second day, Dennis and Mr. Wirtz were gone for a few days. David Dep. 21:11-16. When they

returned, the project was to fall some trees that were over utility lines.

David Dep. 21:20-25.

When Dennis and Mr. Wirtz returned to the property they started with taking down a maple. There was no problem. David Dep. 22:1-10. David did not offer Mr. Wirtz a hard hat prior to this project. David Dep. 23:2-4. They did not use a cable or come-along. David Dep. 22:11-15. Mr. Wirtz was 50 feet away when Dennis downed this 25 foot tree. David Dep. 22:16-22.

After the first tree was down, Dennis cut down a second and a third tree. David Dep. 23:25-24:18. Again, the trees came down without a problem. David Dep. 24:19-20. David and Mr. Wirtz were well out of the way. David Dep. 25:23-26:1. After all three trees were down, the men cleaned up. David Dep. 25:6-10.

The crew then went to cut down a maple tree near the utility lines. David Dep. 25:11-13. The tree was on a 20 degree slope and would have hit the utility lines if it fell down hill. David Dep. 25:11-22; Dennis Dep. 61:4-5. This tree was the largest to that point at approximately 60 to 65 feet in height. Dennis Dep. 61:6-7. Dennis, the trained and certified tree faller, originally considered using wedges to fall the tree, but abandoned

the idea. Dennis Dep. 52:1-12. Dennis and David came up with the idea to use a cable and ratchet to fall this tree. Dennis Dep. 52:11-20; David Dep. 25:25-26:3. Mr. Wirtz did not suggest using the cable and had no idea what David and Dennis were doing as far as using a block and tackle. David Dep. 27:3-6. Mr. Wirtz was not asked if he had ever used a come-along to fall a tree. Dennis Dep. 58:6-8.

The crew next went to the garage to get the necessary equipment. David Dep. 27:16-19. In David's garage were multiple cables of various lengths. Dennis Dep. 52:21-24; 56:8-10. Mr. Wirtz did not pick the cable. Dennis Dep. 56:13-17. The Gilloglys picked the length of the cable to fit the available come-along, they did not base the decision to pick a particular length of cable on the height of the maple tree. Dennis Dep. 88:22-89:8. Even though Dennis' Forest Service training had taught him how to estimate tree height (Dennis Dep. 87:4-19), he did not use that knowledge in this situation because he did not think the tree would reach Mr. Wirtz. Dennis Dep. 87:20-25. David did nothing to determine if the tree, when cut, would reach the base tree. David Dep. 49:5-13. Thus, the certified, trained and experienced tree faller (and David Wirtz' agent), in evaluating the situation, did not use his training and experience to either

warn or protect Mr. Wirtz. There is no evidence that Mr. Wirtz even participated in the discussion or decision as to how to fall the tree or the equipment to use in doing so.

David knew that Mr. Wirtz had no experience in falling trees. David Dep. 29:5-9; Dennis Dep. 62:15-19. David understood that Mr. Wirtz had not used a cable to fall a tree. David Dep. 29:10-12. David did not know if Mr. Wirtz had ever operated or worked around a chain saw. David Dep. 29:13-24.

After David and Dennis determined the method to fall the tree and selected the equipment to do so, all three returned to the problem maple. Dennis and Mr. Wirtz, under David Gillogly's supervision, used a ladder to place the cable on the maple about 12 feet above the ground. Dennis Dep. 59:14-20. Dennis secured the cable on the maple tree. David Dep. 30:19-24. They then put the other end of the cable around a base tree with the ratchet. David Dep. 32:20-22. David told Mr. Wirtz how to operate the ratchet. David Dep. 32:22-23. Mr. Wirtz **did not** select the base tree. Dennis Dep. 62:6-9.

Dennis, the certified tree faller, **did not** believe the maple would

reach the fir tree when cut. Dennis Dep. 63:8-10.' After the cable was in place, David secured the cable and come along. Wirtz Dep. 40:10-25. Mr. Wirtz did not know what was involved because he had never done this before. Wirtz Dep. 40:13-15. David explained to Mr. Wirtz how to put tension on the cable. David Dep. 35:2-5. Mr. Wirtz **was not** aware the tree would fall towards him. Wirtz Dep. 41:16-18. He was unsure of the direction the tree would fall. Wirtz Dep. 44:13-24. He was unsure if the tree would reach him when it fell if by chance it did fall towards him. Wirtz Dep. 44:13-17.

Dennis then started to cut the tree. Dennis Dep. 63:16-24; David Dep. 38:16-39:2. David was standing out of harms way in the drive way. David Dep. 37:5-9. The Gilloglys required Mr. Wirtz to remain at the base tree while Dennis made the cut. David Dep. 39:3-6; Dennis Dep. 63:25-64:7. After each partial cut, Dennis shut the saw off and yelled at Mr. Wirtz to tighten the ratchet. Dennis Dep. 65:9-15; David Dep. 39:7-11. David did not object to the process of pulling the tree up hill or the instructions given to Mr. Wirtz. Dennis Dep. 66:12-25. Dennis told Mr.

