No. 47462-0-II

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

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

v.

SFC HOMES, LLC, a Washington Corporation

Respondent.

BRIEF OF APPELLANT

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INTRODUCTION

This appeal asks whether an injured worker (Garcia-Titla) for a subcontractor (FRDS) may sue the general contractor (SFC Homes) who, according to all public records, owned, developed, and constructed a new home, paid subcontractors to do the work, and yet failed to enforce safety regulations. When Garcia-Titla fell and was injured due to the absence of proper safety equipment, SFC Homes claimed that a different company was responsible for safety. But SFC Homes owed a duty of care to all subcontractors working upon its jobsite, so the injured worker properly sued SFC Homes.

This duty is commonly called the *Stute* duty of care, and is non-delegable. Under *Stute*, SFC Homes could not delegate this duty to a different company. Yet the trial court dismissed on summary judgement, ruling that Garcia-Titla had not proven that the SFC Homes was the general contractor at the jobsite of injury, despite public records proving otherwise.

Public records are the acceptable method of identifying general contractors and owner/developers of new construction sites. This Court should reverse and remand for trial.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in granting SFC Homes' Summary Judgement Motion because the general contractor/owner/developer at the job site owes all workers upon its jobsite a duty of care. CP 483.

2. The trial court erred in granting summary judgment because public records proving that SFC Homes was the general contractor and owner/developer at this job site were sufficient to raise a genuine issue of material fact precluding summary judgment. CP 125, 128, 130, 132, 133, 135, 136, 138, 144, 483.

3. The trial court erred in denying Garcia-Titla's Motion for Reconsideration based on the record presented on summary judgement, when the public records showed the defendant was the general contractor and owner/developer of the construction site, who owed a duty of care to the injured worker. CP 125, 128, 130, 132, 133, 135, 136, 138, 144,197, 198 -203, 485.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err as a matter of law in determining that SFC Homes was not the general contractor and owner/developer of this job site?

2. Did the trial court err in ruling that the public records reflecting that SFC Homes was the general contractor and owner/developer at this job site were not sufficient to raise a genuine issue of material fact precluding summary judgement?

3. Did the trial court err in failing to reconsider its ruling, when there is no legal or contractual basis to sue a different party and the correct defendant has already been named?

STATEMENT OF THE CASE

A. Angel Garcia-Titla was injured in a fall while working at an SFC Homes construction site where no one provided proper or effective fall-prevention or protective equipment.

Angel Garcia Titla was working on a construction site owned and developed by SFC Homes. CP 125. Garcia-Titla was working as a framer for the framing subcontractor, FRDS. CP 55, 58. SFC Homes hired FRDS to frame one of several homes at a Gig Harbor site that SFC Homes owned and developed. CP 57, 58. As Garcia-Titla stood on a wooden piece of lumber that was eventually to become the second-story floor of the house, the lumber (or joist) broke, causing him to fall to the ground with the lumber tumbling down after him. CP 61-64. Garcia-Titla suffered painful injuries when his body hit the ground and the joist hit his head. CP 62-63.

Neither FRDS nor SFC Homes had provided adequate safety equipment on the site, but instead provided a harness and lanyard in a situation where workers had no place to tie off. CP 77, 78, 81-83. Garcia-Titla brought a personal injury *Stute* claim against SFC Homes. CP 38-40.

B. SFC Homes brought a motion for summary judgment, claiming that it was the owner/developer who contracted directly with independent contractors, not a general contractor, and owed no duty of care to Garcia-Titla.

Before trial, SFC Homes brought a motion for summary judgement claiming that it was not the general contractor of the job site (CP 10, 17); it was not the owner/developer in control of the job site (CP 10); and it contracted directly with framing contractors who supervised themselves (CP 10, 105-107). SFC Homes claimed that an owner who is not a general contractor, and who chooses not to retain control of his site, does not owe the *Stute* duty of care as that relates to safety. CP 17-19. SFC Homes plead that its owner Mr. Atsushi Iwasaki allowed the framing contractor FRDS, to supervise itself because it was an independent contractor. CP 20.

Counsel for SFC Homes stated "as an independent contractor, FRDS was free to do the work in its own way." CP 20. And "SFC Homes did not retain the right to interfere with the

manner in which FRDS completed its work, nor did SFC Homes affirmatively assume responsibility for worker safety." CP 20. SFC Homes argued that Garcia-Titla had not proven that SFC Homes was the general contractor of the jobsite. CP 21. SFC Homes argued that as an owner who chose not to retain control of his jobsite, SFC Homes could not be sued under a *Stute* theory of liability. CP 20.

C. Public records showed that SFC Homes was the general contractor and the owner/developer of the job site, but the trial court did not agree that public records were enough to identify the defendant and granted summary judgment.

