

FILED

MAY 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 306364

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

LIZABETH JESSEE,

Appellant,

v.

CITY OF DAYTON,

Respondent.

BRIEF OF APPELLANT

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1014 (1994) (citing *Smith v. Manning's, Inc.*, 13 Wash.2d
573, 126 P.2d 44 (1942)).9

I. INTRODUCTION

Appellant, Lizabeth Jessee, (hereinafter “Ms. Jessee”) was employed by the Walla Walla County Emergency Management Department as an Emergency Management Technician. As part of her employment, she was requested by Columbia County to evaluate an emergency management exercise held at the Dayton Elementary School. The exercise was a simulated school shooting in which emergency responders were to respond to the school and act as they would during a real school shooting. Emergency personnel were then to meet and make observations regarding the exercise during an “after action review”. The “after action review” was scheduled to take place in the Emergency Operations Center for Columbia County, located at 111 South First Street in Dayton, Washington, also known as “the Old Fire Station” (hereinafter “Old Fire Station”).

On May 15, 2008, Ms. Jessee attended the exercise and later the “after action review” at the Old Fire Station as requested. When Ms. Jessee arrived at the Old Fire Station, she discovered that the base of the staircase leading up to the meeting room comprised of two concrete slabs, one on top of the other, that were taller than normal stairs. A wooden

staircase led to the upstairs originating from the concrete slabs, and no handrail was installed for the two cement steps.

Prior to ascending the staircase to the meeting, Ms. Jessee commented to coworker Dale Grogan, who was also attending the “after action review”, that the stairs looked unsafe. When Ms. Jessee reached the top of the staircase, she commented that the Old Fire Station certainly was not ADA compliant. After the meeting, Ms. Jessee descended the same staircase, misjudged the step on one of the concrete slabs, turned her foot, and fell. When Ms. Jessee fell, her right foot ended up landing in a hole in a nearby grate. Ms. Jessee was also injured by four exposed bolts protruding from the floor near the grate that had previously secured a compressor that had since been removed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law by granting summary judgment because the trial court failed to address whether the Defendant City had constructive notice of the danger.
2. The trial court erred as a matter of law because an invitee’s knowledge of the danger is not a complete bar to recovery.
3. The trial court erred as a matter of law by not allowing a jury to determine whether Jessee *voluntarily* assumed the risk.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did material issues of fact exist regarding whether Defendant City had constructive notice of the danger?
2. Did material issues of fact exist regarding whether Ms. Jessee had full subjective understanding and knowledge of the danger?
3. Did material issues of fact exist regarding the voluntariness of Ms. Jessee's actions?
4. Was it appropriate in this case for the trial court to grant Defendant City's Motion for Summary Judgment?

IV. STATEMENT OF THE CASE

A. Request by Columbia County That Ms. Jessee Attend the "After Action Review" in Ms. Jessee's Professional Capacity as Walla Walla County Emergency Management Technician

At the time of her injury, Ms. Jessee was employed by the Walla Walla County Emergency Management Department as an Emergency Management Technician. CP 24. Columbia County borders Walla Walla County, and the City of Dayton, which is located in Columbia County, is 30 miles east of the City of Walla Walla. Columbia County is responsible for providing emergency services to the City of Dayton.

As part of Ms. Jessee's employment, she was requested by Columbia County to attend and evaluate an emergency management exercise held at the Dayton Elementary School. CP 28-29. Ms. Jessee

was then requested to meet and make observations regarding the exercise during an “after action review”. CP 29. As requested, Ms. Jessee did attend both the emergency management exercise as well as the “after action review”. CP 28.

B. Ms. Jessee’s Injury on the Staircase at the “Old Fire Station”

After attending the emergency services training exercise at the Dayton Elementary School, Ms. Jessee and co-worker Dale Grogan proceeded to Dayton’s Old Fire Station for the scheduled after action review. CP 30-32. In order for Ms. Jessee to attend the meeting, she was required to proceed upstairs to a meeting room on the second floor of the Old Fire Station. CP 33. Upon approaching the stairs leading up to the meeting room, Ms. Jessee stated the stairs appeared “unsafe” and saw that there was no handrail. CP 42-43. Ms. Jessee ascended the staircase despite the lack of handrail and appearance that they were unsafe. CP 44. Once Ms. Jessee arrived at the top of the stairs, she commented that “this place certainly isn’t ADA compliant”. CP 37-38. Ms. Jessee then attended the “after action review” along with employees from Columbia County Emergency Services, and possibly employees of the City of Dayton. CP 37-38.

