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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.

REPLY TO BRIEF OF RESPONDENT

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ARGUMENT

Under Washington law, a landowner's duty of care to persons on the land is governed by the entrant's common law status as an invitee, licensee, or trespasser. *Degel v. Majestic Mobile Manor*, 129 Wash.2d 43, 49, 914 P.2d 728 (1996). Where facts regarding the entrance onto land are undisputed, the status of an entrant as an invitee or licensee is a question of law for the court. *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 648-49, 414 P.2d 773 (1966). If facts are disputed, then the question of status of an entrant is one for the jury. *Id.*

A. Ms. Jessee was an "invitee".

Washington State applies the so called "economic benefit" test to determine whether an entrant onto one's land is an invitee. *Id.* at 650. Under this test, an invitee is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant is then engaged. *Id.* at 650. To qualify as an invitee or business visitor under this definition, it must be shown that the business or purpose for which the visitor comes upon the premises is of actual or potential benefit to the owner or occupier thereof. *Id.* at 650; see also *Dotson v. Haddock*, 46 Wash.2d 52, 278 P.2d 338 (1955).

In *Respondent's Brief*, opposing counsel argues Ms. Jessee was acting in furtherance of her own business (that of her employer, Walla Walla County). See *Respondent's Brief*, pg. 6, line 4. This is contrary to the facts and evidence presented. Although Ms. Jessee attended in her capacity as an employee of Walla Walla County, Ms. Jessee was there to assist in evaluation of a full scale Emergency Management Exercise with a scenario involving a school shooting at the local high school located in the City of Dayton. CP 52. Ms. Jessee's attendance at the event was at the request of Columbia County, took place in the City of Dayton, and was to the direct benefit of the Emergency Services serving the City of Dayton. CP 28-30. The City of Dayton relies upon Columbia County Emergency Services to serve the City. CP 189. Had Ms. Jessee been acting in furtherance of her own business, she would have stayed in Walla Walla County. Thus, Ms. Jessee was clearly an invitee at the time of her injury.

It should be noted that it is an undisputed fact that Columbia County is responsible for providing emergency services to Dayton, a fact that is in the record (contrary to the claim made in Respondent's brief). CP 189; *Respondent's Brief*, pg. 21. Bill Peters, the Director of Columbia County Emergency Management, supplied an affidavit testifying as follows:

3. The City of Dayton, Washington, does not have its own emergency management services and is therefore served by Columbia County Emergency Services.

4. To the best of my knowledge, at the time I began serving in the Emergency Management employee capacity as a Deputy Sheriff, a written contract existed between the City of Dayton and Columbia County for the County to provide emergency management services to the City of Dayton.

CP 189. A copy of the Interlocal Agreement for Columbia County Emergency Management Services, Resolution 2009-21 was attached to said affidavit. CP 190-192. It is also in the record that Ms. Jessee was asked by Columbia County to observe its emergency response. CP 30.

B. City had a duty to protect Ms. Jessee.

The Supreme Court of Washington has adopted the Restatement (Second) of Torts Sections 343 and 343A pertaining to premises liability. *Kamla v. Space Needle Corp.*, 147 Wash.2d 114, 52 P.3d 472 (2002). A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, 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. *Id.*

Respondent argues that there is no evidence in the record to suggest that the City should have known that invitees would be harmed despite knowledge of the risk and the obviousness of the same. *Respondent's Brief*, pgs. 11-12. Respondent admits that the stairs at the Old Firehouse are decades old. *Respondent's Brief*, pg. 12, lines 1-2. The stairs were of different tread height and no handrail existed for the concrete slabs. CP 44. There was evidence of alteration and removal of a compressor from the property, leaving exposed bolts and a hole in the grate. CP 52; RP 18. Respondent argues that the City was unaware of a single person who had fallen on the concrete slab steps prior to Ms. Jessee's fall. *Respondent's Brief*, pg. 12, lines 2-5. However, appellant produced evidence that a person had fallen on the wooden staircase directly above the concrete slabs. CP 171. Despite these facts, respondent now argues that the City had no constructive notice of the danger of the staircase. The record is clear that certain facts exist indicating the City should have had knowledge of the dangerous condition. Therefore, the question of constructive notice is a material question of fact that should be decided by a jury.

