FILED
February 3, 2015
Court of Appeals
Division I
State of Washington

72715-0

NO. 72715-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARJORIE N. GRAY,
by and through her Durable
Power of Attorney Agent
JAMES S. GRAY,

Appellants,

v.

BROADVIEW DEVELOPMENT ASSOCIATES II,
a Washington limited partnership, d/b/a IDA CULVER HOUSE
BROADVIEW; BROADVIEW DEVELOPMENT ASSOCIATES, INC.,
a Washington corporation; and ERA LIVING, LLC, a Washington
corporation, jointly and severally liable,

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION AND SUMMARY

Marjorie Gray was an 84 year old resident of the Ida Culver House Broadview ("ICHB") facility in Seattle when she was injured on the steep steps of ICHB's group outing bus. ICBH operates a Continuing Care Retirement Center ("CCRC") that caters to elderly clients and promises "exceptional senior care and peace of mind." Mrs. Gray was an "independent" resident, but this is not a traditional tenant setting. Mrs. Gray had twice before fallen while trying to board ICHB's bus, and after those falls ICHB twice promised Mrs. Gray's family that in the future it would use the lift the bus was equipped with to safely board Mrs. Gray. ICHB did not. Marjorie Gray's leg was seriously injured, and she now became too fearful to ride the bus, which was one of the few remaining shared activities she had with her husband, another ICHB resident.

The court below found that ICHB breached its duty to exercise reasonable care in protecting Mrs. Gray from the danger of a fall on the bus steps, but then the court applied the doctrine of "implied primary assumption of risk," and found that Mrs. Gray voluntarily chose to encounter a known and obvious risk, barring all recovery. The court's holding below failed to analyze ICHB's additional duties under Restatement (Second) of Torts § 343A, requiring a landowner to take affirmative steps to protect an invitee when the owner "should anticipate

the harm despite such knowledge or obviousness." Many reasonable protective measures were readily available to ICHB, in addition to using the lift as promised, such as: having a second aide assist with boarding residents, or using ICHB's other bus, which had a single, no-step entry. In addition, the court failed to analyze the duty created by ICHB's promise to her family that it would use the lift when boarding Mrs. Gray.

Plaintiffs presented by affidavit first-hand observations from Mrs. Gray's daughter, who visited almost daily, and the declaration of an elder care and facility expert with 30 years experience. These raised many issues of disputed material fact, such as whether Mrs. Gray's conduct was actually voluntary, and they set forth well-grounded and reasonable inferences from the facts that would preclude summary judgment. At most, Marjorie Gray's actions were negligent and she did *not* waive ICHB's duties under the common law and the Restatement (Second) of Torts § 343 and § 343A. Comparative negligence may apply, but Mrs. Gray is entitled to have the matter submitted to a jury to decide.

II. ASSIGNMENTS OF ERROR

This case presents five errors and issues for review:

1. Did the court below adequately set forth ICHB's failure to exercise reasonable care under Restatement (Second) of Torts § 343, when

ICHB should expect that Mrs. Gray would fail to protect herself from the steep bus steps if not offered to enter the bus via the lift?

2. Did the court commit reversible error for failing to analyze ICHB's additional duties under Restatement (Second) of Torts § 343A, where the danger of the bus steps is known or obvious but ICHB "should anticipate the harm despite such knowledge or obviousness," and for failing to hold that these duties were not waived by Mrs. Gray?

3. Was the court in error in finding Marjorie Gray's knowingly and voluntarily assumed all risks in climbing the bus steps on October 27, 2010, barring all recovery, even though there was not a *reasonable* option available to her at the time, and the court should have found that a different assumption of risk doctrine may apply, creating at most comparative negligence?

4. Did the court error by not addressing the duty created by promises made by ICHB to Mrs. Gray's family that ICHB would use the bus lift, promises the family relied upon, to Mrs. Gray's detriment?

5. Did the court error in dismissing on summary judgment a case where there are genuine issues of material fact in dispute, including reasonable alternative inferences from the facts?

III. STATEMENT OF THE CASE

A. ICHB Operates a Continuum of Care Campus For Elderly Clients it Knows are Aging and Declining.

The websites for Ida Culver House Broadview ("ICHB") and ERA Living, *see* CP 59-62, make the following representations to the public:

> [Y]ou will find that healthcare services, from Independent Living through Skilled Nursing, at our integrated campus offer exceptional senior care and peace of mind.
> http://www.eraliving.com/communities/broadview
>
> Retirement Community Amenities [available to Independent Living status residents, include]: . . .Wellness and Active Aging programs, On-site Wellness Center for your convenience, Personal and group transportation.
> http://www.eraliving.com/communities/broadview/amenities
>
> The staff at Ida Culver House Broadview offers many ways to improve your health, both physically and mentally. We provide a full continuum of care, including Independent Living, Assisted Living, Memory Care, and Skilled Nursing.
> http://www.eraliving.com/communities/broadview/assisted-living

This is not just a landlord-tenant apartment building or senior housing. ICHB provides a continuum of care with independent living, assisted living, and skilled nursing units on the same site. These facilities are marketed to the public as providing a safe community with services for the elderly and/or disabled, where a person can "age in place" with an increasing degree of services provided as the needs increase. Plaintiffs' expert, Alice Semingson, RNC, who for 30 years has directed the clinical care and provided consultation for many such facilities, says they cater to

a specific clientele with known needs and safety concerns, not typically present with younger populations. CP 129-31, ¶¶ 5, 7. The facilities must provide services in a manner that is safe and appropriate for their clientele. To do otherwise would create foreseeable risks of harm. CP 132, ¶ 7.[1]

B. Mrs. Gray was an Elderly Independent Living Resident at ICHB who Went on Bus Outings With Her Husband.

Marjorie Gray was admitted into ICHB Independent Living section in 2004, and her husband Paul Gray resided in ICHB's Assisted Living section. The Grays had been married for nearly 60 years. Residents in both sections could go on ICHB group outings, using the ICHB van or bus.[2] One of the few activities at ICHB that Mr. and Mrs. Gray could still do together, and gave them great pleasure, was to go on the weekly or biweekly scenic bus trips. CP 148, ¶ 4. Paula Gray, the daughter of Marjorie and Paul Gray, visited her parents on an almost daily basis, and she was the main family member with whom ICHB communicated

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[1] ICHB criticizes Ms. Semingson for referring to Continuing Care Retirement Center (CCRC) standards, saying they're irrelevant. CP 263-64. Mrs. Gray's Complaint at ¶ 3.1 alleged that ICHB "is a continuing care retirement community in Seattle offering a range of services to the public." CP 3. ICHB's Answer at ¶ 3.1 states: "Defendants admit that Ida Culver House Broadview provides a continuum of care to the public." CP 250. This is a distinction without a difference. RCW74.48.010(2) says: "Continuing care retirement community" means a facility that provides a continuum of services by one operational entity or related organization providing independent living services, or boarding home or assisted living services under chapter 18.20 RCW, and skilled nursing services under chapter 18.51 RCW in a single contiguous campus." That definition fits ICHB.

[2] The terms "van" and "bus" are used interchangeably by the parties.

concerning her parents. At the time of Mrs. Gray's first injury on the ICHB bus steps in 2009 she was 83. CP 3-4, ¶¶ 3.1-3.5.

ICHB's Independent Living Residency Agreement calls Mrs. Gray a "Resident." This Residency Agreement does **not** require an Independent Living resident to be able to ascend or descend stairs or steps independently. It only says that an Independent resident must be "independently mobile within the apartment and physically and mentally capable of traversing a normal path to safety without the physical assistance of another person." CP 46, ¶ 8. Mrs. Gray, like many elderly "independent" residents had difficulties with balance and used a wheeled walker when ambulating. CP 149, ¶ 3.