Garcia-Titla provided evidence to show that according to city and county records, the owner of the construction site was SFC Homes. CP 125. The general contractor was SFC Homes. CP 198. SFC Homes took out the building permit to build at the site. CP 198, 200, 202. SFC Homes signed the City of Gig Harbor's permit application documents. CP 427, 428, 432. SFC Homes is a licensed general contractor by trade. CP 130, 132, 138, 436. SFC Homes has a website where it advertises that its company is in the "housing business" (CP 144) as a builder of homes for "construction" of "detached houses." CP 144. There was no other

entity identified in any public record as being either the owner or the general contractor for this construction site.

To this evidence, SFC Homes replied that although it was in fact a general contractor by trade and did have a general contractor's license, it was not at that site at that time, the general contractor of that project. CP 146. Garcia-Titla had no further opportunity to reply. The trial court found that Garcia-Titla had not proven that SFC Homes was the general contractor at the site of Garcia-Titla's injury, nor that he was the owner/developer who held the *Stute* duty of care. The trial court granted SFC Homes' summary judgement motion. CP 483-484.

Garcia-Titla brought a motion for reconsideration providing the court additional public records further showing that SFC Homes was both the general contractor and the owner of the site where he suffered injury. CP 174. The additional documents provided by Garcia-Titla included a certified, stamped copy of the building permit from the City of Gig Harbor listing SFC Homes as the general contractor for the parcel in question; a plumbing permit showing SFC Homes as the general contractor for the parcel in question; and a permit application signed by SFC Homes listing itself as the general contractor for the parcel in question and listing

itself as both the owner and the general contractor for that parcel. CP 197-203, 427. The trial court denied reconsideration. CP 485. The trial court found that Garcia-Titla had produced no evidence to prove that SFC Homes was the general contractor or the owner/developer. CP 485.

ARGUMENT

A. The standard of review is de novo

Review of the granting of summary judgement is *de novo*. *Washington Imaging Services LLC., v. Washington State Department of Revenue*, 171 Wn.2d 548, 252 P.3d 885 (2011). Summary judgment procedure is a liberal measure, designed for arriving at the truth. *Keck v. Collins, 181 Wn. App. 67, 325 P.3d 306 (2014) citing Whitaker v. Coleman, 115 F.2d 305 (1940).* Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial. *(Id).* It is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. *(Id).* The object and function of summary judgment procedure is to avoid a useless trial. *Babcock v. State, 116 Wn. 2d 596, 809 P.2d 143 (1991).* A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. *(Id).* Summary judgment exists to

examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial. *(Id).* There are genuine issues of material fact in this case, that need to be presented to the trier of fact.

B. A proper interpretation of *Stute v PBMC* and its progeny proves that SFC Homes is the correct contractor/developer to sue.

The Supreme Court of Washington held that workers upon construction jobsites are owed a duty of care to comply with safety regulations by the general contractor and the owner/developer of the jobsite. *(See Stute v. PBMC*, 114 Wn.2d 454, 788 P.2d 545 (Wash. 1990). This duty of care is non-delegable. *(Id).* This duty of care stems from the "innate supervisory authority" had by general contractors and owner/developers. *(Id). Stute* is a case where the employee of a subcontractor at a construction site fell off a roof. The worker was not wearing fall protection. It was a Saturday, very few workers were working that day, and there was limited oversight of safety at the construction site. *(See Stute v. PBMC).* The worker lost his grip on the roof, and because he did not have a harness and lanyard on, there was nothing to arrest his fall, or restrain him

from falling in the first place. This lack of safety equipment violated WAC 296-155.

The worker fell to the ground, suffered injury, and a negligence lawsuit against the general contractor and owner/developer of the jobsite followed. *(See Stute v. PBMC).* Thereafter *Stute* required owner/developers of construction sites to have an entity acting in the capacity of general contractor upon a jobsite where two or more subcontractors are hired to work. *(Id).* If you are an owner, and you do not place a general contractor upon a jobsite to supervise the daily safety operations, you will be considered an owner who retained control of the jobsite and the *Stute* responsibilities will pass to you. *(Id).* They will not pass to you because you retained control, they will pass to you because you did not place anyone in the position of general contractor, so the responsibility is yours. (*See Stute v. PBMC*, 114 Wn.2d 454, 788 P.2d 545 (Wash. 1990).

The history of the *Stute* decision is concisely explained in *Moen Co., v. Island Steel Erectors*, 912 P.2d 472, 128 Wash. 2d 745 (1996) as follows:

> In *Kelley v. Howard S. Wright*, 90 Wn.2d at 332-33, we explicitly held a general contractor had a non-delegable duty under the then-existing workplace safety statute to ensure the

safety of all workers on a jobsite. In 1990, we again held a general contractor owed a duty to all employees at a worksite to comply with, or ensure compliance with, safety regulations under WISHA. RCW 49.17. *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 788 P.2d, 545 (1990). This duty is based upon the general contractor's "innate supervisory authority" that constitutes "per se control over the workplace," *Stute*, 114 Wn.2d at 464, and upon the wording of RCW 49.17.060, WAC 296-155-040, and *Stute*, 114 Wn.2d at 457-60.