After the meeting, when Ms. Jessee descended the stairs, she again noticed that the two concrete-slab stairs “seemed taller than normal stairs”. CP 47. When Ms. Jessee stepped down on the first concrete-slab step, she misjudged the step, turned her foot, and fell. CP 48, 50. Ms. Jessee alleges that she would not have fallen if the height of the stairs were uniform, and/or if she had the use of a handrail to descend the final two concrete-slab steps. CP 48, 50.

After losing her footing on the stairs, Ms. Jessee’s foot landed in a previously unnoticed hole in a grate near the step where she first tripped. CP 52; RP 18. She also fell on previously unnoticed bolts protruding from the floor. RP 18.

C. The Trial Court Originally Denied Defendant City’s Motion for Summary Judgment Finding That Material Questions of Fact Existed

Plaintiff’s counsel originally submitted pleadings arguing that there existed questions of fact as to whether Ms. Jessee was a licensee or an invitee at the time of her fall. CP 67-76. Counsel for the City has since agreed that Ms. Jessee was an invitee. RP 30. Counsel for plaintiff also argued that there were questions of fact as to voluntariness, and whether Ms. Jessee truly assumed the risk of harm. CP 156-163. The Superior Court denied the City’s Motion for Summary Judgment. RP 23. In

response, counsel for the City of Dayton filed a Motion for Reconsideration and in the Alternative Summary Judgment. CP 126-128.

At the time of hearing on Defendant City's Motion for Summary Judgment, Judge Acey stated:

As to the assumption of the risk, ah, again, I am far more comfortable leaving that up to the discretion of the jury to assign negligence. I understand your argument that, ah, on implied primary assumption of the risk, ah, but I...don't think it applies 100 percent in this case. No pun intended, ah, on that. Ah, and again, I view that as a genuine issue of material fact as to what extent, if any, the jury may find that the Plaintiff did assume the risk, and therefore did contribute to her own injuries on a comparative negligence basis. RP 23.

Thus, at the time of the first hearing on Defendant's Motion for Summary Judgment, Judge Acey acknowledged that genuine issues of material fact existed with regard to whether Ms. Jessee assumed the risk. RP 23. The trial court correctly found that implied primary assumption of the risk does not apply 100 percent in this case, and that certain facts must be left for a jury to determine. RP 23.

D. The Trial Court Granted Defendant's Motion for Reconsideration and Summary Judgment

On the same facts, the Superior Court then inexplicably reversed itself and granted defense counsel's Motion for Reconsideration and Summary Judgment. RP 40. The trial court found that Ms. Jessee

assumed the risk of harm, and that Ms. Jessee was therefore barred from recovery. RP 38-40. The trial court found that Ms. Jessee assumed the risk, therefore alleviating the City's duty to warn Ms. Jessee about the alleged danger and/or repair the danger to prevent injury to Ms. Jessee. RP 38-40.

V. ARGUMENT: THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT BECAUSE THE TRIAL COURT FAILED TO ADDRESS WHETHER THE DEFENDANT CITY HAD CONSTRUCTIVE NOTICE OF THE HAZARD

During his ruling on the present matter, the honorable Judge Acey for the Superior Court stated as follows:

Washington Law does subscribe to the restatement of tortes (sic) premise that the owner of real property is not liable to invitees for physical harm caused by dangerous conditions...that are known to the person who got harmed, unless the harm should have been anticipated despite the knowledge of the invitee. In this particular case, the record is absolutely silent other than someone passing reference about another fall that really didn't happen exactly where this fall occurred...where this...claimant was injured. Ah, and so, there's no evidence in the record that the City knew of...or should have warned of a dangerous condition...despite the fact that the claimant knew of the problem. RP 38-39.

