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

JOSEPH W. SCHOENMAKERS, a single man,	)	No. 30619-4-III
Appellant,	)	
v.	)	UNPUBLISHED OPINION
CHRISTIAN PATRICK BAGDON and JANE DOE BAGDON, d/b/a DOOR TO DOOR STORE, a sole proprietorship,	)	
Respondents.	)	

Kulik, J. — Joseph Schoenmakers injured his thumb while using a table saw at the Door to Door Store. Mr. Schoenmakers knew that the saw was missing the safety guard and had used it without the guard for 14 years and at least 5,000 times. Mr. Schoenmakers brought a negligence claim against the owner of the store, Chris Bagdon. A trial court granted summary judgment in favor of Mr. Bagdon, concluding that Mr. Schoenmakers assumed the risk of injury when he used the saw. We agree and affirm.

FACTS

The Door to Door Store, owned and operated by Mr. Bagdon, installs interior and exterior doors. Mr. Schoenmakers worked as an independent contractor for the Door to Door Store. Prior to being an independent contractor, Mr. Schoenmakers worked at the Door to Door Store as a paid employee from 1992 to 1997. As an employee, Mr. Schoenmakers worked in sales, went out on install jobs, and worked in the shop.

Mr. Schoenmakers continued installing doors for the Door to Door Store after he became an independent contractor. And he also worked on jobs for independent homeowners. Mr. Schoenmakers had a working relationship with Mr. Bagdon that consisted of Mr. Schoenmakers doing uncompensated work for Mr. Bagdon in exchange for installation jobs and for use of the Door to Door Store's shop and tools.

The Door to Door Store had a table saw in its shop. The table saw had been in the store since the store opened 25 years earlier. The saw consisted of a table of about 5-feet by 8-feet and a 10-inch blade. Mr. Schoenmakers used the saw on a daily basis since he began working at the Door to Door Store. He used the saw to cut plastic, cardboard, aluminum, and wood.

Missing from the saw was the clear plastic safety guard that prevented a person's

fingers or hands from getting cut by the blade and that prevented material from flying into a worker's face. The guard had not been on the table saw since the Door to Door Store opened. Mr. Schoenmakers was aware that the guard was missing and should have been on the saw. He was also aware that the guard was designed to protect a person from injury.

Mr. Bagdon did not want the guard on the table saw. Mr. Bagdon removed the guard because it was a nuisance. Mr. Schoenmakers attempted to talk Mr. Bagdon about the missing guard, but he considered Mr. Bagdon unreceptive to the idea. Even so, Mr. Schoenmakers continued to use the saw without the guard.

Once when Mr. Schoenmakers used the saw, a board he was cutting kicked back and hit him in the hand. Mr. Schoenmakers was aware that the guard had an anti-kickback device on it that would have prevented the board from being kicked back. He also was aware of marks on the doors behind the saw where other kickbacks had hit the door.

On November 15, 2006, Mr. Schoenmakers went to the Door to Door Store to cut insulation for a job. He decided to use the table saw to cut the one-inch wide insulation. He knew that the guard was missing from the saw and, had it been in place, the guard would have prevented his hand from being pulled into the blade. Mr. Schoenmakers

knew that a knife could have been used to cut the insulation, but he had never done it that way and knew that using the knife could result in damage to the product.

As Mr. Schoenmakers held and pushed the insulation through the saw, the blade grabbed the insulation and pulled his thumb into the blade. The saw severely cut Mr. Schoenmakers's thumb. Later at the hospital, a doctor amputated the tip of Mr. Schoenmakers's thumb to his cuticle.

Mr. Schoenmakers filed an action against Mr. Bagdon, alleging that Mr. Bagdon was negligent in maintaining the table saw. Mr. Bagdon filed a motion for summary judgment. The trial court granted Mr. Bagdon's motion for summary judgment based on the implied primary assumption of risk doctrine. Mr. Schoenmakers appeals.

ANALYSIS

An order granting summary judgment is reviewed de novo. *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 98, 249 P.3d 607 (2011). On appeal, the reviewing court considers the same evidence presented to the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriately granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

The defendant, as a moving party, bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If met, the burden shifts to the plaintiff to make a showing sufficient to establish the existence of an element essential to that party's case. *Id.* If the claimant fails to meet that burden, the trial court should grant the motion. *Id*. (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Assumption of Risk. The doctrine of assumption of risk has four facets: (1) express assumption of risk, (2) implied primary assumption of risk, (3) implied reasonable assumption of risk, and (4) implied unreasonable assumption of risk. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 143, 875 P.2d 621 (1994).

Mr. Schoenmakers contends that the trial court erred by dismissing his case based on an implied primary assumption of risk. Instead, Mr. Schoenmakers contends that the implied unreasonable assumption of risk applies and involves a contributory fault analysis that does not bar recovery.[1]

[1] Implied reasonable and implied unreasonable assumption of risk involve a contributory fault analysis that focuses on the "plaintiff's duty to exercise ordinary care for his or her own safety." *Alston v. Blythe*, 88 Wn. App. 26, 32, 943 P.2d 692 (1997). Unreasonable assumption of risk does not bar recovery and retains no independent

Implied primary assumption of risk occurs where the plaintiff impliedly has consented to relieve the defendant of an obligation or duty to act. *Id.* at 144 (quoting *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 497, 834 P.2d 6 (1992)). The elements are 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. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). Stated differently, the plaintiff "'must have knowledge of the risk, appreciate and understand its nature, and voluntarily choose to incur it.'" *Erie v. White*, 92 Wn. App. 297, 303, 966 P.2d 342 (1998) (quoting *Shorter v. Drury*, 103 Wn.2d 645, 656, 695 P.2d 116 (1985)). A finding of implied primary assumption of risk bars any recovery on the duty that was negated. *Id.* at 302.

