No. 95459-3

SUPREME COURT
OF THE STATE OF WASHINGTON

COA NO. III-344495

JOHN and LORI EDWARDS, a marital community,

Plaintiffs/Respondents,

v.

COLVILLE MOTOR SPORTS, INC., a Washington Corporation,

Defendant/Petitioner,

ANSWER TO AMENDED PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF CASES

I. IDENTITY OF RESPONDENTS

John and Lori Edwards, husband and wife, the Respondent's herein, are the Plaintiff's in the personal injury claim against Colville Motor Sports (hereinafter "CMS"), and submit this Answer to the Amended Petition for Review. Respondents respectfully request this Court to deny review of the Court of Appeal's decision designated in Appendix A of this Answer.

II. COURT OF APPEALS DECISION

Division III of the Court of Appeals, without oral argument, filed its unpublished decision in favor of the Respondents John and Lori Edwards, husband and wife on December 19, 2017. A copy of the Court of Appeals decision is appended hereto as Appendix A.

The Court of Appeals reversed a jury verdict in favor of CMS in which the jury specifically found that CMS was negligent and that CMS's negligence was the proximate cause of the injuries to the Plaintiffs, John and Lori Edwards. However, the jury then found that John and Lori Edwards were barred from collecting damages based upon the inappropriately instructed Doctrine of Implied Primary Assumption of the

Risk. The Court of Appeals remanded the case for re-trial and instructed the trial judge to apportion fault based on the contributory fault instruction.

III. CONSIDERATION FOR REVIEW NOT MET

The Amended Petition for review filed on behalf of CMS, does not meet the considerations governing acceptance of review by this Court as outlined in RAP 13.4(b), for the following reasons:

(1) The unpublished opinion of the Court of Appeals in the present matter is not in conflict with a decision of the Supreme Court;

(2) The unpublished opinion of the Court of Appeals in the present matter is not in conflict with a published decision of the Court of Appeals;

(3) The Petition contains no significant question of law under the Constitution of the State of Washington or the United States; and

(4) The Petition does not involve any issues of substantial public interest that should be determined by the Supreme Court

The current Amended Petition for Review is simply a restatement of the arguments made at trial. Those arguments led to the improper and erroneous application of the Implied Primary Assumption of the Risk,

rather than the application of Comparative Negligence and the improper summary dismissal of the Edwards' general negligence claim.

IV. INTRODUCTION

This case involves catastrophic and permanent personal injuries suffered by the Respondent John Edwards on May 31, 2011, on the business property occupied by CMS in Colville Washington. Mr. Edwards was injured when his 800 lb. all-terrain vehicle ("ATV") flipped over backwards, landing on top of him, while it was being loaded on to his pickup truck. The CMS facility includes a retail/maintenance/garage and a large paved customer parking lot, which is uneven and slopes downhill. CMS, which sells, services and repairs ATV's had no loading ramp or dock and no alternative to load and unload ATV's in front of their facility on the unlevel parking lot.

V. STATEMENT OF THE CASE

John Edwards purchased a 2011 Polaris Sportsman 400 ATV from CMS for his wife Lori for Christmas 2010. The ATV was transported by CMS to the Edwards' home and it was unloaded from the truck by a CMS employee. Transcript Vol. III, p. 450, Ln. 2-10. The Edwards' also purchased a "tri-fold" folding metal 6-foot ramp from CMS for the

purpose of loading and unloading the ATV on to a truck for transport. Transcript Vol. III, p. 455, Lines 3-17.

John Edwards estimates that he rode the ATV four or five times to and from the mailbox at the end of his driveway in the five months he owned it. Transcript Vol. III, p. 452-53. He had no prior experience operating an ATV. Transcript Vol. III, p. 449, Lines 2-5.

The CMS dealership sits on a hillside and includes a retail/maintenance/garage facility, a fenced-in area for storage and a large customer parking lot which slopes in a lateral and downhill direction. Ex. P37. The CMS customer parking lot has several parking spaces marked by yellow lines angled in a roughly north-south direction. Ex. P37. CMS, which sells, services and repairs ATVs at their dealership, has no loading ramp or dock and no alternative to load and unload ATVs in from of their facility on the unlevel parking lot. Transcript Vol. III, pp. 550-51.

In May 2011, John Edwards loaded the Polaris ATV on to his Dodge Ram pickup truck at home on a level surface. Transcript Vol. III, p. 456. This was the only time he had ever loaded an ATV. Transcript Vol. III, p. 463, Lines 1-3. He utilized the metal tri-fold ramp, which he purchased from CMS. Transcript Vol. III, p. 455. The next day John

dropped off the ATV at CMS on his way to work. Transcript Vol. III, p. 456-57. An unnamed CMS employee unloaded the Edwards' ATV from the Edwards' truck at the CMS parking lot for its first scheduled maintenance. *Id.*

CMS contacted the Edwards indicating that the maintenance had been performed and the ATV was ready to pick up. Transcript Vol. III, p. 458-459. On the morning of the incident, May 31, 2011, John and Lori Edwards drove their Dodge Ram pickup truck to CMS on their way home after fishing. Transcript Vol. III, p. 459, Lines 2-14. They parked in the CMS parking lot in one of the marked spots provided in front of the building. Their truck was pointed uphill toward the building. Transcript Vol. III, p. 460-61.

John Edwards paid for the service and anticipated that the ATV would again be loaded for him. Transcript Vol. III, p. 460, Lines 20-24. The CMS employee, William Harris, drove the Edwards' Polaris ATV from the maintenance area and parked the ATV a few feet behind the Edwards' truck. Transcript Vol. II, p. 362, Lines 15-19. Mr. Harris assisted John Edwards in hooking up the tri-fold ramp to his pickup truck. Transcript Vol. II, p. 358, Lines 12-19. When asked whether any warnings

were given to Mr. Edwards, Mr. Harris testified, "No, I really didn't." Transcript Vol. II. P. 356, Lines 12-15, p. 357 Lines 6-10, and p. 383 Lines 9-18.

Mr. Harris got off of the ATV, expecting Mr. Edwards to drive it up the ramp and on to his truck. Transcript Vol. II, p. 364 Lines 6-13. Mr. Edwards was surprised at being asked to load it himself. Transcript Vol. III, p. 460 Lines 20-23. Lori Edwards, who was standing next to the truck, said to her husband John, "Hon, I don't think this looks safe." Transcript Vol. I, p. 185, Lines 5-6. John Edwards then asked the CMS employee William Harris, "Should I turn my truck around?" (to point it in a downhill direction). Transcript Vol. III, p. 463, Lines 12-24. Mr. Harris replied "No. We do this all the time. I don't think it makes much difference." Transcript Vol III, p. 464, Lines 1-2; Transcript Vol. II, p. 362, Lines 11-13.

