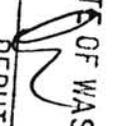


46398-9-II

IN THE COURT OF APPEALS
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
2015 FEB 10 PM 1:14
STATE OF WASHINGTON
BY  DEPUTY

LEE TIMOTHY GLEASON,

APPELLANT,

vs.

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

RESPONDENTS.

APPELLANT'S REPLY BRIEF

Gregory J. Wall
Law Office of Gregory J. Wall, PLLC
104 Tremont Street
Suite 200
Port Orchard, WA 98366
(360) 876-1214

William H. Broughton
Broughton Law Group, PLLC
9057 Washington Avenue N.W.
Silverdale, WA 98383
(360) 692-4888

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I.

ARGUMENT

A. **The Trial Court Ignored Genuine Issues Of Material Fact**

This Court Reviews the Order of Summary Judgment *de novo*, engaging in the same inquiry as the trial court. *Reid v. Pierce County*, 136 Wn.2d 434, 437, 656 P.2d 1030 (1998). The function of the trial court is to determine whether there are genuine issues of material fact to be decided by the jury. Summary Judgment is inappropriate when the facts are not disputed, but differing inferences may be drawn from those facts. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960). All facts must be construed in a manner most favorable to the non-moving party. *Wilson v. Steinback*, 98 Wn.2d 434,437, 961 P.2d 1030 (1982). The trial court did the opposite. It accepted Mr. Cohen's version of events. The basis of the trial court's ruling is unsupported by applicable law. Essentially, the holding below was that Mr. Gleason assumed the risk of injury because he engaged in logging, which is a potentially hazardous activity. As discussed below, merely going to work in the morning does not constitute primary assumption of the risk. The trial court not only failed to recognize the plethora of genuine issues of material fact present in the case, it also

was incorrect in its interpretation of existing law. The decision below should be reversed

There are many genuine issues of material found in the record. The testimony of Mr. Cohen and Mr. Gleason gave two completely different versions of the events of that day. Judging the credibility of witnesses is an issue for the jury, not the court. The trial court incorrectly weighed the evidence presented in a summary judgment motion. This was error. These factual issues can be summarized as follows:

1. Mr. Gleason did not willingly attempt to cut down the tree in question. He was coerced by Mr. Cohen, who told Gleason he would not be paid unless he cut down the tree. Without payment, Gleason was stranded. He needed the unpaid but earned funds for gas money to get home.¹ (CP 84) 175-176) Clearly, there is an

¹ Mr. Gleason testified at p. 87 of his deposition CP 84:

10 Q What exactly did he say?

11 A He said that you have to get this job done before I pay you,
12 give you your gas money. And I said, well, I don't feel safe
13 cutting down that tree pretty much. I told him he needs to
14 call someone, have 'em look at that tree. I remember that to
15 this day, looking up at that tree 'cause it was right next to
16 his house and there's a car and stuff around it, and I did not
17 feel safe to do it, and he said my guys already got that
18 choker in it, you'll be fine, you cut all the rest of these
19 down, and I'll say blah-blah-blah. I said, no, I don't feel
20 safe, and then he's like, well, I ain't gonna pay you pretty
21 much till you get this job done. I said, then I ain't gonna
22 to able to make it back out here 'cause I need my gas money.

issue of fact as to whether Mr. Gleason was acting voluntarily when he cut down the tree.

2. Mr. Cohen directed and controlled the work of Tim Gleason, and other workers Mr. Cohen hired for the logging job, directing which tree to cut down. (CP 80) He also supplied much of the logging equipment. (CP 69,74) There is an issue of fact as to who was in charge of the workplace.
3. Plaintiff was performing the work pursuant to a contract between himself and Mr. Cohen. Under that contract, Gleason was under Cohen's direction and control. (CP 69)
4. The tree in question was rigged by Mr. Cohen's employees, under his direction. There is an issue whether the proximate cause of the accident was the negligence of Mr. Cohen's employees. (CP 175)
5. Mr. Cohen assumed the role of general contractor. Washington law imposes a non-delegable duty to ensure a safe workplace for all workers on the site, regardless of their status.

The trial court incorrectly ruled that, because logging is a hazardous trade, simply coming to work was an assumption of risk. Primary assumption of risk only applies to specific risks, voluntarily assumed. It does not apply to future risk or risk created by the negligence

of others. Mr. Gleason did not voluntarily assume the risk presented by the hazard created by Mr. Cohen's employees and Mr. Cohen himself.

