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STATE OF WASHINGTON  
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46398-9-II

IN THE COURT OF APPEALS  
DIVISION II

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LEE TIMOTHY GLEASON,

APPELLANT,

vs.

BRIAN COHEN and LISA COHEN,  
Husband and wife, and the marital community composed thereof,

RESPONDENTS.

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BRIEF OF APPELLANT

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## I.

### INTRODUCTION

This matter arises from a catastrophic injury suffered by Lee Timothy Gleason when he was struck by a falling tree, while working on property owned by the Cohens. The injury was proximately caused by the negligence of Mr. Cohen and Mr. Cohen's employees, who he was supervising. There are many, many genuine issues of material fact that make this case inappropriate for summary adjudication. The trial court, misunderstanding the application of the implied primary assumption of the risk doctrine, dismissed the case on summary judgment, despite the presence of numerous genuine issues of material fact.

The accident in this case occurred while Mr. Cohen, the landowner, was attempting to remove trees from his land as cheaply as possible. He hired unskilled workers to perform skilled work, and the injuries to Mr. Gleason are the result. Mr. and Mrs. Cohen reside on Bainbridge Island, on a two-acre plot of land that contained about an acre of trees. The Cohens wanted to remove some standing timber from their land. Mr. Cohen elected to act as his own contractor in this project. He has no experience in logging. He was in the habit of hiring unskilled laborers, who he referred to as "handymen" to perform work on is

property. If they needed equipment, in this instance a chain saw, cables, and “come-alongs,” he would rent it for his workers to use. On the day in question, Mr. Cohen was supervising his two handyen, Matt Spillinger and John Daly. They were attempting to remove some trees. Neither Mr. Spillinger nor Mr. Daly had experience in logging and the work was going very slowly. Mr. Cohen could have hired a professional logger or tree company, as he did after the accident, but he did not want incur that expense. Instead, he saw Tim Gleason’s firewood sales advertisement on Craigslist, and called Mr. Gleason.

Tim Gleason is not a logger or in the business of removing trees. He earned a modest living selling firewood, generally by advertising on Craigslist. He was not a licensed contractor or logger. Mr. Cohen saw his ad on Craigslist, and saw this as cheap way of clearing his land. Mr. Cohen has testified that he initially offered to trade some trees that had been cut by his handyen for a cord of firewood. As he and Mr. Gleason continued to communicate by text messages, he changed that to an offer to have Mr. Gleason cut down six trees and sell the logs to a sawmill that would pay cash for logs. Mr. Cohen then proposed that Mr. Gleason sell the trees and that they split the proceeds on a 60/40 basis. At some point, he drew up a contract, which neither party signed. The number of trees is

significant, because Mr. Cohen testified that he believed he could cut six trees on his property without getting a logging permit.

Mr. Gleason and Mr. Cohen generally agree that they were going to sell the logs to the mill and divide the proceeds. It is undisputed that Mr. Cohen has never paid Mr. Gleason for the work done that day. Their testimony disagrees on just about every other issue.

The number of factual issues in this case, both as to witness credibility and whether the conduct of the parties was reasonable, is vast. Mr. Cohen's version of events is diametrically opposite Mr. Gleason and two other men working with him. Mr. Gleason testified that he was to be paid money for gas and a fee for each tree cut, but Mr. Cohen denies this. Mr. Gleason, and other witnesses, state that Mr. Cohen was selecting the trees he wanted to remove and directing the workers, including Mr. Gleason, in that process. Mr. Cohn testified that he was in his home office when he heard trees falling and found Mr. Gleason cutting trees without permission. Mr. Cohen denies that he coerced Mr. Gleason to cut a dangerous, leaning tree, but Mr. Gleason, and other eyewitnesses say otherwise. All the workers on the site have been deposed. One of the workers who came with Mr. Gleason, Binder Basi, supports his version of the story. Mr. Gleason testified that Mr. Cohen withheld payment for gas

and cutting the trees unless the dangerous tree was cut. Mr. Cohen denies this happened. These are factual issues are for a jury to decide.