Mr. Harris testified that ATVs are routinely loaded and unloaded by employees of CMS using portable ramps right out in front of the door where Mr. Edwards' truck was parked on the day in question. Transcript Vol. II, pp. 354-55. He said it happens all the time, and he personally loads ATVs at that very spot on to pickup trucks using the types of ramps sold to and utilized by John Edwards. *Id*. Mr. Harris was asked if it was the policy

for CMS to ask customers if they wanted someone else to load their ATV, and he indicated "it is not. It is just whatever the customer wants." Transcript Vol. II, p. 355, Lines 16-20. Yet, Mr. Harris admitted that Lori Edwards asked him (Mr. Harris) to load the ATV. Transcript Vol. II, p. 355, Lines 16-20. He replied that he had very little experience. *Id.* Lori told Mr. Harris, "Well, you know, he (John) doesn't really have any experience." Transcript Vol. II p. 363 Lines 16-23. Mr. Harris replied, "Well, I probably have less." That was untrue. *Id.*

The Polaris ATV Safety Manual provided to John Edwards by CMS upon purchase warns riders to avoid steep hills exceeding a 25-degree grade. Ex. P42, Atty Bates No. 02858. When asked if Mr. Harris could look at a hill and tell if it exceeded a 25-degree grade, he responded, "No, I could not..." Transcript Vol. II, p. 366, Lines 2-5. He testified that he did not know the degree of the slope on the CMS parking lot. Transcript Vol. III, p. 551 Lines 4-14.

There is no level spot on the parking lot and CMS has no loading dock. Transcript Vol. II, p. 350 Lines 3-9. There are no warning signs at CMS. Transcript Vol. III, p. 550 Lines 5-7. Ex. P37.

Mr. Harris testified that if he, as a CMS employee, felt uncomfortable loading an ATV on to a truck he would go inside and get another employee more experienced that he to load it. Transcript Vol. II, p. 354-55. He did not do the same for John Edwards or suggest it.

After Mr. Harris's refusal to load the ATV, John Edwards started driving it up the 6-foot ramp with Lori, his wife and Harris standing next to him. Transcript Vol. III, p. 465 Lines 4-13. She testified that John "maintained a steady throttle...and when he got to the top he stood up and gravity pulled it back on him." Transcript Vol. I, p. 187, Lines 6-12. She witnessed her husband's horrible injury. *Id.* John received a Life Flight to Sacred Heart Hospital in Spokane. Transcript Vol. I, pp. 189-90.

The Plaintiffs employed forensic engineer, William Skelton, who examined and analyzed the CMS parking lot, the ramps, and pickup truck involved in this incident. He testified that slope the slope of the ramp on the CMS parking lot was 69.5 percent, which equals 35 degrees. Transcript Vol. II, p. 275, Lines 10-15. This exceeded the maximum incline specified by the Polaris manual by 40 percent. *Id.*

Mr. Skelton's investigation determined that if John Edwards' pickup truck had in fact been turned around to point downhill, the ramp

would have presented only a 26-degree incline. Transcript Vol. II, p. 275, Lines 10-15. This would be only one degree above the 25-degree maximum allowed by Polaris. Ex. P42.

Mr. Skelton testified that based on his professional opinion and his examination of the location, the loading spot provided by CMS was unreasonably dangerous for any inexperienced ATV rider like John Edwards. Transcript Vol. II, p. 284 Lines 3-17. Mr. Skelton testified, "That parking lot is definitely not safe for an inexperienced driver to load an ATV using a 6-foot ramp into the back of the pickup truck the way this one was situated." *Id.* Mr. Skelton testified that CMS should have warned Mr. Edwards regarding the dangerous situation, and further testified that CMS employees themselves who are experienced should load and unload ATVs for any inexperienced driver like John Edwards. Transcript Vol. II, p. 290-91.

As a result of his injuries, John Edwards was placed in a medically-induced coma for more than five days; suffered a punctured lung, shattered jaw, fractured eye socket, broken shoulder, and six broken ribs; and his face was crushed. See Transcript Vol. III, p. 467-68. He underwent ten surgical procedures to repair his shattered jaw; he lost teeth,

which are still being replaced with implants seven years later; half of his tongue is numb, with absolutely no feeling due to permanent nerve damage, causing great difficulty eating. His lip is without feeling as well, causing him to drool. His jaw was wired shut for more than two months and he had a to carry wire cutters with him at all times, in case he was to vomit from the medication he was taking, which could have caused him to choke to death. Transcript Vol. III, p. 471-72. He is a choke risk to this day and had to attend "swallow school." Transcript Vol. III, p. 473. He had to attend speech therapy to avoid spitting while he talked, but his speech is affected still. Transcript Vol. III, p. 476. He lost the ability to taste food. His medical expenses exceed $350,000.00 and are continuing.

VI. LEGAL ARGUMENT

1. The Court of Appeals Properly Ruled that the Trial Court Should Not Have Instructed the Jury on Implied Assumption of Risk.

A trial court's ruling on whether to give a jury instruction is reviewed *de novo* to determine whether the instruction is erroneous, and whether the error prejudiced a party. Stevens v. Gordon, 118 Wn.App. 43, 74 P.3d 653 (Div. 3. 2003).

Washington recognizes four categories of assumption of the risk, "(1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable." Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 143, 875 P.2d 621, 633 (1994). The first two categories – express and implied primary, continue to act as a complete bar to recovery. Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Implied unreasonable and implied reasonable, on the other hand, have been subsumed into contributory negligence and merely reduce plaintiff's recoverable damages based on comparative fault. Gleason v. Cohen, 192 Wn.App. 788, 795, 368 P.3d 531 (2016) (citing Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 397, 834 P.2d 6 (1992)).

The court in Dorr v. Big Creek Wood Prods. Inc., 84 Wn.App. 420, 425-26, 927 P.2d 1148 (1996), appropriately cautioned that courts must carefully distinguish between the two types of assumptions of risk. The court explained:

> 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.

The doctrine of implied primary assumption of risk is based on the notion that plaintiff impliedly agrees that the defendant owes *no duty* to the plaintiff regarding certain risks. Gleason, 192 Wn.App. at 795; Kirk, 109 Wn.2d 448, 453, 746 P.2d 285, 288 (1987).

