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SUPREME COURT No. 93141-1

COURT OF APPEALS No. 47462-0-II

SUPREME COURT OF THE
STATE OFWASHINGTON

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

Appellants,

v.

SFC HOMES, LLC, a Washington

Corporation, Respondent.

STRICT REPLY OF APPELLANT

BETSY RODRIGUEZ, P.S.

Betsy Rodriguez
Attorney for
Appellant
PO BOX 11245
Tacoma WA 98411
(253) 566-0127

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INTRODUCTION

This appeal asks whether the Supreme Court case of *Stute v. PBMC.,* Inc. 114 Wn.2d 54, 788 P.2d 545 (1990) applies to a construction site injury where the owner/developer of the property (SFC Homes) contracted with subcontractors, considered them to be independent contractors, and provided no safety oversight. This owner/developer (SFC Homes) was also a general contractor with a general contractor's license, held itself out as a general contractor, and was in the business of building and then selling new residential homes. Here a framer, (Garcia-Titla) fell and was injured due to the absence of proper safety equipment. Per *Stute,* general contractors and owner/developers at construction sites owe a non - delegable duty of care to subcontractors working for them.

REPLY RE STATEMENT OF THE CASE

SFC Homes states at page 4 of its Response to PFR "Garcia-Titla never conducted any discovery on SFC Homes." And similarly states at page 5 of its Response to PFR that Garcia-Titla "produced no contract, testimony, or document showing SFC Homes was acting as the general contractor on this worksite." However, there is no rule requiring a Plaintiff to take depositions in a

Superior Court case. Here, Garcia-Titla's counsel was quite familiar with SFC Homes' safety expert and could anticipate his testimony. There was no need to depose him. SFC Homes' medical expert had already requested a CR 35 examination and Garcia-Titla had already agreed to it. The CR 35 exam report would be forwarded to Garcia-Titla and so there was no need to depose that expert either. Counsel for both SFC Homes and Garcia-Titla had jointly determined that neither side would call an economist or vocational expert. There were no eye-witnesses available other than Garcia-Titla, and he had already provided eight hours of discovery deposition testimony. There was simply no need (and no requirement) for Garcia-Titla to engage in additional costly deposition testimony. Written discovery certainly was propounded to SFC Homes. See CP 154; 116,117. However, based upon a dispute regarding discovery extension deadlines, that discovery was never answered. CP 154; 116,117. What did need to be investigated pre-trial was SFC Homes' Answer to Garcia-Titla's Complaint. In that Answer, SFC Homes indicated that it was the property owner at the site of injury, but denied that it was a general contractor. CP 5. Upon receipt of SFC's Answer, Garcia-Titla immediately began the relevant and necessary investigation into whether SFC Homes was

a general contractor. Seven public records tying SFC Homes either to the jobsite or to "being in the business of residential construction" including an active general contractor's license - were discovered. All were produced in response to SFC Homes' summary judgment motion. CP 124-144. Those public records proved that SFC Homes is a General Contractor and that SFC Homes was granted the subject parcel of land for purposes of building a single family home upon it. This evidence raises genuine issues of material fact as to whether SFC Homes was the general contractor at the jobsite at the time of Garcia-Titla's injury.

SFC also stated in its response that "plaintiff had presented no evidence of any applicable WISHA violation." Response to PFR, pg. 6. This is incorrect. In Garcia-Titla's original response to SFC Homes' summary judgment motion dated January 22, 2015, he went into great detail about what safety devices could have been provided by the management, and how (despite Garcia-Titla's best efforts) a joist that was not provided by him or his company broke under his feet, sending him to the ground. CP 72. Garcia-Titla plead: "Defendants violated the WAC and are responsible for Plaintiff's injuries." CP 118. "This case is governed by *Stute,* and WAC 296- 155." CP 118-19. "Such working conditions violate WAC

296-155 in its entirety, as well as the Supreme Court case of *Stute v. PBMC* and its progeny." CP 120.

