SUPREME COURT NO. 93141-1

COURT OF APPEALS NO. 47462-0-II

SUPREME COURT
OF THE STATE OF WASHINGTON

ANGEL GARCIA-TITLA, individually, and LETICIA SARMIENTO FLORES, individually and the marital community composed thereof

Appellants,

v.

SFC HOMES, LLC, a Washington Corporation,

Respondent.

RESPONDENT SFC HOMES, LLC'S ANSWER TO PETITION FOR REVIEW

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I. IDENTIFICATION OF RESPONDENT

Respondent SFC Homes, LLC ("SFC Homes") requests that the Petition for Review filed by Angel Garcia Titla and Leticia Sarmiento Flores ("Garcia Titla") be denied. Garcia Titla's Petition fails to provide a basis for Supreme Court review under RAP 13.4.

II. COURT OF APPEALS DECISION

Garcia Titla requests review of the April 26, 2016, Court of Appeals decision in *Garcia Titla, et al. v. SFC Homes, LLC*, No. 47462-0-II (Wn.App. Div II April 26, 2016). In a unanimous opinion, the Court of Appeals affirmed the trial court's summary judgment dismissal of the case.

Garcia Titla alleged he was injured in a residential construction worksite incident. SFC Homes owned the property. Garcia Titla's employer, a framing contractor, was retained to perform framing work on the residence. In dismissing the case, the trial court, and Court of Appeals on *de novo* review, ruled that Garcia Titla failed to present evidence to create a genuine issue of material fact that SFC Homes was the general contractor of the worksite or that SFC Homes was an owner in control of the construction work. Therefore, SFC Homes was not liable for worksite safety. The Court of Appeals additionally affirmed on the basis that Garcia Titla presented no evidence of a WISHA or WAC violation, and no evidence that SFC Homes caused the alleged incident.

III. ISSUES BEFORE THE COURT

1. Whether this Court should decline to accept review where there is no conflict between the Court of Appeals decision and this Court's ruling in *Stute v. P.M.B.C.* or other Washington court of appeals decisions?

2. Whether the Court of Appeals properly affirmed dismissal where Garcia Titla failed to present evidence to create a genuine issue of material fact to support his allegations that SFC Homes was either the general contractor or an owner in control of the worksite, and therefore SFC Homes had no duty to ensure worksite safety?

3. Whether the Court of Appeals properly affirmed dismissal where Garcia Titla failed to present evidence to create a genuine issue of material fact of a WISHA violation or causation?

IV. COUNTERSTATEMENT OF THE CASE

A. The Worksite Incident

Angel Garcia Titla alleges he was injured while working on a residential construction jobsite in Gig Harbor on May 20, 2011. CP at 57. SFC Homes owned the property. CP at 106. Garcia Titla was employed by FRDS Construction, Inc., a framing contractor. CP at 55-57, 89, 93.

Garcia Titla testified he was standing on a joist while his coworker was standing on the floor below, handing him pieces of plywood to place over the beams on the second story to create the floor. CP at 61, 66-72. The

joist on which he was standing broke, along with one of the metal sustainers on the wall that had been holding up the joist; Garcia Titla had installed both the joist and the metal sustainer that broke. CP at 60-64.

Garcia Titla was an experienced construction worker and framer. CP at 84, 92-94. He had worked on two framing projects for FRDS before the project in this case, each of which lasted approximately 15 days. CP at 57. Garcia Titla had attended safety meetings on those projects, which were overseen by FRDS team leader Antonio Aguilar and a worksite superintendent. CP at 55, 58, 74-76. At these meetings, Garcia Titla was instructed as to the placement of ladders, and Aguilar would check that safety shoes and hard hats were being used. CP at 74-75.[1]

B. SFC Homes Did Not Participate in or Retain Control Over the Work

SFC Homes had no knowledge of or expertise in framing. CP at 106. SFC Homes was not involved in the framing work, had no control over the work, and had no right to control the work. *Id.* SFC Homes was relying on the expertise of FRDS, which held itself out as an expert in

[1] Garcia Titla testified that at the time of the incident, he was working at a height of over eight feet and was wearing a harness that had been provided to him by FRDS. CP at 75-76, 80, 83. He testified he had not tied the harness to the structure because he was not high enough. CP at 82-83. He was aware that if there was no place to tie a harness, alternate fall protection needed to be used, which involved placing two by fours around the area to hold on to. CP at 77-78. In his Petition, Garcia Titla seems to imply that SFC Homes was responsible for providing harnesses. But SFC Homes had no such responsibility and Garcia Titla testified that his supervisor with FRDS brought the harnesses. CP at 83.

framing. CP at 79-80, 106. Garcia Titla never interacted with or spoke with anyone at SFC Homes. CP at 83-84. There were no other subcontractors on site when he was there. CP at 85. The alleged incident involving Garcia Titla was not reported to SFC Homes by Garcia Titla or FRDS, and no reports regarding the incident were provided to SFC Homes. CP at 106.