'On a continuum of experience, Mr. Wirtz had no experience. Dennis had U. S. Forest Service training and certification for falling trees. It is difficult to imagine that Mr. Wirtz assumed the risk of a tree falling on him when the trained and certified tree faller did not believe that the tree would, under normal and anticipated conditions, reach Mr. Wirtz.

Wirtz that, if he heard a pop, he should move right because they were pulling the tree left. Dennis Dep. 67:15-24. Dennis started to saw a second time and the tree pinched his saw. Dennis Dep. 70:23-71:1. Dennis shut off his saw and told Mr. Wirtz to tighten the ratchet. Dennis Dep. 71:2-4. Dennis turned his saw back on and cut just a bit more. The tree then split, or barber chaired, up the middle. Dennis Dep. 71:12-18; Wirtz Dep. 47:7-10. The tree barber chaired up from the cut to the cable which Dennis, under David's supervision and instruction, had placed on the tree. Dennis Dep. 71:19-25. Mr. Wirtz did nothing after the tree split until instructed by Dennis to do so. Wirtz Dep. 46:1-11.

It was a problem that the tree split and did not fall. David Dep. 43:9-10. David and Dennis Gillogly were fully aware that the barber chair split significantly increased the risk, danger and unpredictability of falling the tree. Unfortunately, there was no discussion with Mr. Wirtz about the significantly increased risk, danger and unpredictability of the partially downed, and barber chaired, tree. Wirtz Dep. 47:22-48:6. While there was a notch in the tree, Mr. Wirtz did not understand the purpose of the notch. Wirtz Dep. 48:10-22. Mr. Wirtz remained at the ratchet. David Dep. 42:22-43:1. Dennis fired up his saw again, touched the tree with his

saw, the top snapped and fell. David Dep. 41:6-10. "It came out of there just that quick." David Dep. 46:3-7. Mr. Wirtz did not see the tree break and it fell in about one second. Wirtz Dep. 50:14-18. The tree spun as it snapped and fell on Mr. Wirtz. Dennis Dep. 72:7-11. The tree twisted and turned as it fell. Dennis Dep. 88:1-5. As a result of the split and the twisting, the tree fell more towards Mr. Wirtz than David (the man in charge) expected. David Dep. 48:7-17. The tree did not fall steady and straight. David Dep. 49:1-4.² Had the tree fallen steady and straight, as those in charge (David and Dennis Gillogly) had expected the tree **would not** have struck Mr. Wirtz.

David Gillogly had previously had two good friends killed while falling a barber chaired tree. David Dep. 41:22-25. David did not provide this information to Mr. Wirtz. David Dep. 43:4-8; 44:20-23. David did not consider getting a professional when the tree barber chaired because Dennis had his government issued tree falling certificate. David Dep. 45:7-12.

²This was not the first time a tree had personally surprised David Gilloglys. While falling a tree at his house in 1998 or 99, the tree spun on the stump and landed on his house. David Dep. 60:24-61:9.

Mr. Wirtz did not have a discussion with The Gilloglys about wearing a hard hat while cutting the trees. Wirtz Dep. 82:17-20. Neither offered him a hard hat to wear while cutting the trees. Wirtz Dep. 82:2325. They did not suggest that he wear a hard hat. Wirtz Dep. 83:1-3. In fact, no hard hats were available for Mr. Wirtz. Wirtz Dep. 83:4-15. Mr. Wirtz was unaware of the severe danger of the situation, the significantly increased danger of the barber chaired tree and the advantages of wearing a hard hat. Wirtz Dep. 84:2-8.

In short, defendants invited Mr. Wirtz onto David and Diana Gillogly's property to participate in an extremely hazardous and dangerous activity. That activity became significantly more dangerous due to an unanticipated event—barber chairing of the tree. David and Dennis Gillogly, both experienced at falling trees and one federally certified at falling trees, were fully aware of the significantly increased danger this event presented. Without warning Mr. Wirtz, without providing him any instruction or training, and without providing him any safety equipment, David and Dennis proceeded to down the tree in the face of the significantly increased risk. Mr. Wirtz could not have, and did not assume

a risk of which he was not aware and summary judgment was not appropriate.

C. Trial Court Proceedings.

At the trial court level, counsel represented David and Diana Gillogly. Defendants Dennis and Melinda Gillogly were unrepresented. To the present knowledge of plaintiffs counsel, the same is true on appeal. Plaintiff's counsel does not anticipate that Dennis and Melinda Gillogly will file a brief on appeal.

At the trial court level, defendants David and Diana Gillogly moved for summary judgment. They argued that Mr. Wirtz assumed the risk of a tree falling on him and that his assumption of the risk negated "any duty defendants [David and Diana] may have owed to him, and therefore, they cannot be negligent." CR 10 , p. 10 (Def. Mem. P. 10). Mr. Wirtz argued that all defendants owed him a duty because he did not have knowledge of the risk, appreciate or understand the nature of the risk or voluntarily choose to encounter the risk. CR 15, p. 16 (Pltf. Mem. P. 16). Dennis and Melinda Gillogly did not submit a written argument relating to David and Diana Gillogly's Motion for Summary Judgment.