B. There Was No Assumption Of Risk

The homeowner relies primarily on *Wirtz v. Gillogly*, 152 Wn. App. 1, 216 P.3d 416 (2009), to argue that the trial court properly granted Summary Judgment holding that assumption of risk bars Plaintiff's claims. However, the facts of *Wirtz* are quite different. There Plaintiff (a longtime friend of the Defendant) agreed to help with a tree felling project as a favor. Unlike the facts presented in the case *sub judice* there was no evidence that the property owner contracted with or compensated Plaintiff to assist with the work. The homeowners did not pressure plaintiff to participate. Plaintiff voiced no concerns about the project.

None of those facts are present here. Mr. Cohen hired Mr. Gleason's crew and two of his own employees. Mr. Cohen coordinated the work. He was present on the job site. He rented equipment for the workers. He knew Plaintiff and the other workers he hired were untrained, uninsured and unlicensed.² When Mr. Gleason voiced concerns about cutting the last tree that Mr. Cohen's employees had rigged for felling, the homeowner threatened to withhold payment for the work already done. Mr. Cohen is a sophisticated and affluent business-person. Tim Gleason is

² Plaintiff and the other workers were hired off of Craigslist. CP 187

a young and unsophisticated laborer. Mr. Gleason needed gas money to get home. He pleaded with the homeowner to no avail to come back the next day to finish the job. The actions leading to Mr. Gleason's injury did not constitute a voluntary assumption of risk.

The homeowner also relies on *Erie v. White*, 92 Wn App. 297, 966 P.2d 342 (1999). This case is also in factually quite different. In *Erie*, the homeowner wanted trees cut down on his property and hired Plaintiff to do the work. The homeowner provided the equipment including pole climbing equipment. Plaintiff noted to the homeowner that the equipment was improper but the Plaintiff decided he could make the equipment work and accepted it. While working in the tree, the Plaintiff accidentally cut through the climbing equipment and was injured.

In affirming the granting of Summary Judgment by the trial court, the Court of Appeals opined that the Plaintiff had recognized that the equipment supplied by the homeowner was inadequate. The Court noted that the Plaintiff could have gone to a rental store for the right equipment or required the homeowner to get the right equipment. The Court also noted that Plaintiff could have declined to proceed.

The Court in *Erie* found as a matter of law that the homeowner did not pressure the plaintiff to proceed using the wrong equipment. The

Court held that a jury could not find that the homeowner exerted pressure to such an extent as to render the Plaintiff's decision involuntary.

In the instant case, Mr. Cohen told Tim Gleason that he would not pay him for the work already done cutting additional trees unless the last tree was cut. (CP 84) Plaintiff needed money for gasoline so that he and his crew could get home. (CP 84) Mr. Cohen denied this, but that only created a factual issue to be decided by the jury. It cannot be the basis for summary judgment.

Mr. Cohen is a sophisticated businessman. (CP 184-185) Tim Gleason is young, unsophisticated and indigent. The evidence also shows that Mr. Cohen separated Mr. Gleason from the rest of his crew so he could pressure him individually. (CP 149-150) Mr. Cohen also pressured Mr. Gleason by pointing out that his other workers had already secured the tree with ropes and that it was ready to be felled. (CP 80, 86)

Plaintiff tried to persuade the homeowner to allow him to come back the next day to cut the last tree. He explained that it was late in the day, light was failing and there was wind present. (CP 83-84) He pleaded with the homeowner to allow him to come back on the following day to cut the remaining tree. (CP 83)

Other decisions of this Court have pointed out that the *Wirtz* decision is limited to its facts. In *Barrett v. Lowes Home Centers, Inc.* 179

Wn at 1, 8-9, 324 P.3d 688, (2013) this Court noted that the Plaintiff in *Wirtz, Supra* voluntarily participated in the tree felling process and did not argue that it was unsafe or attempt to remove himself from the situation. By contrast, Plaintiff argued that the cutting of the final tree was unsafe. He asked to remove himself from the situation.

There is a question of fact as to whether Plaintiff voluntarily assumed the risk of cutting the final tree. For this reason, the decision of the trial Court should be reversed and a jury should be allowed to decide the facts of the case.

C. The Homeowner Controlled And Directed The Work

There is a question of fact whether the homeowner should have anticipated the harm to Gleason despite the obviousness of the dangerous tree by using untrained, unlicensed and unskilled Craigslist workers. The homeowner's control of the work place and Plaintiff's activities is a question of fact for the jury.

The homeowner states in his brief that he did not control Gleason's conduct and did not have control of the worksite. (Brief of Respondent at 27).

