

NO. 72859-8-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

---

CHRISTOPHER PARSONS,  
Appellant,

V.

ESTATE OF HELEN PARSONS, deceased, by  
THEODORE H. PARSONS III, and LAURA  
E. HOEXTER as co-Personal Representatives  
For the Estate of Helen Parsons,  
Respondent.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2015 APR 27 PM 2:22  
W

---

**APPELLANT'S BRIEF**

---

Charles S. Hamilton, III, WSBA #5648  
Attorney for Appellant  
7016 35th Avenue NE  
Seattle, WA 98115-5917  
206-623-6619

## TABLE OF CONTENTS

<b>I. Statement of the Case .....</b>	<b>7</b>
<b>II Assignments of Error.....</b>	<b>10</b>
1. Did the trial court err in granting these Defendants Summary Judgment entered on November 21, 2014 relating to responsibility for Christopher Parsons' fall from a roof belonging to Defendants?	
<b>III. Issues Pertaining to Assignments of Errors: .....</b>	<b>10</b>
1. Principles applicable to Summary Judgment .	
2. Should the trial court have permitted amendment of the Complaint to add the legal theory of the personal representative's duties owed the Plaintiff?	
.....	11
3. Did Theodore Parsons III as personal representative of the estate, breach a duty to maintain habitability of the estate and maintenance of tenantable premises which were owed Christopher Parsons?.....	14
4. Did an employer-employee relationship between the parties exist under WISHA regulation or the common law so as to impose a duty to maintain a safe workplace at the site of the fall of Christopher Parsons?.....	15
5. Did the personal representative of the estate owe a duty of care as landowner, or landlord, or occupier of land so as to avoid responsibility for harm to the tenant, Christopher Parsons? .....	20

6. Did the affirmative defense claiming voluntary and consensual assumption of risk bar recovery for Christopher Parsons?.....	26
<b>CONCLUSION.....</b>	<b>27</b>

## **TABLE OF AUTHORITIES**

### **Table of Cases**

Smith v Safeco Insurance Company 150 Wn.2d 478, 483, 78 P.3d 1275 (2003).....	9
Folsom v Burger King 135 Wn.2d 658, 958 P.2d 301 (1998).....	10
Homeowners Association v. Tydings 72 Wn.App 139, 864 P.2d 392 (1993).....	10
Tabak v State 73 Wn.App 691, 870 P.2d 1014 (1994).....	10
Yuan v Chow 92 Wn.App. 137, 960 P.2d 1003 (1998).....	10
Barnes v McLennon 128 Wn.2d 563, 810 p.2d 469 (1996).....	10
Hooper v Yakima County 79 Wn.App. 770, 904 P.2d 1183 (1995).....	10
Karlberg v. Ottoen 167 Wn.App 522, 280 P.3d 1123 (2012).....	11
Wilson v Horsley 137 Wn.2d 500 , 505, 506, 974 P.2d 316 (1999).....	12
Haselwood v. Bremerton Ice Arena, Inc.	

137 Wn. App 872, 889, 155 P.3d 952 (2007).....	12
Herron v Tribune Publishing Co. 108 Wn.2d 162, 736 P.2d 248 (1987). ....	11
Stansfield v Douglas County 146 Wn.2d 116, 122, 43 P.3d 49 (2002).....	12
Watson v Emard 165 Wn.App 691, 698, 267 P.3d 1048 (2011).....	12
Tauscher v Puget Sound Power and Light Company 96 Wn.2d 274, 635 P.2d 426 (1981).....	16
Allard v Pacific National Bank 99 Wn.2d 394, 663 P.2d 104 (1983).....	13
Esmieu v Schrag 88 Wn.2d 490, 498, 563 P.2d 203 (1977).....	13
Liebergesell v Evans 93 Wn.2d 881-889, 613 P.2d 170 (1980).....	14
Tauscher v Puget Sound Power and Light Company 96 Wn.2d 24, 635 P.2d 426 (1981).....	16
Rogers v Irving 85 Wn. App 455, 933 P.2d 1060 (1997).....	16
Afoa v Port of Seattle 176 Wn.2d 460, 476, 296 P.3d 800 (2013).....	17
Goucher v J.R. Simplot Co. Inc. 104 Wn.2d 662, 671, 709 P.2d 774 (1985).....	18
Goucher v J.R. Simplot Co. Inc. 104 Wn.2d 662 673, 709 P.2d 774 (1985) .....	18
Kelley v Howard S. Wright Construction Co. 90 Wn.2d 323, 331-332, 582 P.2d 500 (1978).....	19
Kamla v Space Needle Corp., 147 Wn.2d 114, 120 52 P.3d 472 (2002).....	19
Tincani v Inland Empires of a Logical Society	

