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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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LEO TIMOTHY GLEASON, Appellant,

v.

BRIAN and LIZA COHEN, Respondents

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BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

This case involves a question of the existence of a duty owed. Even when the facts are accepted in a light most favorable to appellant Gleason, respondent Cohen owed no duty to Gleason. There is no genuine issue of material fact.

Cohen had no duty to protect Gleason under the facts of this case. First, Gleason's claims cannot proceed under any theory of duty owed to an employee. The Labor & Industries statute bars actions by an employee against his employer and co-workers. Second, Gleason's claims are barred pursuant to the theory of implied primary assumption of the risk. Third, Gleason's claims are barred pursuant to the duty owed to a business invitee.

The trial court properly dismissed Gleason's claims and should be affirmed.

## **II. ISSUES PRESENTED**

1. Did Gleason assume the risk of injury, pursuant to the doctrine of implied primary assumption of the risk, relieving Cohen of a duty to protect, when Gleason elected to cut a tree on Cohen's property in spite of his knowledge of the specific hazard that caused his injury, and the availability of a reasonable alternative course of conduct?

2. Is Cohen legally liable to business invitee Gleason, under premises liability law, when Gleason was injured by a condition on Cohen's premises, and Gleason was aware of the specific hazard encountered and realized the specific dangers?

## **1. STATEMENT OF THE CASE**

### **1. Procedure Below**

The appellant, Tim Gleason, was injured when he attempted to cut down a tree located on respondent Cohen's property. CP 4. Suit was filed on July 19, 2013. CP 3. Gleason alleged that "[t]he acts conduct and omission of defendants were negligent and careless in several respects . . ." CP 5. Cohen moved for summary judgment on the basis that he did not owe any duty to Gleason under the facts of the case. CP 16. The court granted Cohen's summary judgment on the basis of the doctrine of implied primary assumption of the risk. CP 225.

### **2. Gleason's Experience with Logging**

Appellant Gleason had significant experience involving the cutting of trees and operating machinery.

He testified that during his work with Port Orchard Sand and Gravel he learned how to run heavy machinery, including backhoes, Bobcats, and excavators. CP 42-43. During his work with Northwest Tree Service, "[w]e'd run – drag branches to the chipper, ground cleanup,

you know, raking, and I guess limbing the trees on the ground. I cut a few trees down, you know, little bit of stuff like that.” CP 44. He learned to use a chain saw and a chipper while in this employ. CP 45. But he already knew this: “I mean, I kind of knew. Just kind of – from the work, growing up around my friends and people, you know. I kind of grew up around stuff like that, I guess you’d say.” CP 45.

Gleason knew how to, through experience and in his work, cut down trees. He knew the business. The following testimony from Gleason, CP 46 through 50, demonstrates his knowledge of trees and falling trees.

Q And you said you cut a few trees down?

A Mm-hmm.

Q What kind of trees are we talking about?

A I don’t know, fir trees, cedar trees. Just like, you know, little ground trees, smaller trees, you know. It – it would vary, just on the job like, you know, go to a safe place. I wasn’t I guess, the boss, you know, so I’d just do it. I got told to do on the job, and if the boss says cut that down, I would. I mean, I grew up, you know, hands-on kind of people in my family. So I guess it’s just kind of something you learned, I guess, over the years is growing up. Was around the stuff, cutting firewood with my dad and you know, its all that kind of stuff so...

Q We’re talking about the trees that you cut down while working for Northwest Tree Service?

A Mm-hmm.

Q How big around? When I say diameter, how big around –

A Eight.

Q -- are these trees?

A Eight to ten inches through, some of the, 50 feet tall, I don’t know. I mean, just depended.

Q How did you go about cutting those trees down? You just stand at the bottom with a chain saw and slice it at the base, or

CP 46.

did you –

A Oh, yeah, you, I mean, I've climbed. Ron let me climb a few trees, you know, like I didn't really like the heights. I wasn't really a climber so I didn't really pursue into that area. Like, you know, you'd have to go to the base of the tree, you'd have to look to see where a proper way for the tree would go down, you know. You'd have to look, make sure there's no – in a safe zone, other people, you know, you know. Your bosses always tell you how, you know, tell you where they want the tree or, you know, make sure there's nothing either break or hit anything, you know, and –

Q So you want to be sure the tree falls in a place where it's not going to destroy something?

A Yeah. Yes.

Q And you learned how to do that, how to figure out how to –

A I mean, I've –

Q -- work –

A -- kind of knew of the trade of like I said of growing up with my dad, being around my father, you know, and my friends. I kind of had friends who had done tree work, you know.

Q And you've been present when –

A Yeah.

Q -- that's gone –

A I've been –

Q -- on –

CP 47.

A -- present, just watching people do it and stuff. I was – I really did – I guess I learned how by just watching some people doing that kind of stuff. So they'd tell me, I guess, how to do it. Lot of areas, and then – then I worked for Northwest Tree Service, watching people do it, you know, watch my other friends in line, what, knew how to log, do it. And so, I mean, so I was around it so I just kind of caught onto it, I guess you could say.

Q During the time at Northwest Tree Service, were you ever involved in using a choker?

A I would use ropes, I guess.

Q Ropes?

A Yeah. The ropes or could – a choke in a way.

Q What's the purpose of using ropes or a choker?