C. Procedural History

On March 11, 2014, Garcia Titla filed a complaint in Pierce County Superior Court against SFC Homes, alleging that SFC Homes breached its duty to maintain a safe workplace. CP at 1-3. In its Answer, SFC Homes denied that it was the general contractor or owner in control of the worksite and admitted only that it was an owner of the worksite. CP at 5.[2] Garcia Titla never conducted any discovery on SFC Homes. CP at 160-161.[3]

On January 8, 2015, SFC Homes moved for summary judgment dismissal of Garcia Titla's claims. CP at 10. SFC Homes owed no duty to Garcia Titla for worksite safety because SFC Homes was an owner and not

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[2] SFC Homes also asserted in the Answer the affirmative defense that plaintiffs had "failed to state a claim upon which relief can be granted." CP at 6.

[3] In response to SFC Homes interrogatory asking Garcia Titla to state the basis for his claim that SFC Homes was the general contractor for the project, Garcia Titla responded, "Plaintiff will be requesting Safety meeting minutes, walk around Safety inspection notes, a Site specific safety plan, and a Safety manual from the General Contractor and will supplement this Answer upon receipt." CP at 95. However, he never requested any materials. CP 160-161. In response to SFC Homes' request that he produce materials supporting his answer, Garcia Titla produced only a printout from the Pierce County Assessor-Treasurer's website showing that SFC Homes was the owner of the land. CP at 89. That SFC Homes owned the land is not in dispute.

a general contractor on the subject worksite, and therefore had no duty to ensure compliance with WISHA regulations under *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 463-64, 788 P.2d 545 (1990). CP at 21-23. SFC Homes did not retain control over the worksite, and therefore owed no common law duty of care to ensure Garcia Titla's safety under *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002). CP at 18-20. Further, there was no evidence of any WISHA violations, and no WISHA violations were issued. CP 101-102, 488-490.

SFC Homes' summary judgment motion was filed within two weeks of the January 20, 2015 discovery cutoff. CP at 49. Garcia Titla had conducted no discovery in the case. CP at 160-161. In his summary judgment response, Garcia Titla asserted that SFC Homes was the general contractor on the worksite, but produced no contract, testimony, or document showing SFC Homes was acting as the general contractor on this worksite. He submitted (1) a Pierce County Assessor-Treasurer's website document that stated that SFC Homes was the *owner* of the property;[4] (2) L&I website printouts that SFC Homes had a general contractor's license[5]; (3) website printouts stating SFC Homes and its parent company were engaged in

[4] CP at 125-126.
[5] CP at 130, 132-133.

single-family housing construction work[6]; and (4) documentation indicating that Atsushi Iwasaki, the president of SFC Homes's parent company, was the manager of another company that engaged in single-family housing construction work.[7] None of the materials submitted indicated SFC Homes was acting as a general contractor on the subject worksite. Garcia Titla next argued that if SFC Homes was not the general contractor then it was an "owner in control," but he presented no evidence that SFC Homes had the right to control or retained control over the worksite. Finally, he presented no evidence of a WISHA or WAC violation or causation.

The trial court granted SFC Homes's summary judgment motion. CP at 172-73. On April 26, 2016, the Court of Appeals affirmed.

V. ARGUMENT AND AUTHORITIES

Garcia Titla fails to present a valid basis for this Court's review under RAP 13.4. Garcia Titla's disagreement with the outcomes in the trial court and Court of Appeals does not indicate any conflict to be resolved by this Court. SFC Homes respectfully requests the Petition be denied.

A. This Court Should Decline to Accept Review as Garcia Titla Has Not Shown a Basis for Review Under RAP 13.4(b)(1) or (2).

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[6] CP at 138 (Department of Revenue printout stating that SFC Homes engaged in "new single-family housing construction"); CP at 144 (printout from Sumitomo Forestry Co., Ltd.'s website stating that SFC Homes engaged in "[c]onstruction and subdivision sales of detached houses").