But the record establishes the following facts:

1. The homeowner was the owner of the job site and work place.

2. The homeowner and other workers hired by the homeowner created conditions that caused Plaintiff to be injured.
3. The condition of the tree causing injury to Gleason was within the province of the homeowner and his other workers he was directing and existed independently of Plaintiff's work.
4. The record before this Court confirms that the homeowner was the owner of the property.

The record also demonstrates that the homeowner demanded that Gleason cut the tree that injured him. This demand was made upon threat of non-payment. The tree that fell on Plaintiff was improperly secured and directed by agents of the homeowner who were acting independent of Plaintiff.

In *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089, (1996) *Restatement (Second) of Torts* § 343A (1965), was quoted with approval for the following proposition: "A possessor of land is negligent if he should have anticipated harm to others even when the harmful condition is known or obvious." It is a question of fact here whether Mr. Cohen, as the owner of the land, should have anticipated the harm to Gleason despite the obviousness of the dangerous tree.

Using untrained, unlicensed and unskilled Craigslist workers by the homeowner increased the danger. Mr. Cohen had those unskilled workers attach ropes to the tree in a misguided effort to control its descent before Plaintiff was directed to cut the tree. As a result, Mr. Cohen exercised both his right and power to control how Plaintiff performed his work. Where the homeowner retained some control over the work, he was required to provide plaintiff a safe place to work. *Kelley v. Howard S. Wright*, 90 Wn2d at 323, 582 P.2d 500 (1978); *Restatements (Second) of Torts* § 414 (1965).

In the instant dispute, all Plaintiff needs to show is that the homeowner retained the right of control of the work place. Further, the mechanism of injury (use of ropes by other untrained workers and selecting the tree) was within the homeowners retained right of control. Summary Judgment was improper with these disputed facts. *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (2012). The decision below should be reversed and the matter remanded for trial.

II.

CONCLUSION

Timothy Gleason is entitled to have his claims resolved by a jury unless all of the evidence viewed in a light most favorable to Mr. Gleason shows an absence of genuine issues of material fact. This case is replete with issues of fact. The trial court ignored these issues.

The record demonstrates a number of disputed facts on critical issues. Plaintiff testified that the homeowner intimidated him into cutting a tree Gleason did not want to cut. Gleason further testified that the cutting of the tree became more dangerous because the homeowner was using unskilled and untrained Craigslist workers to attempt to control the tree as it fell. The decision below shows a basic misunderstanding of the doctrine of implied primary assumption of the risk. This is a doctrine which is narrowly interpreted and only applies to the voluntary assumption of a specific, existing risk. It does not apply to the negligence of Mr. Cohen and his employees. Merely going to work in a potentially hazardous occupation does not constitute implied primary assumption of risk.

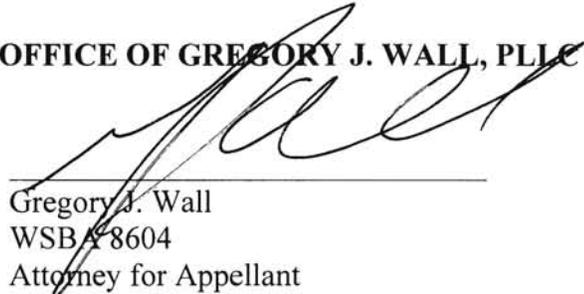
Summary Judgment by the trial Court should be reversed.

Respectfully submitted this 6th day of February 2015.

BROUGHTON LAW GROUP, Inc. P.S.

William H Broughton, WSBA #: 8858
Attorney for Appellant

LAW OFFICE OF GREGORY J. WALL, PLLC



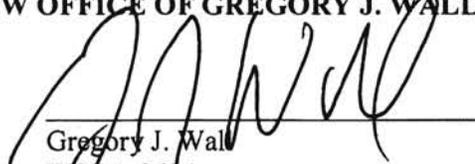
Gregory J. Wall
WSBA #8604
Attorney for Appellant

Respectfully submitted this 9th day of February 2015.

BROUGHTON LAW GROUP, Inc. P.S.


William H Broughton, WSBA #: 8858
Attorney for Appellant

LAW OFFICE OF GREGORY J. WALL, PLLC


Gregory J. Wall
WSBA 8604
Attorney for Appellant

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WASHINGTON STATE COURT OF APPEALS
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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 9th day of February 2015, she caused an original,
copy and bench copy of the following documents:

- 1. Appellant's Reply Brief;
- 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	Venue of Jurisdiction 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	Counsel for Defendants 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



<p>William H. Broughton Attorney at Law Broughton Law Group Inc. PS 9057 Washington Ave NW Silverdale, WA 98383 83341</p>	<p>Co-Counsel for Plaintiff 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.


 SANDRA RIVAS
 Legal Assistant