A To make the tree, if it's unstable, to go certain directions to make the tree go where you want it to go, more or less, trying to get control of the tree or where it would fall.

Q So either with your dad or your friends growing up –

A Mm-hmm.

Q -- or with Northwest Tree Service, did you see how a choke was used or a rope –

A Yes.

Q -- to control a tree?

A Yes.

Q Did you feel like you learned how to do that?

CP 48.

A Yeah. I mean. I've learned, you know, by more people teaching me, I guess. I – I knew of it, yeah, or how – how – how that would control the tree, yes.

Q At Northwest Tree Service when you were cutting trees down, were you involved in doing that? Were other people assisting or were you just doing a tree all by yourself?

A No. I mean, the boss would show you, you know, how to do it. I mean, if you're not cutting a tree down right, the boss would always watch over if someone was cutting a tree, even his own self or his own guy, believe, you know, there's always someone watching over, make sure you're doing it correctly, I guess you could say.

Q Is taking down a 50 foot, 10 inch diameter tree, is that something that you can do as an individual or do you need help from other people to accomplish that task? I don't know much about –

A It -- it --

Q -- it -- so --

A It would --

Q -- you have to --

A -- depend on the tree. I mean, depending on the tree --

Q And what is --

A -- I mean --

Q -- it?

A -- working for someone.

CP 49.

Q What is it that dictates whether there's more than one person involved?

A I guess what's around the tree, the area. If there's people, there's houses, just cars, anything. I mean, it's safe area. I mean, if you went out in the middle of the -- of the mountains and you were cutting trees down, you know, you look for the open passages down between the trees and you cut down. If you're in the middle of a town, you're gonna have your guys around. You need to watch and make sure you're doing it right.

Q And making sure that the tree doesn't fall where it's not supposed --

A Where --

Q -- to fall?

A -- it's not supposed to.

Q So it takes more people to deal with trees in more confined areas?

A Yes.

Q And you knew that's in the course of --

A It's growing up around this place.

CP 50.

Gleason also worked on and off for Timberline Excavation and Tate Choate for three to four years. CP 50 -51. This work involved running heavy machinery, digging poles, and limbing trees. CP 51.

Gleason was also involved in felling trees:

Q Were you taking trees down?

A Yeah. We've taken trees down. I didn't really. Tate did most of that work. I was more the tree limber if we cut trees down, and hooking up chokers to drag the trees out of the woods.

Q You hooked up the choker?

A Yeah. The – or the chains to drag the trees out, you know, if we were doing a clearing job or stuff like that.

\* \* \*

Q When you did a logging job –

A Mm-hmm.

Q -- for Timberline, did you participate in cutting down trees?

A Sometimes. It'd depend on the tree. Like I said, it – safe zoned. I wasn't a professional logger, no. I wouldn't consider myself a, the boss of a logging outfit or nothing. I mean, I – I knew how – what I was doing 'cause of, like I said, growing up around it and meeting, being, watching people do it. I was more of a hands-on person than a book-smart person, I guess you could say.

Q Sure, sure. You learned through work and for Northwest –

A Yeah.

Q -- and Timberline --

A I mean –

Q -- and –

A -- and friends growing up my whole life and through school, cutting firewood. I always cut firewood growing up and stuff like that. It was like my side money. I'd always cut up firewood during the summers and winters and try to sell it, and that's kind of what I did for my living on and off during high school.

CP 51-53.

Gleason further testified about his work and his specific knowledge of trees and which ones are dangerous.

Q . . . And those two businesses, were they kind of in the same business, or did they do different things?

A Them. Northwest Tree Service was a tree company doing dangerous trees or windfall trees or trees over houses, and then Tate was more of a developing and land clearing, I mean, digging houses, like the foundations and building driveways and dirt work, I guess. He was more dirt work, and Northwest Tree Service was more of a dangerous tree company, you know, tree company, I guess, they were?

Q They were more related to trees?

A Yes. Yes.

Q When you were working for Northwest Tree, did you learn by being around what was involved in a dangerous tree situation, what made a tree a dangerous tree?

A Of how it was leaning, what's around it, like I've said in the past.

Q Okay, yes.

A More, you know, if we had people around our houses, trees, cars, you know, 'cause other trees would get hooked up in and in just places like where they wouldn't fall down correctly.

Q Did the type of tree make a difference as to whether it could be dangerous or not?

A Yeah.

Q Tell me about that. What do you know about that?

A Could be dead. A dead tree would be more scary, or a fir tree was, I'd say, probably, the easier tree to cut down, to an alder tree. Alder tree, barber chair, blow up. They could ...

Q They do what?

A Barber chair.

Q What does that mean?

A Like the bottom, when you cut them, they could explode, like they'll break in half, like if you have a tree and you cut it down, it splits in half like that and goes both way, I guess you could say.

Q So you learned about that --

A Yeah.

Q -- while working for Northwest --

A Well, yeah --

Q -- Tree --

A -- and I --

Q -- Service?

A -- had family who were loggers, and, I mean, always hearing about people getting hurt and stuff and, so yeah.

Q That was part of what you knew about --

A Yeah. Everyone knows about it, you know. If you do that kind of work, you usually catch onto stuff like that. You hear stories and stuff.

Q Okay.

A People know what trees are more scary. Madrona trees are scary, you know, or -- or maples. I mean, it could be any tree, just depends on how they're growing and what kind of tree they are, I guess.