ICHB's Residency Agreement reserves to ICHB "the sole discretion and determination" as to whether the resident is able to maintain independent living status. Ms. Semingson says this indicates that ICHB will to some extent be monitoring a resident's condition and decline. Joanne Kramer, RN, ICHB's Wellness Clinic nurse for Independent Living residents, confirmed this. She testified that part of her job was to observe the residents and make a recommendation as to when it was no longer safe for a resident to remain on independent living status, yet she admitted that ICBH had no criteria, does not keep track of injuries to "independent" residents, and in 6 years she has never performed a fall risk

evaluation of an independent living resident, or made a referral for one. CP 74 -79, 102-03. Nurse Kramer also testified that if she made a safety recommendation to the aides, such as that they use a lift for Mrs. Gray when she enters or exits the bus, she would "hope they take that under consideration," but she would not follow-up and speak to the supervisor of the bus drivers, and that ICHB had no process of informing her whether her recommendations were followed. CP 86-87. Ms. Semingson found Ms. Kramer and ICHB's blasé approach to the dangers of falls to be astounding, and their failure to have any system to keep track of adverse events, injuries, or decline in the "independent" residents to fall below the standards of a reasonable CCRC or joint assisted living/independent living facility that caters to the elderly. CP 135, ¶ 11; CP 132-33, ¶ 8.

C. ICHB has Two Buses for Resident Outings: One with a "No-Step" Entry, the Other with a Lift *and* Steps.

ICHB had two large vans, or buses, it uses for resident outings. One is a 2006 Glaval van with an "easy on-low floor" platform entry at the front, which ICHB says "is advertised as allowing passengers to quickly board the van, even with mobility aids." CP 19:11-12. A picture of this "no step" entry platform is at CP 161. Mrs. Gray's daughter, Paula Gray, who saw her parents go on bus outings many times, *never* saw ICHB use this bus/van for the outings. CP 148-49, ¶ 5.

The second bus is described by ICHB as a 2002 Ford van with ADA compliant wheelchair/standee lift, and a "low-floor . . . easy access on and off the van." CP 18:18 to 19:8. In fact, this bus did *not* have a low floor or "easy access." It had a lift on the back right side, used for residents in wheelchairs and some residents with walkers. The second entry was at the front of the bus—via four steep steps. Pictures of this bus are at CP 163-65. These bus steps are where Mrs. Gray fell three times.

Over the years, Paula Gray watched many residents, including her parents, being loaded into ICHB's second bus for the outings. CP 149, ¶ 6. Loading the residents into this bus via the lift was a time consuming, multi-step process, described by Paula Gray at CP 149-50, ¶ 7, taking a minimum of 2 to 5 minutes per resident. Residents who entered via the steps would be told to line up by that door. Residents with walkers set them by the bus door, and then had to climb the steps, pulling themselves up with the railings without staff assistance. CP 150, ¶ 9.

Paula Gray typically saw 6 to 10 residents per bus outing. Rarely did she see more than one ICHB staff person—the driver—handling the boarding of *all* residents, both the residents loaded via the lift, and the residents in front. Ms. Kramer, the Wellness nurse, estimated it was 10 to 12 residents per outing, and she confirmed that ICHB used just one aide to board the residents. CP 68:10 to 69:7. When the aide was busy with

residents on the lift, Paula never saw a second "spotter" person present to help the residents climbing up the steps. CP 150, ¶ 8. Alice Semingson, RNC, who has worked in the industry for years, states that ICHB failed to provide sufficient staff to load the bus, given the numbers of residents and their need for assistance, and that ICHB acted unreasonably, given the foreseeable safety risks for the elderly clientele it served, and the known risks of falls for them and Mrs. Gray on the bus's steps. CP 138, ¶ 16.

D. Marjorie Gray had Three Injury Falls on the Bus Steps, Twice *After* ICHB Promised to Use the Lift on the Bus.

In April 2009, Mrs. Gray fell while trying to climb up the ICBH bus steps, scraping both knees. She required medical treatment for several weeks. Paula Gray spoke with Ms. Kramer, RN, the Wellness Clinic nurse, and asked for future bus outings to have the staff use the lift for her mother. Ms. Kramer assured Paula that she would email and communicate this to all the recreation staff and bus drivers. CP 150-51, ¶ 10. After the April 2009 fall, when Paula subsequently watched the boarding of the bus, and was near enough to be seen by the bus driver, she only saw her mother being boarded with the lift. CP 151, ¶ 13.

In July, 2010, Mrs. Gray fell a second time on the steep bus steps. She abraded her right shin, and the wound became infected. Paula spoke again with Ms. Kramer, RN, who "put her head in her hands, shook it in

frustration, and said: 'I told them to use the lift. I emailed everyone! I'll email them again.' She promised that in the future my mother would only board the bus via the lift." CP 152, ¶¶ 15, 16.

Paula believed Ms. Kramer and relied upon her promise. Paula was never asked, for example, to hire an aide to help with boarding her mother, or to pay ICHB more for extra help, or to have her mother get physical therapy to increase her strength and balance, or to get a fall risk assessment. CP 152-53, ¶¶ 17-20. If Paula had known Ms. Kramer and ICHB were *not* going to follow through with their promises, she would have done something to protect her mother, such as pay for more staff time, or if necessary, move her parents to a different facility. Paula was lulled into a false sense of security. CP 156, ¶ 26.

In mid-September 2010, Marjorie Gray suffered a heart attack, was hospitalized, and had a coronary angiogram to open a blocked artery. ICHB knew about Mrs. Gray's heart attack and hospitalization, and likely knew it would leave her in a weakened condition. CP 154, ¶ 21.

On October 27, 2010, Mrs. Gray fell for the *third time* on the ICHB bus steps. She seriously injured her left leg calf and shin, causing very large hematomas that subsequently burst and required months of wound care treatment, debridement and pain medications. CP 154-55, ¶¶ 22-24. Pictures of the wounds are at CP 167, 169, 170. As a result of this

last injury, Mrs. Gray became too afraid to ride the bus, losing one of the few enjoyable activities that she and her husband could share. CP 9, ¶ 24.

After the October 27, 2010 injury, Paula Gray confronted Ms. Kramer and asked why her mother hadn't been boarded via the lift. Ms. Kramer "again shook her head and told me 'I don't know, I don't know. I'd emailed everyone again after the last fall.'" CP 155, ¶ 25. In ICHB's discovery responses, ICHB says it cannot find a copy of Ms. Kramer's emails sent to staff after the April 2009 and July 2010 falls, but found one after the October 2010 fall. CP 155, ¶ 26; CP 126. At Ms. Kramer's deposition, she did not remember sending emails after the first two falls, or promising Paula she would. Ms. Kramer admitted that Paula's memory about these conversations would be better than hers. CP 87:14 to 88:7.

The bus driver on October 27, 2010—and only aide present—was Roseann Tousley. CP 154, ¶ 22. Over the years Paula has watched several of the bus drivers' interaction with the residents. Some were very patient, but Roseann Tousley was often brusque and rushed with the residents. CP 152, ¶ 14. Loading the residents via the lift was a time consuming process, and Roseann "seemed always in a rush and would load only 1 or a most 2 residents via the lift." CP 150, ¶ 9. Paula has seen Roseann's exasperation when she had to use the lift. She has seen Roseann motion with her arms to the group of gathered residents and point and tell them to

"line up" at the bus's front entry, and they obey. Paula says Roseann is a very intimidating person. CP 157, ¶ 29.

Roseann Tousley has not been deposed by either party, and no one's been able to talk with her. VRP 28:22-23. Marjorie Gray was deposed, but she could no longer recall the incidents. VRP 24:1-2. In October 2011, Paula Gray asked her mother about her past injuries while boarding the bus. CP 156, ¶ 28. A copy of Mrs. Gray's statement is attached at CP 172, and for the Court's convenience is reproduced on the next page. ICHB bases its entire Motion for Summary Judgment on its interpretation of this 1 page statement.

On October 27th, I fell getting on the bus for the scenic ride. My leg was bruised and the staff took me to my room. When Paula called me, I was feeling more pain and she came out to check on me. By then the pain had become intolerable and Paula rolled me down to the car on my walker and took me to the hospital where the bruise burst open in the parking lot. This was the most painful injuries I have had.

This was my 3rd recent fall on the stairs of the scenic bus ride trip. This was the 2nd time I had to be in the hospital for the injury. From my first fall to my 3rd fall, Paula had told staff, Joanne, that I could only board the bus by taking the lift. She and Jimmy reminded me all the time to never take the stairs on the bus.