The testimony of Mr. Gleason and Mr. Basi was that the trailer they brought was full, and they planned to cut down no more trees that day. The tree in question was leaning and Mr. Gleason told Mr. Cohen it was beyond his capability to cut. Despite this advice, Mr. Cohen had his employees rig the tree with the cable and chains he had rented, and insisted that Mr. Gleason cut it. When Mr. Gleason attempted to cut down the tree, it “hung-up,” essentially getting stuck in other trees on the property. There is an issue of fact as to whether the work of Mr. Cohen and his employees were the cause of this, since they had rigged the tree with cables. Tim Gleason was attempting to free the tree, by making cuts in its base, when it fell. This was a very large tree. When it struck Mr. Gleason it caused severe, life threatening injuries. He was evacuated by helicopter to Harborview Medical Center.

Defendants are attempting to evade the non-delegable duty to provide a safe place for workers on his property. By choosing to supervise the work, Mr. Cohen became responsible to see that a safe workplace existed for all workers on the site, regardless of how those workers were characterized. Mr. Cohen also owed a duty to business invitees to his property. Whether he was negligent in the manner in which he ran this

logging operation and the manner in which he kept his premises are questions for a jury to decide.

The Trial Court's ruling in this case shows a misunderstanding of the doctrine of implied primary assumption of the risk. The ruling below essentially says that anyone who goes to work in any job that may be hazardous has assumed the risk of injury. This line of thinking is about a century out of date. This doctrine requires the knowing assumption of a specific risk, not just the risks inherent in a particular occupation. Mr. Gleason did not assume the risk that Mr. Cohen would hire incompetent employees to rig the tree in question or that Mr. Cohen would coerce him to perform a hazardous task. Mr. Cohen was, or should have been, aware that Tim Gleason was not a licensed contractor or logger. He was a person who cut up and sold fire wood. This case is replete with issues regarding credibility of witnesses, reasonableness of conduct, and other factual matters which make it particularly unsuitable for summary judgment. The decision below should be reversed

## **II.**

### **ASSIGNMENTS OF ERROR**

1. The trial court committed error by dismissing this action on the basis of a finding, on a motion for summary judgment, that Plaintiff's claim was barred by the doctrine of implied primary assumption of the risk.
2. The trial court committed error by deciding genuine issues of material fact on a motion for summary Judgment.

## **III.**

### **ISSUES PRESENTED**

1. Did the trial court erroneously apply the doctrine of implied primary assumption of the risk, based solely on the Plaintiff's employment in an occupation which poses a risk of personal injury.
2. Did the trial court commit error by deciding issues of genuine issues of material fact in a motion for summary judgment.

#### IV.

#### STATEMENT OF THE CASE

On November 13, 2014, Brian Cohen was clearing some lumber from his property on Bainbridge Island. This was Mr. Cohen's residence. It is a two-acre plot of land that contained about an acre of trees. CP 184 Mr. Cohen elected to act as his own contractor in this project. CP 184 He is not in the business of logging, and he elected not to hire a professional logger to remove the trees. He claimed that he could remove up to six trees without obtaining a permit from the City of Bainbridge Island. CP 187 Mr. Cohen had made improvements on his property before, and he was in the habit of hiring "handymen" to do the work, rather than hiring licensed contractors. CP 186 He would rent any equipment his employees needed and generally paid them with a check. CP 186 He was aware that Matt Spillinger was not a licensed contractor. CP 186 He found Mr. Spillinger on Craigslist, where he was advertising his services as a house painter. CP 185. This usually involved work like house painting. CP 186 On the day before in question, he hired two of his usual handymen, Matt Spillinger and John Daly, to remove some trees. CP 186 He was aware

that Spillinger and Daly did not have experience in falling trees. CP 186  
He rented a chainsaw and other logging equipment for their use. CP 186  
He did not rent or provide any safety equipment for his employees. CP  
187. However, Spillinger and Daly were not experienced at removing  
trees. The work was very slow, and Mr. Cohen began to look for someone  
else to remove trees, but without hiring a professional logger or tree  
service. CP 187 He consulted Craigslist to find cheap labor.