\* \* \*

Q Working at Timberline Excavation, you said they were less into the tree stuff and more into the whole – they did road and driveways and stuff –

A Mm-hmm.

Q -- in addition, and they might have to take trees out as a –

A Oh, we did some logging jobs.

Q You did?

A Yeah. I mean, we did – did logging jobs, but I wasn't like a tree faller or anything. I mean, I fall some trees. It depended, like I said, on the trees. I wasn't the boss. I was the laborer.

CP 53-56.

When Gleason was not working for a company, he cut firewood and helped friends do logging jobs.

Q What did you do after that?

A Just worked for myself in whatever jobs I could find, you know. Like I said in the beginning, like what I did in high school kind of. Kind of just found whatever kind of jobs I could do to make money, cash jobs, cutting firewood and stuff like that.

Q Was the firewood thing kind of the primary thing for you? This is after Timberline Excavation?

A No. Just – I was – cut firewood, it was just kind of like, you know, good extra money, you know, you made good money. They would – a cord of – cord of direct firewood is 300 bucks. You cut a cord in a day, you making 300 bucks a day, that's a decent living.

Q This is all cash?

A Yeah, cash.

Q Then what other kinds of work were you doing on your own?

A I helped some friends do some logging, like I said, but I – whatever I did for Timberline, I helped a couple other friends to do some cash work.

CP 56-57.

Gleason had specific knowledge regarding dead trees and alder trees.

Q In your work with Northwest Tree Service, Timberline, and your own thing helping friends, did you work with alder trees?

A Yeah, I'd say so.

Q And you knew that they were more difficult to work with than fir trees?

A Yeah.

Q Did you work with, in either of those kinds of businesses with any alders that you knew to be diseased or you found out after it was downed that it was diseased?

A Yeah, I mean, it – in working for Northwest Tree Service, you know, you'd see dead trees, you would see trees, yeah, in a way, you would.

Q So you knew –

A Yeah, you could see an unhealthy tree, you know. You could see dead limbs in it and stuff, I mean. I mean, yes, common sense usually, you could tell what a dead tree . . .

A A dead tree is, is common sense. I mean, I think seeing dead limbs in it and all that kind of stuff, I mean, I guess you could kind of, I mean, most – most people know what a dead tree is, I guess.

Q You can –

A Yes.

Q And you can identify it?

A Yeah, yeah, yeah.

Q All right. And that's –

A You could too, probably.

Q -- based on your experience and your history –

A Yes, ma'am.

Q -- and living in this part of the country?

A Yeah. Hunting, you know, being up in the woods and all that stuff.

Q Would you agree with the proposition that alder trees are generally unpredictable trees to deal with compared to others?

A Yeah.

Q And that's based on all this history –

A History of –

Q -- you've –

A -- growing up and being around it, yes, ma'am.

CP 57-59.

Gleason testified about a variety of different kinds of work he did.

But he liked being out in the woods the best.

Q And in terms of doing construction, remodeling, siding, that kind of – the framing you talked about, there's that kind of building construction, and then there's trees and gravel and excavation.

A Mm-hmm.

Q Is there one of those that you like better than the other in terms of working?

A I like being around the trees, I guess, more.

Q You like being out –

A I like being out in the woods and stuff, being up early and going to work.

CP 60.

Gleason's friend Binder Basi also testified about Gleason's expertise in cutting down trees. He first met Gleason in 2003. CP 93. They then started working side jobs together in 2006. CP 93. Basi helped on jobs where Gleason did clearing: cutting down trees, bucking up firewood, and selling the wood. CP 94. They did about two to three jobs per year. CP 94. Basi observed Gleason cut down trees. He appeared competent in doing so and never had a problem. He cut down "[h]uge trees." CP 139. Basi testified that Gleason cut down trees on most of the jobs they did before Cohen's job. CP 97. In Basi's opinion, Gleason was "[v]ery" experienced in cutting down trees of all sizes, and without any problem. CP 97.

Gleason told respondent Cohen when they met that Gleason had done logging work.

Q Did you tell Cohen at any time, either in arranging for this project or getting there or while you were there, did you tell him that you worked for some kind of a logging company?

A We talked about my past work.

Q That you'd done that kind of –

A Yeah, I had –

Q -- of work?

A -- done that kind of work.

\* \* \*

Q But what I wanted to know is, you told Cohen that you had done some work for some logging --

A Yes.

Q -- companies?

CP 61-62.

### **3. Cohen's Lack of Logging Experience**

Respondent Cohen moved to Washington from California and bought the property at issue here. CP 183-184. He had no experience cutting trees.

Q Prior to this incident in 2012, had you removed any trees from the property?

A No.

CP 101.

Q . . . And what is it that you do for a living?

A Sales and marketing.

Q And what do you sell and what do you market?

A Well, to simplify it, let's say you have a manufacturer that wants to sell, you know, bottled water. They might – they would consult with my company, you know, how to package it, how to present it, and how do we bring it to market; and then I work with

them on conceptually how to finish what they're trying to accomplish and represent them to the retail, you know, channel.

CP 102.

Q And was that the same thing you did in California?

A Mm-hm.

CP 103.

Q What do you know about removing trees? Have you ever cut a tree?

A Never.

Q Do you own a chain saw?