After each fall, everyone in the family reminded me to take the lift and not the stairs. I hate falling and always seem to get significant injuries to my skin when I fall. I would NEVER refuse a ride on the lift over taking the stairs. The stairs are higher than normal and hard for me to climb up.

Sometimes, I would not want to bother the driver to take me on the lift and if they didn't offer, then I just tried taking the stairs. Many times the driver would not offer the lift and I would have to ask, which made me feel like I was imposing.

After the 2nd fall, I think I was offered the lift more often since Paula had talked to Joanne again to make sure I did not take the stairs. Every time I have been offered the lift, I have taken it.

I have not been back on the bus for a ride since Oct. 27th, 2010 because I am too afraid of falling. My husband now has to go without me. I did go on the ride to look at Christmas lights in Dec. 2010 and my son had to ask the driver to use the lift. This is the first ride I have been on since my 3rd fall.

I have never insisted on taking the stairs and have never turned down an offer to go on the lift. I feel like I was offered the lift more often by some staff than others.

This is a true statement made to my daughter, Paula Gray.

Marjorie Nell Gray.

IV. LEGAL ARGUMENT

A. Summary Judgment Standards

The Court in *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960) said "abundant authority" supported the statement that "A Trial Is Not Useless But Absolutely Necessary When There Is a Genuine Issue as to Any Material Fact." A "material fact" is one upon which the outcome of the case depends, in whole or part. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 850 P.2d 1298 (1993). The Court in *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992) summarized the applicable standards:

> Summary judgment is appropriate only if: the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). In such cases facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard.

Scott, id. at 502-03 (citations omitted). The nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations. CR 56(e); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). "Facts asserted by the nonmoving party and supported by affidavits or any other proper evidentiary material must be taken as true." *State ex rel. Bond*

v. State, 62 Wn.2d 487, 491, 383 P.2d 288 (1963). An affidavit containing admissible expert opinion on a significant issue of fact is generally sufficient to create a genuine issue of fact. *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn.App. 49, 871 P.2d 1106 (1994).

An appellate court decides a summary judgment on a *de novo* basis, engaging in the same analysis as the trial court. *Roger Crane & Assoc., Inc. v. Felice*, 74 Wn.App. 769, 875 P.2d 705 (1994). Both the law and the facts are reconsidered by the appellate court. *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). Any findings of fact entered by the trial court are considered superfluous and disregarded by the appellate court. *Redding v. Virginia Mason Medical Center*, 75 Wn.App. 424, 878 P.2d 483 (1994).

B. ICHB Had the Duty to Protect Mrs. Gray, an Elderly Invitee on its Premises, From Unreasonable Risk of Harm from a Condition that ICHB Should Know Mrs. Gray Would Fail to Protect Herself From, Including a Known or Obvious Danger.

In order to establish premises liability or negligence, plaintiffs must show a duty, breach of that duty, resulting injury, and proximate cause. *Hansen v. Friend*, 118 Wn.2d 476, 824 P. 2d 483, *reconsid. denied* (1992); *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

The scope of the legal duty owed by a landowner to a person on the premises depends on the person's status as a trespasser, licensee, or

invitee. *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). As a paying client and resident of the ICHB facility, going on an ICHB bus outing, Marjorie Grey was unquestionably an invitee.

The Restatement (Second) of Torts § 343 and § 343A have been adopted by the Washington Supreme Court to determine landowner liability to invitees. *Degel v. Majestic Mobile Manor, Inc.* 129 Wn.2d 43, 48, 914 P.2d 728 (1996); *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 138-39, 875 P.2d 621 (1994). Restatement § 343 provides:

> 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. (emphasis added)

Restatement § 343 creates a duty to use reasonable care to protect invitees from unreasonable risks of harm that are latent, or if known, the landowner should expect the invitee "will fail to protect" him or herself from. In this case, Mrs. Gray is not alleging that the bus steps were a latent risk or unreasonably dangerous for all passengers. The bus was equipped with both a lift and steps. It was designed to accommodate residents who could safely navigate the steps and residents who needed to be boarded via the lift. The manufacturer of the bus clearly assumed that the operator of the bus would use good judgment in deciding which entry to use for which

resident. Mrs. Gray was 84 years old at time of her October 2010 injury and used a walker. Given her two prior injury falls on these specific bus steps, her heart attack the month before, and the promises made to her family, ICHB should have realized that the bus steps posed an unreasonable risk *for Mrs. Gray* and that there was an unreasonable risk that she would "fail to protect" herself and use the bus's steps if the lift was not offered to her. Reasonable care under Restatement § 343 requires "safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances." *Tincani*, *id.* at 139. Warning Mrs. Gray to *not* climb the bus steps, and offering her the lift (Mrs. Gray's statement said "I would NEVER refuse a ride on the lift over taking the stairs.") was the bare minimum warning and safeguard that should have been done under the circumstances by ICHB, but were not.

In this case, the trial court applied the Restatement § 343 criteria to Mrs. Gray's case, CP 198:3-9, and held there was sufficient evidence to show that given Roseann's brusque, dismissive manner, it would have been difficult for Mrs. Gray to ask for the lift if not offered, that ICHB should have expected Mrs. Gray would not protect herself against the danger of the steps, and that ICHB "failed to exercise care to protect Ms. Gray from the danger of a fall on the bus steps." CP 198:22 to CP 199:3. The court then ruled, however, that Mrs. Gray voluntarily choose to

encounter the known and obvious risk of the steps, and that "as a matter of law, Ms. Gray assumed the risk and cannot recover." CP 199:24 and CP 200:3-4. **The trial court did NOT analyze Mrs. Gray's case pursuant to the second applicable standard, Restatement (Second) of Torts § 343A, regarding a landowner's duty about a "known or obvious danger," where harm can still be anticipated. This is reversible error.**

In *Tincani*, a case involving a teenage boy who fell from a cliff while on a field trip to the Zoo, the Supreme Court held that the trial court failed to instruct the jury on the Zoo's duty concerning a "known or obvious danger," set forth in Restatement (Second) of Torts § 343A:

> (1) 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.

Tincani, id. at 139. In *Degel, id.* at 50, this is described as an ***additional duty*** "if the landlord should have anticipated the harm despite the tenant's knowledge of the danger or despite the obvious nature of the danger."

In Mrs. Gray's case, the trial court did not address the *additional duty* ICHB had toward Mrs. Gray under § 343A, though the issue was briefed below. CP 180-82, 202-07, 230. The court did not analyze ICHB's duty to take affirmative measures to *prevent* injury to Mrs. Gray, given the unreasonable risk that she would be injured if not offered the lift.

Many cases illustrate this. In *Tincani*, the teenage boy was seriously injured after he was separated from his group, went off the Zoo's main trail, and wound up on a dangerous cliff. A classmate yelled to go back to the trail. Tincani instead climbed partway down, stopped, climbed back up, then attempted a second descent by leaping to a ledge, lost his footing and fell 20 feet. *Id.* at 136. The Court found that the testimony and Tincani's actions showed Tincani knew the cliff was dangerous, and acted negligently when attempting the second descent. *Tincani, id.* at 137-138.

The Zoo, however, breached its duties under Restatement (Second) of Torts § 343A. The Zoo had issued an invitation to "walk in the wild," then failed to enforce its adult chaperone rule, and failed to put warnings on dangerous side trails that connected to the main trail. Many young visitors came to the Zoo. The Court said the Zoo "should have anticipated harm from the cliff despite its obvious danger." *Tincani, id.* at 141, 145.