Implied primary assumption of the risk requires proof that, "the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk." Kirk v. Washington State Univ., 109 Wn.2d at 453. "Put another way, the plaintiff "must have knowledge of the specific risk, appreciate and understand its nature and voluntarily choose to incur it." *Id.* The Washington Supreme Court in Scott made it clear that implied primary assumption of risk means that "the plaintiff assumes the dangers that are inherent in and necessary to" a particular activity. 119 Wn.2d at 500-01. Importantly, *implied primary assumption of risk does not apply if the defendant engages in negligent acts that increase the inherent risks of an activity.* Gleason, 192 Wn.App. at 798.

The uncontested evidence at trial showed that the following acts of CMS employees were negligent and created additional risks not inherent in loading the ATV:

1) Defendant's employee, William Harris drove Plaintiffs' ATV from the back shop to behind Plaintiff's truck and loading ramp and parked it "maybe two, three feet from the back of the ramps." Transcript Vol. II, pg. 362 ln. 15-19.

Defendant's expert, Bill Uhl, testified that two to three feet of room is not sufficient space to load the ATV on the truck. Transcript Vol. IV, p. 725, ln. 10-18.

2) Plaintiff Lori Edwards asked William Harris if he would load the ATV and he said "no, I'm not comfortable loading," because he did not have experience. Transcript Vol. II, p. 364, ln. 10-11.

3) John Edwards asked if they should turn their truck around, thinking a downward facing truck would reduce the angle of the ramp. Transcript Vol. III, p. 463, ln. 20-24.

Defendant's employee, William Harris, responded by saying "No, nah, we, we do this all the time." Transcript Vol. III, p. 464 ln 1-2. Mr. Harris continued "I don't think it [turning the truck around] makes much difference." Transcript Vol. II, p. 362, ln. 8-14.

But in fact, turning the truck around would have made a 40 percent difference in the angle of the ramp. Transcript Vol. II, p. 275, ln. 10-15.

4) William Harris testified at trial that when loading an ATV at the spot where the Plaintiff's truck was parked on the day of the incident, required leaning one's body out over the handlebars to prevent flipping over. That procedure is not referenced in the ATV handbook, nor did Mr. Harris inform John Edwards of that safety requirement.

The Court of Appeals in the present case, specifically identified the negligence of the CMS employee which created additional risks which could not be impliedly assumed by John Edwards. The Court of Appeals declared beginning on p. 16, the following:

> "These facts do not support the notion that Mr. Edwards was fully informed of the relevant risks and consented to relieve CMS of its duty to provide a reasonably safe premises. Rather, Mr. Harris's assurances caused Mr. Edwards to believe the risk he was about to take was minimal or nonexistent. In addition, there was no evidence that Mr. Edwards was informed of the risk posed because of the ATV's close proximity to the ramps and the need for rapid acceleration of the ATV up the ramps."

The Court of Appeals noted that CMS argued that Mr. Edwards had a "full understanding of the risk" based upon his ability to see the parking lot slope and having read the owner's manual which described risk associated with "hill climbing". However, neither the CMS employee, William Harris nor the owner of CMS had knowledge of the degree of

slope of the CMS parking lot, or that it exceeded the owner's manual for loading by 40%. The Court of Appeals, beginning on p. 17, declared the following:

> "We agree that Mr. Edwards understood that there was some risk involved in loading his ATV into his truck, given the steep slope of the ramps. But we disagree that the risk here was sufficiently obvious that Mr. Edwards should be found to have consented to the risk so as to relieve CMS of its duty. If the risk was so obvious, it should have been obvious to Mr. Harris. But it was not. Rather than telling Mr. Edwards that the steep angle of the ramps created a risk that the ATV would flip while being loaded, Mr. Harris allayed Mr. Edwards' concerns. Mr. Harris assured Mr. Edwards that ATVs were loaded into trucks there all the time and that turning the truck around would not make much difference. In an extreme case, the risk an ATV will flip is obvious. This is not an extreme case. For this reason, the trial court erred in instructing the jury on implied primary assumption of risk.

2. The Court of Appeals Properly Ruled that the Trial Court Erred by Granting Defendant's Motion for a Directed Verdict Dismissing Plaintiffs' General Negligence Claim.

The standard of review of the granting of a judgment as a matter of law is de novo. Weber Const., Inc. v. County of Spokane, 124 Wn.App. 29, 98 P.3d 60 (Div. III 2004); see also, Mega v. Whitworth College, 136 Wn.App. 661, 668, 158 P.3d 1211 (2007). A directed verdict will be overturned on review when the trial court, in directing the verdict, errs in interpreting the substantive law. Gibson v. City of Tacoma, 60 Wn.App. 26, 803 P.2d 1 (Div. II 1990). The trial court in the present case

misconstrued the law by deciding that the Defendant could have no duties to the Edwards, other than that of an owner or occupier of land, and that premises liability excluded duties not to misinform or to deceive, which would support claims of general negligence.

A motion for judgment as a matter of law admits the truth of the opponent's evidence and all inferences that can be drawn from it. Mega v. Whitworth College, 136 Wn.App. 661, 668, 158 P.3d 1211 (2007).

> Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the non-moving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. (Emphasis Added).

Id. If any admissible evidence exists on which reasonable minds might reach conclusions consistent with the claim, the issue is for the jury. *Id.*

At the end of the Plaintiffs' case in chief, Defendant CMS filed a Motion for Judgment as a matter of law on the Plaintiffs' claim of general negligence. The Defendant argued to the Court on page 74 the following:

> The WPI, I can't point to it on the tip of my fingers, but that's what it says is that you have to prove that the injury or event was caused by the negligent act. And, so, what we have here is the negligent act allegedly being the defective parking lot…

Following argument, Judge Nielsen stated on page 755, the following:

> Well, you know, I guess I could say I think it's clear that Mr. Harris, if he just was not an employee and he was standing there and, and he saw what was about to happen, would he have any obligation, duty to do anything, and he would not. He could just stand there and watch and, and…

Based on that faulty reasoning, Judge Nielsen granted the Defendant's motion to dismiss the Plaintiffs' general negligence claim as a matter of law.

However, there are additional duties owed to an invitee by an owner/occupier beyond those delineated as premises liability. The court in Dorr discusses one additional duty. In that case, both the plaintiff and defendant were experienced loggers. The plaintiff arrived at the defendant's logging location and he "stopped at the stump of a tree that had just fallen." *Id.* at 423. The plaintiff looked around for widow-makers and saw none. *Id.* The plaintiff then "walked on the log only after [defendant] gave him a hand signal indicating that it was safe." *Id.* at 429. Acting upon the defendant's hand signal, plaintiff proceeded and was struck by a widow-maker, causing severe injuries. *Id.*

The court in Dorr also noted that the plaintiff did not base his entire claim under a premises liability theory. *Id.* at 429. The plaintiff claimed in part that the defendant negligently directed him into the hazards. *Id.* "The specific duty at issue in that claim was a duty to avoid giving misleading instructions". *Id.*

Premises liability arises out of a condition on land of an owner/occupier. A general negligence claim arises out of conduct of the owner/occupier. A dangerous condition on a premises would give rise to a duty to warn invitees such as the Edwards. Giving false assurances of the safety of an activity or deceiving an invitee resulting in injury on the premises would constitute negligence.