The trial court held oral argument on David and Diana Gillogly's

Motion for Summary Judgment on March 26, 2007. Counsel represented Mr. Wirtz and defendants David and Diana Gillogly at oral argument. Counsel did not represent Dennis and Melinda Gillogly at oral argument and they did not appear at oral argument.

The issues presented to the trial court in David and Diana Gillogly's motion for summary judgment were: (1) The standard of care the defendant's owed to Mr. Wirtz based on his status as either a licensee or an invitee on the day he was injured; and (2) Whether Mr. Wirtz, in assisting all the defendants, assumed the risk that a tree would fall on him and injure him. CR 10. The trial court considered the written and oral argument of Mr. Wirtz's counsel and Dennis and Melinda Gillogly's counsel.

At the conclusion of oral argument, the court held: (1) Mr. Wirtz's status as a licensee or an invitee was immaterial to a resolution of the Motion for Summary Judgment (TR 11); and (2) Mr. Wirtz, by following the instructions of the defendants, assumed the risk that a tree would fall on him and injure him. TR 11-12. Based on the conclusion that Mr. Wirtz assumed the risk that in following defendants' instructions that a tree would fall on him, the trial court granted defendants David and Diana

Gillogly's Motion for Summary Judgment and entered judgment in favor of David and Diana Gillogly. CR 17.

Subsequent to the court granting David and Diana Gillogly's Motion for Summary Judgment, counsel for Mr. Wirtz, counsel for David and Diana Gillogly and Dennis and Melinda Gillogly conferred regarding the claims remaining against Dennis and Melinda Gillogly. All agreed that, if defendants Dennis and Melinda Gillogly presented a Motion for Summary Judgment based on an assumption of the risk argument (*as* defendants David and Diana Gillogly had argued through counsel), that the court would grant the motion, as it had done for David and Diana Gillogly. Rather than putting Dennis and Melinda Gillogly (and the court) to the time and expense of a Motion for Summary Judgment or proceeding to trial, counsel and Dennis and Melinda Gillogly signed a Stipulated Order and Judgment granting defendants Dennis and Melinda Gillogly summary judgment on the same terms as the summary judgment granted to defendants David and Diana Gillogly. CR.26.

Following entry of a judgment which resolved all claims against all defendants (CR 26), Mr. Wirtz filed his Notice of Appeal. CR 28 .

IV. ARGUMENT

A. Summary of Argument.

Mr. Wirtz was an invitee on the property of Dennis and Diana Gillogly because his presence on the property conferred an economic benefit on Dennis and Diana Gillogly. As an invitee, the defendants owed him the highest level of a duty of care. Defendants did not satisfy this level of care, or at least there is a question of fact as to whether they satisfied this level of care and, therefore, are not entitled to summary judgment.

Mr. Wirtz did not assume the risk of the barber chaired tree falling on him. He did not have knowledge of the risk, he did not appreciate and understand the nature of the risk and he did not voluntarily choose to encounter the risk. At a minimum, there is a question of fact as to these issues. Consequently, the defendants were not entitled to summary judgment.

B. Legal Argument.

1. Standard of Review.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56. The moving party "may prevail by showing that there is an absence of evidence to support the plaintiffs case, but such moving party bears the burden of such showing." *Kennedy v. Sea-Land Service, Inc.*, 62 Wn. App. 839, 856, 816 P.2d 75, 84 (1991). In resolving a motion for summary judgment, "[a]ll facts and reasonable inferences must be considered in the light most favorable to the nonmoving party." *Clark v. Baines*, 150 Wash.2d 905, 910, 84 P.3d 245, 248 (2004). "On appeal from a summary judgment [the Court of Appeals will] engage in the same inquiry as the trial court, viewing the evidence presented in the light most favorable to the nonmoving party." *Johnson v. State of Washington*, 77 Wash. App. 934, 937, 894 P.2d 1366, 1368 (1995); *Kennedy*, 62 Wn. App. at 856-57, 816 P.2d at 84.

Defendants claim they are not responsible for Mr. Wirtz's injuries because they owed no duty to Mr. Wirtz. They argue that they did not owe a duty to Mr. Wirtz because Mr. Wirtz had assumed the risk that a tree would crack unexpectedly, fall unexpectedly, twist unexpectedly, fall the wrong direction unexpectedly, reach Mr. Wirtz unexpectedly and injure

Mr. Wirtz. As defendants argued primary assumption of the risk, they bear the burden of proof. Because there is a question of fact as to whether primary assumption of the risk absolves defendants of any duty to Mr. Wirtz, summary judgment was inappropriate.