124 Wn.2d 121, 875 P.2d 621 (1994).....	20
Degel v Majestic Mobile Manor, Inc. 129 Wn.2d 43, 49, 914 P.2d 728 (1996).....	20
Hymas v UAP Distribution, Inc. 167 Wn.App 136, 150, 272 P.3d 889 (2012).....	20
Borka v Estate of Hoerr 105 Wn.App 974, 21 P.3d 723 (2001).....	20
Dotson v Haddock 46 Wn.2d 52, 54, 278 P.2d 338 (1955).....	21
Winter v Mackner 68 Wn.2d 943, 945, 416 P.2d 453 (1966).....	21
Miniken v Carr 71 Wn.2d 325, 328, 428 P.2d 716 (1967).....	21
Kamla v Space Needle Corp. 147 Wn.2d 114, 125, 126, 52 P.3d 472 (2002).....	19,21
Coleman v Hoffman 115 Wn.App 853, 64 P.3d 65 (2003).....	21
Gildon v Simon Property Group, Inc. 158 Wn.2d 483, 495, 496 145 1196 (2006).....	21
Fitchit v Buchannan 2 Wn.App 965, 972, 472 P.2d 623 (1970).....	22
Ingersoll v Debartolo, Inc. 123 Wn.2d 649, 655, 869 P.2d 1014 (1994).....	22
Mucsi v Graoch Assocs. Ltd P'ship No. 12144 Wn.2d 847, 855, 856, 31 P.3d 684 (2001),.....	23
Geise v Lee 84 Wn.2d 866, 529 P.2d 1054 (1975).....	23
IWAI v State 129 Wn.2d 84, 91 915 P.2d 1089 (1996).....	23

Lian v Stalick 115 Wn.App 590, 62 P.3d 933 2003).....	24
Gregoire v City of Oak Harbor 170 Wn.2d 628, 636, 244 P.3d 924 (2010).....	25
Home v North Kitsap School District 92 Wn.App 709, 965 P.2d 1112 (1998).....	26
Barrett v Lowe’s Homecenters, Inc. 179 Wn.App 1, 6, 324 P.3d 688 (2013).....	26
Kirk v Washington State University 179 Wn.App 1, 6, 324 P.3d 688 (2013).....	26

**Regulations, Rules and Statutes**

RCW 49.17.020 (4).....	16
RCW 49.17.020 (5).....	16
RCW 49.17.020 (8).....	16
RCW 49.17.010.....	18
RCW 11.48.020.....	12, 14,15, 24-27
Washington’s Residential Landlord Tenant Act, Chapter 59.18 RCW. ....	25
RCW 59.18.060 cited in <i>Lian</i> supra, at 598.....	25

**OTHER**

62 AM JUR 2d, Sct.8.....	21
Restatement (second) of Torts Sect. 328E (1965).....	22

## **I. STATEMENT OF THE CASE**

On November 21, 2014, the Honorable Laura Inveen, Judge of the King County Superior Court, entered an Order of Summary Judgment in favor of the Defendants Theodore Parsons, Personal Representative of the Estate of Helen Parsons, and the Estate of Helen Parsons. CP 153-154. At issue generally, was the question of what duty of care, if any, was owed to Christopher Parsons, appellant, indicating liability for injuries sustained in his fall from the roof of what is described as the “ranch house” belonging to the Defendants on the date April 4, 2011. CP 144-146. At Summary Judgment the parties sparred over definition of the relevant relationship of the parties, including those of landlord to tenant, employer to employee, general contractor to subcontractor, and land owner or possessor of land to an invitee. Additionally, the Defendants proposed that in the circumstances of the case, the affirmative defense of assumption of the risk of injury applied.

The definition of the relationship, and extrapolation of standards relating to any duty flowing from the relationship depends on the facts of case. The facts set out below are either agreed upon or may reasonably be inferred from the evidence presented to the trial court.

On April 4, 2011, Christopher Parsons fell from the roof of the Parsons’ property, referred to as the “ranch house,” located at 19612 NE 133<sup>rd</sup> Street, Woodinville, Washington. CP 145. The house belonged to the Estate of Helen

Parsons, his grandmother. (Id.) The personal representative of the Estate of Helen Parsons is Theodore Parsons III. CP36-38.