In *Tincani*, *id.* at 139-40, the Court quoted comment f to the Restatement (Second) of Torts § 343A, listing some of the circumstances in which this additional duty for landowners applies:

> Reason to expect harm to the visitor from known or obvious dangers may arise, for example, *where the possessor has reason to expect that the invitee*'s attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered *or fail to protect against it*. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable person in that position the advantages of doing so would outweigh the apparent risk. Distraction, forgetfulness, or

> foreseeable, reasonable advantages from encountering the danger are factors which trigger the landowner's responsibility to warn of or make safe a known or obvious danger. (emphasis added)

The Court said that "comment f offered these three circumstances as examples and we repeat them as such. They describe *some of the instances* in which a landowner has a duty to warn of known or obvious dangers." *Id.* at 146, fn. 6. (emphasis added). It's clear there are other circumstances in which Restatement § 343A applies because of the *Tincani* Court's holding: "We hold as a matter of law that this is a case of implied unreasonable assumption of risk and, thus, subject to the rules of contributory fault." *Tincani, id.* at 143. Comment f does not include an example of *unreasonable* actions by a plaintiff, yet *Tincani* applied the landowner's additional duty under Restatement § 343A to a set of facts where the plaintiff had acted unreasonably.

It can be difficult sometimes to discern whether a plaintiff's decision to encounter a known danger is "reasonable" or "unreasonable." Mrs. Gray's decision, or acquiescence, to use the bus steps again could be seen as *reasonable* and outweighing the risks—she very much wanted to join her husband and confronting Roseann intimidated her—or as *unreasonable*: she should have just asked to use the lift. However, the distinction doesn't matter. Under either "implied *unreasonable* assumption of risk" or "implied *reasonable* assumption of risk," as discussed further

below, if the landowner has breached its duties, the plaintiff's actions are not a complete bar to recovery, but treated as contributory negligence, reducing the plaintiff's damages. *Leyendecker v. Cousins*, 53 Wn.App. 769, 774, 770 P.2d 675, *review denied* 113 Wn.2d 1018 (1989).

In *Degel*, 129 Wn.2d at 46, a young child was permanently injured when he fell down a steep embankment and into a creek near his mobile home park. The defendant argued it had no duty to protect tenants from the obvious dangers inherent in a natural body of water. The boy's father was aware of the risk posed by the embankment and creek and had briefly turned his attention away from the child. The Supreme Court, citing Restatement § 343 and § 343A, held that the obvious nature of the danger did not exempt the landlord from the "duty to exercise reasonable care to protect all of the tenants of the mobile home park from unreasonable risks . . . if the landlord should have anticipated the harm despite the tenant's knowledge of the danger or despite the obvious nature of the danger." *Id.* at 50. The Court said that with child invitees, the landowner must always keep in mind their age, immaturity, and curiosity. *Id.* at 55.

In *Degel*, the mobile home park owner required families with small children to live in an area nearest the creek. A kids' play area was next to the steep embankment. The mobile home park was unfenced in this area. There is no indication that the embankment or creek was part of the

mobile home park property, so the owner did not "create" these hazards, just like ICHB did not manufacture the bus or its steps. Nonetheless, the Court held that "Where the landowner invites a child on the property for business purposes, the landowner has a duty to take reasonable precautions to make the property safe." *Id.* at 54. The Court called this an "affirmative duty." *Id.* at 49. In reversing the summary judgment, the Court ruled that "it is the function of the trier of fact to decide whether the particular harm should have been anticipated and whether reasonable care was taken to protect against the harm." *Id.*

In *Maynard v. Sisters of Providence*, 72 Wn.App. 878, 866 P.2d 1272 (1994), a man visiting his wife at the hospital was injured when he slipped in the icy parking lot. The icy condition was obvious and known to Maynard, as he couldn't move his care and had earlier slipped on the ice (as Mrs. Gray had fallen before on the steps). The hospital knew about the icy conditions, having sanded the staff parking lot but not yet the visitors' lot. Providence argued Maynard had "assumed the risk" when he walked for a third time on the icy lot and was hurt. In reversing summary judgment based on § 343A, the Court in *Maynard*, *id.* at 884, held:

> [A] landowner should expect harm where there is reason to believe the invitee will proceed to encounter the known or obvious danger because to a reasonable person in his or her position the advantages of doing so would outweigh the apparent risk. Here, the hospital should reasonably anticipate that its visitors will want to

> go home. Other than trying to get his car mobile, Maynard's options were essentially limited to abandoning his car and walking, calling a taxi or remaining at the hospital until conditions changed. Under these circumstances, a reasonable person might well confront the risk of traversing the parking lot to obtain sand.

In *Musci v. Graoch Assoc. Limited Partnership*, 144 Wn.2d 847, 31 P.3d 684 (2001), a tenant slipped outside an icy *side* exit to the apartment complex, which he used even though the main, *front* entrance was clear of snow and ice. There was evidence the side exit was used by tenants in other weather conditions, and the owner had time to clear that exit of snow and ice. In reversing summary judgment, the Court held that Restatement § 343 placed "a duty of reasonable care on a landowner for a known risk if the owner should expect that the tenants will fail to protect themselves against it. . . [W]hen viewed in the light most favorable to Mucsi, as [we] must, there is sufficient evidence to proceed to the jury." *Id.* at 862 (citation omitted).

In *Sjogren v. Properties of the Pacific NW, LLC*, 118 Wn.App. 144, 75 P.3d 592 (2003), the plaintiff fell while descending an interior stairwell to exit an apartment building. An overhead light on an automatic timer had gone off, but the stairwell was illuminated by light coming from an open apartment door. Sjogren was halfway down the stairs when the apartment door was shut and the stairwell became dark. She continued down and fell. The Court reversed based on Restatement § 343A, holding

that a jury could find that a landlord should expect a person "would elect the advantages of continuing down the stairs against the apparent risks of doing so," and therefore, "it would be error here, as it was in *Tincani*, to instruct that the landlord never has a duty to warn about open and apparent dangers." *Sjogren, id.* at 150.

In Mrs. Gray's case, the court felt it was important that the bus steps were not defective. Mrs. Gray could see they were steep, the risk was not hidden. CP 199:22-24. The court distinguished Mrs. Gray from cases where the defendant "created other risks," saying "Here, there are no other risks" and "There is no suggestion that ICHB had a duty to supervise Ms. Gray." CP 199:19-22. That is not the correct formulation. Plaintiffs never alleged ICHB had a duty to supervise Mrs. Gray on an ongoing or extended basis. Plaintiffs only asserted that ICHB should have protected her from the unreasonable and foreseeable risk posed by the bus steps to her. Under Restatement § 343, ICHB had a duty to provide "warnings and safeguards" given the risk that Mrs. Gray would fail to protect herself. Under Restatement § 343A, ICHB's had the additional duty to protect her despite the risk from the steps being obvious or known to her.

In *Tincani* the cliff was obvious to the teenage boy, but because the Zoo was open to kids and teenagers, the Court said a jury could find the Zoo should have taken such additional measures as warning about, or

blocking off the side trails, and enforcing the adult chaperone rule. The failure of the Zoo to take such measures "increased the foreseeable risk that patrons would exceed the area of invitation, thereby exposing themselves to dangerous conditions." *Tincani, id.* at 145. *See also Brown v. Stevens Pass, Inc.*, 97 Wn.App. 519, 526, 984 P.2d 448 (1999) (Court reversed summary judgment where skier hit an unpadded metal fence post that one million skiers had passed by without injury, holding that the "failure to pad the fence posts unduly enhanced the risk of injury to skiers," and therefore comparative negligence applied.)

In *Degel*, the Court found that the mobile home owner could have put a fence between the children's play area and the steep embankment and creek, and that the burden of making the property safe for children was not disproportionately heavy, given that children were invited tenants and the landlord profited from their presence. *Id.* at 53.

In the present case, ICHB invited Mrs. Gray and other elderly tenants to reside at ICHB, and profited from their presence, particularly since all residents are private pay, so ICHB is not constrained by low or state-set Medicaid rates. CP 152, ¶ 17. Moreover, Ms. Semingson says there were many reasonable measures readily available to ICHB to better protect Mrs. Gray, such as: using the other bus with the no-step entry; using a second aide to assist with boarding residents; using the lift

consistently with Mrs. Gray; training staff on how to determine which entry method to use; communicating to the staff and drivers the need to load Mrs. Gray via the lift; or asking the Grays to hire additional help. CP 130-32, 137-39. ¶¶ 4, 7, 8, 15, 16, 17, 18. Just like the plaintiff in *Kirk v. WSU* did not assume the risks caused by the university's improper instruction or supervision, Mrs. Gray did not assume the risks caused by ICHB's improper training or supervision of its staff, or poor communication systems, nor did Mrs. Gray relieve ICHB of its duties under Restatement § 343 and § 343A. Further, ICHB used the lift while Paula Gray was watching, giving Paula a false sense of security. This "unduly enhanced the risk of injury" because Paula otherwise would have taken independent action to protect her mother. ICHB needs to be held accountable for its breach of duties, and any negligence by Mrs. Gray, if such occured, reduces her damages rather than bars all recovery.