In its prior Response on Appeal, SFC stated at page 5 of its response "the Department of Labor and Industries (L&I) conducted an investigation and determined that no safety violations had occurred as a result of the incident." BR 5. This is not true. L&I conducted no investigation because L&I does not inspect all of the work sites after injuries in Washington State. As a rule, L&I only investigates jobsites through planned and/or unannounced inspections, or after fatalities. Nothing in this record supports SFC's assertion.

Most importantly, SFC Homes states at page 7 of its Response to PFR:

> Garcia Titla "failed to present evidence that SFC Homes was the general contractor of the site where the injury occurred, therefore, *Stute* duties did not arise...A key difference between *Stute* and the present case is that the plaintiff in *Stute* presented evidence that PBMC knew that employees of the subcontractor were working on the roof without safety devices...Here plaintiff presented no evidence...that SFC Homes had any knowledge or reason to know of any alleged non-compliance with WISHA."

If Garcia-Titla's case is not reversed, the rule will be that where the general contractor or owner who left his jobsite unsupervised does not see the WAC violation, or has no knowledge of the WAC violation, he is not liable for the injury. This new rule would place an

impossible burden on the lowest ranking laborers who have no knowledge of WAC violations yet apparently won't have to be supervised by general contractors or owners who leave their sites without a general contractor. The rule will be, as stated in Defendant's Declaration, that subcontractors can be left to supervise themselves, and can be treated like independent contractors at new construction job sites. That is not the intent of *Stute*. SFC makes this point very clear at page 14 of its Response to PFR when it states "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." This is the new standard that SFC is trying to introduce in construction site cases which directly contradicts public policy. The point of *Stute* and the *Stute* taskforce was to assign the duty of safety to the general contractor. This is a duty beyond that which exists where injuries occur outside of the construction setting. *Stute* is for the construction setting. This case would cause *Stute* liability to be limited in the construction setting to situation where a general contractor chose to be the general at his site, and an owner who left no general contractor at his site chose to take control of his site. Basically, Washington state will return to the days before *Stute*

existed, nullifying the point of this landmark case. The point of *Stute* is that on a construction site, yes there always is a third party to sue, if you work for a subcontractor. Certainly, the issues of causation and liability are separate from the issue of duty. But here SFC Homes had the *Stute* duty of care.

SFC Homes states in its Response to PFR at page 10 "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." Garcia Titla is not asking for that relief. Instead, Garcia Titla is pleading that, where the jobsite owner at a new construction site, who is also a general contractor by trade and license, does not leave another general contractor in charge of safety, he inherits the *Stute* duty of care. Garcia Titla is asking this Court to find that a general contractor cannot delegate the duty of safety to its subcontractor simply by saying the general chose not to be the general at that particular site at that particular time.

SFC Homes states in its Response to PFR at page 10 "Garcia Titla could have deposed SFC Homes' representative, but he did not." However, there was no reason to depose Mr. Iwasaki of SFC Homes since he provided the Declaration that stated that he left his subcontractors alone. His Declaration proved SFC's breach

of the *Stute* duty of care.

SFC Homes claims at page 14 of its Response to PFR that it "did not play a role sufficiently analogous to general contractors to justify imposing upon them the same non-delegable duty to ensure WISHA compliance." Except that SFC Homes did play a role sufficiently analogous to general contractors because this jobsite owner was a general contractor. And it was the general contractor that chose to leave no other general contractor to supervise its site. So by default it becomes the general contractor of its site, or in the alternative the owner who now inherits the *Stute* duty of care.

SFC Homes states on page 15 of its Response to PFR: "Owner/developers could be liable for WISHA violations where the facts showed the owner/developer had the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations. 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." If this owner/developer, who is also a general contractor by license and trade, was not in the "best position to enforce compliance with safety," at its own jobsite, then who was? No other general contractor was left on site to be responsible for overall safety. SFC

Homes tells the Court repeatedly that the framing subcontractor was an independent contractor left to supervise itself. This cannot be the case at new construction sites. This is a clear violation of *Stute* by SFC Homes.