[7] CP at 140 (Secretary of State listing for Creekstone Development, listing Iwasaki as manager); CP at 142 (stating that Creekstone engages in "new single-family housing construction").

Critically, Garcia Titla's Petition for Review does not show a basis for review by this Court. Garcia Titla seeks review under RAP 13.4(b)(1) and (2), which apply if the Court of Appeals decision is in conflict with a decision of this Court or with another decision of the appellate courts.

Summary judgment is appropriately granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).[8] Contrary to Garcia Titla's argument, the Court of Appeals' decision did not conflict with *Stute v. P.M.B.C.* In fact, the Court of Appeals expressly addressed and applied *Stute*, and determined that Garcia Titla "failed to present evidence that SFC Homes was the general contractor of the site where the injury occurred." Court of Appeals Opinion, at 8.[9] Therefore, *Stute* duties did not arise.

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[8] The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is a defendant and meets this burden, the burden shifts to the plaintiff to bring forth "specific facts showing that there is a genuine issue for trial." *Rathvon v. Columbia Pac. Airlines*, 30 Wn. App. 193, 201, 633 P.2d 122 (1981). If the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" then the trial court should grant the defendant's motion. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 382, 46 P.3d 789 (2002) (internal quotation marks omitted) (quoting *Young*, 112 Wn.2d at 225).

[9] A key difference between *Stute* and the present case is that the plaintiff in *Stute* presented evidence that P.B.M.C. "knew that employees of the subcontractor were working on the roof without safety devices." *Stute*, *supra*, 114 Wn.2d at 456. In *Stute*, P.B.M.C. acknowledged it was the general contractor but argued it did not have responsibility to a subcontractor's employee for ensuring WISHA compliance. Here, SFC Homes denies it was the general contractor and plaintiff presented no evidence in response to the summary judgment motion to establish SFC Homes was acting as the general contractor on this worksite. Nor was there evidence that SFC Homes had any knowledge or reason to know of any alleged non-compliance with WISHA.

The Court of Appeals' decision likewise did not conflict with any other appellate decision regarding duties of an "owner in control". The Court of Appeals followed the precedent that a jobsite owner is not per se liable for worksite negligence and an owner/developer does not have a duty for worksite safety unless there is some control over the work exercised by the jobsite owner/developer.[10] Garcia Titla presented no evidence that SFC Homes exercised or retained such control. As such, he did not satisfy his burden to create a genuine issue of material fact that would defeat SFC Homes' summary judgment motion.[11]

B. SFC Homes Had No *Stute* Duty To Ensure Compliance with WISHA Regulations on this Worksite.

Under *Stute*, the general contractor on a worksite has a non-delegable duty to all workers to ensure compliance with WISHA safety regulations. 114 Wn.2d at 463-64; see also RCW 49.17.060(2). However, SFC Homes was not the general contractor on this worksite.

1. Garcia Titla Did Not Establish SFC Homes Was the General Contractor on this Worksite.

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[10] The Court of Appeals applied the established tests in *Kelley v. Howard S. Wright Constr. Co.*, and *Kamla v. Space Needle*, that "there must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way," in order to impose a duty on a jobsite owner.

[11] The dismissal also was affirmed by the Court of Appeals where Garcia Titla presented no evidence of a WISHA violation.

SFC Homes presented evidence on summary judgment that: SFC Homes did not oversee the framing work on the site; SFC Homes relied on FRDS; and SFC Homes did not oversee or control the work of FRDS. Garcia Titla argues that SFC Homes' lack of presence on the site means it breached *Stute* duties. But SFC Homes never had such duties in the first place on these facts.

Where SFC Homes submitted evidence establishing the absence of a material fact on the issue- establishing SFC Homes did not retain control over the worksite and had no involvement in the construction work- it was Garcia Titla's burden to submit evidence establishing a genuine issue of material fact on the control issue. See *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 382, 46 P.3d 789 (2002); *Rathvon v. Columbia Pac. Airlines*, 30 Wn. App. 193, 201, 633 P.2d 122 (1981).