Here, Garcia-Titla sued SFC Homes under a *Stute* theory of negligence and breach of the non-delegable duty to maintain a safe work place. A breach of the *Stute* duty is a breach of omission: If the general contractor did not supervise its site, it breached its duty. (WAC 296-155-100). If the general contractor left its framers to frame alone, without supervising the safety aspect of their job, it breached its duty. (WAC 296-155-100; 110). A general contractor must require safety meetings and the general contractor must keep the documentation of those meetings. (WAC 296-155-110). If he states in his sworn Declaration that he maintained no control over his jobsite - as SFC Homes has done here - he breached his duty. (WAC 296-155-100). If he claims that he hired independent contractors, and left them to fend for themselves, he breached his duty. (WAC 295-155).

Mr. Iwasaki's Declaration proved the breach of duty, or at the very least created a genuine issue of material fact, because he

swore in his Declaration that the framers were treated as independent contractors and left to supervise themselves. He breached the duty of care required of general contractors and owner/developers. SFC Homes misinterpreted and misapplied the principles of *Stute v. PBMC* in its Motion for Summary Judgement.

In this case, it has been overwhelmingly proven by county records that SFC Homes is a general contractor. Whether it was working at this site as the general contractor, or whether it was an owner/developer is not material. If it did not leave a general contractor at the site daily, to supervise safety, then as a default it becomes the owner in control of the site, whether it chose to exercise that control or not. *(See Stute, Moen, Kelley, etc., supra).* That is why SFC Homes'argument should have failed when it argued that Garcia-Titla must prove that SFC Homes was more than the owner/developer, and was more than a general contractor. Garcia-Titla did not have to prove that SFC Homes was choosing to act as the general contractor at that site at that time. Or, that SFC Homes did not retain control by choice, and as such, did not have the duty of control by law. There is no choice in the matter for SFC Homes, because it chose to purchase land,

hire subcontractors, and build homes upon it. That thrusts the non-delegable *Stute* duties upon SFC Homes.

All Garcia-Titla had to prove was that (1) he was working at the job site (CP 80); (2) no one from SFC Homes ever came around to supervise the safety aspect of the job (CP 79, 83, 84); and (3) he suffered injury after a faulty piece of lumber broke under his feet (CP 62). He testified to these facts already, in his Deposition, part of which was originally submitted in SFC Homes' summary judgement moving papers. He stated that he never spoke to anyone from SFC Homes at any time (CP 83, 84) proving that SFC Homes did not have a safety orientation with him and did not come around daily to inspect the jobsite. He also testified that he attended no safety meetings by anyone while he worked at that jobsite. CP 79.

This testimony regarding lack of safety oversight proves the breach of the general/owner's non-delegable duty. Causation is left to the trier of fact; but duty exists. This breach specifically violates but is not limited to, violations of RCW 49.17.060; WAC 296-155-040; WAC 296-155-100; WAC 296-155-110; and *Stute v. PBMC*, 114 Wn.2d 454 (1990).

Most importantly to this case, this Court in *Doss v. Rayonier Inc.* 803 P.2d 4, 60 Wash. App. 125 (1991) stated that whether a defendant is an owner/developer or a general contractor matters not. This Court, citing the Division 1 case of *Weinert v. Bronco National Co.*, Wn.App 692, 795 P.2d 1167 (1990) stated:

> We do not overlook the fact that defendant is an owner/developer rather than a general contractor hired by an owner. We see no significance to this factor insofar as applying *Stute* to the facts of this case. The owner/developer's position is so comparable to that of general contractor in *Stute* that the reasons for the holding in *Stute* apply here. The purpose of the statutes and regulations relied upon in *Stute* is to protect workers. The basis for imposing the duty to enforce those laws on a general contractor exists with respect to an owner/developer who, like the general contractor, has the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations. (*Doss, supra*).

In Weinert v. Bronco National Co., Wn.App 692, 795 P.2d 1167 (1990), the Court ruled that an owner/developer was liable for injuries sustained by an employee of the construction company hired by its siding subcontractor. The employee fell from scaffolding erected by its own employer. No evidence showed that the owner/developer had participated in the erection of the

scaffolding, yet the owner/developer was still liable. The Court in *Weinert* stated:

> The Deposition testimony before the Court asserts that Weinert was working on defective planks used in the scaffolding and that the scaffolding was unstable. It also provides a basis for a trier of fact to find that defective scaffolding was a proximate cause of Weinert's fall and resulting injuries.... In reaching its conclusion, the *Stute* Court rejected the contention that before such a duty could be imposed, there must be proof the general contractor controlled the work of the subcontractor.... We do not overlook the fact that Bronco is an owner/developer rather than a general contractor hired by an owner. We see no significance to this factor insofar as applying *Stute* to the facts of this case. (See *Weinert*, supra).

