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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 306194

Washington State Court of Appeals

JOSEPH SCHOENMAKERS, Appellant

v.

CHRISTIAN PATRICK BAGDON AND JANE DOE
BAGDON, d/b/a DOOR TO DOOR STORE, a sole
proprietorship

APPELLANT'S REPLY BRIEF

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I. STATEMENT OF FACTS

The entire statement of facts set forth in the Appellant's Brief applies to this brief and is incorporated herein by reference as if fully set forth.

Appellant Joseph Schoenmakers never impliedly consented to relieve Bagdon of the duty to provide a safe place to work. Schoenmakers had previously, in 1997, brought the issue of circular saw not having the guard on it to Bagdon's attention, and Bagdon refused to put the hood guard on the circular saw. (CP 217). Bagdon did not want Schoenmakers to put it on either. Bagdon told Schoenmakers that it was a waste of time. (CP 217).

There was an option to cut the insulation with a razor knife, but Schoenmakers testified that it was not a suitable option because the insulation would be damaged if he had cut it with a razor knife. (CP 217). Schoenmakers had never done it that way. (CP 217).

II. ARGUMENT

A. The Defendant Christian Bagdon had a nondelegable duty to provide a safe workplace.

Defendants arguments here try to place all the blame of this devastating and disfiguring thumb accident on Joseph Schoenmakers because he voluntarily used the saw knowing that the hood guard was not on it. Defendant's argument overlooks that Chris Bagdon ha a nondelegable duty to maintain a safe workplace.

1. The Washington Administrative Code imposed a duty of care on Bagdon as an "employer" to Schoenmakers, an "employee."

Under Washington law, negligence has four elements: duty, breach of duty, causation, and injury. Kennedy v. Sea-Land, 62 Wn. App. 839, 856, 816 P.2d 75 (1991). “A material fact is one upon which the outcome of the litigation depends, in whole or in part.” Kennedy, 62 Wn. App. at 856. Violation of a statute or safety regulation may be considered by the trier of fact as evidence of negligence. RCW 5.40.050. A duty of care arises from either common law principles or from a statute or regulations. Bernethy v. Walt Failor’s, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982).

The Washington Administrative Code defines “employer” to include “any person... or business entity which engages in any business... in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person..” WAC 296-24-012 (6). The term employee is defined to include “an employee of an employer who is employed in the business of his or the employer where by way of manual labor or otherwise and 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 chapter where by manual labor or otherwise.” (Emphasis added.) WAC 296-24-012(18).

WAC 296-800-110 provides that the employer’s responsibility is “[t]o provide a safe and healthy workplace free from recognized hazards.” (See text, Appendix A-2) WAC 296-800-11005 provides that an employer must “[p]rovide [its] employees a workplace free from recognized hazards that are causing, or are likely to cause, serious injury or death.” That WAC further provides that a “hazard is recognized if it is commonly known in the employer’s industry, or if there is evidence that the employer

knew or should have known of the existence of the hazard, or if it can be established that any reasonable person would have recognized the hazard.” (Appendix A-3).

WAC 296-800-11010 provides that the employer “use safety devices” “that are reasonably adequate to make your workplace safe.” The employer must “not remove... any safety device... furnished for use in any employment or place of employment.” (Appendix A-4) Further, under WAC 296-800-11030 an employer must “[t]ake responsibility for the safe condition of tools and equipment used by employees.” (Appendix A-5) WAC 296-800-11035 places the burden on employers to “enforce rules that lead to a safe and healthy work environment...” (Appendix A-6).

The term “workplace” is defined under WAC 296-24-012 (19) as “any... premises, room or other place where an employee or employees are employed for the performance of labor or service over which the employer has the right of access or control...” (Emphasis added.) (Appendix A-7)

Here, Bagdon had a duty to comply with WAC 296-806-48012, pertaining to circular saws, which provides as follows:

You must:

Guard each hand-fed circular saw with a hood that completely enclosed both the portion of the saw that is above both:

The table;

And

The material being cut.

Make sure the hood is designed and constructed to do **all** of the following:

Protect the operator from flying splinters and broken saw teeth.

Strong enough to resist damage from reasonable operation, adjustments, and handling.

Made of material soft enough to not break saw teeth.

Note: Hoods should be made of material that:

Does not shatter when broken.

Is not explosive.

Is less combustible than wood.