The Edwards' negligence claim was separate and apart from the premises liability theory and focused on the negligent conduct of CMS, not just the dangerous condition of the land. A party is entitled to have the court instruct the jury on his theory of the case when there is substantial evidence to support it. Woods v. Goodson, 55 Wn.2d 687, 349 P.2d 731 (1960). Over Plaintiffs' objection, the Court directed verdict in favor of the Defendant CMS and refused to allow Plaintiffs to argue that the

Defendant was negligent, despite the substantial evidence introduced. This was reversible error.

VII. CONCLUSION

The Court of Appeals properly reversed the jury verdict in this case and remanded for a new trial. It was error to instruct on the implied primary assumption of risk in light of the conduct of the Defendant, CMS, which were separate and apart from the inherent risk of loading an ATV and which could not be impliedly assumed by the Plaintiffs. It is additionally an error to summarily dismiss the Edwards' general negligence claim in light of the substantial evidence that the conduct of the Defendant fell below the standard of care for the protection of the Plaintiffs and was negligent. There was no basis for the trial court to find that premises liability subsumes and excludes any and all claims of general negligence by an owner/occupier.

This court is respectfully requested to deny review herein.

DATED this 21 day of March 2018.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 21st day of March 2018, the foregoing Answer to Amended Petition for Review was delivered to the following persons in the manner indicated:

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TERI BRACKEN

APPENDIX

EXHIBIT A – Court of Appeals' Unpublished Opinion in Edwards v. Colville Motor Sports, Inc., No. 34449-5-III, dated December 19, 2017.

FILED
DECEMBER 19, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JOHN AND LORI EDWARDS, a marital community, Appellants. v. COLVILLE MOTOR SPORTS, INC., a Washington corporation; JOHN DOE and JANE DOE, a marital community, Respondents.	)	No. 34449-5-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — John Edwards and Lori Edwards appeal from a defense judgment following a jury trial. They assert they are entitled to a new trial based on various trial court errors. We agree that the trial court erred when it instructed the jury on implied assumption of risk and when it dismissed the Edwardses' general negligence claim. We therefore reverse the judgment and remand for a new trial.

FACTS

In December 2010, Mr. Edwards bought an all-terrain vehicle (ATV) from Colville Motor Sports, Inc. (CMS). At the time of purchase, Mr. Edwards received a

Polaris owner's manual, contract paperwork, and an operational video, which was essentially the owner's manual in video form. Mr. Edwards read and signed a document that stated:

> "Hill climbing is dangerous and should be attempted only by experienced operators. Start on shallow slopes and practice procedures described in the owner's manual before trying steeper terrain. Some hills are too steep to safely stop or recover from and [sic] unsuccessful climbing attempt. If the vehicle slides backwards downhill, apply brakes with gradual even pressure to avoid flip over."

Report of Proceedings (RP) at 500.

Mr. Edwards had never ridden an ATV before. Mr. and Ms. Edwards read the owner's manual and watched the operational video together. The manual instructed that failure to heed its warnings and safety precautions could "result in severe injury or death." Ex. 42 at 5. It also warned that "[a] collision or rollover [could] occur quickly, even during routine maneuvers like turning, or driving on hills or over obstacles, if [the rider] fail[ed] to take proper precautions." Ex. 42 at 5.

The owner's manual also contained specific instructions regarding driving uphill. It instructed the rider to "[p]roceed at a steady rate of speed and throttle opening." Ex. 42 at 51. It cautioned that "[o]pening the throttle suddenly could cause the ATV to flip over backwards." Ex. 42 at 51. It further warned that "[o]perating on excessively steep hills

could cause an overturn," and instructed the rider to "[n]ever operate the ATV on hills steeper than 25 degrees." Ex. 42 at 16.

The owner's manual also contained instructions for the rider if the ATV stalled while climbing a hill. If the ATV lost forward speed or began rolling downhill, the manual instructed riders to keep their body weight uphill, apply the brakes, and "[n]ever apply engine power." Ex. 42 at 16. The manual warned that stalling or rolling backwards while climbing a hill could cause an overturn. Mr. Edwards understood these instructions.

A CMS employee delivered the ATV to the Edwardses' home and unloaded it. Mr. Edwards noticed the deliveryperson used a ramp to unload the ATV, so he went and bought six-foot ramps for loading and unloading the ATV in the future. Mr. Edwards drove the ATV four or five times throughout the next few months, mainly to ride to and from the mailbox at the end of his driveway.

In mid-May 2011, Mr. Edwards took the ATV to CMS for its first scheduled maintenance. At home, without assistance, Mr. Edwards attached the loading ramps to the tailgate of his full-size pickup truck. He did this on a level surface. He then drove the ATV into the bed of his truck without difficulty. This was the first time he had ever

loaded the ATV. He drove his truck to CMS where an unknown employee unloaded the ATV for him.

About two weeks later, CMS called Mr. Edwards and told him the ATV was ready. On May 31, on their way home from a fishing trip, Mr. and Ms. Edwards decided to pick up the ATV.

CMS sat on a hillside. Its parking lot sloped downhill and away from the building. There was no level spot in the parking lot. Yellow lines marked parking spaces, which faced the building at an angle. There were no warning signs about the slope or how to load ATVs. CMS did not have a loading dock.

Mr. Edwards parked his truck in one of the marked spots in front of CMS, with his truck facing uphill toward the building. Mr. Edwards went inside and paid the bill. He walked back out to his truck, removed the ramps from the bed, and began getting them ready.

A CMS shop assistant, William Harris, drove the Edwardses' ATV out from the shop and parked it two or three feet behind Mr. Edwards' truck. Mr. Harris helped Mr. Edwards finish attaching the ramps to the truck's tailgate.

Mr. Edwards assumed a CMS employee would load the ATV into his truck. Both customers and CMS employees would regularly load ATVs into trucks just outside the

door of the building. The majority of customers who brought their ATVs in for maintenance would unload the ATVs themselves. However, an experienced CMS employee would load the ATV if asked, and it was up to the customers whether they wanted to load their ATVs themselves.