2. **First Assignment: Mr. Wirtz Was An Invitee, Not a Licensee.**³

Washington, like many jurisdictions, "recognizes three levels of duties owed generally by land possessors to persons on their land based on whether the person is an invitee, licensee or trespasser." *Johnson v. State*, 77 Wash.App. 934, 940, 894 P.2d 1366, 1370 (1995). The highest level of duty is owed to an invitee, an intermediate level of duty is owed to a licensee and the lowest level of duty is owed to a trespasser. *Id.* at 940-41, 894 P.2d at 1370.⁴ As Mr. Wirtz was an invitee (or at least there is a question of fact on this issue), the defendants owed him the highest duty of care while he was on the property. The defendants breached that duty of

³The trial court did not resolve Mr. Wirtz's status as an invitee or a licensee. The trial court held that as either an invitee or a licensee, Mr. Wirtz assumed the risk for the tree barber charring unexpectedly, falling unexpectedly, twisting unexpectedly, falling the wrong direction unexpectedly and/or reaching Mr. Wirtz unexpectedly.

⁴There is no claim that Mr. Wirtz was a trespasser. Consequently, Mr. Wirtz does not address the definition of a trespasser or the duties owed to a trespasser.

care (or at least there is a question of fact on this issue) and, therefore, were not entitled to summary judgment.

a. Mr. Wirtz Was An Invitee.

"When the facts regarding a visitor's entry onto property are undisputed, the visitor's legal status as an invitee, licensee or trespasser is indeed a question of law. . . [b]ut when the facts are disputed, the question is one for the jury to decide. *Beebe v. Moses*, 113 Wash.App. 464, 467, 54 P.3d 188, 189 (2002). The status of the visitor to the property as an invitee or license is determined at the time of the visit in question. *See, e.g., Thompson v. Katzer*, 86 Wash.App.2d 280, 936 P.2d 421 (1997); *Ward v. Thompson*, 57 Wash.2d 655, 359 P.2d 143 (1961); *Beebe*, 113 Wash.App. 464, 54 P.3d 188. Thus, any prior relationship between Mr. Wirtz and the defendants is irrelevant. (*See, e.g., Defendants' Memorandum*, p. 5, 1. 9.).

There are, generally speaking, two tests used to determine whether a visitor qualifies as an invitee: "(1) The economic benefit test, and (2) the invitation test." *Ward*, 57 Wash.2d at 657, 359 P.2d at 144; 2 Restatement, Torts, § 332. Under the economic benefit test, "some economic benefit (though it may be indirect) must be conferred upon the occupier by the visit." *Ward*, 57 Wash.2d at 657, 359 P.2d at 144; *see, also, Thompson*, 86

Wash.App.2d at 286, 936 P.2d at 424 (one who bestows an economic benefit may be an invitee).

The *Ward* case is very similar to the current situation. In *Ward*, the defendant stepson, asked the plaintiff to come to his property to assist in building a house. The plaintiff was not anticipating any compensation. While at the defendant's property, the plaintiff, in an effort to help the defendant with construction and at the defendant's request, climbed on to a scaffolding. The scaffolding collapsed and injured the plaintiff. The court held that the plaintiff was an invitee and that the fact that "he was not paid for his services is of no consequence." *Id* at 659, 359 P.2d at 145. Courts typically apply invitee status to those who volunteer for the economic benefit of the property owner and are injured while doing so. *Erdman v. Lower Yakima Valley, Washington Lodge No. 2112*, 41 Wash.App. 197, 203

704 P.2d 150, 154, n.2 (1985); *see, also, Holzheimer v. Johannesen*, 125 Id. 397, 871 P.2d 814 (Id. Ct. 1994) (one who enters land is invitee if the visit may confer a business, commercial, monetary or other tangible benefit to the landowner); *Carter v. Kinney*, 896 SW.2d 926, 928 (Mo. Ct. 1995)(entrant becomes an invitee when the possessor invites him with the expectation of a material benefit from the visit); *Dorton v. Francisco*,

309 Ark 472, 833 SW.2d 362 (AK Set., 1992) (friend who assisted on farm without compensation is invitee).

In this case, Mr. Wirtz was on the defendants' property at the request of the defendants. His work on the property was not merely incidental to a purpose that was primarily familial or social. Mr. Wirtz's efforts were the purpose of the visit to David and Diana Gillogly's property. Mr. Wirtz was on the property to fall trees for the benefit of David and Diana Gillogly and to assist Dennis Gillogly. Mr. Wirtz conferred a significant economic benefit in that he saved defendants the time and expense of hiring a tree service—an expense they could not afford. Thus, Mr. Wirtz was on the property as an invitee, not a licensee, and the defendants owed him the highest standard of care. At a minimum, there is a question of fact as to whether Mr. Wirtz as an invitee or a licensee and thus, a question of fact as to the applicable standard of care.

b. The Defendants Breached Their Duty of Care to Mr. Wirtz as an Invitee.

A possessor of land is liable to invitees for physical harm the possessor causes through "his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves

against it." 2 Restatement, Torts, § 341A. The possessor of land also owes a duty to an invitee to "discover dangerous conditions through reasonable inspection, and repair that condition or warn the invitee, unless it is known or obvious." *Scott v. Pacific West Mountain Resort*, 119 Wash.2d 484, 500, 834 P.2d 6, 14-15 (1992); 2 Restatement, Torts, § 343. Thus, there are two different duties owed to an invitee: (1) The possessor must conduct dangerous activities with reasonable care for the safety of the invitee; and (2) The possessor must make reasonable efforts to discover a dangerous condition and repair that condition or warn the invitee of the condition. The defendants fell short on both of these standards.