This case is identical to *Weinert*. Garcia-Titla's Deposition testimony has asserted that he was working on a defective plank. That plank was unstable, proven by the fact that the plank broke under his feet. This testimony provides the basis for a trier of fact to find that a defective piece of wood was a proximate cause of Garcia-Titla's fall and resulting injuries. Like in *Weinert* following *Stute*, in reaching its conclusion, this Court should reject the contention that before such a duty can be imposed, there must be proof that the general contractor controlled the work of the subcontractor. Just like in *Weinert* following *Stute*, this Court should see no significance in the fact that SFC Homes may be an owner/developer or a general contractor, or both at this site. All

the cases since *Stute,* place the duty to provide a safe place to work on entities like SFC Homes. As such, SFC Homes was the correct entity to sue in this case and should not have been summarily dismissed.

SFC Homes argued that *Stute* was not the case on point, and instead *Kamla v. Space Needle* 147 Wn.2d 114 (2002) governed this case. *Kamla* is not on point. *Kamla* involved an owner (the Space Needle) who was not a general contractor, and an independent contractor that was not a subcontractor. Independent contractors differ from subcontractors. The title itself explains the difference: Independent contractors are independent, like the plumber who comes to your home to fix your sink. Subcontractors work under a higher contractor – the general or prime contractor. They work on construction sites, which are hazardous employment sites, where safety is of utmost importance because injuries are very likely. Like a father to his children, the general or prime contractor is responsible for the safety of his subcontractors, per the mandates of *Stute.* Contrary to Defendant's pleadings, *Kamla v. Space Needle*, 147 Wn.2d 114 (2002) does not apply to this case. In *Kamla*, the Space Needle was not a general contractor, and it did not hire

subcontractors to build a residential home. The Space Needle hired a fireworks company to put on a fireworks show. The Court found that nonetheless, if the Space Needle had been "in the business" of fireworks, it could have been considered an owner who retained control of the fireworks display at issue in that case. Since the Space Needle was not an owner who was "in the business" of fireworks, it did not meet the requirements of being an owner in control. The Space Needle did not need to place another entity between itself and the fireworks independent contractor, the independent contractor was not a subcontractor, and the Space Needle was not building a residential or commercial home. The Space Needle was simply an owner, who hired an independent contractor.

In this case the trial court found that, like the Space Needle in *Kamla*, SFC Homes declared itself to be an owner who chose not to retain control. Therefore, it did not inherit the *Stute* duties. This is not a legally permissible interpretation of Washington law, because *Stute* and its progeny mandate that the general contractor has a *per se* duty of safety for all workers at its job site. *(Stute v. PBMC,* 114 Wn.2d 454, 788 P.2d 545 (1990). If the owner fails to hire a general contractor, then he inherits the *per se* duty. *(Id).*

C. Genuine issues of material fact remain to be decided as to whether SFC Homes is the general contractor and/or owner/developer (or both) for this job site.

Summary judgment shall be granted if the pleadings and affidavits on file show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985); *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *review denied*, 118 Wn.2d 1023 (1992). The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young,* 112 Wn.2d at 225; *Right-Price Recreation, LLC v. Connells Prairie Community Council,* 146 Wn.2d 370, 381, 46 P.3d 789 (2002). Once that initial burden has been met, the burden then shifts to the nonmoving party to set forth specific facts showing there is a genuine issue for trial. *Rathvon v. Columbia Pac. Airlines*, 30 Wn.App 193, 201, 633 P.2d 122 (1981), *review denied*, 96 Wn.2d 1025 (1982).

i. Public records prove there is a genuine issue of material fact as to whether SFC Homes is the contractor/developer of this jobsite

The correct party to sue in a construction site negligence action, is the general contractor, the owner/developer, or both. *Stute v. PBMC*, 114 Wn.2d 454, 788 P.2d 545 (Wash. 1990).

These parties have a non-delegable, *per se* duty to enforce safety regulations at their construction sites. *(Id).* The way to determine the identity of the general contractor and owner/developer is to investigate public records, because the general contractor and/or owner/developer are required by law to apply for and be granted, a building permit for the site they wish to develop. RCW 19.27.095 governs the application for and consideration of building permits in the state of Washington. Beyond these requirements, local ordinances refine the requirements for a fully completed application. Here, the home where Garcia-Titla fell was being built in Gig Harbor, so the Gig Harbor Municipal Code was the ordinance that governed this construction.

> RCW 19.27.095 and GHMC 15.08.020 require:
>
> Any owner or authorized agent who intends to construct...a building or structure...shall first make application to the building official and obtain the required permit.
>
> (A) To obtain a permit, the applicant shall first file a written application on a form furnished by the City for that purpose. A complete building permit application shall consist of the following information:
>
> (a) The legal description, or tax parcel number...the street address if available, and may include any other identification of the construction site by the prime contractor;
>
> (b) The property owner's name, address, and phone number;

> (c) The prime contractor's business name, address, phone number, current state contractor registration number;
>
> (ii) The name and address of the firm that has issued a payment bond...
>
> 3. A description of the work to be covered by the permit for which application is made; and
>
> 4. The proposed use and occupancy for which the proposed work is intended...