As Mr. Harris helped Mr. Edwards attach the ramps to the tailgate, Ms. Edwards said, "'Hon, this doesn't look safe.'" RP at 463. Mr. Edwards agreed. Ms. Edwards expressed her concerns to Mr. Harris and asked Mr. Harris if he would load the ATV into the truck.[1] Mr. Harris responded that he was uncomfortable doing so because he did not have much experience with ATVs. Typically, when Mr. Harris was uncomfortable loading an ATV, he would go get a more experienced employee to load it. Mr. Harris did not offer to go inside to get someone more experienced to load the ATV, nor did Mr. Edwards ask him to do so.

Mr. Edwards recognized that the parking lot was "[c]learly" sloped. RP at 518. Because of the slope, the Edwardses asked Mr. Harris if they should turn the truck around so it would face downhill and away from the building, thus decreasing the angle of the

[1] The parties dispute certain aspects of these discussions. These discussions are germane to the Edwardes' general negligence claim, which was dismissed by the trial court as a matter of law. Because our review of that ruling requires us to consider these facts in the light most favorable to the Edwardses, we set forth these facts favorably to the Edwardses for purposes of our review.

ramps. Mr. Harris responded, "'No, we do it right here all the time,'" and also stated that he did not think "it makes much difference." RP at 185, 362.

Mr. Edwards got on the ATV and sat in the middle of the seat. Ms. Edwards and Mr. Harris stood to the side of the truck. Mr. Edwards was not wearing a helmet, although he had one at home, and CMS had some inside. He did not ask to borrow one, nor did Mr. Harris offer one. Mr. Edwards began driving up the ramp.

Mr. Edwards did not start out with enough speed and began losing momentum as the front tires reached the tailgate. As the ATV came to a stop, Mr. Edwards hit the throttle. This caused the front of the ATV to pop up and caused the ATV's center of gravity to shift behind the rear wheels. When this happened, the ATV flipped backward and landed on top of Mr. Edwards.

Mr. Harris pulled the ATV off Mr. Edwards. Paramedics arrived and Mr. Edwards was flown by helicopter to a hospital. The ATV had broken his eye socket, shoulder, and several ribs. It also shattered his jaw, punctured his lung, and penetrated his cheek and neck. Hospital staff put Mr. Edwards into a medically-induced coma for five days. He underwent 11 surgical procedures and incurred roughly $349,000 in medical expenses. He continues to have problems swallowing, speaking, eating, and drinking.

PROCEDURE

The Edwardses filed suit, naming CMS, John Doe, and Jane Doe as defendants.[2] They asserted claims of general negligence and premises liability.

Before trial, the Edwardses moved to exclude any evidence that Mr. Edwards was not wearing a helmet when the accident occurred. They argued this evidence was irrelevant to the issue of comparative negligence because Mr. Edwards's failure to wear a helmet did not cause the ATV to flip over. They also argued this evidence was irrelevant to Mr. Edwards's failure to mitigate damages, given that CMS had not presented any expert evidence showing that a helmet would have prevented some of Mr. Edwards's injuries.

The trial court granted the Edwardses' motion to exclude any helmet evidence as it related to the issue of factual causation. However, the trial court denied the motion as it related to the issue of damages, provided that CMS could show the absence of a helmet resulted in Mr. Edwards sustaining more severe injuries than he would have otherwise. The Edwardses requested permission to voir dire any experts to determine if they had sufficient medical training to opine on whether a helmet could have prevented Mr. Edwards's injuries. CMS argued that expert medical testimony was unnecessary, and that

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[2] John Doe was later determined to be Mr. Harris.

it would be obvious for the jury that a helmet could have prevented some injuries. The trial court reserved ruling on the issue until it became ripe during the trial.

In its opening statement, CMS told the jury that Mr. Edwards was not wearing a helmet when the accident occurred, noted that Mr. Edwards's helmet had a faceguard, and asserted that a helmet would have protected him from some of the injuries. CMS further told the jury that Mr. Edwards did not ask CMS for a helmet, but rather chose not to wear one.

The Edwardses first called Ms. Edwards. On direct examination, plaintiffs' counsel asked Ms. Edwards if anyone at CMS had offered to obtain a helmet, and Ms. Edwards responded that no one had. Plaintiffs' counsel then asked if Mr. Harris had worn a helmet when he drove the ATV out from the shop, and Ms. Edwards testified that he had not.

On cross-examination, defense counsel asked Ms. Edwards if she and Mr. Edwards owned a helmet, and if they had it with them when they went to pick up the ATV. Ms. Edwards responded that they owned one, but did not bring it with them. Defense counsel asked if it was a full-face helmet that covered the wearer's neck and chin. Ms. Edwards testified it was. Defense counsel then asked where the ATV injured Mr. Edwards. Ms. Edwards testified the ATV injured his cheek and jaw area. Defense

counsel asked Ms. Edwards if her husband had instructed her to wear a helmet when she rode the ATV, and Ms. Edwards testified that he did.

The Edwardses called a forensic engineer, Dr. William Skelton. Dr. Skelton had evaluated CMS's parking lot, measured its slope, and measured the slope of the ramps while they were attached to Mr. Edwards's truck in the parking lot. Dr. Skelton testified that when Mr. Edwards's truck was parked facing uphill toward the building, the ramps had a slope of 35 degrees. He testified that when Mr. Edwards's truck was parked facing downhill away from the building, the ramps had a slope of 26 degrees.

Dr. Skelton opined that based on his experience and investigation, CMS's parking lot was not reasonably safe for an inexperienced rider to load an ATV using 6-foot ramps. However, he testified that a rider could safely load an ATV on a slope of 35 degrees, if the rider had enough experience. He further testified that an ATV parked a few feet from the ramp would not gain enough momentum to carry it over the ramps and into the pickup, but that an ATV starting from 15 to 20 feet back would.

On direct examination, plaintiffs' counsel also questioned Dr. Skelton as to whether Mr. Edwards's injuries would have been lesser if Mr. Edwards had worn a helmet. Dr. Skelton responded that he was not a biomechanical engineer or a medical doctor and was thus unqualified to opine on that subject. However, he also remarked that

a helmet would not have prevented the handlebar from penetrating Mr. Edwards's cheek, unless it was a full-face helmet.

On cross-examination, defense counsel asked Dr. Skelton whether a full-face helmet would have prevented Mr. Edwards's injuries. Dr. Skelton responded that a full-face helmet could have deflected the ATV's handlebar.