You must:

Mount the hood so it does all of the following:

Operates positively and reliably.

Maintains true alignment with the saw.

Resists any side thrust or force that could throw it out of line.

Make sure the hood:

Allows the material to be inserted or sawed without any considerable resistance.

And

Does one of the following:

Automatically remains in contact with the material being cut;

Or

Is manually adjusted to within one-quarter inch of the material being cut.

Exemption:

Saws may be guarded with a fixed enclosure, fixed barrier guard, or a manually adjusted guard when specific conditions prevent using a standard automatic adjusting guard.

Alternative guards have to both:

Provide protection equivalent to a standard automatic adjusting guard;

And

Be used according to the manufacturer's instructions with sufficient supervision to comply with this requirement.

(Emphasis added.)

Here, under the definitions, Schoenmakers was an employee even if he was, at times, an independent contractor. He was an independent contractor performing personal labor for Door-to-Door by doing the installs of merchandise or other personal labor. See WAC 296-24-012(18), Schoenmakers a) had a desk at Door-to-Door, b) took sales calls and worked them, and c) performed work at the Door-to-Door shop as part of his oral contract with Chris Bagdon. The job Schoenmakers was doing at the time of his thumb injury was one that Schoenmakers gave the estimate to the customer, ordered the materials at his desk at Door-to-Door with the cell phone Bagdon provided for such estimates, used the Door-to-Door truck to deliver the shutters, and used the Door-to-Door shop to cut the insulation for that job. Under these circumstances, he met the definition

of “employee” and Bagdon as the “employer.” Thus, Bagdon as an employer, had the duty to follow the WISHA regulations pertaining to circular saws for Schoenmakers’ safety. Bagdon failed in that duty by taking off the saw hood guard and refusing to put it back on. Thus, there was a question of fact as to the duty and breach under the WAC’s.

2. **Washington common law also establishes a jobsite owner’s duty to “independent contractors.”**

A specific duty to comply with WISHA regulations is owed by the jobsite owner. Kennedy v. Sea-Land, 62 Wn. App. at 851-52 (1991). See also Doss v. ITT Rayonier Inc., 60 Wn. App. 125, 128-129, 803 P.2d 4, review denied, 116 Wn.2d 1034 (1991) and Weinert v. Bronco National Co., 58 Wn. App. 692, 695, 795 P.2d 1167 (1990).

In Phillips v. Kaiser Alum. and Chemical Corp., 74 Wn. App. 741, 750-51, 753, n.26, 875 P.2d 1228 (1994) there was evidence that Kaiser, the owner of the site had retained control over the way the work was done. Kaiser had ordered that the bus be cut with chainsaws. Kaiser had a meeting on the day Phillips was injured to discuss safety issues. Kaiser had hired Al Wilhelm to oversee the job. He was on the job everyday to confirm where the work would begin and talk about any safety issues.

In Kaiser, Phillips was the employee of an independent contractor. He became dizzy and faint from fumes and fell unconscious. While he was unconscious an aluminum bus fell on his ankle severely injuring it. Kaiser, 74 Wn. App. at 746. Each 10 foot segment of aluminum bus plank weighed about 1,000 pounds. Kaiser, 74 Wn. App. at 743.

The court held that Kaiser owed Phillips a common law duty of care which required Kaiser to comply with specific Washington State Industrial Safety and Health

Act of 1973 (WISHA) regulations. Because no specific WISHA regulations applied in that case the court granted summary judgment on that issue.

On appeal, the court held that a principal/employer of an independent contractor owes a duty of care to an employee of the contractor if it retains the right to control the contractor's work. Kaiser, 74 Wn. App. at 750 citing, inter alia, Restatement (Second) of Torts § 414 (1965). Whether a right to control has been retained depends on the parties contract, the parties conduct, and other related factors. Kaiser, 74 Wn. App. at 750.

The principal employer must have reserved a right "to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor" employees." Kaiser, 74 Wn. App. at 750. When a right to control is retained, the principal/employer has a duty to take reasonable care to provide a safe place of work under common law of tort. Kaiser, 74 Wn. App. at 750-751.

The court held that Kaiser had exercised a right to control safety related matters and had therefore owed a common law duty of care. Kaiser had exercised control over safety, training, supervision, ventilation, and scaffolding. Kaiser, 74 Wn. App. at 753, N.26. The court reversed the summary judgment and remanded for a new trial on the entire cause of action for negligence. Kaiser, 74 Wn. App. at 754.