C. The Superior Court Used the Wrong Assumption of Risk Doctrine, and Should Have Found There was Possible Contributory Negligence by Mrs. Gray, but Not a Complete Bar on Her Claims.

The Supreme Court in *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 496, 834 P.2d 6 (1992) reviewed the assumption of risk doctrine at length and said that it is divided into four classifications: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied

unreasonable. Express assumption of risk usually involves a written waiver agreement and is not applicable here.

> Implied primary assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks. . . .
>
> A classic example of primary assumption of risk occurs in sports cases. One who participates in sports "assumes the risks" which are inherent in the sport. . . . A defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport.

Scott, id. at 497-98 (citations omitted).

> In contrast, implied reasonable and 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. 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.

Scott, id. at 499 (citations omitted). Implied reasonable and unreasonable assumption of risk by a plaintiff will reduce, rather than bar, the plaintiff's recovery. The comparative negligence of the defendant and plaintiff must be resolved at trial, not on summary judgment. *Scott, id.* at 503. In Mrs. Gray's case, the appropriate doctrines to apply, if any, are implied reasonable assumption of risk or implied unreasonable assumption of risk.

In *ITT Rayonier, Inc. v. Puget Sound Freight Lines*, 44 Wn.App. 368, 722 P.2d 1310 (1986), the court explained that the doctrine of

assumption of risk developed during the industrial revolution and reflected the general impulse of common law courts to insulate the employer as much as possible from bearing the human cost of doing industrialized business. It then infiltrated nearly every area of negligence law. More recently, "[a]ssumption of the risk has experienced a slow but steady fall from grace" as courts have gradually adopted the position that it "should have no continued existence as a separate defense in situations where the defense of contributory negligence is available." *Id.* at 374-75.

In *Dorr v. Big Creek Wood Products, Inc.*, 84 Wn.App. 420, 425-26, 927 P.2d 1148 (1996), this Division cautioned against the use of implied primary assumption of risk too readily:

> Trial courts are rightfully wary of requests to instruct the jury on implied primary assumption of the risk. That doctrine, if not boxed in and carefully watched, has an expansive tendency to reintroduce the complete bar to recovery into territory now staked out by statute as the domain of comparative negligence. In most situations, a plaintiff who has voluntarily encountered a known specific risk has, at worst, merely failed to use ordinary care for his or her own safety, and an instruction on contributory negligence is all that is necessary and appropriate.

To establish implied *primary* assumption of risk (which bars recovery), it is said that the defendant must prove 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. Washington State University*, 109 Wn.2d 448, 453, 746 P.2d 285, 288 (1987). For a

choice to be *voluntary*, the plaintiff must choose the risk "despite knowing of a reasonable alternative course of action." *Erie v. White*, 92 Wn.App 297, 304, 966 P.2d 342 (1998). There must be "a reasonable opportunity to act differently." *Zook v. Baier*, 9 Wn.App. 708, 716, 514 P.2d 923 (1973). A bald statement of the rule is not self-explanatory. An examination of our state's case law shows how narrowly this doctrine is construed in practice, as courts rarely find implied *primary* assumption of risk to have occurred, and instead, have held that the proper rule to use is implied reasonable or unreasonable assumption of risk.

In *Tincani,* the Court found that Tincani had full knowledge of the risks in descending the cliff once he tried a second descent of the cliff.[3] Prior to that descent, Tincani was told by his friend to backtrack on the trail he'd come from. In other words, Tincani had a "reasonable alternative course of action." Instead, he "disregarded the advice of his friend, tried for a second time to descend the cliff, and fell." *Id.* at 137. The Court said that the jury's verdict, which assigned some of the blame to Tincani, "indicates it concluded Tincani voluntarily chose to encounter a risk created by the Zoo's negligence. This type of assumption of risk is called

[3] "Even if he had not appreciated the risk of falling while at the top of the outcropping, Tincani knew the cliff was dangerous when he climbed partway down. . . .[T]he jury had to have concluded that Tincani knew 'of the specific risk associated with climbing down the cliff' and 'understood the nature of this risk.' The jury reached the only reasonable conclusion: Tincani knew or had reason to know climbing down the cliff was dangerous." *Id.* at 137-38.

'unreasonable assumption of the risk.'" *Id.* at 145. Thus, in *Tincani* where the plaintiff had a full, subjective understanding of the specific risks, and voluntarily chose to encounter the risks despite the presence of a reasonable alternate course of action, the Court held that this constituted unreasonable assumption of risk, creating comparative fault, and was *not* implied primary assumption of risk, barring recovery.

In *Tincani*, the Zoo had argued that "Tincani completely assumed the risk of harm because the 'risk of falling is inherent in and necessary to the activity of climbing down the face of a cliff.'" *Id.* at 144. The Court disagreed, stating at 144-45:

> Tincani did not enter the Zoo to engage in the activity or sport of "rock climbing". Tincani visited the Zoo as part of a school field trip. Entrance and exploration of the Zoo was encouraged. The activity in which the students engaged was intended to be a "walk in the wild". The risk of serious injury while visiting a zoo should not be a risk inherent in and necessary to such an activity.

In Mrs. Gray's case, the activity was a scenic bus outing, *not* climbing bus steps. ICHB argued below that a common feature of the cases of implied *primary* assumption of risk is that "The risks encountered are inherent in the activity in which they are participating rather than specifically created by the premises owner's negligence." CP 220:7-8. ICHB said "boarding the van **was** inherent in and necessary to the scenic van tour—Gray could not have participated in the tour without boarding

the van. . . Gray voluntarily chose to encounter a *risk inherent in the activity* to which she was choosing to participate." CP 220:16-19 (**bold** original) (*italics* added).

This is simply not true. The bus used by ICHB was equipped with both a lift and steps. Climbing the bus steps was **not** an *inherent or necessary* part of the activity of going on a scenic bus tour. Getting *into* the bus was necessary, but the lift could have been used for Mrs. Gray, or ICHB could have used its "no step" entry bus for the outings.

In *Tincani*, the failures by the Zoo included both action (encouragement to explore the grounds) and inactions (not enforcing the chaperone rule, not posting warning signs). Similarly in the present case, ICHB engaged in likely action (Roseann brusquely directing residents to line up for entry via the steps) and inactions (ICHB not using the lift for Mrs. Gray, not providing a second aide to assist with boarding, not telling staff to board Mrs. Gray via the lift).

Many other cases have concluded like *Tincani* that where the injured plaintiff knew the risks and voluntarily encountered them, the potential negligence by the plaintiff is a damage-reducing factor, and does *not* obviate the landowner's duties under Restatement § 343 or § 343A. In *Maynard,* the plaintiff was injured on the icy parking lot not while returning to his car but when he digressed to help another visitor. The

Court held: "Maynard's digression to try and assist another driver does not *ipso facto* relieve Providence of its duty, but is a consideration for a jury in determining comparative negligence." *Maynard, id.* at 884. In *Musci,* where the tenant exited a side door onto a path obviously covered with snow and ice, the Court said: "The jury may deliberate as to whether Keeler's Corner breached its duty to its tenant, as well as whether Mucsi breached his duty to exercise reasonable care under the circumstances." *Id.* at 862. In *Degel*, where the child's father knew the risks posed by the nearby steep embankment and creek and turned his attention from the young child, the Court held: "Any failure on the part of a parent to properly supervise a child may go to the issues of contributory fault or proximate cause, but not to whether a duty exists." *Id.* at 54.