Christopher Parsons was living at the Parson's ranch house as a beneficiary and heir of the Estate, and, according to the parties was a vaguely-described caretaker/tenant for the Estate. CP 2; 38, 39. This characterization is muddied by what appears to be a denial of that status in Defendants' Answer to the Complaint. CP 5. Christopher Parsons was not paid to be a caretaker. CP 38. However dysfunctional the relationship, the right of control of the administration of the Estate and the maintenance of the properties of the Estate, remained the responsibility of Theodore Parsons III, personal representative of the Estate. CP36-48. In July, 2012, the Estate evicted Christopher Parsons from the Parsons property, giving him notice of termination of his tenancy, which articulated his status as tenant from month to month. CP 128.

On the day of his fall, Christopher Parsons had climbed the roof to repair a leak which was spilling into the living quarters of the home. CP 145. He was placing a tarp over one of the leaking areas of the roof to cover the area where the leak was damaging a piano in the living room, when he fell from the roof. CP 145.

Approximately two weeks before he attempted to make repairs on the roof, Christopher Parsons had told Theodore Parsons III that the home needed professional roofing repair. CP 145. The debilitated state of the roof was known

to Defendants for a long time for reason that trees had fallen on the roof causing damage which was only partially repaired through insurance. CP 145

Christopher Parsons was not a professional roofer. CP 145. Nonetheless, Theodore Parsons III told Christopher Parsons to make the repairs by himself, without any show of concern for the safety of the repairs, the cost of the repairs, or the manner of repairs. In the materials submitted by the defense, Christopher Parsons reports: "I followed my brother's instructions and climbed up on the roof". CP 119. The result was Christopher Parsons' fall and substantial injury to him. He remains injured and in need of further medical care. CP 145, 120.

Aside from his statutory responsibilities as personal representative of the estate, and aside from his responsibilities for maintaining and preserving the habitability of the estate, Theodore Parsons III was trustee of a trust set up by Lucile Parsons, his mother; Christopher Parsons was the beneficiary. CP 144-145; 37. The terms of the trust gave Theodore Parsons III the authority to make monetary disbursements appropriate to Christopher Parsons' condition. Christopher Parsons received \$800 per month from the trust. CP 144-145. The trust monies were handled by an agency called Outlook Services, hired by Theodore Parsons III. Id.

The trust was of little assistance in contributing to Christopher Parsons' recovery from his fall. CP 120.

## ARGUMENT

### 1. Principles Applicable to Summary Judgment

An appellate court reviews a summary judgment in the same manner as the trial court. *Smith v Safeco Insurance Company*, 150 Wn.2d 478, 483, 78 P.3d 1275 (2003). In the summary judgment context, the movant bears the burden of establishing the absence of a genuine dispute regarding any material fact. *Folsom v Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998).

In assessing a motion for summary judgment, the Court must view the facts in a light most favorable to the non-moving party, in this instance, Christopher Parsons. *Homeowners Association v. Tydings*, 72 Wn.App 139, 864 P.2d 392 (1993). All reasonable inferences from the evidence must be drawn in favor of the non-moving party. *Tabak v State*, 73 Wn.App 691, 870 P.2d 1014 (1994).

A summary judgment of dismissal of this lawsuit is sustainable only if there are no genuine issues of disputed material fact. *Homeowners*, supra at 154. The party resisting summary judgment must present some evidence, even inconsistent evidence, which will support the existence of a material issue of fact. *Yuan v. Chow*, 92 Wn.App. 137, 960 P.2d 1003 (1998); *Barnes v. McLennon*, 128 Wn.2d 563, 810 P.2d 469 (1996). Where issues of fact are presented, a court may not decide a factual issue unless reasonable minds can reach only one conclusion from the evidence presented. *Hooper v. Yakima County*, 79 Wn.App. 770, 904 P.2d 1183 (1995).

**2. The trial court should have permitted amendment of the complaint to add the legal theory of the personal representatives duty owed the Plaintiff.**

Plaintiff alleged, “among others” in his Complaint, the three claims upon which the defendants based their Motion for Summary Judgment. CP 1-3; 11-35. Christopher Parsons’ response to the summary judgment motion addressed the duty of care owed Christopher Parsons by the Estate. CP131-43; 155-165. It is submitted that the personal representative’s obligations were placed in controversy by the defendant-movant’s evidence, and that, therefore, no amendment to the pleading was required. Alternatively, it is submitted that a motion to add a legal theory asserting the duty owed by the personal representative of the Estate, should have been granted. The trial court denied the amendment specifying a breach of the personal representative’s duty as “procedurally out of order”. CP 154.