The jobsite owner owes a specific duty to comply with WISHA regulations, Kennedy, 62 Wash. App. at 851-2.

A jobsite owner which retains a right to control the work of an independent contractor owes the same duty of care for the safety of employees of the independent contractor as owed by a general contractor to the employees of a subcontractor. Kennedy v. Sea-Land Service, 62 Wn. App. 839, 855, 816 P.2d 75 (1991). The court in Kennedy

also held that an employer of an independent contractor, if it retained the requisite degree of control over the work, had the same duty of care as would a general contractor under Kelley v. Howard S. Wright Constr. Co., 90 Wn.2d 323, 582 P.2d 500 (1978). Kennedy, 62 Wn. App. at 855.

The right of control depends on the owner's contractual right of control or the degree of control actually exercised. Kennedy, 62 Wn. App. at 858.

"The common law retained control exception to the general rule of non-liability refers to 'employers' and is not limited to 'general contractors.'" Restatement (Second) of Torts § 414 (1965). Where the employer of the independent contractor retains control over some part of the work, the employer has a duty, within the scope of that control, to provide a safe place of work. Kelley, 90 Wn.2d at 330-31.

In Stute v. P.B.M.C., 114 Wash.2d 454, 460, 780 P.2d 545 (1990), the owner/developer who was acting as its own general contractor knew the employees of the "sub" were working without safety devices. "The Stute decision that the general contractor was liable had two bases: (1) that the general contractor's obligations under relevant WISHA regulations extended to the employees of the subcontractor as well as to the "general's" own employees; and (2) that the common law exception to non-liability of employers of independent contractors to the employees of the "sub" applies to general contractors for the reasons stated in Kelley: as a matter of policy, a general contractor, who by the very nature of his role retains control over the work, is in the best position to implement necessary precautions and provide necessary safety equipment. The relevant issue is the degree of retained control."

The court in Kennedy held that Sea-Land, as the employer of Container Stevedoring, if it retained the requisite degree of control over the work, had the same duty of care as would a general contractor under Kelley.

The court in Kennedy reviewed the contractual provisions between the parties and the facts pertaining to the “degree of control actually exercised by Sea-Land.” The court held that the degree of control actually exercised may not in all cases depend on the terms of a contract, so it held that that issue was one for the trier of fact. Kennedy, 62 Wn. App. at 858-9.

In this case Schoenmakers testified that Bagdon, the owner of the shop, allowed him to use it. He specifically allowed Schoenmakers to use the circular saw. Bagdon told Schoenmakers that he didn’t want the hood put back on the saw because it cut down on productivity. Schoenmakers tried to talk to him about it, but Chris Bagdon didn’t want to discuss it.

Bagdon knew that Schoenmakers and other employees did use it without the hood guard. Thus, Bagdon exercised control over that piece of equipment. He owed a common law duty of care to make sure it had the hood guard on it to protect Schoenmakers and others.

3. Bagdon owed a duty of care to Schoenmakers as a “business invitee.”

Independent contractors hired by landowners are invitees on the landowners premises. Epperly v. City of Seattle, 65 Wash. 2d 777, 786, 399 P.2d 591 (1965) Washington has also adopted **Restatement of Torts** § 343 and 343A. Kinney v. Space Needle Corp., 121 Wn. App. 242, 85 P.3d 918 (Div 1 2004). Section 343 provides as follows:

If possessor of land is subject to liability for physical harm caused to his invitees by a condition of the land, but only if he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (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 reasonable care to protect them against the danger.

(Emphasis added.)

Section 343A states in pertinent part:

(1) a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition of the land whose danger is known or obvious to them, unless, the possessor should anticipate the harm despite such knowledge or obviousness.

Therefore, “[a] landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious nature of the danger.” Kamla v. Space Needle Corp., 147 Wash. 2d 114, 126, 52 P.3d 472 (2002).

In Kinney, the court held that (Space Needle Corp. should have anticipated the harm to Kinney, despite the obvious hazard of the ladders, small platforms and the hatch opening. Kinney, 121 Wn. App. at 250. See also Kamla, 147 Wn.2d at 126. The trier of the fact should have determined whether Space Needle Corp. owed her a common law duty as a invitee. Kinney, 121 Wn. App. at 250.