Summary judgment is not well suited for negligence cases, which ordinarily raise factual issues to be decided by the jury. *Morris v. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974) (reversing dismissal on summary judgment where the parties disputed the reasonableness of a landowner's excavation work and its link to downstream damage); *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn.App. 49, 57, 871 P.2d 1106 (1994) (reversing summary judgment in a case of negligent supervision, where experts disagreed about the foreseeability of the risk of an assault). In this

case, the parties clearly dispute the reasonableness of their actions and the foreseeability of Mrs. Gray's third fall on the bus steps.

Summary judgment also is not appropriate when the *evidentiary facts* are not in dispute, but different inferences may be drawn from them regarding *ultimate facts* such as intent or good faith. *See e.g.*, *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960) (parents knew of child's tendency to jump on people, but whether they knew it was *dangerous* cannot be resolved on summary judgment); *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn.App. 326, 330, 966 P.2d 351 (1998) ("[I]t is only when the facts are undisputed and the inferences therefrom are plain and *incapable of reasonable doubt or difference of opinion* that it may be a question of law for the court.") (emphasis added).

The case of *Leyendecker v. Cousins*, *id.* 53 Wn.App. 769, illustrates the intersection between a defendant's duty of reasonable care and the plaintiff's implied reasonable or unreasonable assumption of risk in a case where the plaintiff's intent and consent, as with Mrs. Gray, was unclear. In *Leyendecker*, the plaintiff was employed in a timber salvage operation in the woods. A helicopter used on the job had landed in a clearing for "hot refueling" (engines idling and rotors spinning). Leyendecker emerged into the clearing, and after "safely passing the

rotating tail rotor, he inexplicably reversed his steps and walked into the whirling rotor. He was injured seriously." *Id.* at 771.

Leyendecker testified in deposition that he was familiar with helicopters, he had 20/20 vision, normal hearing, admitted that a spinning rotor is dangerous, said he saw and heard the helicopter, and that there was sufficient space to pass by safely. He could not recall being struck. *Id.* Plaintiff's expert, an engineering psychologist, offered a human factors analysis. He testified that a spinning tail rotor is a low contrast object that people can inadvertently run into it, and therefore, the defendant should have designated a safer landing zone by putting a perimeter barrier or ground crew around the helicopter during re-fueling. *Id.* at 771-72.

In reversing summary judgment, the Court found that Leyendecker saw the spinning tail rotor, appreciated the risk, and "voluntarily chose to walk past the spinning blade," and then "for whatever reason, turned around and walked back into it." *Id.* at 775. The Court held, *id.* at 775:

> Although such evidence clearly establishes Leyendecker's knowledge and appreciation of the risk, once encountered, the record is devoid of any evidence tending to prove his antecedent consent to relieve the defendants of any duty they might have to him because of the risks of conducting a hot refueling operation at the landing site. On the contrary, it appears that finding a spinning tail rotor in close proximity to the trail's end was entirely unexpected, and that Leyendecker chose to risk coming into contact with it without defendants' knowledge. Such circumstances clearly fall within either the implied reasonable or unreasonable assumption of risk categories, which, as previously stated, are

> subsumed under contributory negligence and thus may not serve to bar plaintiff's claim; rather, they act merely as damage-reducing factors.

There are many parallels here to Mrs. Gray's case. Mrs. Gray wrote a statement that addresses some but not all issues. She starts with "On October 27th, I fell getting on the bus for the scenic ride." She talks about some drivers offering her the lift more than others, but she does ***not*** say what staff interaction she had October 27. Leyendecker could not recall being struck, and apparently in his deposition he couldn't explain why he suddenly turned and walked into the rotor, given the Court's word choice of 'inexplicable' and 'then for whatever reason.' ICHB does not know *why* Mrs. Gray attempted to climb the bus steps. Roseann was at the lift assisting Mr. Gray into the bus, and then says in her incident report statement: "Marjorie proceeded up the bus steps. After the first step her legs became weak and she called for me to help her." CP 121. This doesn't tell us *why* Mrs. Gray tried to ascend those steps. Just as in *Leyendecker*, regarding the injury in question "the record is devoid of any evidence tending to prove [her] antecedent consent to relieve the defendants of any duty they might have to [her]." (Actually, Paula Gray was doing all that she could to *not* relieve ICHB of its duties to protect her mother.) And as in *Leyendecker*, defendants assert no knowledge of why Mrs. Gray's tried the steps rather than asked for the lift.

Plaintiffs' expert, Ms. Semingson, like the expert in *Leyendecker*, did not see the injury event, but provided the equivalent of human factors analysis by explaining the context of a CCRC serving the elderly: the declining condition in the elderly making them less stable and less able to appreciate hazards; the conditioning that has occurred for many women of Mrs. Gray's generation to acquiesce to directions; the dependency and fear of retaliation for residents in facilities; and the rushed atmosphere if only one aide—particularly brusque Roseann—is responsible for boarding all the residents. CP 135-37. ¶¶ 12-15. Like the expert in *Leyendecker*, Ms. Semingson's opinion is that the defendants should have taken these factors into account and then implemented measures to provide greater safety.

ICHB accuses Paula Gray and Alice Semingson of "speculation" since they were not present on October 27, 2010. This is not speculation. Paula Gray's declaration contains firsthand observations about ICHB, and her lay opinion rationally based on those observations. Alice Semingson's expert opinions are based upon 30 years personal experience in the field, and the records in this case. Plaintiffs are permitted to use circumstantial evidence, as the Court addressed at length in *Conrad v. Alderwood Manor*, 119 Wn.App. 275, 281, 78 P.3d 177 (2003), a case involving a bed-ridden nursing home resident who was discovered with a broken femur no one had reported, and the Court held: "The plaintiff need not establish

causation by direct and positive evidence. She need only show by 'a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable.'" (citations omitted); *see also Allen v. Asbestos Corp.*, 137 Wn.App. 233, 240-41, 157 P.3d 406 (2007).

ICHB is not entitled to summary judgment unless it can show that "the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion," *Attwood, id.* In this case, ICHB must show that the only reasonable inferences to be drawn from Mrs. Gray's 1 page statement are that she knowingly and *voluntarily* assumed the risks of the bus steps, despite reasonably available alternatives, and she knowingly and voluntarily waived all other duties ICHB had under Restatement (Second) of Torts § 343 and § 343A to protect her from foreseeable harm. ICHB simply cannot carry that burden.

To begin with, the extent to which Mrs. Gray's statement shows that she voluntarily chose to walk up the steps of the ICHB bus is highly disputed. Mrs. Gray statement says:

> I hate falling and always seem to get significant injuries to my skin when I fall. I would NEVER refuse a ride on the lift over taking the stairs. The stairs are higher than normal and hard for me to climb up.
>
> Sometimes, I would not want to bother the driver to take me on the lift and if they didn't offer, then I just tried taking the stairs. Many times the drier would not offer the lift and I would have to ask, which made me feel like I was imposing.

. . . Every time I have been offered the lift, I have taken it. CP 172.

Mrs. Gray's statement can reasonably be interpreted in different ways, with different implications for the ultimate facts of intent and voluntariness, crucial to the establishment of primary implied assumption of risk. Alice Semingson, RNC, interprets Mrs. Gray's statement as reflecting a person who only with great reluctance would use the steps and who felt intimidated by the circumstances. She interprets Mrs. Gray's statement that she "would NEVER refuse a ride on the lift over taking the stairs. . . . Many times the driver would not offer the lift and I would have to ask, which made me like I was imposing" as reflecting the acquiescence seen in many women in her generation, particularly in a facility setting where there's a strong fear of retaliation, and even more so when there is a brusque and intimidating employee driving the bus. CP 136, ¶14.