Based on the above, the entity that an injured worker sues when he or she brings a *Stute* case is the state contractor, whose name, address, phone number, current state contractor registration number and bond are registered with the city, listed on the building permit application, and listed on the building permit itself after it is granted. Here, SFC Homes' state contractor registration number is listed on the building permit application as well as on the building permit. CP 427, 198-203. SFC Homes' name, address, and phone number are listed on the building permit application both under "owner" and under "contractor." CP 427. SFC Homes is listed as the contractor in charge of being present for all of the city inspections that took place at this job site. CP 427, 432. We can link this contractor to this lawsuit because here, the parcel of land and the address of this jobsite are identified as the place where

SFC Homes chose to build the house where Garcia-Titla fell. CP 125. SFC Homes is both the owner/developer and general contractor for this parcel, and the only party to sue in this case.

Therefore, according to Pierce County and City of Gig Harbor records, the owner of the construction site was SFC Homes. CP 125, 427. The general contractor for the construction site was SFC Homes. CP 197-203, 427, 432. SFC Homes took out the building and plumbing permits to build at the site. CP 197-203, 427. SFC Homes is listed as the owner of the parcel. CP 125. SFC Homes signed off on the City of Gig Harbor's application documents indicating that it would be responsible for overseeing all city inspections of the construction and would adhere to all laws pertaining to construction in Washington State. CP 427. SFC Homes is a general contractor by trade. CP 130, 132. SFC Homes has a website where it advertises its company as a builder of homes, and has a general contractor's license. CP 132, 133, 135, 136, 138, 144. There was no other entity identified in any public records as being either the owner or the general contractor for this construction site. For these reasons, and under a *Stute* theory of liability, Garcia-Titla brought his action against SFC Homes.

SFC Homes stated the ISSUE in its summary judgement motion as follows:

> "Whether summary judgment must be granted as a matter of law where SFC Homes was an owner of property and not a general contractor." CP 16.

SFC Homes stated under LEGAL ANALYSIS:

> Summary Judgment should be granted as a matter of law where SFC Homes was an owner and not a general contractor... CP 18; SFC Homes...neither acted nor served as a general contractor... CP 17; SFC Homes was an owner, and not a general contractor... CP 10, 16, 17, 18, 21; SFC Homes was the land owner and not the general contractor... CP 11, 21; SFC Homes is not similar enough to a general contractor to justify imposing the same non-delegable duty of care to ensure WISHA compliant work conditions... CP 29.

Garcia-Titla has set forth specific facts showing there clearly are genuine issues of material fact for trial regarding whether SFC Homes is the contractor/developer of this job site. Summary judgement is improper when there is a genuine issue of material fact. Even if this Court takes the evidence in the light most favorable to the defendant (which is the opposite of the correct standard) at most, the SFC Homes itself has created a genuine issue of fact: Was SFC Homes the general/owner/developer or not? This is a material fact because the outcome of the case depends on the answer to this question. If there is a genuine issue of material

fact, the trial court erred as a matter of law in granting SFC Homes' summary judgement motion. The more SFC Homes states that it is not the general contractor, the more a genuine issue of material fact exists, in the face of the public records in evidence. Taking all reasonable inferences in the light most favorable to Garcia-Titla, genuine issues of material fact exist as to whether SFC Homes is the general contractor, the owner/developer, or both, for this jobsite.

ii. Iwasaki's declaration proves that there is a genuine issue of material fact as to whether SFC Homes breached the *Stute* duty of care

In support of its motion, SFC Homes submitted the aforementioned declaration of SFC Homes' owner, Atsushi Iwasaki of Sumitomo Forestry Group, the parent company of SFC Homes. CP 105-107. Mr. Iwasaki stated that SFC Homes "had no control" over its framing subcontractor FRDS, and had "no right to control" FRDS. CP 106. It did not control the jobsite, and it did not control Garcia-Titla's employer FRDS. CP 106. SFC Homes plead that FRDS was treated like an independent contractor, therefore, the duties imposed upon general contractors by the case of *Stute v. PBMC* could not apply to SFC Homes. CP 20-23, 106. It plead that "SFC Homes reasonably relied on FRDS to ensure WISHA

compliance." CP 22. Such reliance on a subcontractor for safety oversight is a violation of WAC 296-155. Mr. Iwasaki did not state in his Declaration that any other group was hired by SFC Homes to act as the general contractor. Instead, his counsel plead that the subcontractors were independent contractors and were left to supervise themselves. CP 20-23,106. Mr. Iwasaki's position was clear: He was not a general contractor, so *Stute* duties could not apply to him. CP 20-23,106.