A No. Well, I wouldn't say no, I have a – I guess it's called a limber. Its kind of got a thing and it's got a small blade where you can take some branches off a tree.

Q Is it motorized?

A Electric.

Q Chain saw to me is a gasoline or electric power thing with a big chain going around.

A No.

CP 185.

Q When you lived in California, did you ever have occasion to remove any trees or do any major landscaping on the property you had there?

A No.

CP 185.

Appellant Gleason had no knowledge of the Cohen's experience or lack thereof.

Q Did you talk to Cohen about what experience he had with trees before?

A Not vaguely [sic]. I don't remember exactly what – about that. I don't remember us talking about that. He just – he knew what – he knew what he wanted done, I guess, that day.

CP 79.

#### **4. Events of the Day of the Accident**

Appellant Gleason had an advertisement on craigslist in 2012 for firewood. CP 63-65. Respondent Cohen contacted Gleason from the ad.

Q When you had contact with Cohen –

A Mm-hmm.

Q -- for the first time, --

A Mm-hmm.

Q -- how was that contact made?

A He wanted to know if I wanted to trade some big trees that were on the ground for firewood, you know, like different – like chunks of trees for some of my firewood, wanted to trade me. These guys had some trees cut down, . . .

CP 66.

Gleason went to Cohen's property on November 12, 2012. At that time, his expectation was that he was going to load up some already-cut logs. CP 70. Gleason took three helpers with him: Binder Basi, Jinder Basi, and Joe Smith. CP 67. They had the following equipment with them: a truck and trailer, a Bobcat, two chain saws, and straps to chain down the logs on the trailer. CP 68-69. The truck belonged to Binder Basi. CP 95-96. Basi testified that Gleason provided two chain saws. CP 95. Basi testified that Gleason also brought climbing gear and a choker with them to Cohen's. CP 95.

After some research by Gleason and Cohen, they decided to sell the logs to Rainestree, a mill in Shelton. CP 70-71. Rainestree wanted the logs cut to certain lengths, wanted a certain size, and did not want any diseased wood. CP 71-72.

Gleason and Cohen agreed to the following financial deal regarding the logs:

Q What was the financial deal going to be?

A We, he – he was gonna give me like 60/40 for the gas, you know, so it – for us to load ‘em up and take ‘em down to the place, you know so we were gonna get 60 percent. He was gonna get 40 because we had to drive or whatever. So we were, you know, he was gonna pay us, you know, that way, you know, money out of his pocket.

CP 73. Cohen also testified that the deal was for Gleason to sell the logs to a mill and they would split the proceeds 60-40. CP 190.

After the deal was struck, Gleason began to work on the logs and get them loaded.

Q Let’s go back for a minute. Was the first thing you did was to load some logs onto your truck and trailer?

A Yeah, to get ‘em out of his workers – and to help us – you know what I’m saying, his two lead guys, the guys that were telling us what to do, he wanted us to load the trees up so they can make it safer for all of us to work, you know, so want to get the trees off the ground who were already there, before you cut more down, he said.

\*\*\*

Q And in terms of those logs, this is when you first got there, the first thing you did, did you have to cut those into lengths?

A Some of ‘em. . . .

CP 74-75.

Q Were you also cutting limbs off the trunks of these downed trees?

A Most of them already had the limbs cut off. Maybe a couple needed to be cut off 'cause his guys already had 'em limbed up.

Q Did you engage in the process of getting the lengths into the truck and trailer?

A Yeah. I – I had it – he had a tape measure he gave me.

Q Okay.

A Cut the lengths. That's all right.

Q How did you get the lengths onto the trailer?

A What do you mean?

Q Describe how you moved the –

A With –

Q -- truck –

A -- the Bobcat that Binder had with us.

CP 76-77.

Gleason testified that during his work, Cohen asked him to also cut down some additional trees.

Q So you get the wood off the ground?

A Mm-hmm.

Q What happens next?

A He – he comes out and –

Q Who?

A Mr. Cohen, comes out, out of whatever, wherever he was at the time.

Q Yes.

A And he says, hey, you think you could help us cut down these trees, and I said yeah. I mean –

Q Wait, wait, wait. One step at a time. He comes out and says, can you help us take down these trees?

A Yes.

Q Did he point out those trees?

A Yes. He walked around his property and said these are trees I need cut down, do you think you could help me do that. I said,

yeah, I got a little bit of experience in it, you know, 'cause of where I've worked. He says cool, cool.

CP 78.

Q So he then asks you if you'll help take down some, in other words, fell some trees?

A Yeah, cut down some trees.

Q Did you agree that, yeah, I can cut down trees?

A Yeah.

Q Did you look at the trees he wanted cut down?

A Oh, yeah. He walked through there and put spray paint on every one of them for me.

Q Okay.

A The ones he wanted to cut down.

Q Were you okay with that?

A Yeah. I was okay with the ones he told me to cut down.

CP 79-80.

At this point, Gleason and his men "had the trailer loaded" with logs. CP 83. "At the end of the day, after we walked around all the tree and he told me the ones to cut down, there were a couple trees, . . ." CP 83.

Gleason claims that there was one last tree that Cohen wanted cut down, and that Gleason did not want to cut it.