Washington courts are traditionally lenient in allowing amendments to a complaint. This is so even in circumstances where a trial date is approaching. *Karlberg v. Ottoen*, 167 Wn.App 522, 280 P.3d 1123 (2012). It has been held that delay in amendment, by itself, is insufficient basis for purposes of denying an amendment. *Herron v Tribune Publishing Co.*, 108 Wn.2d 162, 736 P.2d 248 (1987).

Fundamental to the question of permitting amendment of a pleading is assessment of whether or not there is surprise to the adversary, or prejudice to his presentation of evidence. It has been stated that “the touchstone for denying an amendment of a Complaint is the prejudice such amendment will cause the non-moving party.” *Haselwood v Bremerton Ice Arena, Inc.* 137 Wn. App 872, 889, 155 P.3d 952 (2007); *Wilson v Horsley*, 137 Wn.2d 500, 505, 506, 974 P.2d 316 (1999). Where litigation has begun involving particular conduct or transactions, the adding of an additional legal theory, without effecting new evidence or new parties, is generally permissible. *Stansfield v Douglas County*, 146 Wn.2d 116, 122, 43 P.3d 498 (2002). A trial court’s decision with regard to a motion to amend a complaint is directed to the discretion of the court; but it must be based on tenable grounds or tenable reasons. *Watson v Eward*, 165 Wn.App 691, 698, 267 P.3d 1048 (2011).

In this case, it is a given that Theodore Parsons III was a personal representative of the estate of Helen Parsons. An amendment, were it necessary to abet injection into the litigation of a claim of violation of the personal representative’s duties owed Christopher Parsons, addressed a legal theory of liability. This did not implicate a need for new witnesses or new evidence. Trial date was in February of 2015, more than two months away from the hearing. It is submitted that if an amendment were needed for these purposes, the amendment should have been allowed.

Civil Rule 15 (a) provides that leave to amend, “shall be freely given when justice so requires.” CR15 (a). As has been indicated, the Civil Rules are intended to facilitate proper decisions on the merits, to provide all parties with adequate notice of the basis for claims that have been asserted against them, and to allow amendment of the pleadings except where amendments would result in “prejudice to the opposing party.” *Herron*, supra at 165-168.

The effect of an amendment, or the allowance of Plaintiff’s argument at summary judgment, was simply to present a legal theory relating to the duties of the defendants in this case. It is submitted, whether by permitting amendment, or simply by allowing full argument upon the issues generated by the litigation, the duties of the personal representative were intrinsic to the claims and defenses in the case, and should have been considered at the summary judgment hearing.

**3. Theodore Parsons III, Personal Representative of the estate breached duties to maintain habitability of the estate and maintenance of tenantable premises which were owed Christopher Parsons.**

A trustee and an administrator of a trust or an estate has a fiduciary duty owed its heirs and beneficiaries. *Allard v. Pacific National Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983). A trustee owes to its beneficiaries the highest degree of good faith, care, loyalty, and integrity. *Esmieu v Schrag*, 88 Wn.2d 490,498,563 P.2d 203 (1977). The duty of the trustee to manage the assets of

the beneficiaries would include preserving the structural integrity of the assets such as the Parsons family home. The executor of an estate is entitled to possess and control the estate property during the administration of the estate and has a right to that possession even against other heirs. RCW 11.48.020

Theodore Parsons III was a personal representative of the estate of Helen Parsons. That status imposes a fiduciary duty owed to heirs and beneficiaries of the estate. A fiduciary duty is described as a relationship wherein one may expect another to care for his interests. *Liebergesell v Evans*, 93 Wn.2d 881-889, 613 P.2d, 170 (1980). Theodore Parsons' unremitting neglect to attend to the duties of maintenance of the Parsons house, diminished an asset of the heirs and beneficiaries and would seem to establish a breach of that fiduciary duty. RCW 11.48.020: Personal Representative's duty to maintain "tenantable repair" of premises. Not only was Theodore Parsons III the personal representative of the Parsons Estate, but he was also charged with the duties of trustee of a trust for the care and maintenance of Christopher Parsons. CP 144-145, 37, 120. Genuine issues of material fact exist as to whether or not by ignoring Christopher Parsons' entreaties for repair of the roof, Theodore Parsons III breached his duties as trustee of the trust created for the benefit of Christopher Parsons.