The Edwardses' last witness was Mr. Edwards. On cross-examination, defense counsel asked Mr. Edwards whether his helmet was a full-face helmet, and Mr. Edwards testified it was. He further testified that in May 2011, he owned a "modular" helmet that covered his cheeks and jawline. RP at 515. Defense counsel asked Mr. Edwards why he did not have his helmet with him when he went to pick up the ATV. Mr. Edwards testified that he and his wife spontaneously decided to pick up the ATV on the way back from a fishing trip. Finally, defense counsel asked whether Mr. Edwards asked to borrow a helmet. Mr. Edwards testified that he did not ask, but no one offered one, either.

During the jury instruction conference, CMS proposed instructing the jury on implied primary assumption of risk. The Edwardses objected and proposed only instructing the jury on contributory negligence. The court instructed the jury on assumption of risk and contributory negligence. The court's assumption of risk

instruction modified the Washington pattern instruction by adding a sentence at the end of the instruction. The modified instruction read:

> It is a defense to an action for personal injury that the person injured impliedly assumed a specific risk of harm.
>
> A person impliedly assumes a risk of harm if that person knows of the specific risk associated with a course of conduct, understands its nature, and voluntarily consents to accept the risk by engaging in that conduct, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.
>
> A person's acceptance of risk is not voluntary if that person is left with no reasonable alternative course of conduct to avoid the harm because of defendant's negligence.
>
> A person's implied assumption of a specific risk is not knowing if you find the person was given misleading information or a misleading assurance of safety.

CP at 349.

After both parties rested, CMS moved to dismiss the Edwardses' general negligence claim as a matter of law. It argued that it only owed Mr. Edwards a duty as the owner and operator of the premises, and that it did not owe him a separate general duty of care. It argued its premises liability duty also encompassed Mr. Harris's actions. The Edwardses disagreed, arguing Mr. Harris had a separate duty not to give Mr. Edwards misleading instructions or false assurances of safety. They argued Mr. Harris's actions supported a general negligence claim separate and apart from their premises

liability claim, which focused on the dangerous conditions of the land. The court agreed with CMS and dismissed the Edwardses' general negligence claim.

The jury found that CMS breached its duty to the Edwardses and that CMS's negligence proximately caused Mr. Edwards's injuries. However, the jury also found that Mr. Edwards impliedly assumed the risk. The Edwardses asked the trial court to poll the jury, and the court did so. The Edwardses did not object to any inconsistency in the jury's verdict.

The Edwardses moved under CR 59 for a new trial on damages. They argued that (1) CMS violated the trial court's order in limine regarding the helmet evidence, (2) the trial court erred in dismissing their general negligence claim as a matter of law, (3) the trial court erred in instructing the jury on implied primary assumption of risk, and (4) the jury's responses on the special verdict form were inconsistent.

As to the helmet evidence, the trial court ruled that, apart from CMS's remarks in its opening statement, the Edwardses opened the door to this evidence by questioning their witnesses about the helmet on direct examination. The trial court also ruled that CMS adequately demonstrated the relationship between the absence of a helmet and Mr. Edwards's injuries, and that this link was within the experience and observation of ordinary laypeople.

The trial court further ruled that it properly dismissed the Edwardses' general negligence claim. The court found that CMS did not have a general duty to protect Mr. Edwards or give accurate advice, and that its only duty arose out of its ownership and operation of the premises. The court also ruled that the jury's finding of implied primary assumption of risk negated any duty.

The trial court also concluded it properly instructed the jury on implied primary assumption of risk. It ruled that Mr. Edwards had a full subjective understanding of the specific risk—the steep ramp, the slope of the parking lot, and Mr. Harris's statements—yet nevertheless voluntarily chose to encounter it.

Finally, the trial court determined the jury's verdict was consistent. The court reasoned that the jury's findings on negligence and proximate cause focused on CMS's actions, but that its findings on assumption of risk focused on Mr. Edwards's actions. The trial court denied the Edwardses' motion for a new trial on damages.

In light of the jury's finding that Mr. Edwards had impliedly assumed the risk, the trial court entered judgment in favor of CMS. The Edwardses appeal.

On appeal, the Edwardses argue the trial court erred in four respects: (1) by instructing the jury on implied primary assumption of risk, (2) by directing a verdict dismissing their general negligence claim, (3) by allowing CMS to violate the order in

limine excluding evidence that Mr. Edwards did not use a helmet, and (4) by giving an inconsistent and confusing special verdict form. We agree with the Edwardses' first two arguments, determine that they are entitled to a new trial on both of their claims and decline to address the latter two issues as moot.

ANALYSIS

1. ASSUMPTION OF RISK

The Edwardses argue that the trial court erred in instructing the jury on implied primary assumption of risk, which acted as a complete bar to recovery. They argue that CMS's sloped lot, Mr. Harris's placement of the ATV within two or three feet of the ramps, and Mr. Harris's assurances, all increased the risk inherent in loading an ATV into a truck. And because the defendants' positive actions increased the inherent risk, the doctrine of implied unreasonable assumption of risk applied. They further argue that because implied unreasonable assumption of risk permits apportionment of fault, no assumption of risk instruction should have been given since the court's contributory fault instruction sufficed to apportion fault. This court reviews jury instructions de novo. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010) (plurality opinion).

Washington law recognizes four categories of assumption of risk: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Hvolboll v. Wolff Co.*, 187 Wn. App. 37, 47, 347 P.3d 476 (2015). The first two types—express and implied primary—are complete bars to recovery. *Gleason v. Cohen*, 192 Wn. App. 788, 794, 368 P.3d 531 (2016). The latter two types—implied reasonable and implied unreasonable—are essentially forms of contributory negligence and merely reduce the plaintiff's recoverable damages based on comparative fault. *Id.* at 795.

"*Express* and *implied primary* assumption of risk arise where a plaintiff has consented to relieve the defendant of a duty to the plaintiff regarding specific known risks." *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). *Kirk* emphasizes that both of these types of assumptions of risk are based on the plaintiff's consent to a negation of the defendant's duty:

> Where express assumption of risk occurs, the plaintiff's consent is manifested by an affirmatively demonstrated, and presumably bargained upon, express agreement. Implied primary assumption of risk is similarly based on consent by the plaintiff, but without the additional ceremonial and evidentiary weight of an express agreement. . . . The basis of these two types of assumption of risk is the plaintiff's consent to the negation of a duty by the defendant with regard to those risks assumed by the plaintiff.

Id. at 453-54 (internal quotation marks and citations omitted).