A . . . And he said there's one last tree, and I said I don't want to cut it down. That was the last tree we had there. He's like my guys already got the choker set and he – I said no, I don't want to do it, I'm ready to go home, I'll be back tomorrow – or tomorrow, it's late, it's rainy, tired, and I wanted to go home that day. And said – he pretty much begged me to cut down this last tree, and I didn't want to do it.

Q So why didn't you leave?

A Said it's already hooked up.

Q Why didn't you leave?

A Because he was like saying he wasn't going pay us our money without – without cutting this last tree down 'cause it wasn't done.

\*\*\*

Q So you believed that in order to get paid, you had to continue to cut trees?

\*\*\*

A Yes, ma'am. . . . And I said, well, I don't feel safe cutting down that tree pretty much. I told him he needs to call someone, have 'em look at that tree. I remember that to this day, looking up at that tree 'cause it was right next to his house and there's a car and stuff around it, and I did not feel safe to do it, . . .

Q All right. So what happened?

A So then I cut down the tree and it didn't go right, and that's all I remember.

CP 83 - 84.

Gleason knew the tree was dangerous before he cut it. He knew it was an alder and should be climbed to cut. He knew it was "hooked up wrong," in other words, the choke was not properly set.

Q Why do you think you got hit?

A (No audible response.)

Q What went wrong?

A They – Matt and them had their tree hooked up wrong and it wasn't a safe tree to be cutting down.

Q So it's not a safe tree, it's –

A You need to have –

Q -- an alder –

A -- that tree climb –

Q -- tree?

A -- like I told 'em.

Q You knew it was an unsafe tree?

A Yeah. But he said he wasn't gonna pay me and I wanted to get home and I wanted to have money, 'cause I didn't have money to get home that day.

Q So money was more important than safety that –

A Yeah –

Q -- afternoon?

A -- I wouldn't have made it home. I wanted to get home, see my family.

\*\*\*

Q So you knew the tree was dangerous, you didn't like the way the choke was set, and you saw that they were having trouble with it?

A I didn't see they were having trouble with it 'cause they weren't having trouble with it at the time of hooking the choker up. I just felt it wasn't a safe tree for me to cut down 'cause of where the house was or something like that --

\*\*\*

Q When you saw where the choke was set before you did any cutting --

A Yep.

Q -- did you tell me before that you told them I don't like the way that's set?

A Yes, I did.

Q And they wouldn't change it?

A They said, oh, no, it's set, it's hooked up right, it's hooked up right. . . . , and I told him that he need to have it climbed -- that tree climbed.

CP 89-91.

Gleason did cut the tree down. He notched the face of the tree first. CP 85. The other workers then put pressure on the tree with the come-along/winch. CP 85-86. At this point the plaintiff was on the back side of the tree and was placing another cut into the base. CP 86-87.

After the second cut, the tree moved. Basi testified:

A . . . Tim started cutting, and this tree was arched, and I remember Tim yelling at me to bring the Cat over to position it with the bucket up to keep it from falling back on the house. Where it was, it was -- it was arched, so when it started going, 'cause if -- when he cut it, it was rotted out so it fell off the -- the stump. So that's when he yelled at me and bring the Cat, Bobcat

around and position it so it would keep it from falling. Then he had Mr. Cohen move his vehicles 'cause they were sitting in the driveway. Mr. Cohen moved his vehicles, and then Tim yelled run, and all of us ran. . . .

CP 98-99.

## 2. ARGUMENT

### 1. Summary Judgment Law

We review a superior court's summary judgment order de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment–Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *See, e.g., LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (footnote omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

*Granville Condo. Homeowners Ass'n v. Kuehner*, 177 Wn. App. 543, 551, 312 P.3d 702, 707 (2013).

## **2. Negligence Law**

An essential element of appellant Gleason's negligence case is the existence of a duty owed by respondent Cohen to Gleason.

A cause of action for negligence requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991) (citing *Pedroza*, 101 Wn.2d at 228, 677 P.2d 166).

*Tincani v. Inland Empire Zoological Soc.*, 124 Wn. 2d 121, 127-28, 875 P.2d 621 (1994).

In this case, Cohen did not owe any duty to Gleason, as a matter of law. An "essential element" of Gleason's case cannot be proven. Gleason's claims were properly dismissed by the trial court.

## **3. Gleason's Employment Status**

Appellant Gleason argues in his brief that respondent Cohen was not his employer, and that Gleason was not an employee pursuant to RCW Title 51. Brief of Appellant, pages 22-27. Gleason cites to exceptions to the Industrial Insurance Act including an exception where "[t]he 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." RCW 51.08.195(1). He also cites to RCW 51.12.020 regarding

what employments are excluded from the Industrial Insurance Act including “[a]ny person employed to do gardening, maintenance, or repair, in or about the private home of the employer.” RCW 51.12.020(2).

Gleason also argues that an employer/employee relationship requires the alleged employer to have the “right to control” the employee’s physical conduct, along with consent to the relationship. Since Cohen did not control Gleason’s conduct, and since Cohen did not consent to being an “employer,” there is no employment relationship. Brief of Appellant, pages 26-27.

Cohen agrees that Gleason was not his employee pursuant to the statutes and cases cited. CP 208, 209.

#### **4. Application of Employment Law**

Appellant Gleason then goes on to argue that even though there is no employer/employee relationship, respondent Cohen owed a duty to provide a safe “work site” or “workplace.” However, the cases cited for this proposition deal exclusively with workplaces involving employers and employees. Those cases do not govern this case because they are premised on the employer/employee relationship, which relationship Gleason argues does not exist in this case.