The personal representative has the right to immediate possession of estate property even against other heirs. RCW 11.48.020. The personal

representative has the responsibility to maintain the estate in “tenantable repair”:

“Every personal representative shall, after having qualified, by giving bond as hereinbefore provided, have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his or her control.”

RCW 11.48.020

**4. An employer-employee relationship between the parties existed under WISHA regulation or the common law so as to impose a duty to maintain a safe workplace at the site of the fall of Christopher Parsons.**

The Complaint asserted a claim of violation of workplace safe regulations under statute of the common law. CP 1-3. For purposes of the Washington’s Industrial Safety and Health Act, hereinafter WISHA, an “employer” is defined as:

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

RCW 49.17.020 (4)

An “employee” of an employer is one defined as:

“employed in the business of his or her employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is her or her personal labor for an employer under this chapter whether by way of manual labor or otherwise.”

RCW 49.17.020 (5)

The definition of “workplace” applicable to these statutes is set forth:

‘any plant, yard, premises, room, or other place where an employee or employees are employed for the purposes of labor or a service over which the employer has access or control and includes, but is not limited to, all workplaces covered by industrial insurance under Title 51.’”

RCW 49.17.020 (8)

Washington’s safety statutes impose non-delegable duties on an employer. *Tauscher v Puget Sound Power and Light Company*, 96 Wn.2d 274, 635 P.2d 426 (1981). Should WISHA regulations not apply strictly to an administrator of an estate and its personal representative, those statutes can establish relevant evidence of standards of care bearing upon general issues of negligence.

In their argument against WISHA application, Defendants relied almost exclusively on the holding in one case, *Rogers v. Irving*, for the proposition that the personal representative and estate of Helen Parsons cannot be an “employer” as defined in WISHA statutes. *Rogers v. Irving*, 85 Wn. App 455, 933 P.2d 1060 (1997). In that case, the homeowner, Mr. Irving, hired an independent professional contractor to construct a roof to his home. While working on the

roof, the independent contractor slipped and fell off the roof, suffering injury. The *Rogers* court found that because defendant Irving was a home-owner, hiring professional workers to build his home, for purposes of “pursuing his own personal benefit,” he was not engaging in an activity for “gain or livelihood,” and therefore he was not an employer under WISHA definitions. *Rogers supra* p 463. Because the home-owner was not an “employer” under WISHA definition, he was not held to owe a duty of care to the independent contractor.

Defendants’ arguments in the present case assign to Defendants the status of homeowner and to Christopher Parsons the status of an independent contractor. As personal representative, Theodore Parsons owed duties to the heirs and beneficiaries of the estate. RCW 11.48.010 and 11.48.020 He received fees for this work, tantamount to a business activity. Christopher Parsons had no contract, and his skill and knowledge of roofing did not exceed those of the personal representative. The disparity of specialized skill and knowledge between that of the employer and that of an employee is a cardinal liability-reducing factor for the employer. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 476, 296 P.3d 800 (2013). No such disparity existed in the present case.

Washington courts hold that a jobsite owner has a statutory duty to prevent WISHA violations, if he retains control over work done on a jobsite. *Afoa v. Port of Seattle*, 176 Wn.2d, 470, 296 P.3d 800 (2013). WISHA legislation was enacted to assure “safe and healthful working conditions for

every man and woman working in the State of Washington...” RCW49.17.010. Its provisions are expansive, commensurate with its purpose. There are two kinds of duties imposed by these statutes: a “general duty” to maintain a workplace free from recognized hazards, a duty which runs only from an employer to its employees. *Goucher v J.R. Simplot Co.*, 104 Wn.2d 662, 671, 709 P.2d 774. And there is also a “specific duty” for employers to comply with WISHA regulations. *Id.* The specific duty runs to any employee who may be harmed by the employer’s violations of safety rules *Afoa supra* at 471. The duty of a jobsite owner exists if he retains control over the manner in which his contractors complete their work. *Afoa supra* at 472. In this case the personal representative retained control over the manner in which the roof was repaired; this is evident by his rejection of the request for a professional roofer and his instruction to Christopher Parsons climb the roof and do the work himself. Deficient exercise of control does not nullify the existence and import of a right of control.