Ms. Semingson also interpreted Mrs. Gray's statement in the context of the bus loading in October 2010. It is undisputed that ICHB "provided only one staff person to load a bus that has steep steps on one end and a time consuming lift on the other." CP 137, ¶15. The bus driver on October 27, 2010 was Roseann. ICHB has not put forward *any* evidence to dispute plaintiffs' characterization of Roseann as brusque and intimidating, though it had the opportunity to submit further declarations

in its Reply below. Based on her experience, Ms. Semingson says that "If there were two employees present, one at the lift and a second at the steps, residents potentially could choose which entry to use, but in these circumstances there was no real choice." CP 137 ¶15. She notes the Wellness nurse Kramer testified that "Mrs. Gray was *not* someone who would insist on using the bus's steps." Mrs. Gray also wrote: "Every time I have been offered the lift, I have taken it." Ms. Semingson states "I can only conclude that Ida Culver's Roseann did NOT offer the lift to Mrs. Gray on October 27, 2010, who then felt intimidated and compelled to line up and use the steps." CP 137, ¶15. If Mrs. Gray felt intimidated or rushed by Roseann, and there was no second aide, then the lift that day was not a "reasonably available alternative," and Mrs. Gray's choice to try the steps was not truly voluntary.

The trial court below found there was evidence Roseann acted in a brusque, dismissive manner with ICHB residents, and it would have been difficult for Mrs. Gray to ask for the lift if not offered, and therefore, ICHB "failed to exercise care to protect Ms. Gray from the danger of a fall on the bus steps." CP 189:21 to 199:4. Inexplicably, the court then held Mrs. Gray "voluntarily choose" to climb the bus steps, because Mrs. Gray "had other options available to her (the lift, a request for assistance, or decline to participate)." CP 199:25-26. The trial court failed to recognize

that these options must be a "*reasonable* alternative course of action" *Erie, id.* at 304, and that they must provide Mrs. Gray "a *reasonable* opportunity to act differently." *Zook, id.* at 716. The lift for Mrs. Gray was not a reasonable available alternative given that Roseann was the driver that day. It is undisputed that ICHB did *not* provide staff assistance or spotters at the steps, so this was not a reasonable option available to Mrs. Gray. And saying that she could have "declined to participate" in one of the few remaining shared activities with her husband of 60 years, is not a reasonable demand of Mrs. Gray. Moreover, this is certainly *not* how the modern cases have interpreted these situations. In *Tincani*, the teenager could have easily backtracked on the trail, but his suit was not barred. In *Mucsi*, the tenant could have easily used the clear front entrance, but his suit was not barred. In *Maynard*, the husband could have called a cab or stopped visiting his wife, but that was not required. In *Brown v. Stevens Pass*, the skier could have just not gone skiing, but that was not the rule.

In assessing alleged assumption of risk, the question of whether the plaintiff has consented—and the scope of such consent—is an issue of fact for the jury, except when reasonable minds could *not* differ in their interpretation of the facts. *Alston v. Blythe*, 88 Wn.App. 26, 34, 943 P.2d 692 (1997). In Mrs. Gray's case, her "consent" and the interpretation of her actions is highly disputed, making summary judgment inappropriate.

D. Cases of True Implied Primary Assumption of Risk are Few and Distinguishable from Mrs. Gray's.

Modern cases where implied *primary* assumption of risk has been found are quite few. The *Leyendecker* Court, *id.* at 773-74, listed two such cases that were "perfect examples"— *Foster v. Carter,* 49 Wn.App. 340, 742 P.2d 1257 (1987), and *Ridge v. Kladnick,* 42 Wn.App. 785, 713 P.2d 1131, *review denied* 106 Wn.2d 1011 (1986).

In *Foster*, some teenage boys decided to have a "BB gun war" in the woods. All of the boys consented to point guns and shoot at each other. The evidence was undisputed that the rules of the "BB gun war" were followed, yet one of the boys was accidently hit in the eye. The Court ruled that as a matter of law, the injured boy "assumed the risk" of injury from a BB gun. *Id.* at 345-46. In *Ridge*, the plaintiff was a frequent participant at a roller skating rink in the game of "Shoot-The-Duck/Wipe Out." In this game, the skaters pick up speed, then squat down on one leg with the other leg fully extended in front, and at the signal "Wipe Out" they try to knock each other over. The plaintiff complained that he was hit before the signal "Wipe Out," but the Court concluded the jury's answers on the special verdict form indicated that the jury found the rules had been followed. *Id.* at 789. In affirming the decision, the *Ridge* Court held that:

> By taking part in the game, Ridge agreed to accept the risks inherent in the game that were obvious and necessary. One of those

> risks was that of being knocked over and injured. Because Ridge voluntarily and knowingly placed himself into this area of appreciable risk, Skate King does not owe a duty to him with regard to those risks.

In *Wirtz v. Gillogly*, 152 Wn.App. 1, 216 P.3d 416 (2009), the plaintiff was injured while helping a friend who was cutting trees on his parents' property. His friend and the friend's father, the defendants, both had experience felling trees. They wore hardhats but Wirtz refused to wear one. He watched the tree felling process for three days and helped stack wood. On the fourth day, Wirtz participated in felling one tree by ratcheting a cable line to keep it taut around the tree. He testified he knew it could fall his way. Before starting, the defendants offered a hardhat but he refused. The father told Wirtz the tree could hit him and "It's better to be safe than sorry," but Wirtz said he'd be OK. When the tree began to split, they paused, and he was again told "Now would be the time to put a hardhat on," but he refused. When the tree began to split further, they paused, and Wirtz was told that the tree could fall unpredictably and he did not have to continue with the project. He stayed. The tree split, a piece of it hit him in the head and knocked him unconscious. He later sued the Gillogys for failing to provide him with safety equipment, including a hardhat, and for failing to exercise ordinary care. *Id.* at 2-5.

The Court in *Wirtz* affirmed the summary judgment dismissal of Wirtz' claims on the basis of implied *primary* assumption of risk. The

Court found that "reasonable minds could not differ about whether Wirtz knowingly and voluntarily assumed the risk inherent in felling trees." *Id.* at 9. He knew the specific risks, his participation was voluntary, as there was no evidence of defendants pressuring him and he voiced no concerns, and when the risks increased he was again offered a hardhat and told he could stop, but he refused to. *Wirtz, id.* at 10-11. He assumed the risk.

E. RCW 18.20 Does *Not* Bar ICHB from Providing Mrs. Gray With Help Getting on the Bus and Complying With Restatement (Second) of Torts § 343 and § 343A.

In argument below, ICHB cited the assisted living facility licensing statute, RCW 18.20, and claimed that this law "prohibits Ida Culver House from . . . . assuming a 'general responsibility for the safety and well-being' of an independent living tenant (a 'nonresident individual) such as Gray." CP 188-89. ICHB listed the definitions found in RCW 18.20.020, and argued that contrary to Ms. Semingson's expert opinion, ICHB had "no duty whatsoever to provide 'additional precautions to prevent Mrs. Gray's fall on October 27, 2010.'" [CP 189, referencing CP 130, ¶4]. ICHB claims the Legislature has "unequivocally pronounced" that facilities like ICHB have no such duty to assist an "independent tenant." CP 190:2.

This is a red herring. The purpose of the assisted living facility licensing statute is to regulate these types of care facilities and to prohibit

them from providing an ongoing degree of care to residents in unlicensed units without any state DSHS oversight. Thus, if the facility is providing domiciliary care, defined to mean assistance with such activities as bathing or dressing, or nursing or health services; or if the facility is assuming the "general responsibility for the safety and well-being of the resident," which in effect means 24 hour responsibility when the resident is in the facility and the provision of a number of potential services, then the facility must have that resident in a licensed room, which is inspected by DSHS and the ombudsman program. *See*, RCW 18.20.020(5), (6); RCW 18.20.030(4); WAC 388-78A-2020; WAC 388-78A-2035.

Mrs. Gray never alleged that in October 2010 she needed domiciliary care or wanted ICHB to assume "general responsibility for the safety and well-being" of her. She simply asked, and was promised, to have ICHB use the lift when boarding her on the bus for the scenic trips every one to two weeks. The provision of that service, which is not much different than holding the door open for a person in a wheelchair, would *not* violate any "pronouncement" by the Legislature or other assisting living facility laws. Mrs. Gray was still an "independent living" resident per ICHB's criteria. She was just having trouble with navigating the steep steps into the bus, now that she was 84, weaker, and using a walker. The bus had a lift, and ICHB promised to use it for her, but didn't.