Tim Gleason is a disabled worker, who supplemented his modest  
lifestyle selling firewood. He is a young man, and he had worked for a  
few tree services before becoming disabled. He has never had a  
contractor's license or a held himself out as a logger. CP 63 He was just a  
guy who bought and sold firewood. He advertised his wood sales on  
Craigslist. CP 63 Mr. Cohen saw his ad on Craigslist and called him. CP  
187 Mr. Cohen has testified that he initially offered to trade some trees  
that had been cut by his handymen for a cord of firewood. CP 188, 190  
As he and Mr. Gleason continued to communicate by text messages, he  
changed that to an offer to have Mr. Gleason cut down six trees. CP 189  
Mr. Gleason knew of a sawmill that was willing to buy the wood. CP 189  
The text messages are part of the record. CP 125 When Mr. Gleason  
arrived at his home, Mr. Cohen then proposed that Mr. Gleason sell the

trees and they split the proceeds on a 60/40 basis. CP 190 He states at page 29, line 15 of his deposition, CP 190 :

15 Q. So looking at this contract, it basically says  
16 he's going to cut some logs, trees -- he will take the cut  
17 alder trees from your property to the mill and that you  
18 guys are going to have it on a 60-40 split on the cost of  
19 it.

20 A. Correct.

21 Q. Or the receipt. And was that the deal you had  
22 made with him?

23 A. Correct.

These facts are undisputed. Mr. Gleason testified that he was to be paid money for gas and a fee for each tree cut, CP 80, but Mr. Cohen denies this. Mr. Gleason was never paid by Mr. Cohen. CP 191

Text messages were exchanged between Mr. Cohen and Mr. Gleason the morning of November 13. CP 125 They begin by offering Mr. Gleason the chance to cut up the trees already felled by Mr. Cohen's employees. CP 190 They later change to removing six trees. Mr. Cohen has attempted to portray himself as a mere bystander to the tree removal work on his property, but it is clear from these messages, and the testimony of witnesses that he was actively supervising the work. He was being the logging contractor.

When Mr. Gleason and two associates arrived at the site, Mr. Cohen's handymen had already cut down several trees. When he arrived at the Cohen home, Mr. Cohen drew up a contract and made a copy of Mr.

Gleeson's driver's license. CP 189 While the contract was never signed, it shows the gist of the arrangement. CP 189 Witness testimony makes it clear that Mr. Cohen was actively directing the work. (See Binder Basi testimony, CP 147-148) Mr. Basi was one of the workers who arrived with Mr. Gleason. His testimony, beginning at page 21, line 13, (CP 149-150) shows Mr. Cohen's active supervision of the job:

Q. Did you know what Mr. Gleason was hired to do at the Cohen property?

A. Yes.

Q. How did you know that?

A. Tim told us.

Q. So it was Tim?

A. Yes.

Q. You never heard what Cohen said to him about what he was hired to do?

A. Well, I heard a part of it when we first pulled up to house because he was standing there.

Q. Cohen?

A. Yes. Waiting for us, 'cause apparently Tim was late. But the initial part of the initial part of the job was six trees to cut down.

Q. Cohen said to Tim –

A. Yeah.

Q. -- I want six trees down?

A. Yes. And then he walked him around the property and pointed out the trees.

Mr. Basi then testified that Mr. Cohen's two employees were actively involved in the tree removal, under Mr. Cohen's supervision. (see Basi deposition P. 25). CP 155 Mr. Basi corroborates that Mr. Gleason did not want to cut the last tree, the one that injured him, but that Mr. Cohen

insisted. (See: Basi deposition, p. 24-25). CP 154-155 The danger tree was prepared for cutting by Mr. Cohen's employees, Spillinger and Daly, by attaching choker chains and a cable, under Mr. Cohen's direction. (See: Basi deposition, p. 24-25). CP 154-155 Tim Gleason's testimony was that Mr. Cohen not only insisted, despite Tim's reluctance to cut a dangerous tree, but that he threatened to withhold payment if he did not cut down this last tree. (See: Gleason deposition, p. 96, L.21) CP 91 Tim Gleason told Mr. Cohen he did not like the way Cohen's employees had rigged the tree, but Mr. Cohen still insisted he cut the tree. CP 91