Under WISHA regulation, and conventional analogues to the “specific duty” described above, no employer-employee relationship is required. *Afoa supra* at 473. *Goucher v J.R. Simplot Co.* 104 Wn.2d 662, 673, 709 P.2d 774 (1985). If there is a genuine dispute over the degree and efficacy of control exercised by the Defendants over Christopher Parsons, summary judgment is inappropriate. *Afoa, supra*, at 474. At issue is the right of control of the

workplace, not the actual exercise of control. *Kamla v Space Needle Corp.*, 147 Wn.2d 114, 120 52 P.3d 472 (2002)

Under the common law's safe workplace doctrine, landowners and general contractors who retain control over a work site have a duty to maintain safe work areas. *Afoa*, supra at 475; *Kelley v Howard S. Wright Construction Co.*, 90 Wn.2d 323, 331-332, 582 P.2d 500 (1978). This doctrine is described as a rule of law which "elevates concerns for worker's safety over rigid adherence to formalistic labels and emphasizes this court's central role in ensuring the safety of our state's workers." *Afoa* supra at 476. The court in *Afoa* found that such labels as independent contractor or general contractor will not allow circumscription of the fundamental purpose of ensuring the existence of a safe workplace. *Afoa* supra at 477. The purpose of the doctrine relating to maintenance of a safe workplace is to place the safety burden upon the entity in the best position to ensure a safe working environment. *Afoa* supra at 477.

**5. The personal representative of the estate owed a duty of care as landowner, or landlord, or occupier of land so as to avoid responsibility for harm to the tenant, Christopher Parsons.**

A negligence claim requires proof of the existence of a duty owed, breach of that duty resulting injury, and proximate cause between the breach and the injury. *Tincani v. Inland Empires of a Logical Society*, 124 Wn.2d 121, 875

P.2d 621 (1994). The threshold question of whether a duty is owed the plaintiff is a question of law. *Id.* at 128. The existence of a duty may derive from statutory provisions or common law principles. *Degel v Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996). However, when the existence of a duty depends on proof of facts, which would either support or derogate from the concept of duty, summary judgment is inappropriate. *Hymas v. UAP Distribution, Inc.*, 167 Wn.App 136, 150, 272 P.3d 889 (2012). An estate may be sued by a person injured on the premises belonging to the estate. *Borka v Estate of Hoerr*, 105 Wn.App 974, 21 P.3d 723 (2001).

The extent of the duty owed by a land-owner to an individual is determined in good measure by the status, as a trespasser, licensee or invitee, of the person present on the property of a landowner. An invitee is one who is expressly, or impliedly, invited on the premises of another. *Dotson v Haddock*, 46 Wn.2d 52, 54, 278 P.2d 338 (1955). An invitee's status can be implied from prior conduct and statements of the property possessors or their agents. *Winter v Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453 (1966). The scope of an invitation, and duties attendant on the invitation, depends upon what the invitee is to do on the premises, as well as where the invitee may reasonably be foreseen to go. *Botka*, *supra* at 983; *Miniken v Carr*, 71 Wn.2d 325, 328, 428 P.2d 716 (1967).

A landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious

nature of the danger. *Kamla v Space Needle Corp.*, 147 Wn.2d 114, 125, 126, 52 P.3d 472 (2002). A claim that Christopher Parsons subjected himself to open and obvious dangers, is attenuated, to an extent by Theodore Parsons III's direction to him to fix the roof, warranting the inference that perceived no danger in the activity of repair. Issues of foreseeability of injury or risk would be matter for consideration by the trier of fact. *Coleman v Hoffman*, 115 Wn.App 853, 859, 64 P.3d 65 (2003); citing 62 AM JUR 2d, Sct.8 "Anyone who assumes control over premises, no matter under what guise, assumes the duty to keep them in repair." See also *Gildon v Simon Property Group, Inc.*, 158 Wn.2d P.3d 483, 495,496 145 1196 (2006). *Fitchett v Buchanan*, 2 Wn.App 965, 472 P.2d 623 (1970).