Garcia Titla did not create a genuine issue of material fact to establish that SFC Homes was the general contractor on this project. The Assessor-Treasurer's report merely states that SFC Homes was the property owner. CP at 125. Licensing documents stated that SFC Homes had a construction contractor's license but made no representations regarding the project site in question. CP at 130, 132-33. Other documents indicated SFC Homes was managed by Mr. Iwasaki and was in the business of new single-

family housing construction. CP at 135-36, 138, 144. They say nothing about the jobsite in question. Garcia Titla failed to marshal evidence that SFC Homes was acting as the general contractor for the project in question.

2. Having a Contractor's License Did Not Make SFC Homes the General Contractor on This Project.

Garcia Titla asks the Court to find that every jobsite owner who has a contractor's license necessarily is deemed the general contractor for any work performed on property they own. However, that would be contrary to the evidence. As stated in a declaration of an SFC Homes representative, Atsushi Iwasaki, FRDS was hired because SFC Homes had no knowledge of framing and relied on FRDS's expertise. CP at 106.[12] SFC Homes did not participate in or control any of the work performed by FRDS. CP at 106. Garcia Titla could have deposed SFC Homes' representative, but he did not. He could have submitted a declaration from his own expert in response to the summary judgment motion, but he did not.[13] There is no conflict for this Court to resolve.[14] As the Court of Appeals stated, Garcia Titla's claim was dismissed based on lack of evidence:

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[12] Mr. Iwasaki was the manager of SFC Homes and president of its holding company. CP at 105.

[13] Although Garcia Titla conducted no discovery, he asserts without citation to the record or any authority that there were "no contracts" and that that is "commonplace in residential construction." (Petition, at 3). None of his assertions or allegations constitute evidence.

[14] Garcia Titla tries to create a false "conflict" between the Court of Appeals decision and established precedent, stating that this Court "should provide guidance as to the proper legal standard or test for determining when an entity is acting as a general contractor at a construction project and therefore has the duty of safety on the project." (Petition, at 1).

> Garcia Titla and Sarmiento Flores failed to present evidence that SFC Homes was the general contractor of the site where the injury occurred. SFC Homes did have a contractor's license, but Garcia Titla and Sarmiento Flores did not present evidence that SFC Homes acted as the general contractor at this specific site. Therefore, the plaintiffs failed to present any evidence to create a genuine dispute of material fact that SFC Homes was the general contractor.

Court of Appeals Opinion, at 8.

C. SFC Homes Was Not an Owner in Control of the Worksite.

Garcia Titla was the employee of independent contractor, FRDS. At common law, an entity that retains an independent contractor to perform work on a jobsite is generally immune from liability for injuries sustained by the employees of the independent contractor. *Kamla*, 147 Wn.2d at 121. An exception to this rule arises when the entity retains the right to direct the manner in which the independent contractor performs its work. *Id.*:

> The employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Kamla, 147 Wn.2d at 121 (quoting RESTATEMENT SECOND OF TORTS § 414 cmt. c (1965)). The test for control is well established.[15] Even where a landowner has the right to accept or reject work or safety plans or cancel work, something more is required before a duty will be imposed to protect an independent contractor's employees. See, e.g., *Cano-Garcia*, supra.[16]

Here, the undisputed and unchallenged testimony of Mr. Iwasaki was that SFC Homes had neither actual control over FRDS's work at the jobsite nor retained control over that work. CP at 106. Garcia Titla presented no evidence in response to the summary judgment motion to support his bald allegation that SFC Homes retained control. He instead argues that SFC Homes did not have someone present at the site or conduct safety meetings, according to Garcia Titla's testimony. But this argument

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[15] The question whether control is retained by a jobsite owner is subject to the test set forth in *Kamla*. In evaluating whether an owner had the right to control the work on the jobsite, courts must "look beyond evidence of inspections, demands of contract compliance, suggestions or recommendations that did not necessarily need to be followed, prescriptions of alterations and deviations, receipt of reports, and authority to stop work or resume work." *Cano-Garcia v. King County*, 168 Wn. App. 223, 234-35, 277 P.3d 34 (2012).

[16] Even the right to inspect an independent contractor's work, to demand contract compliance, or to order work stopped does not constitute "retained control" over the subcontractor's operations. See *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991). The *Hennig* court reasoned, "It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor's employees." *Id.*; see also *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 663, 240 P.3d 162 (2010) ("The employer does not retain control by controlling the timing or order of work, by retaining the right to order the work stopped, or by inspecting the contractor's work to ensure adequate progress."); *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 447, 711 P.2d 1090 (1985) ("[G]eneral contractual rights [such] as the right to order the work stopped or to control the order of the work or the right to inspect the progress of the work do not mean that the general contractor controls the method of the subcontractor's work.").

puts the cart before the horse: SFC Homes had no duty to be on site or conduct safety meetings where it was not the general contractor and did not retain control of the work.