In *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 803 P. 3d 4 (1991), the court specifically noted that

Inasmuch as both the general contractor and subcontractor come *within the statutory definition of employer*, the primary employer, the general contractor, has, as a matter of policy, the duty to comply with or ensure compliance with WISHA and its regulations.

*Doss*, 60 Wn. App. at 128 (emphasis added). The *Doss* ruling required *employers* to comply with WISHA regulations (“safety regulations” as described by the plaintiff.) Since Cohen is not an *employer* he is not governed by the duties – employment regulations – applicable to employers.

*Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978) also dealt with a workplace, employer/employee relationships, and OSHA regulations. It is not applicable here for the same reasons that *Doss* is not applicable. If Gleason is not an employee, and Cohen is not an employer, neither *Doss* nor *Kelley* apply, and the defendant is not subject to “safety regulations” governing the “workplace.”

Further, Gleason couches this argument in the “right to control the workplace” rhetoric. Brief of Appellant, page 22. But Gleason previously argued that he was not an employee because he fell under the exception noted at RCW 51.08.195(1) which provided that there was not an employer/employee relationship when “[t]he individual has been and will continue to be *free from control over the performance of the service*, both

under the contract of service and in fact . . .” Emphasis added. The plaintiff cannot have the argument both ways. Either there is an employment relationship and all of the requirements *and immunities* surrounding that relationship apply; or there is not, and statutory, case law, and administrative duties applicable to the employment relationship *do not apply*.

Finally, Gleason has cited no “safety regulation” violated by Cohen, or how that failure contributed to the accident. There is no evidence of a duty violated pursuant to this argument.

#### **5. Implied Primary Assumption of the Risk**

There is no evidence of a violation of duty under negligence principles.

It is a defense to an action for *[personal injury]* . . . that the *[person injured]* impliedly assumed a specific risk of harm.

A person impliedly assumes a risk of harm if that person knows of the specific risk associated with *[a course of conduct]* *[an activity]*, understands its nature, voluntarily chooses to accept the risk by engaging in that *[conduct]* *[activity]*, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.

[A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct *[to avoid the harm]* *[or]* *[to exercise or protect a right or privilege]* because of the defendant's negligence.]

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 13.03 (6th ed.)

(Hereafter WPI.) The comment to this instruction provides:

Implied primary assumption of risk remains viable as a defense in Washington to the specific risk assumed, notwithstanding the enactment of the comparative negligence or contributory fault statutes. See *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992); *Kirk v. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987).

*Id.* The Washington Pattern Instructions discuss assumption of the risk generally at WPI 13.00 Introduction:

Because express and implied primary assumption of risk negate the defendant's duty with regard to the risks assumed, they act as a bar to plaintiff's recovery when the injury results from one of the assumed risks. E.g., *Scott v. Pacific West Mountain Resort*, [119 Wn.2d 484, 834 P.2d 6 (1992) . . . ; *Alston v. Blythe*, 88 Wn.App. 26, 943 P.2d 692 (1997) . . . The general elements of proof for express and implied primary assumption of risk are substantially the same. The evidence must show that plaintiff (1) had full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk. See *Kirk v. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987) . . .

WPI 13.00 Introduction.

Appellant Gleason had “full subjective understanding of the presence and nature of the specific risk.” He knew that alder trees were dangerous, knew that he did not want to cut this one down, and knew that he did not like the way the choker was placed on the tree. After the cutting started, he knew further that the tree was not doing what it was supposed to do and that he did not think the situation was safe.

Gleason also “voluntarily chose to encounter the risk.” He had a reasonable alternative course of action available to him. He could have left. Even after he started his work, and realized the situation in more depth, Gleason continued with the cutting of the tree. He did not leave the site, with his workers, and the valuable logs they had loaded for the mill. He claims that he believed that respondent Cohen would not pay him. However, he was in control of the logs for which he was to be paid by a third party, the sawmill. The valuable logs, for which he originally contracted, were in his truck and trailer, under his control.

The case *Wirtz v. Gillogly*, 152 Wn. App. 1, 216 P.3d 416 (2009) is on point. In that case

the plaintiff was injured by a falling tree while helping the defendant clear trees from his property. . . He knew the tree could fall and injure him because he had observed and discussed the tree felling process and he had planned an escape route to avoid the falling tree. *Wirtz*, 152 Wn. App. at 10, 216 P.3d 416. Additionally, his actions were voluntary because he could have refused to help at any point. *Wirtz*, 152 Wn. App. at 10-11, 216 P.3d 416.

*Barrett v. Lowe’s Home Centers, Inc.*, 179 Wn. App. 1, 8-9, 324 P.3d 688 (2013). The *Barrett* court distinguished *Wirtz* on the basis that

the plaintiff was injured by a risk inherent in the activity he was engaged in and because he manifested consent to assume that risk. A tree falling and injuring a participant is a risk inherent in tree felling. . . Further, the plaintiff in *Wirtz* manifested his consent to assume the risk: he voluntarily participated in the tree-felling

process and did not argue that it was unsafe or attempt to remove himself from the situation.

*Barrett*, 179 Wn. App. at 9.

The *Wirtz* court relied upon *Erie v. White*, 92 Wn. App. 297, 966 P.2d 342 (1998), *rev. den.*, 137 Wn.2d 1022, 980 P.2d 1280 (1999).