C. Ms. Jessee's knowledge is not a complete bar to recovery.

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Restatement (Second) of Torts Section 343A; *Kamla v. Space Needle Corp.*, 147 Wash.2d 114, 52 P.3d 472 (2002). Respondent argues that Ms. Jessee's knowledge of the danger and alleged assumption of the risk bars her claim. *Respondent's Brief*, pg. 12. The doctrine of assumption of the risk has 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. *Erie v. White*, 92 Wash.App. 297, 302, 966 P.2d 342, 344-345 (Div. 2, 1998). Implied primary assumption of the risk will obviate any duty upon the defendant if the evidence shows that the plaintiff (1) had full subjective understanding, and (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk. *Id.* at 302. 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 plaintiff voluntarily chooses to

encounter that risk. *Lascheid v. City of Kennewick*, 154 P.3d 307, 137 Wash.App. 633 (2007). This is not a complete bar to recovery, and instead, the jury weighs it in determining comparative fault. *Id.*

Respondent continues to argue that Ms. Jessee is barred from any recovery due to her alleged primary implied assumption of the risk. Ms. Jessee has admitted knowledge of the uneven stair height and lack of handrailing. However, Ms. Jessee's actions do not arise to primary implied assumption of the risk. Instead, her actions are more akin to implied reasonable and/or unreasonable assumption of the risk. The facts should be considered by a jury, which may or may not reduce her damages due to any fault on her part.

The case of *Kirk v. Washington State University*, 109 Wash.2d, 448, 746, P.2d, 285 (1987) is persuasive (although in that case the plaintiff's injury occurred prior to Washington's adoption of the comparative fault statute, the Court decided the case following adoption of the statute, a matter which the Court addresses in its decision). In *Kirk*, the Washington State Supreme Court provided a detailed analysis of the doctrine of assumption of the risk. *Id.* In *Kirk*, a cheerleader was injured during a practice after falling onto astro turf and landing on her elbow. In that case, the plaintiff was aware of a potential danger arising from the

activity in which she was participating. Ms. Kirk was attempting to jump up onto a male cheerleader's shoulder in a "pop up" maneuver. Although Ms. Kirk was aware of the danger of potential falls prior to her performing the maneuver, the Washington State Supreme Court refused to find that this knowledge was a complete bar to Ms. Kirk's recovery. The Court stated as follows:

In the present case, the trial court did not err in rejecting proposed instructions regarding assumption of the risk as a complete bar to recovery. Although express and implied primary assumption of the risk remain valid defenses, they do not provide the total defense claimed by the defendant. Implied unreasonable assumption of the risk has never been considered a total bar to recovery in comparative negligence jurisdictions.

Id. at 458.

In the present case, there are questions as to both voluntariness and Ms. Jessee's full understanding as to the risk involved (both addressed in Appellant's Brief). There is nothing in the record that indicates Ms. Jessee knew of any other way to get to or from the meeting room. Respondent dismisses the fact that Ms. Jessee had no knowledge of the "exposed bolts" and "hole in the grate". *Respondent's Brief*, pg. 19. However, these facts impact whether Ms. Jessee in fact had a full subjective understanding of the presence and nature of the specific risk.

CONCLUSION

Upon Summary Judgment Motion, viewed in a light most favorable to the non-moving party (Ms. Jessee), there are multiple questions of material facts which should be decided by a jury. For this reason, the trial court improperly granted City's motion for summary judgment.

RESPECTFULLY submitted this 24 day of July, 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 24 day of July, 2012, a true and correct copy of the foregoing *Reply to Brief of Respondent* was served upon the following parties and their counsel of record in the manner indicated below:

Michael E. McFarland, Jr.	Via Regular Mail	<input checked="" type="checkbox"/>
Evans, Craven & Lackie, PS	Via Certified Mail	<input type="checkbox"/>
818 W Riverside	Via Overnight Mail	<input type="checkbox"/>
Suite 250, Lincoln Plaza	Via Facsimile	<input checked="" type="checkbox"/>
Spokane, WA 99201-0910	Hand Delivered	<input type="checkbox"/>

Dated: 7/24/12



Stacy Pambrun Demory