In *Oak Harbor*, Justice Chambers, concurring, noted:

> The difference between express assumption of risk and implied primary assumption of risk is ceremonial and evidentiary. . . . The effect of implied primary assumption of risk and express assumption of risk is also identical—both result in a complete bar to recovery with regard to the specific risk assumed. While express assumption of risk requires evidence that the claimant has expressly assumed a specific risk, implied primary assumption of risk requires evidence that if the claimant failed to expressly assume a specific risk, the claimant's actions were tantamount to expressly assuming a specific risk. Because the evidentiary standard is so high, this court has never applied implied primary assumption of risk to bar recovery in any case. Implied primary assumption of risk should accordingly be applied with caution and with a proper understanding of the principles underlying the doctrine.

Oak Harbor, 170 Wn.2d at 644-45 (internal quotation marks and citations omitted).

The facts here fall short of the high evidentiary standard required for application of implied primary assumption of risk. Mr. Edwards asked Mr. Harris, CMS's employee, if he should turn his truck around so the angle of the ramps would be lessened. Mr. Harris responded that people load ATVs there all the time, and that turning the truck around would not make much difference. These facts do not support the notion that Mr. Edwards was fully informed of the relevant risks and consented to relieve CMS of its duty to provide a reasonably safe premises. Rather, Mr. Harris's assurances caused Mr. Edwards to believe the risk he was about to take was minimal or nonexistent. In addition, there was no evidence that Mr. Edwards was informed of the risk posed because of the ATV's

close proximity to the ramps and the need for rapid acceleration of the ATV up the ramps.

CMS primarily argues that Mr. Edwards had a full understanding of the risk that the ATV could flip over. *See* Br. of Resp't at 21, 23-24. It cites his review of the documents and owner's manual, as well as his understanding of the risks associated with hill climbing. It also notes that Mr. Edwards could clearly see the parking lot's slope.

> By entering freely and voluntarily into any relation or situation where the negligence of the defendant is obvious, the plaintiff may be found to accept and consent to it, and to undertake to look out for himself and relieve the defendant of the duty.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 485 (5th ed. 1984) (footnote omitted).

We agree that Mr. Edwards understood that there was some risk involved in loading his ATV into his truck, given the steep slope of the ramps. But we disagree that the risk here was sufficiently obvious that Mr. Edwards should be found to have consented to the risk so as to relieve CMS of its duty. If the risk was so obvious, it should have been obvious to Mr. Harris. But it was not. Rather than telling Mr. Edwards that the steep angle of the ramps created a risk that the ATV would flip while being loaded, Mr. Harris allayed Mr. Edwards's concerns. Mr. Harris assured Mr. Edwards that ATVs were loaded into trucks there all the time and that turning the truck around would not make much difference. In an extreme case, the risk an ATV will flip is obvious. This is

not an extreme case. For this reason, the trial court erred in instructing the jury on implied primary assumption of risk.[3]

2. GENERAL NEGLIGENCE CLAIM

CMS argues the Edwardses waived their general negligence claim because they never argued or proposed an instruction on it. However, in responding to CMS's motion for a directed verdict, the Edwardses expressly argued that Mr. Harris had a separate duty not to give them misleading instructions or false assurances of safety, which was distinct from their premises liability claim. The Edwardses' argument sufficiently preserved their claim.

CMS also argues that the Edwardses could not bring a general negligence claim because landowners do not owe a general standard of reasonable care under all circumstances. CMS cites *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015) in support of their argument. However, in *McKown*, the court

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[3] This court recently distinguished implied primary assumption of risk from unreasonable assumption of risk on the basis that the former does not apply whenever the defendant created the risk. *Gleason*, 192 Wn. App. at 800. We question this distinction for two reasons. First, *Oak Harbor*, our Supreme Court's most recent case on the subject, does not note this distinction. Second, leading authorities confirm that primary assumption of risk applies even when the defendant creates the risk. *See Restatement (Second) of Torts* § 496C(1) (1965); KEETON ET AL., *supra*, at 485-86; *see also Kirk*, 109 Wn.2d at 452-54.

simply held that it would not abandon the common law classifications of invitees, licensees, and trespassers, and replace them with a general standard of care regardless of the plaintiff's status. *Id.* at 765. The *McKown* court never held or implied that plaintiffs cannot assert both premises liability and general negligence claims when the facts support both theories.

Under general negligence principles, "if injury is caused by the *acts* of the defendants (misfeasance), a duty to use reasonable care to avoid injury will be assumed." 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 2:2, at 37-38 (4th ed. 2013). In other words, by creating a risk of harm, the person has a duty to ensure the harm does not happen. *Id.* § 2:4, at 44. On the other hand, when an injury results from a person's omission or failure to act, there will be no liability unless the person voluntarily assumed the duty to protect the other from harm. *Id.* § 2:2, at 37-38.

For example, in *Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997), a truck driver, Steven McVay, waved a pedestrian, Gloray Alston, across lanes of traffic and did not notice a car approaching in the next lane or warn Alston of the car. *Id.* at 29-30. The car hit Alston. *Id.* The *Alston* court explained the truck driver assumed a duty:

> Before he stopped his truck, . . . [McVay] did not owe a duty to help Alston cross the street safely; that was solely her responsibility. Even after he stopped his truck, he still did not owe a duty to help Alston cross the street safely—unless and until he undertook to wave her in front of the truck and across the southbound lanes. If he did that, a jury could find that he assumed a duty to help Alston cross the street; that he was obligated to discharge that duty with reasonable care; and that he failed to exercise reasonable care by not perceiving [the oncoming car], or by failing to warn of [its] presence.

Id. at 37 (emphasis omitted).

Here, the Edwardses' general negligence and premises liability claims were based on different duties that CMS owed them. They asserted a premises liability claim based on CMS's duty as the owner and operator of the premises. Their theory supporting this claim was that the slope of the parking lot created an unreasonably dangerous condition for loading ATVs. In other words, this claim focused on the condition of the property itself.

In contrast, the Edwardses' general negligence claim was based on CMS's negligent *activity*, rather than the premises itself. After the Edwardses asked if they should turn the truck around to reduce the angle of the ramps, Mr. Harris stated that they "'[did] it right [t]here all the time,'" and that it did not make "'much difference.'" RP at 185, 362. Like the truck driver in *Alston*, Mr. Harris assumed a duty when he gave them assurances of safety. At that point, he was obligated to discharge that duty with

reasonable care. Because the evidence permitted a trier of fact to find in favor of the Edwardses on their general negligence claim, the trial court erred by dismissing this claim as a matter of law.

CONCLUSION

We conclude the trial court erred when it instructed the jury on implied assumption of risk. The trial court should not have instructed on implied assumption of risk, but instead should have allowed the jury to apportion fault based on the contributory fault instruction. We also conclude the trial court erred by dismissing the Edwardses' general negligence claim as a matter of law.