Garcia Titla brought forth *no* facts that SFC Homes retained a right to supervise FRDS's work such that FRDS was "'not entirely free to do the work in his own way.'" *Kamla*, 147 Wn.2d at 121 (quoting RESTATEMENT (SECOND) OF TORTS § 414 cmt. c). The Court of Appeals held:

> SFC Homes did not retain control over the work so that a duty of care would arise. Per Iwasaki' s declaration, FRDS provided control over the framing because SFC Homes had no experience in this area. SFC Homes relied on FRDS' s expertise. Garcia Titla did not raise any material issue of fact as to this matter. In addition, Garcia Titla never interacted with anyone from SFC Homes.

Court of Appeals Opinion, at 9-10. Again, there is no "conflict" for this Court to review. Garcia Titla failed to present evidence to support his claims.

1. There is No Requirement to Have an Owner in Control

Garcia Titla seems to argue that a jobsite owner who hires a subcontractor automatically becomes an "owner in control" upon whom the duty of worksite safety falls. No regulation or case law so states. Further, Garcia Titla's argument seeks imposition of *per se* liability on jobsite owner/developers, a result previously rejected by this Court:

> Our first question is whether jobsite owners are per se liable under the statutory requirements of RCW 49.17.060. They are not. Nothing in chapter 49.17 RCW specifically imposes a duty upon jobsite owners to comply with WISHA. The second question is whether jobsite owners play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor. We hold they do not.

Kamla, 147 Wn.2d at 123-24.

Nonetheless, Garcia Titla repeatedly makes the erroneous argument that as an owner, SFC Homes was per se liable for compliance with WISHA regulations if it did not hire a general contractor. Garcia Titla cites *Stute*, *Moen v. Island Steel Erectors*, 128 Wn.2d 745, 912 P.2d 472 (1996), and *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), but *Stute*, *Moen*, and *Kelley* all involved the duties of general contractors, not jobsite owners. Where there is no general contractor and no owner in control, a worker's recovery may be limited to industrial insurance benefits. There is not always a third party to sue.

2. Garcia Titla Mischaracterizes *Stute*

Garcia Titla argues that *Stute* and its progeny apply a per se rule for worksite safety not only to general contractors, but also to "owner/developers." Again, such an interpretation of *Stute* would impose a per se duty on jobsite owners to ensure WISHA compliance, a position not supported by *Stute* or its progeny. See, e.g., *Afoa v. Port of Seattle*, 176

Wn.2d 460, 472, 296 P.3d 800 (2013) (no per se duty imposed on jobsite owners under *Stute*).

Garcia Titla cites two cases, *Doss v. ITT Rayonier Inc.*, 60 Wn. App. 125, 803 P.2d 4 (1991) and *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990), for this proposition. Those cases are distinguishable from the instant case. In *Doss*, the jobsite owner, ITT Rayonier, owned the mill and the independent contractor's employee was killed while cleaning the inside of the mill owner's boiler. On those facts, the court concluded that the mill owner owed the decedent a common law duty to exercise ordinary care for his safety because of its influence over safety aspects of the boiler cleaning. 60 Wn.App., at 130. In those circumstances there was "no significant difference between an owner-independent contractor relationship and a general contractor-subcontractor relationship." 60 Wn. App. at 127, n. 2. In *Weinert*, Division One held that an owner/developer could be liable for WISHA violations where the facts showed the owner/developer in that case had "the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations." 58 Wn. App. at 696. Those facts are not present in this case, where Garcia Titla failed to show SFC Homes had or retained any supervisory authority over the framing work.

Here, Garcia Titla has failed to present evidence supporting his theory of retained control, and the only evidence on this point is the declaration of SFC Homes' representative. CP at 106. Garcia Titla has not created an issue of fact to establish retained control.