The test for knowledge is subjective. The plaintiff must have knowledge of and appreciate the specific risk that caused the injury. *Id.* at 304 (quoting *Shorter*, 103 Wn.2d at 656-57). The evidence must show that the injured person knew of the specific defect causing his or her injuries before the assumption of risk doctrine applies. *Klein v. R.D. Werner Co.*, 98 Wn.2d 316, 319, 654 P.2d 94 (1982).

"Whether a plaintiff decides *voluntarily* to encounter a risk depends on whether he

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significance from contributory negligence. *Tincani*, 124 Wn.2d at 145.

or she elects to encounter it despite knowing of a reasonable alternative course of action." *Erie*, 92 Wn. App. at 304.

To define the scope of the plaintiff's consent, the court must identify the duties that the defendant would have had in the absence of the assumption of risk doctrine and then segregate those duties into "(a) those (if any) which the plaintiff consented to negate, and (b) those (if any) which the defendant retained." *Alston v. Blythe*, 88 Wn. App. 26, 34, 943 P.2d 692 (1997).

In *Erie*, the defendant, Mr. White, hired Mr. Erie to cut a tree and supplied Mr. Erie with pole climbing equipment. *Erie*, 92 Wn. App. at 300. While in the tree, Mr. Erie accidentally cut through the safety strap of the equipment, fell, and was injured. *Id*. at 301. Mr. Erie brought an action against Mr. White for negligently supplying him with pole climbing equipment instead of tree climbing equipment. *Id*. The court found that Mr. Erie knew and appreciated the risk when he looked at the pole climbing equipment and realized that the pole climbing equipment did not have the steel enforced safety strap needed when using a chain saw high in a tree. *Id*. at 306. The court also found that Mr. Erie had a reasonable alternative course of action by going to the rental store for other equipment or declining to cut the tree. *Id*. The court granted summary judgment in favor of Mr. White because reasonable minds could not differ on whether Mr. Erie knowingly

and voluntarily assumed the risk of injury by using the pole climbing equipment. *Id*.

Here, Mr. Schoenmakers had subjective knowledge of the specific risk of using the table saw without the guard. He testified that he knew that the guard was supposed to be on the saw but instead was missing. He knew that Mr. Bagdon refused to put the guard on the saw. He knew the purpose of the guard was to keep a person's fingers or hands from getting cut by the blade. He stated, "Had the guard been on the saw that day of the incident it would have prevented my hand from being pulled into the blade." Clerk's Papers at 217. Thus, Mr. Schoenmakers knew and appreciated the risk of injuring his thumb as a result of using the table saw without the guard.

Mr. Schoenmakers also voluntarily assumed the risk involved in using the table saw without the blade. Mr. Schoenmakers chose the guardless table saw to cut the insulation instead of other reasonable alternative courses of action. He could have used a knife to cut the one-inch strip of insulation. He also could have declined to use the table saw. Instead, he elected to encounter the risk of getting his hand pulled into the blade despite knowing of a reasonable alternative course of action. Mr. Schoenmakers relieved Mr. Bagdon of a duty to safely maintain the saw by knowingly using the table saw without the guard.

Mr. Schoenmakers's situation is very similar to the situation in *Erie*. Just like Mr.

White's role in *Erie*, Mr. Bagdon was negligent in providing the equipment. However, Mr. Schoenmakers, like Mr. Erie, knew of the specific danger of using the supplied equipment, proceeded, and was injured. Based on *Erie*, Mr. Schoenmakers assumed the risk of injury in using the equipment.

The cases cited by Mr. Schoenmakers are distinguishable. In *Tincani*, the court determined that the implied primary assumption of risk doctrine did not apply because the plaintiff did not know of or assume the risk created by the Zoo's failure to provide reasonably safe facilities. *Tincani*, 124 Wn.2d at 145. "The risk of serious injury while visiting a zoo should not be a risk inherent in and necessary to such an activity." *Id*. at 144-45. As compared to *Tincani*, Mr. Schoenmakers's situation differs because he understood the inherent risk in using the table saw without the guard.

The trial court did not err in granting summary judgment in favor of Mr. Bagdon. Reasonable minds could not differ on whether Mr. Schoenmakers assumed the risk of injury by using the table saw without the blade guard. Mr. Schoenmakers knew the guard was missing from the table saw, had a subjective understanding that the using the table saw without the guard could cause injury to his hand, and voluntarily chose to encounter the risk when he used the saw instead of another available alternative. The implied primary assumption of risk doctrine bars Mr. Schoenmakers's action.

Premises Liability. An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). An insufficient record on appeal precludes review. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994).

Nonetheless, even considering premises liability and all of Mr. Schoenmakers's arguments, Mr. Schoenmakers does not prevail.

We affirm summary judgment in favor of Mr. Bagdon.

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.

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Kulik, J.

WE CONCUR:

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Sweeney, J. Brown, J.