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WASHINGTON CASE UPDATE

case in point...

Can a Defendant's Negligent Conduct Undermine an Assumption of Risk Argument?

From the desk of Kyle D. Riley: Is a plaintiff barred from recovering damages in a negligence lawsuit by voluntarily assuming the risk created by a defendant's negligence?

Claims Pointer: Division II of the Washington Court of Appeals held that a plaintiff injured by a falling tree is not necessarily barred from recovery despite his voluntarily choice in encountering the risks inherent in cutting down large trees. Division II held that where the risk is increased by a defendant's negligent conduct, the plaintiff's voluntary assumption of the risk will be treated as contributory negligence and his recoverable damages will be reduced in light of his own comparative fault. This appears to reflect a split between Division II and Division III on primary assumption of the risk and will likely make it more difficult to obtain summary.

Gleason v. Cohen, 46398-9-II, Washington Court of Appeals, Div. II (Feb. 24, 2016).

Leo Timothy Gleason ("Gleason") was injured while helping Brian Cohen ("Cohen") cut down trees on Cohen's property. Gleason was not a professional logger, but had extensive experience cutting down trees. Cohen had two men cutting down trees when Gleason arrived on the property. Gleason expected the job would entail loading downed trees onto his personal trailer and transporting them to a mill. After stacking wood on the trailer, Cohen asked Gleason if he could help cut down a few more trees for $100 per tree. Gleason did not feel safe cutting down a specific tree because of its proximity to Cohen's house, car and other obstacles. He also believed that Cohen's workers improperly placed the choker chain on the tree and asked them to adjust it. The workers disagreed, indicating the choker was hooked up properly and was safe. Though he did not want to cut the tree down and knew it was unsafe, Gleason acquiesced because Cohen threatened to withhold payment. The falling tree struck and injured Gleason.

Gleason filed a lawsuit against Cohen and the trial court granted Cohen's motion for summary judgment, ruling that Gleason was barred from recovery because he assumed the risk of injury. Gleason appealed and the Washington Court of Appeals reversed the trial court's ruling.

In its decision, the court distinguished between implied primary assumption of risk and implied unreasonable assumption of risk, the main difference being that the first is a complete bar to recovery whereas the latter only reduces a plaintiff's damages. According to the court, implied primary assumption of the risk arises where a plaintiff has impliedly consented to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks. Implied unreasonable assumption of the risk, however, does not involve a plaintiff's consent to relieve the defendant of duty. Rather, this type of assumption of risk involves defendant breaching a duty that creates a risk of harm and whether a plaintiff choosing to take that risk would constitute a form of contributory negligence. The court found that there was no question that implied primary assumption of risk applied to the dangers inherent in cutting down trees. However, implied unreasonable assumption of risk would apply to Gleason's voluntary choice to encounter a risk created by Cohen's negligence. Therefore, the court concluded that the trier of fact must determine whether the incident was caused by an inherent danger or an enhanced risk created by the defendant's negligence.

The court also rejected Cohen's argument that implied primary assumption of risk applies any time a plaintiff voluntarily encounters a known risk. According to the court, voluntarily assuming a risk of harm is an essential characteristic of all types of assumption of risk. The determining factor is whether the plaintiff has been injured by an inherent risk of

Contact: Kyle Riley | www.smithfreed.com | email: kriley@smithfreed.com
Ph:206.576.7575 | Fax: 206.576.7580 | 705 Second Avenue, 17th Floor | Seattle | WA | 98104

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an activity. On the other hand, the plaintiff is not assumed to have consented to additional risks created by the defendant's negligence. In this case, Gleason may have voluntarily encountered a known risk in cutting down trees, however, he alleges Cohen's additional conduct increased the risk of being injured while cutting down trees, namely requesting he cut down the particular tree given its location and the improper placement of the choker chains.

This case is important in that it appears summary judgment will be more difficult to obtain in Washington where a party voluntarily assumed the specific risk. Furthermore, the court noted that in most situations where a plaintiff voluntarily encounters a known specific risk a contributory negligence instruction is all that is necessary and appropriate. Therefore, this decision will likely result in fewer successful summary judgment motions in scenarios where a plaintiff voluntarily assumed a known risk. It is unclear how this case will affect express assumption of the risk (i.e. liability releases). The Court of Appeals reversed the trial court's grant of summary judgment in favor of Cohen and remanded for further proceedings.

Contact: Kyle Riley | www.smithfreed.com | email: kriley@smithfreed.com
Ph:206.576.7575 | Fax: 206.576.7580 | 705 Second Avenue, 17th Floor | Seattle | WA | 98104

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