The Defendants lacked reasonable care in a dangerous activity.

The defendants, directly through David Gillogly and Dennis Gillogly, were conducting a dangerous activity—falling trees—on the property of David and Diana Gillogly. Mr. Wirtz was inexperienced and unknowledgeable in this activity. He was inexperienced and unknowledgeable in the use of a cable and ratchet. In stark contrast, David Gillogly had fallen numerous trees and Dennis Gillogly had the highest level of tree falling certificate from the United States Forest Service. The

defendants did not warn Mr. Wirtz of the danger of his location while working the cable and ratchet. They did not tell him that they knew how to measure the height of a tree so as to position him a safe distance from the tree they were cutting. They did not tell him they had failed to measure the height of the tree so they could position him at a safe distance. They did not tell him the risk of the tree falling on him. Dennis Gillogly, the most experienced and trained of the three, did not expect the tree to reach Mr. Wirtz if it fell in his direction. They did not tell him the risk of the tree twisting as it fell. They did not tell him the risk of the tree not falling where intended or the chance that it would not fall where intended.

Even if the defendants did take some proper action in regards to a "standard" for tree falling (which is open to debate and, thus, a fact question), they did not warn Mr. Wirtz of the significantly increased danger due to the barber chair split in the tree. They did not warn Mr. Wirtz that similar splits killed two of David Gillogly's friends. They did not warn Mr. Wirtz that the barber chair split increased the risk of the tree twisting, falling quickly or falling in an unintended direction. They did not warn Mr. Wirtz that David Gillogly had previously dropped a tree on his house because the tree twisted as it fell. Clearly, they did not fully inform or train

Mr. Wirtz of the danger their activities were creating. There is a question as to whether defendants met the standard of care owing to an invitee.

The Gilloglys directed Mr. Wirtz to the location in which he was injured. They placed him by the anchor tree and told him to pull the maple tree with a cable and a ratchet. Significantly, they instructed him to remain in that dangerous location **even when he was not operating the ratchet.**

It is undisputed that Mr. Wirtz and Dennis Gillogly alternately operated the ratchet and cut on the tree. Thus, when Dennis Gillogly was operating the saw, there was absolutely no need for Mr. Wirtz to remain by the anchor tree and, unknown to him, in harms way. The Gilloglys could easily have informed Mr. Wirtz of the danger and, between times he operated the ratchet, instructed him or at least suggested that he move further away from the maple to a safer location. As the tree fell while Dennis Gillogly was cutting, not while Mr. Wirtz was ratcheting, this simple warning/advice would have saved Mr. Wirtz. Rather than provide the warning/advice, however, the defendants required Mr. Wirtz to stay in the place they had placed him, where they had made him to feel safe. In fact, they were successful in giving Mr. Wirtz a sense of security and he thought he was out of harms way. David and Dennis Gillogly did not use their training,

knowledge and experience to warn Mr. Wirtz of the danger which, through their doing, existed for him. Thus, as in *Dorr v. Big Creek Wood Products, Inc.*, 84 Wash.App. 420, 429-430, 927 P.2d 1152-53 (1996), David and Dennis Gillogly, and therefore the defendants, directed Mr. Wirtz to the danger and are responsible for doing so.

Defendants did not repair or warn of the danger.

Even if the defendants were not engaged in a dangerous activity (at a minimum there is a question of fact on this issue), there are no facts demonstrating that they warned Mr. Wirtz of the dangerous position in which they had placed him either before or after the tree barber chaired. Dennis Gillogly knew how to measure the maple and get Mr. Wirtz a safe distance from the maple. He did not do so. The Gilloglys picked the cable they used, not because it was long enough to get Mr. Wirtz out of harms way, but because it was convenient. The Gilloglys **did not** warn Mr. Wirtz of the risks involved in these expedient "decisions."

Similarly, as noted, defendants did not warn Mr. Wirtz of the risk that the maple would twist. They did not warn Mr. Wirtz of the risk that the maple would not fall where or as intended. They did not warn Mr. Wirtz that the barber chair split in the maple increased the risk. They did

not warn Mr. Wirtz to move away from the base tree while Dennis Gillogly operated the saw. Rather, they knew the risks, they had personally experienced the risks (two friends dead and a tree on the house) and, yet, placed Mr. Wirtz in a dangerous location without any warnings or even simple efforts to protect him (i.e. requiring he wear a hard hat or moving him from the base tree while Dennis Gillogly operated the saw on the maple). A jury could conclude that the defendants breached their duty of care to Mr. Wirtz. Thus, summary judgment was not appropriate.

c. The Defendants Breached Their Duty of Care to Mr. Wirtz as a Licensee.

Mr. Wirtz does not believe he was merely a licensee on the property. Mr. Wirtz believes the evidence is strong that he was an invitee. At a minimum, there is a question of fact as to whether he was an invitee or a licensee. That question of fact was sufficient to defeat the motion for summary judgment. Even if Mr. Wirtz were a licensee, however, the defendants' conduct still fell below the applicable standard of care.

