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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31836-2-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

EDWARD HVOLBOLL
Appellants/Plaintiffs,

v.

HSC REAL ESTATE INC.; PERRENOUD ROOFING INC.;
CLOCKTOWER PLACE LLC;
Defendants/Respondents

And

WOLFF COMPANY ; CONSOLIDATED AMERICAN
SERVICES; W-B SUNRISE LLC.
Defendants Below

Appellant's Reply Brief

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REPLY ARGUMENT

I. PRIMARY IMPLIED ASSUMPTION OF RISK DOES NOT APPLY TO TENANT SLIP AND FALL ON ICE CASES

The recent Washington Supreme Court decisions regarding ‘tenant ice and snow’ do not discuss Assumption of Risk and the Assumption of Risk decisions do not discuss ‘tenant ice and snow.’ [See Appellant’s opening brief fn. 1 and 2] The upshot is that under most circumstances ‘assumption of risk’ is not an issue where a tenant falls on an icy common area.

HVOLBOLL’s position does not mean a tenant could *never* assume the risk of crossing an icy area. [Respondent Brief at 11] If the claimant is found to have acted unreasonably as a matter of fact, then there would be no duty owed. But as a separate doctrine, implied primary assumption of risk is redundant in this context.

The determination of duty in tenant ice and snow cases requires the Court to first decide whether the landlord should

anticipate that a tenant will elect to encounter know icy conditions where to a reasonable person would likely encounter the hazard “the advantages of doing so would outweigh the apparent risk.”¹ So the duty exists even if the landlord would expect a tenant to know there was a danger, if it is likely the tenant would risk the dangerous condition anyway.

That is simply inconsistent with the general definition of the implied primary assumption of risk doctrine that the tenant is deemed to consent to the risk where he (1) had knowledge (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.²

There are two ways to reconcile this inconsistency.

The first is to find that the Supreme Court, in deciding

¹*Iwai v. State*, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996); *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wash.2d 847, 855, 31 P.3d 684 (2001).

²*Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010); *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987).

the *Iwai* and *Mucsi* cases, knew full well that assumption of risk was out there but decided the cases so that assumption of risk does not apply to tenant ice and snow situations.

The alternative possibility is that Implied Primary Assumption of Risk is available as an affirmative defense but only where the tenant is shown to have acted unreasonably – i.e., that he proceeded to encounter a known risk that a reasonable person would *not* have been expected to encounter, thus falling outside the landlord's scope of duty. But that would necessarily be a fact question for the jury, not a summary judgment issue; and it would be no different than finding that there was no duty to begin with.

It is instructive to look at Justice Madsen's *dissent* in *Mucsi v. Graoch Associates Ltd. Partnership No. 12*:³

The question whether a duty existed in this case depends upon whether there was sufficient evidence of "foreseeable, reasonable advantages from encountering the danger." ... The threshold question of whether a duty

³144 Wn.2d 847, 865, 868, 31 P.3d 684, 692, 694 (2001)

is owed is a question of law for the courts, ... though factual determinations may be necessary to resolving the question. The duty issue in this case necessarily requires assessment of the facts relative to whether Graoch had reason to anticipate the harm because to a reasonable person the advantages of going out the side door would outweigh the apparent risk of slipping in the snow. ...

The majority replaces the tort principles adopted and recognized in *Tincani* and *Degel* with **a new and unprecedented rule of tort law where known or obvious dangers are involved**. The majority concludes that if the landlord has actual or constructive notice or foreseeability of the hazardous condition, and there is a reasonable time to alleviate the situation, then **the fact that a tenant has knowledge of the condition does not relieve the landowner of the duty to keep common areas reasonably safe from hazards likely to cause injury**.

The majority has announced an exceedingly broad rule of liability, **disregarding the known or obvious danger doctrine**, and has made the landlord the guarantor of a tenant's safety. [Bold emphasis added, citations omitted]

So the dissent to the Mucsi decision basically says the same thing that Mr. HVOLBOLL says: the landlord duty is present even if the tenant knows the way is slippery. That cannot be reconciled with assumption of risk as a duty-negating principle. The Supreme Court knew that the doctrine existed, and decided

in a way that made the doctrine moot in these cases.

II. FACT QUESTIONS

A. Voluntariness: no reasonable alternatives

Mr. HVOLBOLL had alternatives, but not necessarily safer one if he needed to get to the office. There was no alternative path that did not involve the same risk. Driving his car would have required him to park, get out, and face the same risk. So his only *safe* alternative was not to go there at all.

Respondents argue that was an acceptable alternative: go home and wait for winter to be over. [Respondent's brief at 19] Good advice, perhaps, for hibernating bears but not rational for humans. As noted in our opening brief, PROSSER & KEETON ON TORTS (5th Ed. 1984) §68 at p. 491 specifically address assumption of risk by a tenant: the tenant "is not required to surrender a valuable legal right, such as the use of his own property as he sees fit, merely because the defendant's conduct has threatened him with harm if the right is exercised."

Mr. Hvolboll's testimony that there were no safer routes, all were equally icy and dangerous. [CP 110, 135, 142] is enough to create a question of fact.

B. Subjective Knowledge

For assumption of risk to apply, a plaintiff must have "full subjective understanding" both of the presence and nature of the specific risk, and voluntarily choose to encounter the risk.⁴ He must not only be aware of the facts which create the danger, but must also *subjectively* appreciate the danger itself and the nature, character, and extent which make it unreasonable.⁵

There is a fact question whether Mr. HVOLBOLL understood the nature of the condition that day. The previous slippery conditions were ones he knew and could have handled.

⁴ *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987).

⁵ RESTATEMENT (SECOND) OF TORTS § 496 D cmt. b cited in *Egan v. Cauble*, 92 Wn.App. 372, 379 fn. 22, 966 P.2d 362 (1998).

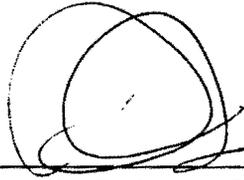
The conditions that day were different and worse. [CP 129-130]

CONCLUSION

For better or for worse the State Supreme Court has decided that in tenant ice and snow situations a landlord has a duty to protect a tenant even if the tenant engages in conduct that would comprise assumption of risk. There is arguably a slight distinction possible if the tenant has acted in a way that is unreasonable under a “reasonable person” standard; but whether that is deemed an ‘assumption of risk” or is simply conduct that falls outside the scope of the landlord’s duty, it poses a fact question. So, too, do the questions of Mr. HVOLBOLL’s alternatives to encountering the slippery pavement, and his subjective knowledge of the conditions present at that specific time.

This court should reverse and remand for trial.

March 9, 2014



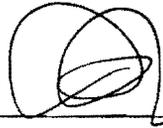
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Dated March 9, 2014



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