Our decision in *Erie* illustrates the doctrine of assumption of risk in an analogous context. Erie was using pole-climbing equipment to fell a tree when he accidentally cut through his safety strap with a chainsaw, fell to the ground, and was injured. *Erie*, 92 Wn. App. at 300-01, 966 P.2d 342. Erie alleged that White had negligently supplied him with the wrong equipment. But the trial court granted White's summary judgment motion, ruling that Erie had assumed the risk because he knowingly and voluntarily participated in the activity. *Id.* at 301, 966 P.2d 342.

*Wirtz*, 152 Wash. App. at 8.

On appeal, we noted that to sustain summary judgment, the evidence must show that Erie had a full subjective understanding of the presence and nature of the risk and still voluntarily chose to encounter it. . . . We also stated that whether a plaintiff decides to act voluntarily to encounter a risk depends on whether he knows about a reasonable, alternative course of action. . . . The plaintiff must be aware of more than just the generalized risk of his activities; he must also appreciate the specific hazard which caused the injury. . . . (citing *Martin v. Kidwiler*, 71 Wn.2d 47, 49-50, 426 P.2d 489 (1967) (the plaintiff must have knowledge of the risk, appreciate its nature, and voluntarily choose to incur it.)

The evidence showed that Erie (1) knew he needed a metal-backed safety strap and (2) had reasonable alternative courses of action because he could have used different equipment, asked White to do the work, or simply declined to proceed. . . . Therefore, we affirmed the trial court's summary judgment dismissal of Erie's complaint, holding that reasonable minds could not differ about whether Erie had knowingly and voluntarily assumed the risk. . . .

Similarly here, reasonable minds could not differ about whether Wirtz knowingly and voluntarily assumed the risk inherent in felling trees.

*Wirtz*, 152 Wash. App. at 8-9.

The Court of Appeals more recently enforced the defense of implied primary assumption of risk in *Jessee v. City Council of Dayton*, 173 Wn.App. 410, 293 P.3d 1290 (2013). In that case, the plaintiff knew that a flight of stairs was dangerous and pointed out their deficiencies. But she used the stairs anyway and fell as she was going back down them. The court dismissed the case, and the Court of Appeals affirmed, on the basis that the City had no duty. The plaintiff had assumed the risk under implied primary assumption of risk. The Court held that

A plaintiff has knowledge if she “at the time of decision, actually and subjectively knew . . . all facts that a reasonable person in the plaintiff’s shoes would want to know and consider” at the time she chose to incur the risk. *Home v. N. Kitsap Sch. Dist.*, 92 Wn.App. 709, 720, 965 P.2d 1112 (1998) (emphasis omitted). This requires that the plaintiff have specific, rather than generalized, knowledge of risk. *Id.* at 720–21, 965 P.2d 1112.

*Jessee*, 173 Wn. App. at 414-15.

In *Jessee*, the plaintiff knew about specific dangers of the stairs: lack of a handrail and non-code compliant stair treads. In this case, Gleason knew that alders were dangerous trees, and knew he did not like the looks of the tree at issue, did not like that it was close to Cohen’s

house, and that he did not like the way the choker was on it. He had specific knowledge of this tree's dangerousness and the risk of cutting it.

Gleason claims that he was forced to cut the tree; i.e. that his assumption of the risk was involuntary. However, the *Jessee* court held that in order for assumption of the risk to be involuntary, it would require the defendant to impose the risk on the plaintiff.

The concept of voluntariness required that the City show that Ms. Jessee elected "to encounter [the risk] despite knowing of a reasonable alternative course of action." [citation omitted] A plaintiff's actions are voluntary if she voices concern about a risk, but ultimately accepts the risk. . . . (quoting RESTATEMENT (SECOND) OF TORTS § 496E cmt. a (1965)). A plaintiff's actions are voluntary when she feels compelled by outside considerations to take the risk. RESTATEMENT § 496E cmt. b. The *Restatement* gives two examples of this. In one, a plaintiff knows that a house is dangerous, but rents it anyway because she cannot find or afford another. *Id.* In the second, a plaintiff knows that the defendant's car has faulty brakes, but asks the defendant to drive her to the hospital because she is badly bleeding. RESTATEMENT § 496E cmt. b. illus. 1. In both examples, the plaintiff voluntarily assumes the risk.

The facts here are even more compelling than these examples. Ms. Jessee voluntarily assumed the risk inherent in the Old Fire Station's stairs. She voiced concern about the stairs, but she went up them anyway. Ms. Jessee suggests that her choice was involuntary because she was at work, was expected to attend the meeting, and did not choose the meeting place. However, these were her concerns. The City did not impose them on her.

*Jessee*, 173 Wn. App. at 415.

The Comment to WPI 13.03 further discusses the element of voluntariness:

Whether a plaintiff chooses voluntarily to encounter a known risk, “depends on whether he or she elects to encounter it despite knowing of a reasonable alternative course of action.” *Egan v. Cauble*, 92 Wn.App. [372] at 379 [966 P.2d 362 (1998)]; *Home v. North Kitsap School Dist.*, 92 Wn.App. at 721; *Erie v. White*, 92 Wn.App. at 304. In order for assumption of risk to bar recovery, the plaintiff “must have had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger.” *Zook v. Baier*, 9 Wn.App. 708, 716, 514 P.2d 923 (1973).