To counter Mr. Iwasaki's declaration, Garcia-Titla's response to SFC's summary judgement provided irrefutable evidence that SFC Homes was a general contractor. CP 128, 130, 132, 133, 138,144. In that response Garcia-Titla provided to the court the aforementioned public records which were not limited to but included: SFC Homes' general contractor's license (CP 130); SFC Homes' website information where it holds itself out as a General Contractor and Builder of Homes (CP 144); SFC Home's County Assessor Record listing it as the owner of the property where Garcia-Titla fell (CP 124); and SFC Homes registration with the Department of Revenue listing it as a Builder of New Construction Homes (CP 138). This should have ended the inquiry, and proven that SFC Homes was a general contractor. But the trial court

agreed that Garcia-Titla had not shown proof that SFC Homes was a general contractor, or an owner/developer who retained the *Stute* duties, and dismissed this case.

Immediately thereafter, Garcia-Titla discovered evidence that proved that SFC Homes was the general contractor at the subject jobsite, at the time of this injury. Garcia-Titla provided this evidence, which consisted of the City of Gig Harbor's building permit and building permit application materials, to the trial court in the form of a Motion for Reconsideration. Garcia-Titla also secured an official, stamped seal from the Clerk of the City of Gig Harbor showing proof that SFC Homes took out the building and plumbing permits to build the home in question. CP 197, 198-203. Garcia-Titla also included the building permit application where SFC Homes listed itself as the general contractor, and listed itself as the owner/developer. CP 427. As such, SFC Homes was the general contractor according to the City of Gig Harbor. The newly discovered certified document from the City of Gig Harbor and the building and plumbing permits showed that SFC Homes was the contractor who applied for and received the building and plumbing permits, at all relevant times, for the building site where the Garcia-Titla was injured. This should certainly have ended the inquiry.

The admission in SFC Homes' reply brief that SFC Homes at all relevant times had a general contractor's license, coupled with the City of Gig Harbor's building and plumbing permits, further created a genuine issue of material fact as to whether SFC Homes was the general contractor at the site of this injury and at the time of this injury. The building permit showed that the contractor for parcel #400254-0250 (the parcel where Garcia-Titla fell) was SFC Homes. CP 427. The contractor for that site under license number SFCHOHL099R0 was SFC Homes. CP 427. This is irrefutable proof that SFC Homes was the general contractor at that site, at the time of this injury. Taking all reasonable inferences in the light most favorable to Garcia-Titla, summary judgement should not have been granted.

D. The trial court should have reconsidered its ruling because the correct defendant has been named, and there is no legal or contractual basis to sue a different party.

Pursuant to CR59(a)(4) a Motion for Reconsideration may be granted where there is newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the time of trial. The new evidence produced by Garcia-Titla was the aforementioned stamped and authenticated building and plumbing

permits from the Clerk of the City of Gig Harbor, along with the application for permit documents. Pursuant to PCLR 7(c), CR 59(a)(3),(4),(7),(9) and CR 60(b)(1),(3),(4),(11), Garcia-Titla's request for reconsideration should have been granted. It was an abuse of the trial court's discretion not to grant reconsideration. A trial court's decision can be reversed if it is "manifestly unreasonable, or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield,* 133 Wn.2d 39, 940 P.2d 1362 (1997). In our case the trial court abused its discretion in denying Garcia-Titla's motion for reconsideration.

i. <u>No contract governs this case</u>

During oral argument on Garcia-Titla's Motion for Reconsideration, counsel for SFC Homes stated to the court that she had a contract that governed this case. That turned out to be false. No such contract was produced, and SFC Homes, according to all public records, was the owner and the general contractor at this jobsite. SFC Homes continued to alleged there was a contract that lead to another entity called Henley USA, LLC, as having contracted with the subcontractors at the subject jobsite. By this point in the proceedings, SFC Homes was admitting that it was a general contractor as well as the owner of the parcel at issue. SFC

Homes admitted in a footnote in its brief "SFC Homes does have such a license." CP 146. A new contract between other parties would not change who the general contractor was, for this site. It would not change who the owner was, for this site. If another entity contracted with the subcontractors, that entity could be another subcontractor, another general contractor working as lead subcontractor, a labor broker, or a safety superintendent hired by SFC Homes. That still would not affect Garcia-Titla's right to sue the general contractor and owner/developer of the site where he fell. At most, it might allow SFC Homes to claim an "empty chair" defense, and spread liability around to be shared by one more defendant.

If SFC Homes chose not to act in the capacity of general contractor it was still the owner/developer in control, who allowed the framers to supervise themselves according to its own declaration, and can be sued for negligence herein. At most, this evidence creates genuine issues of material fact for the trier of fact. As stated by Safety Expert Mr. Mike Sotelo:

> A: ...In the testimony by the owner... he said, I trust them [the framers] for everything. I don't have to worry about it. And that just doesn't fly.

> Q: ...I think what he's saying is he doesn't control the work being performed.
> A: That's not true... he does control the work...who pays them? The framers are doing it for free?
> Q: No, I'm not saying he doesn't pay them
>
> A: That's control....I was a general contractor for 40 years, and trust me, we have control. When we pay somebody, we control. We don't say, Okay, we're going to give you $50,000.00 and you could do it any way you want, anytime you want, and wherever you want. It just doesn't work that way... Whoever the subcontractor, the framing contractor got the set of plans from and gave a price to and got paid from, they have control.... CP 233, 234.