Defendants have argued that one must be an actual possessor of land in order to acquire premises liability in the form of duties owed persons on the land. The defendants relied for this proposition upon the case of *Coleman v Hoffman*, 115 Wn.App 853, 64 P.3d 65 (2003). The *Coleman* case, which addresses liability issues of a "mortgagee in possession", does not limit for injuries to invitees on the land to the fact of actual physical possession. As a general proposition, "a possessor of land", when that characterization is at issue, is described:

"(a) a person who is in occupation of the land with intent to control it or, (b) a person who has been in occupation of the land with intent to control it, if no other person as subsequently occupied it with intent to control it, or (c) a person who is

entitled to immediate occupation of the land, if no other person is in possession under clauses (a) and (b)."

*Ingersoll v Debartolo, Inc.*, 123 Wn.2d 649, 655, 869 P.2d 1014 (1994), citing Restatement (second) of Torts Sect. 328E (1965). It should be beyond dispute that Theodore Parsons III and the estate of Helen Parsons had a right to immediate and exclusive possession of the Parsons property regardless of the manner in which they acted to exercise that right. RCW 11.48.20: "Right to possession and management of estate." Defendant's own evidence reflects that the estate asserting title and/or a paramount right of possession evicted Christopher Parsons from the premises in 2012. CP 39-40.

One who assumes control over premises, no matter under what guise of authority, assumes the duty to keep them in repair: *Fitchit v Buchannan*, 2 Wn.App 965, 972, 472 P.2d 623 (1970): holding that the owner of real property, assuming the right to control and manage the property, can't escape the liability for injuries to another from a defective condition by showing absence of title in himself.

To the extent that the estate is a landowner, as the estate has asserted, and that Christopher Parsons was a tenant of whatever chameleon description, the duty of care owed the invitee-tenant subjects the landowner to liability if the landowner (a) knows or by the exercise of reasonable care would discover the (hazardous) condition, and should realize that it involves an unnecessary risk of

harm to tenants; (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 the tenant against danger. *Mucsi v Graoch Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847, 855, 856, 31 P.3d 684 (2001). This standard invites resolution only of the trier of fact.

The duty of reasonable care owed an invitee comprehends an affirmative duty to inspect for dangerous conditions followed by, “such repair, safeguards, or warnings as may be reasonably necessary for a tenant’s protection under the circumstances.” *Id* at 856. In this case, Theodore Parsons III knew about the roof’s decaying condition, failed to make any inspection after 2006, and provided no instruction, guidance, or safeguards to Christopher Parsons in connection with his instruction to repair the deficient roof. A landlord’s liability for injury caused by a dangerous or hazardous condition may be established by proof that the landowner had “actual or constructive notice of the danger and the landowner failed within a reasonable time to exercise reasonable care in alleviating the situation.” *Geise v Lee*, 84 Wn.2d 866, 529 P.2d 1054 (1975).

A landowner has an affirmative duty to maintain common areas in a reasonably safe condition. *IWAI v State*, 129 Wn.2d 84, 915 P.2d 1089 (1996) To the extent that the estate is a landowner, or a landlord, and regardless of whether rent was collected from Christopher Parsons, the repair of a roof would be a repair of a common area of the tenancy.

The Defendants asserted that Christopher Parsons was a tenant of the estate, either a tenant at will or a tenant from month to month. CP 128, 123. That being so, Theodore Parsons III would be characterized as a landlord. The landlord's duty owed a tenant resides in statutory and common law. *Lian v Stalick*, 115 Wn.App 590, 62 P.3d 933 (2003). In Washington, a landlord is liable to a tenant for physical harm from a condition on the premises when evidence exists that (1) the condition was dangerous, (2) the landlord was aware of the condition or had a reasonable opportunity to arrest the condition and failed to exercise ordinary care to repair the condition, and (3) that the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute of regulation. *Lian*, supra at 595. The evidence in the case establishes that as landlord/personal representative knew that the condition of the roof was deteriorating impairing the structural integrity of the house, and the welfare of the tenant, and that he expressly declined, to exercise ordinary care to repair the condition, choosing instead to direct Christopher Parsons to fix the roof himself.

The landlord's duty owed a tenant may be found in an implied warranty of habitability or a duty created by statute or regulation. A personal representative of an estate has the statutory duty to maintain the premises of the estate in "tenantable repair", RCW 11.48.020.

A question of material fact, existed as to whether or not the condition of the roof and its need for repair fell within the personal representative's obligation to make "tenantable repair." RCW 11.48.020

An alternative statutory duty is the duty imposed upon the landlord by Washington's Residential Landlord Tenant Act, Chapter 59.18 RCW. A relevant tenancy habitability provision states:

"The landlord at all times during tenancy will keep the premises fit for human habitation and shall in particular (2) maintain the roofs, floors, walls, chimneys, fireplaces, foundations and all other good structural components in reasonably good repair so as to be usable and capable and resisting any and all forces and loads to which they may be subjected."