Mr. Gleason did remove several of the trees selected by Mr. Cohen. Mr. Gleason's associates loaded the logs cut by Mr. Gleason and by Spillinger and Daly onto a trailer, for transport to a mill. Mr. Cohen then directed Mr. Gleason to cut down a large tree. Mr. Gleason did not want to cut it, because it had grown crookedly and it was beyond his capability. (See: Basi deposition, p. 51) When Mr. Cohen insisted that this be done, or there would be no pay, Mr. Gleason complied. The tree hung-up. (See: Basi deposition, p. 27) While attempting to free it, the tree fell and struck Mr. Gleason, causing severe, life threatening injuries. (See: Basi deposition, p. 27-28)

There are genuine issues of fact in this case as to how much control and supervision of the logging operation was being exercised by

Mr. Cohen. Mr. Gleason testified that Mr. Cohen was selecting which tree was to be cut and the manner of cutting. Mr. Cohen denies this. However, it is undisputed that he was in charge of the work site. He had his casual employees, Matt Spillinger and John Daly performing some of the work and Mr. Gleason and his associates were performing only those things directed by Mr. Cohen. Mr. Cohen denied in his deposition that he had employed Mr. Gleason. He stated, at pages 26-27 (CP 189) of his deposition: "Well, I didn't really hire him [Gleason] for anything. He was just going to haul logs away." At page 60, he testified as follows

9 Q. Going back to this, when you hired Mr. Gleason,  
10 did you have any reservations about hiring a guy that  
11 you'd never worked with before to work with  
12 machinery on  
13 your property?  
14 A. Well, I didn't hire him to do work on the  
15 property other than haul the logs away. That was what  
16 it  
17 was designed to do. **So I wouldn't really say it's**  
18 **hiring**  
19 **him** other than entering into an agreement, which I  
20 took a  
21 picture of his truck and driver's license and wanted an  
22 agreement.

Although he is taking the position that he was Mr. Gleason's employer, he strenuously denied this in his deposition.

Mr. Basi also discusses why this tree became so dangerous. First, it was rigged with chains, ropes, and come-alongs by Mr. Cohen's

employees, under his direction. CP 149-150 It hung up between two trees after it was cut, thereby preventing it from falling. (See: Basi deposition, p. 34-35) CP 159-160, 177 Mr. Basi then attempted to direct its fall with the Bobcat he was operating and Mr. Gleason was removing the tree in sections. It broke halfway up, and the falling log struck Tim Gleason, essentially breaking his back.

After the accident, Mr. Cohen hired a licensed professional tree service to remove the trees. CP 193

Defendants are attempting to evade the non-delegable duty to provide a safe place for workers on his property. By choosing to supervise the work, Mr. Cohen became responsible to see that a safe workplace existed. This included ensuring that safety regulations were followed. This did not make him Mr. Gleason's employer, as that term is used for workers' compensation purposes. Mr. Cohen also never paid wages, or any other compensation to Mr. Gleason, nor has he ever paid Industrial Insurance premiums. He is not entitled to the immunity given to actual employers under the Industrial Insurance Act.

## V.

### ARGUMENT

#### A. Standard of Review

Review of a decision granting a Motion for Summary Judgment is De Novo. Appellate courts review questions of law and summary judgment rulings de novo, engaging in the same inquiry as the trial court. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). All facts, and reasonable inferences that a jury could draw from the facts, are construed in the manner most favorable to the non-moving party. *Wilson v. Steinback*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)

In reviewing an order of summary judgment, we engage in the same inquiry as the trial court. The motion for summary judgment should be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. We consider the facts in a light most favorable to the nonmoving party. *See Wilson v. Steinback*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). In this case, the nonmoving parties are the Plaintiffs. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)

If there is are genuine issues of material fact in a case, a trial is mandatory.

Burden of proof is on the moving party to show the absence of any questions of material fact. *Caldwell v. Yellow Cab Service, Inc.*, 2 Wn. App. 588, 469 P.2d 218 (1970). Reasonableness of conduct is usually a question of fact. *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974).

Issues of negligence and proximate causation are not generally susceptible to summary adjudication. *LaPlante v. State of Washington*, 85 Wn.2d 154, 160, 531 P.2d 299 (1975). In this case, there are factual questions of witness credibility, proximate causation, and status of the persons involved in the case. The trial court ignored the existence of these genuine issues of material fact, in effect ruling on who he thought would prevail on these issues. It is not proper for a court to decide issues of fact while ruling on a summary judgment motion.