A land possessor is liable to a licensee for physical harm to the licensee if the possessor fails to carry on his activities with reasonable care for the licensee's safety if (1) he should expect that the licensee will not discover or realize the danger; and (2) the licensee does not know or have

reason to know of the possessor's activities and of the risk involved. 2, Restatement, Torts, § 341. The possessor must "exercise reasonable care to warn the licensee of his intention to do an act which he should realize is likely to cause harm to the licensee if he comes into or remains within the area endangered by [the act]." 2, Restatement, Torts, § 341, comment c.

The possessor is also liable to a licensee if the possessor knows of a dangerous condition on the property and can reasonably anticipate that his licensee will not discover or realize the risk. *Memel v. Reimer*, 85 Wash.2d 685, 538 P.2d 517, 519 (1975). If the possessor discovers a danger, he must either repair the danger or warn of the danger. *Minikin v. Carr*, 71 Wash.2d 325, 329, 428 P.2d 716, 718 (1967); 2, Restatement, Torts, § 342. "The possessor's duty also arises if he has had peculiar experience which enables him to realize the risk involved in a condition which he should recognize as unlikely to be appreciated by his licensee as an ordinary man or where he knows that his licensee's experience and intelligence is likely to prevent him from appreciating the risk which is appreciable by a man of ordinary experience and judgment." 2, Restatement, Torts, § 342, comment c.

The defendants' conduct, through David and Dennis Gillogly, fell short on both of these standards. Mr. Wirtz did not realize the danger David and Dennis Gillogly had created. In fact, he felt "safe." Mr. Wirtz did not appreciate the risks involved and that were clear and known to David and Dennis Gillogly. If Mr. Wirtz truly appreciated the risk, he likely would have requested a hard hat or refused the assignment. Additionally, the defendants should have insisted he use a hard hat. As noted above, Mr. Wirtz did not possess information to fully inform him of the dangerous situation created and in which he was placed. All the defendants had to do to exercise reasonable care was to instruct Mr. Wirtz to move away from the base tree while Dennis Gillogly operated the saw on the maple tree. Reasonable care required them to provide this information and warn Mr. Wirtz that, while they knew how to measure the height of a tree and had longer cables to use, they had not done so. They failed to warn Mr. Wirtz that, when the tree barber chaired, they significantly increased the danger to him in the position they placed him. The defendants created a danger then increased the danger and failed to warn or protect Mr. Wirtz. This conduct falls below the applicable standard of care owed to a licensee.

The Defendants also breached their duty to Mr. Wirtz as a licensee because they knew directly through David and Dennis Gillogly, of the dangerous situation they had created when the maple barber chaired. They had "peculiar experience" which enabled them to realize the risk and they should have recognized that Mr. Wirtz did not appreciate the risk. After all, two of David Gillogly's friends were killed under similar circumstances. David Gillogly had dropped a tree on his house. Dennis Gillogly was a trained a certified tree faller. Mr. Wirtz did not have any of this experience or training. The Gilloglys had no reason to expect that Mr. Wirtz appreciated the risk **because they did not explain the risk and they had no reason to believe he had ever experience the risk.** Thus, even if Mr. Wirtz is a licensee, there is a question of fact as to whether the defendants exercised the proper standard of care and, therefore, summary judgment was not appropriate.⁵

⁵Additionally, where the danger of harm is great, as it is with falling trees based on David Gillogly's own experience, public policy requires that the possessor of the property take "the utmost precaution to keep" the activity and equipment safe, regardless of the technicalities of the plaintiff's legal status. *Ward*, 57 Wash.2d at 660 , 359 P.2d at 145. The Defendants did not meet this standard in this case.

3. Second Assignment: Mr. Wirtz Did Not Assume The Risk In This Case.

"Traditionally, the doctrine of assumption of risk has four facets: (1) express assumption of the risk; (2) implied primary assumption of the risk; (3) implied reasonable assumption of the risk; and (4) implied unreasonable assumption of the risk." *Erie v. White*, 92 Wash.App. 297, 302, 966 P.2d 342, 344 (Division 2 1998). Express assumption of the risk "occurs when parties agree in advance that one of them is under no obligation to use reasonable care for the benefit of the other and will not be liable for what would otherwise be negligence." *Scott*, 119 Wash.2d at 496, 834 P.2d at 13. Implied reasonable assumption of the risk and implied unreasonable assumption of the risk are simply alternative names for contributory negligence. *Id* at 302, 966 P.2d at 344-45. Below, defendants argued only implied primary assumption of the risk. Defendants did not argue express, implied reasonable or implied unreasonable assumption of the risk and those theories they are not at issue in this case.