Here, although Joseph Schoenmakers knew that the hood guard was not on the saw, there is a question of fact as to whether Bagdon knew that Schoenmakers (and other employees) would fail to protect themselves against the danger, especially when Bagdon refused to put on the hood guard and would not allow Schoenmakers to put it on either. Thus, Bagdon “should have anticipated the harm to Schoenmakers as his invitee despite the obvious nature of the danger.”

B. The facts in this case fit the category of “unreasonable assumption of risk,” which retains no independent significance from contributory negligence after Washington’s adoption of comparative negligence.

In Tincani v. Inland Empire, 124 Wn.2d 121, 875 P.2d 621 (1994), the court held that the “assumption of risk” doctrine did not bar recovery based on § 343A; rather it acted as a damage-reducing fact based on comparative negligence. Tincani, 124 Wn.2d at 145. The jury’s verdict in that case indicated that the jury had concluded that Tincani, a 14 year old boy, voluntarily chose to encounter a risk created by the Zoo’s negligence. This type of assumption of the risk is called “unreasonable assumption of the risk.” Tincani, 124 Wn.2d at 145. “Unreasonable assumption of the risk retains no independent significance from contributory negligence after Washington’s adoption of comparative negligence.” Tincani, 124 Wn.2d at 145, citing, Scott v. Pacific W. Mt. Resort, 119 Wn.2d 484, 499, 834 P.2d 6 (1992). (Emphasis added.)

The court in Tincani explained that “such assumption of risk does not bar all recovery because the jury may apportion the percentage of fault attributable to each responsible party.” Tincani, 124 Wn.2d at 145, quoting Scott, 119 Wn.2d at 499. The court in Tincani therefore agreed with the Court of Appeals that Tincani’s assumption of risk did not bar recovery. Tincani, 124 Wn.2d at 145.

Although “implied primary assumption of the risk” still remains a complete bar to recovery, Tincani, 124 Wn.2d at 143, the facts in this case do not rise to the level of implied primary assumption of the risk where a Appellant assumes the dangers which are inherent in and necessary to the particular sport or activity. Tincani, 124 Wn.2d at 143.

By contrast, under the “unreasonable assumption of the risk” doctrine, a person voluntarily chooses to encounter a risk created by the possessor’s negligence. Tincani, 124 Wn.2d at 145. Here, Bagdon’s refusal to ensure that the hood guard was on the circular saw violated his duties under several theories explained supra, and it was a nondelegable duty specifically defined in the WISHA regulations set forth above in section A1 of this brief. Bagdon, not Schoenmakers, created this risk by negligently refusing to keep the hood guard on the circular saw. Schoenmakers specifically addressed this issue with Bagdon, who refused to resolve this safety hazard.

Here, Schoenmakers assumed the risk of working with a table saw, which is inherently dangerous. He did not, however, assume the risk of working with a table saw without the proper safety equipment – i.e., the hood guard. The fact that Schoenmakers continued to use it despite the fact that Bagdon would not put on the guard may constitute “unreasonable assumption of the risk” as defined above, but his unreasonable assumption of risk is a factor for the jury to consider in assigning Schoenmakers a percentage of contributory negligence and does not act as a complete bar to recovery.

III. CONCLUSION

There are questions of fact sufficient to go to the jury on three duties of care. The first is the care owed as an employer to an employee under WISHA for Bagdon’s violations of a specific WAC pertaining to circular saws.

The second is the duty of care owed by an owner of a workplace to protect employees and independent contractors arising under the common law of Kelley and subsequent cases.

The third is the duty of care owed to invitees under the **Restatement of Torts** sections 343 and 343A, adopted as common law in Washington State, pertaining to a duty of care owed to invitees.

The assumption of risk doctrine does not act as a complete bar to recovery because Schoenmakers acts fall under the “unreasonable assumption of risk” doctrine.

The court should reverse the trial court order granting the Defendant’s Motion for Summary Judgment and remand to the trial court to reset the trial date.

Respectfully submitted this 24th day of August 2012.



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APPENDIX A-1

(4) The term "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

(5) The term "employee" means an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise and 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 chapter whether by way of manual labor or otherwise.