**B. The Doctrine Of Primary Assumption Of Risk Does Not Apply To This Case.**

The basis for the trial court's decision in this case was that Mr. Gleeson, by agreeing to work in an occupation which was hazardous, assumed all risk of injury. This shows a complete misunderstanding of the doctrine. A similar argument was considered and rejected in *Lascheid v. City of Kennewick*, 137 Wn. App. 633, 640, 154 P.3d 307 (2007). That case concerned an injury by a police officer who was injured while attempting to negotiate a high-speed obstacle course. The City's argument was that the officer, by agreeing to work in an occupation which was hazardous, assumed the risk of any injury. The Court of appeals disagreed. They held that the party asserting assumption of risk must show an assumption of a known and specific risk and not one created by

the future negligence of the defendant. Merely engaging in an occupation which poses a risk is insufficient to invoke the doctrine. The trial court's comment (VR p.) that working in logging invoked the doctrine shows a similar misunderstanding. The Court discussed the concept at 640-641 of the opinion:

There are four kinds of assumption of risk: (1) express assumption of risk; (2) implied primary assumption of risk; (3) implied reasonable assumption of risk; and (4) implied unreasonable assumption of risk. *Scott v. Pac. W. Mountain Resort*, 119 Wash.2d 484, 496, 834 P.2d 6 (1992).

The City asserts implied primary assumption of risk as a defense. This is the only one of the four that is a complete bar to a plaintiff's recovery. *Dorr v. Big Creek Wood Prods., Inc.*, 84 Wash.App. 420, 425, 927 P.2d 1148 (1996). The primary assumption of risk defense obviates any duty; and, of course—no duty no negligence. *Id.* This is because if the plaintiff consented—before any act by the defendant—to relieve the defendant of any duty regarding a specific known hazard, there can be no negligence. *Id.* at 426–27, 927 P.2d 1148; *Scott*, 119 Wash.2d at 500–01, 834 P.2d 6.

We construe the doctrine narrowly because implied primary assumption of risk is a complete bar to recovery. *Dorr*, 84 Wash.App. at 425, 927 P.2d 1148. The defense has been successfully invoked in sports injury cases. Participants there knew and voluntarily accepted the inherent risks. *Scott*, 119 Wash.2d at 498, 834 P.2d 6.

In *Scott*, the court rejected primary assumption of risk as a complete bar to recovery. *Scott*, 119 Wash.2d at 503–04, 834 P.2d 6. The court allowed the plaintiff to bring a claim of negligence beyond the assumed risk inherent in the activity. *Id.* There, a boy was injured skiing. He sued the ski resort. The court concluded that he assumed the risk only of hazards inherent in the sport—not of the resort

operator's negligence. The court did not rule out that the plaintiff may have been contributorily negligent by unreasonably assuming some risk. *Id.* at 503, 834 P.2d 6. But negligence was not a complete bar. It was a question of fact for the jury. *Id.*

The case of *Dorr v. Big Creek Wood Products*, 84 Wn.2d 420, 927 P.2d 1148 (1996) is on point. Unlike Tim Gleason, the Plaintiff in *Dorr* was a professional logger. He went to visit the Defendant's work site, where active logging was going on. He was invited into the area by the Defendant, and was injured when a limb fell from a tree and struck him. Mr. Dorr brought an action based on negligence and the liability of the possessor of land to a licensee. The Court, at 425, affirmed the trial court's decision not to give an instruction on implied primary assumption of risk.

The defense of implied primary assumption of the risk remains viable in Washington as a complete bar to a plaintiff's recovery, even after the adoption of comparative negligence.

In that respect it is distinct from contributory negligence, which merely reduces a plaintiff's damages.

This is because assumption of risk in this form is really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action. Without a breach of duty by the defendant, there is thus logically nothing to compare with any misconduct of the plaintiff.

Trial courts are rightfully wary of requests to instruct the jury on implied primary assumption of the risk. That 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. But implied primary assumption of the risk does occupy its own narrow niche.