WPI 13.03, Comment, Subjective Standard.

Here, Gleason could have walked away from the dangerous tree. He could have left. He was concerned about the risk of cutting down the tree at issue. He expressed those specific concerns, but did the job anyway. He had an alternative course of action: to leave, with the logs already cut and in his possession. They were valuable and were to be sold to a mill. He went ahead with the cutting for his own reason, concern about additional payment. There is no evidence that Cohen prevented Gleason from leaving the premises, with the valuable logs already loaded.

Gleason’s claims are barred under the doctrine of implied primary assumption of the risk. Gleason knowingly and voluntarily assumed a known risk. This relieves Cohen of a duty. Gleason’s claims were

properly dismissed because he cannot prove an essential element of negligence: the existence of a duty owed.

## 6. Premises Liability

In premises liability actions, a person's status, based on the common law classifications of persons entering upon real property (invitee, licensee, or trespasser), determines the scope of the duty of care owed by the possessor (owner or occupier) of that property. *Van Dinter v. Kennewick*, 121 Wn.2d 38, 41, 846 P.2d 522 (1993); *Younce v. Ferguson*, 106 Wn.2d 658, 666–67, 724 P.2d 991 (1986). See generally W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* §§ 58–61 (5th ed. 1984) (hereafter *Prosser & Keeton on Torts*).

*Tincani*, 124 Wn. 2d at 128.

For purposes of the underlying motion for summary judgment only, respondent Cohen assumed that appellant Gleason was a business invitee on his property. CP 36. This is the highest status in the analysis of premises liability.

A *[business]* . . . invitee is a person who is either expressly or impliedly invited onto the premises of another [for some purpose connected with a business interest or business benefit to the *[owner]* . . .

WPI 120.05. The owner of property owes the highest duty to an invitee.

An *[owner of premises]* . . . is liable for any *[physical]* injuries to its *[business invitees]* . . . caused by a condition on the premises if the *[owner]* . . . :

(a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such [*business invitees*] . . . ;

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and

(c) fails to exercise ordinary care to protect them against the danger.

WPI 120.07. All three prongs of the test must be met.

In this case, section (b) of the test is not met. As discussed above, Gleason knew the tree he was asked to cut was a dangerous type of tree, knew that the tree itself looked dangerous, knew that the location of the tree was dangerous, and knew that he did not like the way the choke was placed. As the cutting proceeded, Gleason continued to believe the tree was dangerous, and had the defendant move his cars. Gleason clearly discovered and realized the danger he faced. Cohen did not owe him a duty to make it safe, because Gleason knew it was not safe. An owner of premises is liable for any physical injuries *only* when he should expect that the plaintiff will not discover or realize the danger. Here Gleason did discover and realize the danger. He could have left and not cut the tree down. This was his decision. He was not being held against his will at the Cohen property. Therefore, under premises liability law, Cohen did not

owe any duty to Gleason. If analyzed under premises liability law, the trial court's dismissal was also correct.

## V. CONCLUSION

The trial court properly dismissed this action because appellant Gleason cannot prove, as a matter of law, an essential element of his negligence action: a duty owed by respondent Cohen.

First, Gleason cannot be owed duties that would be owed to an employee. If he was an employee, this suit is completely barred.

Second, Gleason assumed the risk of cutting the tree that hit him. He knew of the specific risks. He voluntarily chose to assume those risks, in spite of another viable alternative course of action. His claims are completely barred because Cohen owed no duty to protect him.

Finally, if Gleason is a business invitee, the owner Cohen only owes a duty of care if Gleason did not discover and realize the danger. Gleason's claims are barred because he did in fact discover and recognize the specific dangerous situation involved.

Respondents Cohen request that the Court of Appeals affirm the trial court's dismissal of this case.

Dated this 12th day of December, 2014.

Respectfully submitted,

  
Beth A. Jensen #15925

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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DEPUTY

LEO TIMOTHY GLEASON,  Plaintiff/Appellant,  v.  BRIAN COHEN and LIZA COHEN, husband and wife and the marital community comprised thereof,  Defendants/Respondents.	Appeal No. 46398-9-II  Kitsap Co. Sup. Ct. No. 13-2-01590-2  DECLARATION OF SERVICE
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Susan P. Candoo states and declares as follows:

I am the office manager for the offices of Richard J. Jensen, P.S.,  
attorneys for defendants in the above-entitled action.

On December 15, 2014, I caused a copy of the following documents:

1. Brief of Respondents
2. and this Declaration of Service.

to be served on the parties listed below by the methods indicated:

1. Washington State Court of Appeals, Div. II by ABC/LMI
2. William H. Broughton, Attorney at Law, Co-Counsel for plaintiff  
by email: [bill@bbroughtonlaw.com](mailto:bill@bbroughtonlaw.com)
3. Gregory Wall, Attorney at Law, Co-Counsel for plaintiff  
by email: [gregwall@gjwlaw.com](mailto:gregwall@gjwlaw.com)

I certify under penalty of perjury under the laws of the State of Washington  
that the foregoing is true and correct.

DATED at Fircrest, WA, this 15<sup>th</sup> day of December, 2014.

RICHARD J. JENSEN, P.S. & ASSOCIATES



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Susan P. Candoo