Judge Acey went on to state:

I believe as a matter of pure law I've got to rule in the Defendant's favor in this case because there's nothing in the record that shows...the Defendant – the City, should

have anticipated the harm...despite the knowledge of the...dangerous condition by the...claimant – by the Plaintiff. And so...that's the – I'm granting the motion for reconsideration and granting the motion for summary judgment. RP 40.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if (a) he 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. *Kamla v. Needle Corp.*, 52 P.3d 472, 478, 147 Wash.2d 114 (2002); see also Restatement (Second) of Torts § 343.

Generally, a business owner is liable to an invitee for an unsafe condition on the premises if the condition was “caused by the proprietor or his employees, or the proprietor [had] actual or constructive notice of the unsafe condition.” *Wiltse v. Albertson's, Inc.*, 116 Wash.2d 452, 460, 805 P.2d 793 (1991) (quoting *Pimentel v. Roundup Co.*, 100 Wash.2d 39, 40, 49, 666 P.2d 888 (1983)); see also *Ingersoll v. DeBartolo, Inc.*, 123 Wash.2d 649, 652, 869 P.2d 1014 (1994) (citing *Smith v. Manning's, Inc.*,

13 Wash.2d 573, 126 P.2d 44 (1942)). *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wash.App. 183, 188, 127 P.3d 5 (2005).

Reasonable care requires a landowner to inspect for dangerous conditions, “followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee’s] protection under the circumstances.” *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d at 139, 875 P.2d 621 (1984) (quoting RESTATEMENT (SECOND) OF TORTS § 343, cmt. b). Constructive notice arises where the condition “has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.” *Ingersoll*, 123 Wash.2d at 652, 869 P.2d 1014 (quoting *Smith*, 13 Wash.2d at 580, 126 P.2d 44). Ordinarily, it is a question of fact for the jury whether, under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care. *Coleman v. Ernst Home Ctr., Inc.*, 70 Wash.App. 213, 220, 853 P.2d 473 (1993) (citing *Morton v. Lee*, 75 Wash.2d 393, 450 P.2d 957 (1969)). *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wash.App. 183, 188, 127 P.3d 5 (2005).

In the present case, a material issue of fact exists regarding whether the Defendant City had constructive notice of the danger prior to Ms. Jessee's injury. In his ruling, Judge Acey stated "there's no evidence in the record that the City knew of...or should have warned of a dangerous condition..." RP 39. However, it was error for the judge to disregard whether the Defendant City had constructive knowledge of the danger for at least two reasons.

First, a portion of Ms. Jessee's injuries from her fall were caused when her foot was caught in a hole in a grate and when she fell against exposed bolts protruding from the floor. RP 18. Previously, a compressor had been bolted to the floor in that location. The trial court erred in granting summary judgment because further testimony and evidence is needed regarding whether an employee of Defendant City removed the compressor, left the exposed bolts, and failed to repair the hole in the grate. If an employee of Defendant City caused that portion of the dangerous condition, then the City had constructive knowledge of the condition.

Second, the trial court erred in granting summary judgment because a material issue of fact exists as to whether Defendant City used reasonable care to inspect for dangerous conditions on the premises. At

least one other person had fallen on the same staircase, albeit on the steps rather than the concrete slabs. CP 171. It should have been a question for a jury as to whether the dangerous condition existed long enough so that it would have been discovered by an owner exercising reasonable care.

**VI. ARGUMENT: WHETHER MS. JESSEE ASSUMED
THE RISK IS A QUESTION OF FACT FOR A JURY**

The landowner has a duty to protect invitees even from known or obvious dangers if the landowner should anticipate the harm to invitees despite such knowledge or obviousness. *Tincani*, 124 Wash.2d at 139. The fact that the danger is generally known to the invitee bringing the negligence action does not necessarily insulate the possessor of land from liability. *Ford v. Red Lion Inns*, 840 P. 2d 198, 67 Wash.App. 766 (1992). The possessor's duty to the invitee is based upon an expectation of the invitee that the premises have been made safe for him, and there are some situations in which there is a duty to protect the invitee against even known dangers if the possessor should have anticipated the harm to the invitee notwithstanding such knowledge. *Id.*