"Implied primary assumption of the risk arises where the plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks." *Id* at 497, 834 P.2d at 13 (emphasis in original). "To

invoke (implied primary) assumption of the 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 the **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 Wash.App. at 303, 966 P.2d at 345 (citations omitted, emphasis added). Courts are reluctant to apply primary assumption of the risk because the "doctrine, if not boxed in and carefully watched, has an expansive tendency to reintroduce the complete bar to recovery into territory now staked out by statute as the domain of comparative negligence. In most situations, a plaintiff who has voluntarily encountered a known specific risk has, at worst, merely failed to use ordinary care for his or her own safety, and an instruction on contributory negligence is all that is necessary and appropriate." *Dorr*, 84 Wash.App. 2d at 425-26, 927 P.2d at 1150 (citations omitted).

a. Mr. Wirtz Did Not Subjectively Understand or Knowingly Encounter the Risk of a Barber Chaired Tree Falling on Him.

Whether the plaintiff, in this case Mr. Wirtz, **knowingly**

encountered the risk, turns on whether he, **at the time of his action and/or**

decision, "actually and subjectively knew **all** facts that a reasonable person in the defendant's shoes would know and disclose, or, concomitantly, all facts that a reasonable person in the plaintiff's shoes would want to know and consider." *Erie* at 303-04, 966 P.2d at 345-46 (emphasis added). "The plaintiff must be aware of more than just a generalized risk of his activities; there must be proof he knew of and appreciated the **specific hazard** which caused the injury." *Id* (citations omitted, emphasis added). Similarly, whether the plaintiff **voluntarily** encounters the risk depends on "whether he or she elects to encounter it despite knowing of a reasonable alternative course of action." *Id* at 304, 966 P.2d at 346. Even if the plaintiff accepts the risks inherent in a particular activity, he does not necessarily assume the risks of the defendant providing dangerous facilities or equipment or of improper instruction or supervision. *Scott*, 119 Wash.2d at 499, 834 P.2d at 14. Assumption of the risk **does not** relieve the possessor of the obligation to provide reasonably safe facilities and equipment. *Id* at 38, 834 P.2d at 16; *see, also, Kirk v. Washington State University*, 109 Wash.2d 448, 746 P.2d 285 (1987).

In this case, even if Mr. Wirtz was aware of the general danger of falling trees (and there is a question of fact on this issue), defendants must

also prove that Mr. Wirtz was fully aware of the increased risk and danger of falling a barber chaired tree. There is absolutely no evidence that Mr. Wirtz had any knowledge of the increased risk or danger of falling a barber chaired tree. Summary judgment was not appropriate.

b. Mr. Wirtz Was Not Aware of the Specific Risk of a Barber Chaired Tree.

A reasonable person in the defendants' position would have disclosed a great deal more information. They would have told Mr. Wirtz they selected the length of the cable due to convenience, without considering whether, and not because it would, get him out of the reach of the maple. A reasonable person would have told Mr. Wirtz how to measure a tree height and determine a safe distance from the tree. A reasonable person would have informed Mr. Wirtz that they did not take this simple precaution of which they were fully aware and easily could have performed. A reasonable person would have told Mr. Wirtz that a barber chaired tree may likely snap unexpectedly and likely fall faster than anticipated. A reasonable person would have informed Mr. Wirtz that a barber chaired tree likely will not fall where intended and that he may not out run the falling tree if it does fall unexpectedly in an unanticipated direction. A reasonable person would have told Mr. Wirtz that the split tree increased his risk and

that two friends had died in a similar situation. A reasonable person also would have told Mr. Wirtz that trees are unpredictable and that David Gillogly had previously dropped a twisting tree on his house. There is, undoubtedly, other information a reasonable person should have provided Mr. Wirtz in this situation. Clearly, defendants did not disclose all of the facts they knew and should have disclosed. Similarly, Mr. Wirtz did not have possession of all facts which a reasonable person would have liked or needed to know and consider. Thus, defendants cannot show as a matter of law that Mr. Wirtz understood the presence and nature of the specific risk presented by a barber chaired tree.

c. Mr. Wirtz Did Not Voluntarily Encounter the Risk of a Barber Chaired Tree.

Mr. Wirtz did not voluntarily encounter the risk which ultimately injured him. The defendants created the situation. They placed Mr. Wirtz by the anchor tree within striking distance of the maple tree in a dangerous position. They did not, however, inform Mr. Wirtz of a reasonable alternative course of action. They did not inform Mr. Wirtz that he **did not** need to stay at the base tree near the ratchet while Dennis Gillogly operated the chain saw. They did not explain other options for downing the tree: professionals. They did not explain alternatives to continuing with their

process after the tree barber chaired. They did not explain the increased risk of a barber chaired tree. There were a lot of options which the defendants did not provide to Mr. Wirtz and they could not, with his knowledge and experience, have reasonably expected him to anticipate. Thus, Mr. Wirtz did not voluntarily assume the risk that the tree would fall on him. He could not voluntarily assume the risk when the defendants' actions made him feel "safe." Mr. Wirtz could not voluntarily assume a risk of which he was not aware.

d. The Defendants Did Not Provide Safe Facilities or Equipment.