In this case, Mr. Gleason did not voluntarily assume a specific risk of Mr. Cohen's negligence or the negligence of Mr. Cohen's employees. One requirement of this doctrine is that the assumption of risk occurs prior to any act of the Defendant. That does not fit the facts of this case, when construed in a manner favoring the non-moving party. Mr. Cohen's employees had already rigged the tree with chains and other equipment he provided. Mr. Gleason wanted nothing to do with the tree, and said so. Mr. Cohen coerced him into cutting the tree by threatening to withhold payment if he refused.

This defense is often raised in cases dealing with hazardous sports. In *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 508, 834 P.2d 6 (1992) the Supreme Court rejected the idea that a consumer merely going to a ski resort relieved the operator of the resort of a duty of care, and there was no assumption of the risk or negligent operation of the resort. *Kirk v. Washington State University*, 109 Wn.2d 448, 454, 746 P.2d 285 (1987) dealt with an injured cheerleader. Plaintiff alleged that her injuries

were due to inadequate supervision and training by the University's employees. The Court held that Ms. Kirk only assumed those risks inherent to cheerleading, and that these did not include negligent supervision and training. They rejected the complete bar to recovery.

In another case dealing with logging, *Leyendecker v. Cousins*, 53 Wn. App. 769, 770 P.2d 1320 (1989), the doctrine of primary assumption of the risk was rejected by the Court. In that case, the plaintiff, a contract logger, was clearing some land. The lumber was being moved by helicopter. When the helicopter landed to refuel, Mr. Leyendecker walked into the rear propeller and was severely injured. As in this case, Mr. Leyendecker alleged that the defendant had failed to follow state safety regulations.

The *Leyendecker* court discusses the different types of assumption of the risk, at 773:

...assumption of risk is divided into four classifications: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 68, 496–97 (5th ed. 1984). Primary assumption of risk occurs where the plaintiff either expressly or impliedly has consented to relieve the defendant of an obligation or duty to act in a certain way toward him; with express assumption of risk, the plaintiff consents by an affirmatively demonstrated and presumably bargained upon, express agreement. *Kirk v. Washington State University*, 109 Wash.2d 448, 453, 746 P.2d 285 (1987). Implied primary assumption of risk also is based on consent, but without “the additional ceremonial

and evidentiary weight of an express agreement.” (Citations omitted.) *Kirk*, 109 Wash.2d at 453, 746 P.2d 285. In both of these forms of assumption of risk, consent operates as a principle of no duty “hence no breach and no underlying cause of action.” *Codd v. Stevens Pass, Inc.*, 45 Wash.App. 393, 402, 725 P.2d 1008 (1986), *review denied*, 107 Wash.2d 1020 (1987). Thus, *Foster v. Carter*, which involved participants in a BB gun war, and *Ridge v. Kladnick* are perfect examples of situations where consent impliedly is given in advance of engaging in an activity likely to cause harm to the participant.

In contrast, implied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. In such a case, plaintiff's conduct is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk.<sup>2</sup> W. Keeton, at 481.

As recognized in *Shorter v. Drury*, *supra*, Keeton's analysis is consistent with the adoption of comparative negligence, which abrogated the defense only with regard to that form of assumption of risk where the plaintiff's conduct is contributorily negligent. [citations omitted] Accordingly, Washington continues to recognize express and implied primary assumption of risk as a complete bar to a plaintiff's recovery to the extent the damages resulted from the specific risks assumed. *Kirk*, 109 Wash.2d at 448, 746 P.2d 285. Similarly, implied reasonable and unreasonable assumption of risk, being merely variants of contributory negligence, are subsumed thereunder and are to be treated equivalently. *Kirk*, 109 Wash.2d at 453–58, 746 P.2d 285.

Merely working in a potentially hazardous occupation, like cutting down trees or construction does not qualify as a primary assumption of the risk. If that were the case, the person or entity running the operation, like Mr.

Cohen, would never be liable for their negligent supervision of the workplace or their duty to ensure that safety regulations were followed. Because it is a complete bar to recovery, rather than a damage reducing factor, this doctrine must be narrowly construed. It only applies in the rare circumstance where a specific risk is unequivocally and voluntarily assumed. Tim Gleason did not want to cut down this tree. He was coerced into doing so by Mr. Cohen, who threatened to withhold payment for the work already done. His reluctant attempt to remove the tree does not relieve Mr. Cohen of the consequences of his negligence or that of his employees. The Trial Court's dismissal of this action of should be reversed.