3. Untimely Evidence

Garcia Titla purports to cite to materials that he submitted after the trial court's summary judgment order was entered, in support of his motion for reconsideration. The untimely submitted materials were public records from 2011 and were available prior to the summary judgment motion filed in January 2015.[17] The trial court denied the motion for reconsideration and the Court of Appeals affirmed, holding the trial court did not abuse its discretion in denying the motion to reconsider. Court of Appeals Opinion, at 12 (holding Garcia Titla "did not exercise due diligence in obtaining this evidence"). Garcia Titla has not petitioned this Court to review the Court of Appeals ruling that the untimely filed materials were not newly discovered evidence, that Garcia Titla had not exercised due diligence in obtaining the evidence, and that the trial court properly refused to consider

[17] Those citations include building and plumbing permits. CP at 198-203, 427, and 432. However, the purpose of reconsideration is not to permit the losing party to have a second chance at presenting evidence to support their claim, and Garcia Titla did not provide a sound basis under Civil Rule 59 for the Court to consider the additional materials.

those materials and properly denied the motion for reconsideration. Therefore, Garcia Titla may not now rely such materials.

Even if considered, as the Court of Appeals analysis made clear, it still would not have created a genuine dispute as to a material fact. "The newly found evidence did not counter the evidence provided by SFC Homes that it did not control the jobsite in a way that gave rise to a duty." Court of Appeals Opinion, at 12.[18]

D. No Evidence of WISHA Violations

Finally, Garcia Titla failed to present evidence in response to the summary judgment motion of safety or health WISHA violations. Thus, remedies under *Stute* are unavailable. Garcia Titla had the burden of showing that SFC Homes "did not follow *particular* WISHA regulations." *Stute*, 114 Wn.2d at 457 (emphasis added). Garcia Titla provided no evidence of any WISHA or DOSH violations to the court. CP at 118. By contrast, at summary judgment, SFC Homes submitted testimony from its safety expert, Kurt Stranne, who stated that WISHA does not require fall protection for framers at heights of under ten feet.[19] CP at 489-90; see also CP at 80, 83.

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[18] The application for permits in the absence of any contract between SFC Homes and FRDS does not create an issue of material fact as to SFC Homes' status as jobsite owner only and its lack of control over the jobsite, in light of the undisputed evidence presented that SFC Homes did not serve as the general contractor for the project and SFC Homes did not retain the right to control the work being performed on the subject property. .

[19] WAC 296-155-24510 (the provision applicable in 2011) provides: "When employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall

Garcia Titla presented no evidence he was at a height greater than ten feet. As such, SFC Homes established the absence of an issue of fact. Garcia Titla failed to respond with facts showing the existence of an issue of fact on whether WISHA violations occurred. The trial court recognized this failure at oral argument, stating:

> Well, but even a general contractor is not a strict liability standard. You still have to show a [WISHA] violation. So where do you have that? I mean, all that does—if they are a general, it just means that they can't shift the responsibility for general safety compliance on-site, but you've got to show that there was a violation and that that was a cause of his injury, and I don't have that either.

CP at 293. Affirming the trial court, the Court of Appeals held that Garcia Titla "identified specific regulations that they alleged were violated, but did not provide any support for their allegations." Court of Appeals Opinion, at 10.[20] He submitted no expert testimony in response to the summary judgment motion to support a claim of a WISHA violation. Expert opinions that help establish the elements of negligence are admissible. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007). Here, Garcia Titla only offered an expert opinion for the first time with his motion to reconsider, after the trial court entered the order granting summary judgment; he offered no expert opinion in response to the

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ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed, and implemented." CP 489.

[20] Garcia Titla admitted he had not alleged any WISHA violations. CP at 293-94.

summary judgment motion. See CP at 122-148. Again, as the Court of Appeals affirmed, the trial court properly refused to consider the late submitted expert testimony, as it was not "newly discovered evidence" which Garcia Titla could not with reasonable diligence have discovered and produced in response to the summary judgment motion. CR 59(a)(4). Court of Appeals Opinion, at 12. The dismissal also can be affirmed on this basis.

VI. CONCLUSION

The decisions of the trial court and Court of Appeals were correct. There is no conflict for this Court to resolve and the Petition should be denied.

RESPECTFULLY SUBMITTED this 16th day of June, 2016.

ANDREWS ▪ SKINNER, P.S.

By _____

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DECLARATION OF SERVICE

I, Sally Gannett, hereby declare as follows:

1. I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 16th day of June, 2016, I caused a copy of the foregoing Respondent SFC Homes, LLC's Answer to Petition for Review to be sent for service upon the following in the manner indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of June, 2016, at Seattle, Washington.

Sally Gannett, Legal Assistant