In the present case, there exist issues of material fact as to whether Ms. Jessee possessed a full understanding of the nature and extent of the hazard and whether she fully realized the danger. Expert Joellen Gill

testified that the tread depth for one of the cement steps over which Ms. Jessee tripped was 10½ inches, and that tread depth violated the Uniform Building Code which requires a minimum tread depth of 11 inches. CP 95-96. Ms. Gill further testified that the Fair Safety Code recommends a tread depth of no less than 13 inches. CP 96. Ms. Gill also testified that the riser height was “higher than anticipated”. CP 93. Ms. Gill’s report covers the effect of extreme variation in riser height on the naïve user. Ms. Gill went on to testify that by naïve user, she meant someone who is unaware of the fact that the riser is higher than the riser’s they have encountered in the staircase to that point. CP 94. She went on to state that she recalled that Ms. Jessee’s testimony was that Ms. Jessee was in fact aware of the difference in riser height based upon her ascension of the stairs. Ms. Gill testified, “I would say she’s naïve in the fact that she had no experience descending the staircase, which is a different set of skills required to successfully descend a tread that is higher than--or a riser that is higher than what you expect them to ascend, so in that sense she was certainly naïve.” CP 94.

Based on the testimony of Ms. Jessee and Ms. Gill, an issue of material fact exists as to whether Ms. Jessee fully appreciated the risk involved or that she realized the danger. Further, there are material

questions of fact as to when Ms. Jessee became aware of the danger. If Ms. Jessee did fully appreciate the risk, but only after ascending the stairs, then she was left with no choice but to descend the same stairway to exit the building. There is nothing in the court record which suggests that Ms. Jessee knew of any other way out of the building. CP

In making its ruling, the superior court failed to analyze all aspects of the doctrine of assumption of the risk. The doctrine of assumption of the risk involves four facets: (1) express assumption of the risk; (2) implied primary assumption of the risk; (3) implied reasonable assumption of the risk; and (4) implied unreasonable assumption of the risk. *Home v. North Kitsap School District*, 92 Wash.App. 709, 718, 965 P.2d 1112 (1998). Implied reasonable and implied unreasonable assumption of risk arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. *Scott v. Pac. W. Mountain*, 119 Wash.2d 484, 498-99, 834 P.2d 6 (1992). In such a case, plaintiff's conduct is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk. *Id.* at 498-499. Thus, implied reasonable and unreasonable assumption of the risk are comparative negligence under the comparative fault system.

Implied primary assumption of risk arises “where a plaintiff has impliedly consented...to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks.” *Id.* at 497. The focus is on the scope of the assumption, i.e., what risks were assumed. *Id.* Under implied primary assumption of risk the defendant must show that the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk. *Kirk v. Wash. State Univ.*, 109 Wash.2d 448, 454, 746 P.2d 285 (1987).

Generally, implied primary assumption of risk is a complete bar to a plaintiff's recovery. *Lascheid v. City of Kennewick*, 137 Wash.App. 633, 641, 154 P.3d 307 (2007), *review denied*, 164 Wash.2d 1037, 197 P.3d 1185 (2008). Because it is a complete bar to recovery, the doctrine is narrowly construed. *Id.* at 641. The standard is subjective and specific to the particular plaintiff and the particular facts. *Id.* at 642. It is not enough to show what the plaintiff could have or should have foreseen, but rather it must be shown that the plaintiff actually knew the specific risks and accepted them. *Id.* at 642.

To the extent injury results from plaintiff's implied primary assumption of risk *and* defendant's negligence, implied primary assumption of risk does not serve as a complete bar to recovery. *Kirk* at

454–455. Assumption of the risk may act to limit recovery but only to the extent the plaintiff’s damages resulted from the specific risks known to the plaintiff and voluntarily encountered. *Id.* at 455-456. To the extent a plaintiff’s injuries resulted from other risks created by the defendant, the defendant remains liable for that portion. *Id.*

In the present case, Ms. Jessee acknowledged that the stairs appeared “unsafe” and that there was no handrail for the cement-slab steps. CP 48, 50. However, according to the record, Ms. Jessee had no knowledge of a hole in the grate or the exposed bolts which contributed to her injuries. RP 18.