**C. Mr. Cohen had duty to provide a safe workplace.**

In this case, Mr. Cohen owed a number of duties, both as the possessor of land to business invitees, and as a owner who was supervising a work site. The evidence in this case establishes that Mr. Cohen took an active part in directing the work done on his property on the day Tim Gleason was injured. He directed his employees and instructed Mr. Gleason and his crew, both as to which trees to cut and the manner of cutting. He provided much of the equipment being used. While there was no written contract between Mr. Cohen and the people doing the work, he was clearly in charge of the workplace.

When the owner of the premises that constitute the workplace has the right to control the workplace, or actually exercises that control, he becomes responsible for ensuring that the workplace is reasonably safe. This includes ensuring that the workers have the skill to do the work and to see that all safety regulations are being filed. *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 803 P.3d 4 (1991). The owner of the worksite, who exercises control over the work, has a non-delegable duty to see that all safety regulations are being followed, even by contractors he hires. *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 330-331, 582 P.2d 500 (1978). In this case, Mr. Cohen provided no safety equipment and had unskilled workers in his employ participating in the work. His duty is non-delegable. He cannot contract it away and his ignorance of the rules is not an excuse for maintaining an unsafe workplace. Mr. Cohen, by hiring workers he knew to be unskilled and unlicensed in logging, simply to save money, made this a very unsafe work place. Tim Gleason paid the price for Mr. Cohen's attempt to conduct a logging operation on his property.

**D. Mr. Cohen does not meet the statutory criteria to be considered an employer under the provision of the I.I.A.**

Mr. Cohen attempted to claim that he was Mr. Gleason's employer and therefore immune from suit. This is despite his own testimony to the

contrary and the failure to enroll as an employer with the Department of Labor & Industries. The term “employer” is a term of art when applied in the context of RCW 51. Employers who meet that definition and comply with the act are immune from suit. This immunity is in exchange for the “sure and certain” remedy provided by workers’ compensation benefits. RCW 51.04.010. This statute abolished the subject matter jurisdiction of Superior Court for suits by workers against employers, “except as in this title provided.” The issue then becomes whether Mr. Cohen can be considered an employer and Mr. Gleason a worker, as those terms are defined and interpreted in the Industrial Insurance Act.

“Employer” is defined in RCW 51.080.70:

"Employer" means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers. Or as an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW.

There are exceptions to this definition, and the definition of a worker, all of which apply to this case, and exclude Mr. Gleason’s claim from the

Industrial Insurance Act. "Worker" is defined by RCW 51.08.180:

"Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

This is intended to cover a wide scope of employments, but there are exceptions, which apply in this case.

It is uncontroverted that Mr. Gleason was working at the Cohen residence. It is also uncontroverted that Mr. Cohen was not in the logging business. This was simply some work at his home, done on a casual or occasional basis. He falls within the exceptions noted at RCW 51.08.195:

**"Employer" and "worker" – Additional exception.**

As an exception to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

(1) The individual has been and will continue to be free from control or direction over the performance of the

service, both under the contract of service and in fact;  
and

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

Certain employments are also excluded from the operation of the Industrial Insurance Act. These occupations are found at RCW 51.12.020, which states, in part:

The following are the only employments which shall not be included within the mandatory coverage of this title:

**Employments excluded:**

... (2) **Any person employed to do gardening, maintenance, or repair, in or about the private home of the employer.** For the purposes of this subsection, "maintenance" means the work of keeping in proper condition, "repair" means to restore to sound condition after damage, and "private home" means a person's place of residence.

(3) A person whose employment is not in the course of the trade, business, or profession of his or her employer and is not in or about the private home of the employer. ...

This section would seem to fit the undisputed facts of this case. Mr. Cohen testified that this logging work was to remove some trees that had been breaking out and damaging his home.

Persons claiming to be employers must register with the Department of Labor & Industries and pay an insurance premium. See: RCW 51.14.040. Mr. Cohen had not complied with this requirement. This is the basis for a claim of immunity.

When an employer ... pays its industrial insurance premiums pursuant to the Act the employer may no longer be looked to for recourse. The fund, created to provide for losses expected to occur, is the sole source of recovery.

*Seattle-First National Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 241, 588 P.2d 1308 (1978).