APPENDIX A-2

Washington Administrative Code

Title 296. Labor and Industries, Department of

Chapter 296-800. Safety and health core rules

EMPLOYER RESPONSIBILITIES: SAFE WORKPLACE

All regulations passed and filed through February 17, 2010

§ 296-800-110. Employer responsibilities: Safe workplace - Summary

Your responsibility:

To provide a safe and healthy workplace free from recognized hazards.

IMPORTANT:

Use these rules where there are no specific rules applicable to the particular hazard.

You must:

Provide a workplace free from recognized hazards.

WAC 296-800-11005.

Provide and use means to make your workplace safe.

WAC 296-800-11010.

Prohibit employees from entering, or being in, any workplace that is not safe.

WAC 296-800-11015.

Construct your workplace so it is safe.

WAC 296-800-11020.

Prohibit alcohol and narcotics from your workplace.

WAC 296-800-11025.

Prohibit employees from using tools and equipment that are not safe.

WAC 296-800-11030.

Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.

WAC 296-800-11035.

Control chemical agents.

WAC 296-800-11040.

APPENDIX A-3

Washington Administrative Code

Title 296. Labor and Industries, Department of

Chapter 296-800. Safety and health core rules

EMPLOYER RESPONSIBILITIES: SAFE WORKPLACE

All regulations passed and filed through February 17, 2010

§ 296-800-11005. Provide a workplace free from recognized hazards

You must:

* Provide your employees a workplace free from recognized hazards that are causing, or are likely to cause, serious injury or death.

A hazard is recognized if it is commonly known in the employer's industry, or if there is evidence that the Note: employer knew or should have known of the existence of the hazard, or if it can be established that any reasonable person would have recognized the hazard.

History. Statutory Authority: RCW 49.17.010, 49.17.040, and 49.17.050 . 01-23-060, § 296-800-11005, filed 11/20/01, effective 12/1/01; 01-11-038, § 296-800-11005, filed 5/9/01, effective 9/1/01.

APPENDIX A-4

Washington Administrative Code

Title 296. Labor and Industries, Department of

Chapter 296-800. Safety and health core rules

EMPLOYER RESPONSIBILITIES: SAFE WORKPLACE

All regulations passed and filed through February 17, 2010

§ 296-800-11010. Provide and use means to make your workplace safe

You must:

* Provide and use safety devices, safeguards, and use work practices, methods, processes, and means that are reasonably adequate to make your workplace safe.

- Do not remove, displace, damage, destroy or carry off any safety device, safeguard, notice or warning, furnished for use in any employment or place of employment.

- Do not interfere with use of any of the above.

- Do not interfere with the use of any method or process adopted for the protection of any employee.

- Do everything reasonably necessary to protect the life and safety of your employees.

History. Statutory Authority: RCW 49.17.010, 49.17.040, and 49.17.050 . 01-11-038, § 296-800-11010, filed 5/9/01, effective 9/1/01.

APPENDIX A-5

Washington Administrative Code

Title 296. Labor and Industries, Department of

Chapter 296-800. Safety and health core rules

EMPLOYER RESPONSIBILITIES: SAFE WORKPLACE

All regulations passed and filed through February 17, 2010

§ 296-800-11030. Prohibit employees from using tools and equipment that are not safe

You must:

- * Take responsibility for the safe condition of tools and equipment used by employees.

Note: This applies to all equipment, materials, tools, and machinery whether owned by the employer or another firm or individual.

History. Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, and 49.17.060. 03-18-090, § 296-800-11030, filed 9/2/03, effective 11/1/03. Statutory Authority: RCW 49.17.010, 49.17.040, and 49.17.050. 01-11-038, § 296-800-11030, filed 5/9/01, effective 9/1/01.

APPENDIX A-6

Washington Administrative Code

Title 296. Labor and Industries, Department of

Chapter 296-800. Safety and health core rules

EMPLOYER RESPONSIBILITIES: SAFE WORKPLACE

All regulations passed and filed through February 17, 2010

§ 296-800-11035. Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice

You must:

* Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.

History. Statutory Authority: RCW 49.17.010, 49.17.040, and 49.17.050 . 01-11-038, § 296-800-11035, filed 5/9/01, effective 9/1/01.

APPENDIX A-7

8) The term "work place" means any plant, yard, premises, room, or other place where an employee or employees are employed for the performance of labor or service over which the employer has the right of access or control, and includes, but is not limited to, all work places covered by industrial insurance under Title 51 RCW, as now or hereafter amended.