Implied reasonable or unreasonable assumption of the risk may arise when a plaintiff knows about an existing risk created by the defendant’s existing negligence—and yet voluntarily chooses to encounter that risk. *Lascheid* at 643. These theories are not a complete bar to recovery, but rather a jury weighs them in determining comparative fault. *Id.*

In the present case, the jury must weigh the evidence and determine whether Ms. Jessee assumed the risk. The jury should be instructed as to the pertinent area of the law and then be allowed to

determine material issues of fact as to what legal theory applies given the facts of the case.

VII. ARGUMENT: THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT ALLOWING A JURY TO DETERMINE WHETHER MS. JESSEE *VOLUNTARILY* ASSUMED THE RISK.

Even if the court finds that Ms. Jessee subjectively understood the risk prior to descending the stairs, this does not mean that Ms. Jessee *voluntarily* assumed the risk. The case of *Home* is on point. *Home*, 92 Wash.App. 709, 965 P.2d 1112 (1998). In *Home*, a junior high football coach, Kurt Home, was injured when he attempted to protect a player from a raised curb separating the football field from the surrounding running track. *Id.* Home's football team played an away game at North Kitsap Junior High. *Id.* When Home arrived at the football field, he saw the raised curb separating the field from the track. *Id.* Home thought it presented a hazard to the players who may be propelled out of bounds during the game. *Id.* After discussing the potential hazard with another coach, he intentionally stationed himself directly in front of the curb so that he could stop any player who might be heading for it. *Id.* Later in the game, his team ran a sweep play towards his side of the field. *Id.* A tackler from the opposing team hit one of Home's players into the sideline. *Id.* Home stopped the player from impacting the curb by using

both his hands and body to stop the player. The resulting impact injured Home. *Id.*

North Kitsap moved for summary judgment based, in part, upon the argument that Home knowingly and voluntarily assumed the risk that culminated in the accident. The trial court granted the motion, and Home appealed. The Court of Appeals reversed summary judgment. In its decision, the Court of Appeals stated as follows:

Whether a plaintiff decides voluntarily to encounter a risk depends on whether he or she elects to encounter it despite knowing of a reasonable alternative course of action. Thus, Division One has said that for assumption of the risk to bar recovery, the plaintiff “must have had a reasonable opportunity to act differently or proceed on an alternative course that would have avoided the danger.” *Id.* at 721.

The Court reasoned that although Home knew all the facts that a reasonable person would have wanted to know and consider before deciding to encounter the danger, that a rational trier of fact could find that he had no reasonable alternative but to stand in front of the curb to protect his players. *Id.* Accordingly, the Court concluded that whether Home had truly voluntarily assumed the risk was a question of fact for the jury. *Id.* at 723.

In the present case, Ms. Jessee does not dispute that she noticed the stair risers were of varying heights and there was no handrail at the base of the stairs. CP 42-43. However, Ms. Jessee did not know all the facts that a reasonable person would have wanted to know and consider when deciding whether to ascend the stairs. She also did not *voluntarily* assume the risk. Ms. Jessee was not given a reasonable alternative route to the meeting, as she knew of no other way to reach the meeting room. Nor was Ms. Jessee responsible for choosing the location of the meeting. Had Ms. Jessee chosen not to ascend and descend the stairs, she would have been forced to forego the after action review after having been requested to attend as part of her employment, and after having spent hours observing the emergency preparedness exercise. Thus, there is a question of fact as to whether Ms. Jessee voluntarily assumed the risk.

VIII. CONCLUSION

The record on appeal demonstrates that questions of material fact exist, and that the Superior Court's grant of defendant's Motion for Summary Judgment is improper at this time.

The trial court improperly applied the legal doctrine of assumption of risk when determining whether to grant defendant's Motion for Summary Judgment. Had the trial court used the proper legal definitions

applied to assumption of the risk, the court could not have found that Ms. Jessee assumed the risk, and that her claim is barred.

The Superior Court also improperly failed to address issues of whether Ms. Jessee *voluntarily* assumed the risk. The question of voluntariness is a material issue of fact that should be presented to a jury.

The Superior Court improperly granted the City's Motion for Summary Judgment and the Superior Court's decision should be reversed and remanded for further proceedings.

RESPECTFULLY SUBMITTED this 12 day of May, 2012.

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