SFC Homes claimed that the contract in its possession governed this case, and legally shifted SFC Homes duty to provide a safe place to work away from SFC Homes and placed that duty squarely on a sister-company of SFC Homes identified as Hensley USA. SFC Homes claimed that this contract would prove Garcia-Titla sued the wrong entity. The trial court ordered SFC Homes to produce the contract. The document produced by SFC Homes was called the "Master Subcontract." CP 380-405. It was not a contract. CP 380-405. It was not related to our case. CP 380-405. It certainly did not control our case, provide a basis to add a defendant to our case, or provide cause to dismiss our case. CP 380-405. At best, it was a bid from framer FRDS to Hensley USA, signed only by FRDS for some unknown jobsite at some unlisted

parcel during a different time period where "Hensley", along with a party identified as "Bennett," are listed as the owners of the land, and Hensley is listed as the general contractor. (SFC Homes has been consistently adamant that it is the owner of the land in question here). The document does not list SFC Homes at all, and certainly does not list it as the owner of the land in that document, therefore proving that the document has nothing to do with our case.

The document is 21 pages long, and on almost every page there is a signature line for the general contractor to sign, and every signature line is left blank, causing it to be legally unenforceable in any court. CP 380-405. The document claims that Hensley USA along with Bennett are the owners for a project, and Hensley USA was the general contractor. At the bottom of almost every page it declares itself to be a "Master Subcontract Agreement" for owner Bennett. Since SFC Homes has been adamant that it is the owner of the parcel of land in our case (see declaration of Iwasaki CP 105-107), by SFC Homes' own argument, the document has no relationship to our case.

The only way to determine who legally retained the *Stute* duties for a particular parcel of land and for a particular project is to

see who - based on public records - was granted the parcel of land to build homes there; whether that entity is a general contractor with a general contractor's license; who applied for the building permit to build that house; who was listed as the owner and contractor on the building permit application; who was listed as the general contractor on the actual building permit, etc. Here, the only entity listed is SFC Homes. Therefore, SFC Homes remains the only party for Garcia-Titla to sue.

The "Master Subcontract" submitted by Defendant cannot, under any contract theory, be considered a binding contract between any parties; a binding contract between Hensley USA and SFC Homes, the owner of our parcel at our jobsite; a binding contract between Hensley USA and SFC Homes, the general contractor of our parcel at our jobsite; or any type of contract that would shift the *Stute* duties away from SFC Homes at our parcel at our jobsite. Here, the legally identified and chargeable general contractor is SFC Homes. Here, the duty of SFC Homes is non-delegable. This is due to SFC Homes' "innate supervisory authority" that "constitutes per se control over the workplace." *(See Doss v Rayonier, Inc.,* 803 P.2d 4, 60 Wash. App. 125 (1991) and *Weinert v Bronco National Co.,* Wn. App. 692, 795 P.2d 1167 (1990).

Nothing changed with the introduction of this non-binding, unsigned document between a different set of owners (Hensley USA and Bennett), a different general contractor (Hensley) at an unspecified jobsite with no address listed, no parcel number listed, for unspecific work during a different time period. Our client was only at the SFC Homes jobsite for 4 days. CP 79. The dates were May 15 - 20, 2011 and this document was signed by FRDS apparently in 2010, then the date was crossed out and changed to February, 2011, neither date being consistent with the time period when Garcia-Titla fell at the SFC Homes jobsite. CP 380.

The document claims to have FRDS' safety plan attached to it. Nothing was attached to the document; not our jobsite address, not our parcel number. There is no link at all between this document and our case. There isn't even a Declaration from SFC Homes claiming a relationship between this document and our case. This document provides SFC Homes no ability to escape liability for injuries at this jobsite. The trial court denied reconsideration after reviewing this document. CP 485.

ii. SFC Homes can seek its own contractual remedy

In *Gilbert Moen Co. v. Island Steel Erectors, Inc.,* 128 Wn.2d 745; 912 P.2d 472 (1996), the Supreme Court of Washington stated:

> We hold parties to their contracts. If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract... We hold Island to the contract it negotiated with Moen...