The defendants did not provide reasonably safe facilities, equipment or instruction. They did not provide a long enough cable. They did not provide a safe and secure escape route. They did not require or provide a hard hat. They did not instruct Mr. Gillogly to move away from the base tree while Dennis Gillogly operated the saw. They did not reconsider these issues (or even discuss these issues among themselves or with Mr. Wirtz) when the tree barber chaired. In short, when the danger they created suddenly and significantly increased, they made no effort to protect, warn or caution the completely inexperienced Mr. Wirtz. Mr. Wirtz did not

knowingly and voluntarily assume the risk. He could not do so under these facts.

Erie, 92 Wash.App. 297, 966 P.2d 342 does not assist the defendants. In *Erie*, the possessor/defendant hired the plaintiff, a tree falling expert (already distinguished from Mr. Wirtz) to fall trees on his property. The possessor/defendant agreed to rent the tree climbing equipment but, unfortunately, rented pole climbing equipment instead. The plaintiff tree falling expert knew the difference between tree climbing equipment and pole climbing equipment and knew that the possessor/defendant had rented the wrong equipment. The tree climbing expert, however, elected to use the improper equipment and, as a result, suffered a significant injury. The court found for the defendant on primary assumption of the risk. *Id* at 306, 966 P.2d at 347.

In this case, Mr. Wirtz was not, by any stretch of the imagination, a tree falling or climbing expert. He had no knowledge or experience. He did not know how to fall a tree or even use a ratchet. The defendants possessed that information, placed Mr. Wirtz in harms way and gave him improper equipment. They did not correct these negligent actions even when the tree barber chaired and they significantly increased (unbeknown

to Mr. Wirtz) the danger they had already created. These facts are, essentially, 180 degrees opposite to the *Erie* case. This court should, similarly, reach a 180 degree opposite conclusion and find that primary assumption of the risk does not bar Mr. Wirtz's claim.

In a like manner, *Dorr* does not assist the defendants. In *Dorr*, the plaintiff, an experienced and knowledgeable woodsman, was injured when he visited a friend at a tree falling site and a widow-maker fell on Mr. Don. *Id* at 423-24, 927 P.2d at 1149. The court found that the plaintiff, a licensee (not an invitee as Mr. Wirtz), **did not** assume the risk of the defendant providing negligent or misleading directions. *Id* at 429, 927 P.2d at 1152. Similarly, in this case, Mr. Wirtz may have appreciated some risk from working around the trees. The defendants described it as a risk of widow-makers. Mr. Wirtz, however was struck by a falling tree, not a widow-maker. Additionally, the defendants failed to train Mr. Wirtz, give him improper instructions on where to stand, did not measure the height of the tree and did not provide a cable long enough to avoid the reach of the falling maple. David Gillogly did not instruct or train Mr. Wirtz on the safe use of the ratchet and/or to leave the base tree while Dennis Gillogly used his saw. Defendants also failed to inform Mr. Wirtz of the increased risk

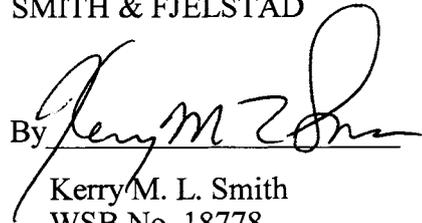
due to the barber chair split and the risk of death when dealing with such a tree. Nobody informed Mr. Wirtz of the danger that the tree would twist and fall in an unintended location at an unanticipated speed. In reality, much like the defendant in *Dorr*, the defendants negligently directed Mr. Wirtz to the hazard and gave him misleading directions which led him to a false sense of feeling "safe." Like the defendant in *Dorr*, the defendants **were not** entitled to the complete defense of primary assumption of the risk. At a minimum, there is a question of fact as to whether the defendants are entitled to this complete defense to Mr. Wirtz's claim. Summary judgment was not appropriate.

V. CONCLUSION

Mr. Wirtz was an invitee and the defendants did not satisfy their duty of care. Even if Mr. Wirtz is a licensee, the defendants did not satisfy their burden of care. Primary assumption of the risk does not protect the defendants because Mr. Wirtz did not knowingly and voluntarily accept the specific risk the defendants created and/or knew existed. At a minimum, there are questions of fact on all of these issues and defendants were not entitled to summary judgment.

Dated: August 26, 2008.

SMITH & FJELSTAD

By 

Kerry M. L. Smith
WSB No. 18778
Of Attorneys for Plaintiff

1 CERTIFICATE OF FILING

2 I certify that on August 26, 2008, I filed the original of this **APPELLANT'S OPENING**
3 **BRIEF** with the Court of Appeals Administrator at the following address:

4 Washington State Court of Appeals
5 Division Two
6 950 SW Broadway, Suite 300
7 Tacoma, WA 98402-4454

8 CERTIFICATE OF SERVICE

9 I certify that on August 26, 2008, I served a true copy of this **APPELLANT'S**
10 **OPENING BRIEF** on:

11 Attorney for Respondents
12 Michael A. Lehner
13 Lehner & Rodriguez
14 1500 SW First Avenue, Suite 1150
15 Portland, OR 97201

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21 DATED this 26th day of August, 2008.

22 **SMITH & FJELSTAD**

23 [Signature]
24 By: Kerry M.L. Smith, WSB# 18778
25 Attorney for Plaintiff-Appellant
26