RCW 59.18.060, cited in *Lian* supra, at 598.

Under the holding in *Lian*, there existed a material issue of disputed fact relating to whether or not Theodore Parsons III had satisfied the landlord's duty owed to the tenant, Christopher Parsons, to keep the roof in reasonably good repair.

**6. The affirmative defense claiming voluntary and consensual assumption of risk did not bar Christopher Parsons' claims of negligence.**

The Tort Reform Act of 1986 has contributed to the reduction of the impact of assumption of risk in Washington. There are several kinds of assumption of risk recognized by Washington courts: expressed assumption of risk; implied primary assumption of risk; applied unreasonable assumption of

risk; and implied reasonable assumption of risk. *Gregoire v City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Express and implied assumption of risk apply when a plaintiff has consented to relieve the defendant of a duty regarding specific known risks. *Id* at 636. Express assumption of risk exists when a plaintiff states that he or she consents to relieve the defendant of any duty owed. *Home v North Kitsap School District*, 92 Wn.App 709, 965 P.2d 1112 (1998).

Implied primary assumption of risk, if found, may operate as a complete bar to a plaintiff's recovery. *Gregoire supra* at 636. The other forms of assumption of risk are treated now as forms of comparable fault, formerly, but no longer, contributory negligence. When a defendant's negligent acts increase the risk that a plaintiff is said to assume, that contribution impairs the argument of voluntary consent to additional risks. *Barrett v Lowe's Homecenters, Inc.*, 179 Wn.App 1, 6, 324 P.3d 688 (2013) The existence of alternative actions reasonably available to one claimed to have assumed the risk of injury, and whether the alternative available and rejected by Christopher Parsons, are matters for the trier of fact. Where the defendant's failure and a demand that the Plaintiff do the repairs for the estate, failure to repair the roof or to provide requested professional help to repair the roof, was a cause of damages to the plaintiff, the doctrine of implied employed primary assumption of risk is not appropriate to bar complete recovery by the plaintiff. *Kirk v Washington State*

*University*, 109 Wn.2d 448, 455, 746 P.2d 285 (1987). It is properly an analysis made by the trier of fact.

### **CONCLUSION**

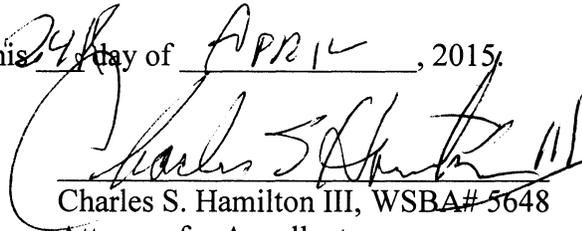
Whether or not repair of the roof of the Parsons ranch-house constituted an open and obvious danger is an issue which should be assessed by the trier of fact. The evidence adduced at summary judgment described the knowledge of Theodore Parsons III that the Parsons' roof needed repair, that Christopher Parsons had requested that the personal representative, responsible for maintenance of tenantable repair of the premises, should hire a professional roofer to address the problem of the leaking roof. For undisclosed reasons, Theodore Parsons III rejected the request for a professional roofer and instead instructed Christopher Parsons to make the repairs himself. This instruction left Christopher Parsons with the unwanted choice of allowing the leakage from the roof to erode the structural integrity of the house, and to impair the habitability of the house, or to undertake the repair by himself.

It is not clear why during the several years before Christopher Parsons' fall, the ranch-house was left in studied disrepair. Nonetheless, regardless of the particular identification of the legal relationship between Theodore Parsons III, personal representative of the estate and Christopher Parsons, it is submitted that a duty of care was owed to Christopher Parsons, a duty founded upon the

responsibility of Defendants for maintaining the integrity of the Parsons premises and the responsibility to avoid perpetuation of an unsafe and debilitating condition on the premises, jeopardizing the security of individuals living on the premises.

For the reasons set forth above, it is respectfully submitted that material issues of disputed fact remain in controversy and that the Order Granting Summary Judgment by the trial court should be reversed and that this matter should be set on for trial.

DATED this 24<sup>th</sup> day of April, 2015.



Charles S. Hamilton III, WSBA# 5648  
Attorney for Appellant