In *Moen*, the Supreme Court had to decide whether an indemnity agreement between the general contractor and the employer of the injured Plaintiff could shift liability in part, away from the general contractor. The employer of the injured Plaintiff cited to RCW 51 which mandates that employers have immunity from negligence suits brought by their own workers. *Moen* found that despite this, a contract such as one promising to indemnify the general contractor in certain situations, was valid and enforceable. There, the validity of indemnification agreements was brought into question, as they were generally considered useless and confusing after *Stute.* The *Moen* court further stated:

> The construction industry is highly structured by contractual relationships. The court has historically deferred to such

> contractual relationships in lieu of adopting new tort principles in this field. The allocation of responsibility for workplace injuries by contract is consistent with this historical policy and was expressly approved by the Legislature...The parties here negotiated the Indemnification Addendum. Island agreed to provide liability insurance coverage to Moen consistent with the Indemnification Addendum. The parties' Indemnification Addendum is enforceable, under RCW 4.24.115, according to its terms....As there are fact questions about the parties' concurrent negligence and damages, the decision of the Court of Appeals is reversed and the case remanded for trial. *(Id).*

Therefore per *Moen*, the general contractor or owner/developer who contracts away his non-delegable *Stute* duties still has a remedy. The *Stute* case is brought against the general contractor and owner/developer, but thereafter, should the injured worker prevail, the general/owner can bring his breach of contract case against the entity with which he contracted, and get reimbursed via the provisions of that contract. So if in fact SFC Homes has a contract with Hensley USA where SFC Homes contracts away its *Stute* duties to Hensley, then SFC Homes can bring that breach of contract case if he actually pays some damages to Garcia-Titla. But under no case law is a plaintiff such as Garcia-Titla barred from bringing forth a *Stute* claim against a general contractor of record and the owner/developer of record merely because that general contractor chose to delegate away his

non-delegable duty of safety to another contractor, under a contract that is not in evidence.

The reason for this principle is also stated in *Moen*:

> At common law, a general contractor had no duty to the employees of its independent subcontractor, unless the general contractor retained control over part of the work. *Kelley v. Howard S. Wright Construction Co.,* 90 Wn.2d 323, 582 P.2d 500 (1978). In *Kelley*, we explicitly held a general contractor had a non-delegable duty under the then-existing workplace safety statute to ensure the safety of all workers on a jobsite. *Kelley*, 90 Wn.2d at 332-333. In 1990, we again held a general contractor owed a duty to all employees at a worksite to comply with, or ensure compliance with, safety regulations under WISHA [now DOSH]. RCW 49.17. *Stute v. PBMC*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990). This duty is based upon the general contractor's "innate supervisory authority" that constitutes "per se control over the workplace," *Stute,* 114 Wn.2d at 464, and upon the wording of RCW 49.17.060, WAC 296-155-040, and *Stute*, 114 Wn.2d at 457-60. *(Moen, supra*).

The same principles apply to this case. There is no contractual basis to dismiss Garcia-Titla's case against SFC Homes, the owner and general contractor of the construction site of injury. This Court should not accept SFC Homes' argument that Hensley USA has some relationship to this case. However, should this Court accept SFC Homes' argument in this regard, the extremely close relationship between SFC Homes and the alleged new general contractor Hensley USA, gives rise to an inference that SFC Homes knew who the real party in interest actually was,

all along. Hensley USA therefore had notice of the suit and relation back is appropriate. *Tellinghuisen v. King County Council,* 103 Wn.2d 221, 691 P.2d 575 (1984); *Teller v. APM Terminals Pacific Ltd.,* 134 Wn.App 696, 142 P.3d 179 (2006). The failure to name a party in an original complaint is inexcusable where the omitted party's identity is a matter of public record. *(Id.)*

Here, the omitted party's identity was not a matter of public record, and so Hensley USA can be added. Hensley USA and SFC Homes are owned by Sumitomo, which is managed by Atsushi Iwasaki. CP 435, 436, 438, 439, 442. Hensley USA and SFC Homes are located at 11100 Main Street in Bellevue, WA. CP 435, 438. Hensley USA and SFC Homes both have $12,000 cash savings accounts in lieu of bonds. CP 436, 437, 439, 440. Hensley USA and SFC Homes both have the same insurance coverage under International Insurance of Hannover for $1,000,000. CP 436, 439. Hensley USA and SFC Homes are both covered under the same policy, #CDB14/YFI4CP01/010. CP 436, 439.

Hensley USA may not be the same entity as SFC Homes, but it certainly had knowledge of this lawsuit, since SFC Homes' attorney was holding to the theory that Hensley USA was liable all along. Therefore Hensley USA can be added to this lawsuit,

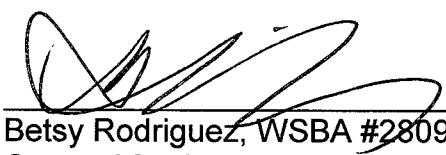
through a relation back theory. That still doesn't nullify the lawsuit against SFC Homes, the general contractor and owner/developer of the parcel of land where Garcia-Titla fell and suffered injury, it is respectfully submitted.

CONCLUSION

This Court should reverse the trial court's order granting Defendant's Summary Judgement Motion, and should reverse the trial Court's Denial of Garcia-Titla's Motion for Reconsideration. This Court should remand this case for trial.

RESPECTFULLY SUBMITTED this 26th day of June, 2015.

BETSY RODRIGUEZ, PS



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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT**, postage prepaid, via U.S. mail on the 26th day of June, 2015, to the following counsel of record at the following address:

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