Employer-worker status also requires two elements. The alleged

employer must have right to control employees' physical conduct in the performance of his duties, and both parties must consent to the relationship. *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 39 P.3d 1006 (2000). Mr. Cohen has repeatedly stated that he was not the employer. His assertion is that Mr. Gleason was an independent contractor. At the very least, there is an issue of fact as to whether Mr. Gleason was a worker, and Mr. Cohen was the employer. It appears from the undisputed evidence that Mr. Gleason would not be considered Mr. Cohen's employee, for the purposes of the Industrial Insurance Act.

## VI.

### CONCLUSION

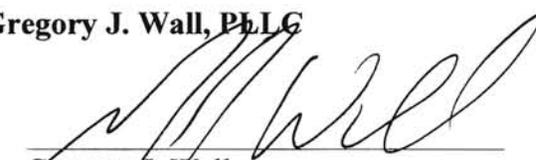
It is rare to see a case that is less suitable to summary adjudication than this one. The number of genuine issues of material facts are almost too numerous to list. Issues of witness credibility, status of the parties and the reasonableness of the conduct of the party are replete in this case. The trial court, rather than simply recognizing these questions of fact, attempted to act as jury and decide the issues. This is not permitted by Civil Rule 56. The trial court also misunderstood the doctrine of implied primary assumption of risk by taking the position that one who engages in

logging assumes the risks inherent in the trade. This is not the law. This doctrine is narrowly construed and applied sparingly, because it acts as a complete bar to recovery and relieves the landowner of his or her duties. In this case, Mr. Cohen attempted to be a logging contractor, hiring unskilled employees and renting dangerous equipment. He compelled others on the work site to engage in dangerous activities by threatening to withhold payment for their services. He now tries to evade his non-delegable duty to everyone on this job, by claiming that logging is a dangerous occupation. This is an incorrect application of the law.

The court below should be reversed.

<sup>14<sup>th</sup></sup>  
Dated this Day of November, 2014.

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# Appendix

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WASHINGTON STATE COURT OF APPEALS  
 DIVISION TWO

LEO TIMOTHY GLEASON,  
 Plaintiff,

vs.

BRIAN COHEN and LIZA COHEN, husband  
 and wife and the marital community comprised  
 thereof,  
 Defendants.

Court Of Appeals, Div II No.: 46398-9-II

Kitsap Co. Sup. Ct No. 13-2-01590-5

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 14th day of November 2014, she caused an original, copy and bench copy of the following documents:

1. Brief Of Appellant;
2. and this Certificate of Service.

to be served on the parties listed below by the method(s) indicated:

Party/Counsel	Additional Information	Method of Service
Washington State Court Of Appeals Division II Attn: Cheryl, Case Manager 950 Braodway, Suite 300 Tacoma, WA 98402-44545	<b>Venue of Jurisdiction</b> Ph: 253-593-2970 Fax: 253-593-2970 Email: coa2filings@courts.wa.gov	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery ABC Legal Messenger Service <input type="checkbox"/> fed-ex/overnight delivery <input type="checkbox"/> facsimile <input type="checkbox"/> Email
Beth A. Jensen Attorney at Law Richard J. Jensen & Associates 1021 Regents Boulevard Fircrest, WA 98466	<b>Counsel for Defendants</b> WSBA #15925 Ph: 253-272-8400 Fax: 253-272-8420	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery ABC Legal Messenger Service <input type="checkbox"/> fed-ex/overnight delivery <input type="checkbox"/> facsimile <input type="checkbox"/> Email bethjensen@rijensenlaw.com

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<p>William H. Broughton Attorney at Law Broughton Law Group Inc. PS 9057 Washington Ave NW Silverdale, WA 98383 83341</p>	<p><b>Co-Counsel for Plaintiff</b> WSBA #8858 Ph: 360-692-488 Fax: 360-692-4987</p>	<p><input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery ABC Legal Messenger Service <input type="checkbox"/> fed-ex/overnight delivery <input type="checkbox"/> facsimile <input type="checkbox"/> Email: bill@bbroughtonlaw.com</p>
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct.

Dated at Port Orchard, Washington.

  
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SANDRA RIVAS  
Legal Assistant