ICHB ignores that it still had duties under the common law and Restatement (Second) of Torts § 343 and § 343A, in the same way, for example, that it must comply with both the Federal Fair Housing Act and RCW 18.20. If somehow compliance with Restatement § 343 or § 343A meant ICHB had to provide more assistance than allowed under RCW 18.20 in an unlicensed unit, then ICHB could move the person to a licensed room, or ask DSHS to license that person's room. This is a relatively quick process that entails paying a pro-rata share of the $108/year license fee for a room, and getting an inspection by DSHS if the room wasn't originally inspected by DSHS when the building was licensed. https://www.dshs.wa.gov/altsa/faq?field_altsa_topics_value=alf In short, RCW 18.20 does *not* negate the common law or prohibit ICHB's compliance with its duties under the Restatement (Second) of Torts.

F. Promises Made by ICHB and Relied Upon by Mrs. Gray's Family Create an Additional Basis for Liability

A separate duty was created by ICHB's promises, through its agent Joanne Kramer, RN, who told Paula Gray after her mother fell on the bus steps in April 2009 and July 2010, that ICHB would use the lift in the future when boarding her mother into the bus. At her deposition, Ms. Kramer said she didn't remember those promises, but admitted that Paula Gray's memory would be better on this. Assuming for the moment that

ICHB did *not* have a duty to assist Mrs. Gray into the bus, and this was a "gratuitous" promise, the courts have found that such promises, when relied upon by the plaintiff, create duties for the defendant.

In *Brown v. MacPherson's Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975), the Court held that liability can be established by a party gratuitously assuming a duty to warn or protect another, who then breaches that duty. In *Brown*, the state led a third party, Mr. MacPherson, to refrain from warning landowners of avalanche danger because the state said that they would take care of the matter. This caused MacPherson to "refrain from action on appellants' behalf he otherwise would have taken." *Id.* at 299. The failure by the state created potential liability for nonfeasance. *Id.* at 300.

Brown noted that early common law did not hold parties liable for a failure to act, but that more modern law has changed, stating at 300:

> [T]he most prominent [change involves] promises which induce reliance, causing the promisee to refrain from seeking help elsewhere and thereby worsening his or her situation. This court recognized that inaction may create liability in such circumstances in *Sheridan v. Aetna Cas. & Sur. Co., supra* [3 Wn.2d 423, 439-40, 100 P.2d 1024 (1940)]. There the defendant insurance company voluntarily undertook to inspect a hotel elevator and make periodic reports to the city on its safety; the hotel owners relied on the defendant and did not themselves make inspections. The reports were not made as required by ordinance and the elevator malfunctioned, injuring the plaintiff.

Brown favorably quoted three out of state cases where "a duty to act has been found to have been created by reliance not by the person to whom the aid is to be rendered, but by another who, as a result of the promise, refrains from acting on that person's behalf." *Id.* at 301.

In this case, Paula Gray's declaration sets forth the promises made to her—that the lift would be used—and that she saw it used when she was present. She said that she *relied upon* these promises, for otherwise she would have taken further actions to protect her mother. CP 150-53, ¶¶ 10, 13, 16, 17-20; CP 156, ¶26. Plaintiffs' Complaint made the same allegation, *id.* at ¶ 3.13, and this was raised again at the summary judgment hearing[4] and briefed in Plaintiffs' Motion for Reconsideration, CP 211-12, 228, and 231, but the court below made no ruling on the issue.

In *Brown,* the Court rejected the state's argument that its agents were limited to the powers explicitly granted in the department's governing statute. ICHB has made the same argument with regards to the licensing statute, RCW 18.20, limiting its duties to Mrs. Gray. The Supreme Court in *Brown, id.* at 302-303, addressed the alleged limits imposed by the statute in a way applicable to this case:

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[4] "[I]t is very much plaintiff's position that promises were made and they were relied upon. Other steps perhaps could have been taken by plaintiff to protect Marjorie Gray if they'd known they were necessary, but it was not believed that they were necessary because of the promises made." VRP 35-36.

> No special permission is necessary, either for public officials or private individuals, to warn others of some peril to them when a *legal duty has been assumed to do so.* ...To hold otherwise would be to establish that, because of the finite statutory authority it gives its agents, the government can escape responsibility for their breach of the moral and legal duty to keep their official word. We refuse to make such a rule here. (emphasis added)

Since *Brown*, other Washington courts have ruled similarly. In *Roth v. Kay*, 35 Wn.App. 1, 4, 664 P.2d 1299 (1983), the plaintiff sued his doctor for not mailing in his worker's compensation application. The Court reversed a summary judgment dismissal because the plaintiff said he had been told by a staff person that the doctor would file the form. It was not clear whether the doctor had a *duty* to do so, but *Roth* adopted the wisdom of Judge Cardozo, who said:

> It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.

Roth, id. at 4, quoting *Glanzer v. Shepard,* 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922). *See also, Alston v. Blythe, id.* 88 Wn.App. at 35 (Where plaintiff pedestrian was struck by a car after allegedly being waved across the street by defendant parked motorist, trial court should have given jury instruction that "A person, having no duty to act, who nevertheless chooses to act, must do so without negligence.").

In *Folsom v. Burger King,* 135 Wn.2d 658, 676-77, 958 P.2d 301 (1998), a consolidated suit on behalf of two Burger King employees who

were killed by a former employee, the Court reviewed several pertinent tort law principles:

> Under traditional tort law, absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists. . . . There are exceptions to these traditional rules. An exception may create an affirmative duty to protect another from harm. If an exception applies, liability may be imposed despite the absence of negligence. These special relationships typically arise when one party is entrusted with the well-being of the other party. (citations omitted)

Folsom, id. at 674-75. The Court then discussed the voluntary rescue doctrine at 676:

> A person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promisee to refrain from seeking help elsewhere. . . . When a defendant undertakes a rescue, a *special relationship* develops, giving rise to actionable negligence if a defendant breaches the duty of care by failing to act reasonably. (citations omitted) (emphasis added)

ICHB may now deny that promises were made to Mrs. Gray's family, or claim that they were made *after* but not before her October 2010 fall. If so, the rule is that "Disputes over the existence of oral agreements are not appropriately decided on summary judgment." *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn.App. 495, 500, 962 P.2d 824 (1997). ("Only a factfinder can determine which of these statements is more credible, considering all the evidence." *Id.* at 501). *See also*, *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn.App. 352, 354, 563 P.2d 211 (1977) ("Oral contracts are often, by their very nature, dependent upon an

understanding of the surrounding circumstances, the intent of the parties, and the credibility of witnesses. . . The trier of fact in a trial setting should make the final determination."). If ICHB admits its oral promises to Paula Gray to use a lift for her mother, inducing Paula's reliance, that is another basis for duty and liability. If ICHB denies making the oral promises, the dispute should be resolved by a fact finder.

V. CONCLUSION

Plaintiffs submit that multiple, genuine issues of material fact exist precluding summary judgment. Plaintiffs have submitted substantial evidence that would support a reasonable jury verdict in favor of Mrs. Gray. The summary judgment ruling below should be reversed, and Marjorie Gray should be allowed to submit her case to a jury.

RESPECTFULLY SUBMITTED this 3rd day of February, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of February, 2015, I caused to be served a true and correct copy of the document(s) listed below to the individual(s) named below in the specific manner indicated:

Document(s) Served

1. Opening Brief of Appellants

Individual(s) Served

David J. Corey, WSBA No. 26683 Amber L. Pearce, WSBA No. 31626 Colin F. Kearns, WSBA No. 45282 FLOYD, PFLUEGER & RINGER P.S. 200 West Thomas Street, Suite 500 Seattle, WA 98119-4298 dcorey@floyd-ringer.com apearce@floyd-ringer.com ckearns@floyd-ringer.com Attorneys for Respondents	☐ Legal Messenger ☐ Hand Delivered ☐ Facsimile X First Class Mail X Email per agreement ☐ Federal Express

DATED this 3rd day of February, 2015 at Seattle, Washington.

Jeff B. Crollard