The Edwardses therefore are entitled to a new trial on both of their claims. For this reason, their assertions that CMS violated the motion in limine and that the special verdict form was improper are both moot.

Reverse and remand for a new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

SIDDOWAY, J. (concurring) — Too many cases in which implied primary assumption of the risk is asserted as a defense are necessarily overturned on appeal because of a failure to identify and instruct the jury on the relevant risk. The problem might be alleviated if the Washington pattern jury instructions recommended that the jury be explicitly instructed on the relevant risk.

The problem appears often to arise in cases like this one: A plaintiff engages or is about to engage in an activity that presents a risk of which the plaintiff is aware (the "original" risk). The defendant is present and engages in conduct that lowers the plaintiff's guard. If the defendant's conduct is negligent, the relevant risk for assumption of risk purposes is not the original risk. It is, instead, the risk that the defendant will fail to carry out a duty owed to the plaintiff.

If the relevant risk in such cases is properly identified, trial courts should recognize that it is unlikely to be supported by evidence, as Justice Chambers pointed out in his concurring opinion in *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 644-45, 244 P.3d 924 (2010) (plurality opinion). And in the unusual case where the defense *is* supported by evidence, instruction on the relevant risk means we will not be faced as often as we are now with the need to reverse.

Several reported decisions illustrate the problem. The negligence alleged by the plaintiff in *Dorr v. Big Creek Wood Products, Inc.* was that the defendant's principal

waved him forward in a logging area despite a dangerous widow-maker suspended in branches overhead. 84 Wn. App. 420, 423-24, 927 P.2d 1148 (1996). The trial court refused to instruct on implied primary assumption of the risk, having been persuaded that the total bar would not apply if there was arguably negligence on the part of the defendant. *Id.* at 426. This court held that the trial court erred because the defense of implied primary assumption of the risk "remains viable," "occupy[ing] its own narrow niche." *Id.* at 425-26.

This court nonetheless affirmed the trial outcome, concluding that the evidence provided no basis for a finding that Mr. Dorr assumed the relevant risk. The relevant risk was not the original risk of encountering a widow-maker where trees are being felled, a risk of which Mr. Dorr was aware. It was instead the risk that the defendant's principal would breach the duty to avoid giving misleading directions. *Id.* at 430. And "[n]othing about Dorr's conduct manifested or implied his consent to release Big Creek from the duty to avoid misdirecting him." *Id.*

Similarly, in *Alston v. Blythe*, 88 Wn. App. 26, 33, 943 P.2d 692 (1997), the plaintiff, a pedestrian, contended that the defendant truck driver, who had stopped to let her cross a four-lane road, negligently waved her across another lane of traffic. The trial court instructed on implied primary assumption of the risk, but this court concluded that it did so in error. Given Ms. Alston's theory of liability, the availability of the defense turned on whether Ms. Alston assumed the risk that the truck driver would not perform the duty of ordinary care owed her as a matter of law or, stated differently, whether she

consented to relieving the driver and his employer of that duty. *Id.* at 34-35. It was not whether she was aware of and assumed the original risk of crossing the street without the protection of a marked crosswalk. There was no evidence that Ms. Alston consented to relieve the defendants of their duty of care. This court observed that in most situations, the evidence will not support such consent. *Id.*

Erie v. White, 92 Wn. App. 297, 966 P.2d 342 (1998) was, like *Alston*, an opinion authored by Judge Dean Morgan, but one that illustrates evidence that supports instructing the jury on implied primary assumption of the risk. Mr. Erie agreed to perform tree trimming work if the defendant provided the necessary equipment. Mr. Erie recognized on arriving at the defendant's home that the defendant had negligently provided pole climbing rather than tree climbing equipment. The critical difference is that pole climbing equipment has a leather safety strap whereas tree climbing equipment has a steel reinforced safety strap so that a person using a chain saw cannot cut through it accidentally. *Id.* at 299.

Mr. Erie proceeded to perform the work with the pole climbing equipment and was injured when he accidentally cut through the safety strap with his chain saw. The court observed that Mr. Erie himself testified that when he looked at the equipment provided, "he realized it was pole-climbing equipment that did not have the steel-reinforced safety strap needed when using a chain saw high in a tree." *Id.* at 306. The evidence supported the defense contention that Mr. Erie was aware of more than the

original risk associated with tree trimming—he was aware of and assumed the risk that the defendant would negligently provide the wrong equipment. *Id.* at 306.

More recently, in *Jessee v. City Council of Dayton*, 173 Wn. App. 410, 413, 293 P.3d 1290 (2013), this court affirmed a trial court finding of implied primary assumption of risk where a plaintiff encountered a negligently constructed stairway and proceeded to use it. Before proceeding up the stairs, Ms. Jessee commented that they "were not 'ADA compliant'[1] and looked 'unsafe.'" *Id.* at 412. On later descending the stairs, she fell. Because no agent of the defendant engaged in a negligent act or omission that put Ms. Jessee off her guard, the relevant risk was the original risk of the hazardous stairway, which she knowingly assumed.[2]

In this case, the trial court did not correctly identify the relevant risk. This is borne out by the instructions it gave after deciding to submit the defense to the jury, in which the risk identified was "the risk of driving the ATV up the ramp." Clerk's Papers at 335 (Instruction 8). Given the Edwardses' theory of negligence, the relevant risk was that Colville Motor Sports (CMS) and its employees would breach the duty to avoid giving misleading directions. *Id.* at 430. As was the case in *Dorr*, nothing about the

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[1] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213.

[2] Plaintiffs who freely and voluntarily enter unsafe stairways is an example of implied primary assumption of the risk identified in the Prosser and Keeton treatise relied on by the Washington Supreme Court for our current common law. *See* W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 68, at 486 (5th ed. 1984). The treatise was relied on in *Shorter v. Drury*, 103 Wn.2d 645, 655-56, 695 P.2d 116 (1985) and *Kirk v. Washington State University*, 109 Wn.2d 448, 452-54, 746 P.2d 285 (1987).

Edwardses' conduct manifested or implied consent to release CMS from the duty to avoid misleading them.

Many of our superior courts see cases such as these infrequently, and the importance of identifying the relevant risk where more than one risk is present can be overlooked. This is so even where, as here, a veteran trial judge and experienced lawyers spent considerable time trying to get the law and the instructions right. I reiterate my encouragement to the Washington Pattern Instruction Committee that it review this issue.

Siddoway, J.

I CONCUR:

Fearing, C.J.

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