REPLY RE NEW ISSUES

A. New Construction Sites Must Have a General Contractor on Site to Supervise Safety

The Supreme Court of Washington held that the general contractor and the owner/developer of the jobsite owe workers on construction jobsites a duty of care to comply with safety regulations. *Stute v. PBMC,* 114 Wn.2d 454, 788 P.2d 545 (1990). This duty of care is non-delegable. *Id.* It stems from their "innate supervisory authority." *Id. Stute* involved the employee of a subcontractor at a construction site falling off a roof. The worker did not have a harness and lanyard on, so there was nothing to arrest his fall, or restrain him from falling in the first place. *Stute,* 114 Wn.2d at 1. This lack of safety equipment violated RCW 49.17.010 and WAC 296-155. *Stute,* 114 Wn.2d at 7.

Here, the testimony in evidence proves that there were no

safety meetings at this site. CP 79. Safety meetings must be site specific, because each site has its specific hazards. WAC 296-155-100; 110. No safety meetings occurred at this job site (CP 79) proving the violation of WAC 296-155.

SFC Homes argues that *Stute* is not on point, and instead cites *Kamla v. Space Needle* 147 Wn.2d 114 (2002). *Kamla* is inapposite. It involved an owner (the Space Needle) who was not a general contractor, and an independent contractor who was not a subcontractor. *Kamla,* 147 Wn.2d at 1. Independent contractors differ from subcontractors. The title itself explains the difference: Independent contractors are independent, like the plumber who fixes your sink. Subcontractors at construction sites work under a higher contractor – the general or prime contractor. The general or prime contractor is responsible for the safety of his subcontractors under *Stute.*

Kamla does not apply here. 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 in the fireworks business, it was not an owner in control. The Space Needle was "not similar enough to a general contractor to justify imposing the same non-delegable duty of care to ensure WISHA [WAC] compliant work conditions." *Kamla,* 147 Wn.2d at 5. There, the independent fireworks contractor was not a subcontractor on a construction site, and the Space Needle was not building a residential or commercial home. The Space Needle was simply an owner that hired an independent contractor. In our case SFC Homes is in fact a general contractor that builds homes. Clearly, it is "similar enough to a general contractor to justify imposing the same non-delegable duty of care to ensure WISHA [WAC] compliant work conditions." *Kamla* at 5. Our case involves subcontractors to a general contractor and/or owner/developer. Our case involves liability for breach of the duty of safety at a construction site. That has nothing to do with independent contractors and owners outside of construction sites where no such duty is owed.

SFC Homes quotes *Kamla,* claiming that *Kamla* addresses

"whether jobsite owners play a role sufficiently analogous to general contractors to justify imposing upon them the same non- delegable duty to ensure WISHA compliance when there is no general contractor. We hold that they do not." BR 23. This partial quote from *Kamla* is incomplete. It has to do with job site owners who are not general contractors and who are not in the business of building houses. When it states "when there is no general contractor" it means "when no general contractor is required," not "when the owner/developer of land does not feel like hiring a general contractor" – as was the case here. The Court of Appeals has expressly extended *Stute's* nondelegable duty of ensuring WISHA compliant work conditions to parties other than general contractors. In *Weinert v. Bronco National* Co., 58 Wn. App. 692, 795 P.2d 1167 (1990), Bronco, an owner/developer, hired a contractor to install siding. The contractor, in turn, subcontracted with Adrey Construction, by whom Weinert was employed. After Weinert fell off scaffolding erected by Adrey Construction, he sued Bronco arguing Bronco owed him a specific duty to comply with WISHA [now DOSH and WAC] regulations. Holding Bronco could be liable, the Court of Appeals pointedly noted, "*Stute* rejected the contention that before the duty could be imposed, there must be

proof the general contractor controlled the work of the subcontractor." *Weinert,* 58 Wn. App at 696.

In the State of Washington, the general contractor of the project where Garcia-Titla fell was SFC Homes. The Assessor-Treasurer's office listed SFC Homes as the grantor for the construction site, and listed a parcel number for the construction site, parcel number 4002540225. CP 126. Investigation into the parcel led to the record confirming that this was a "new construction" site belonging to SFC Homes. CP 126. A Corporations search of SFC Homes led to two corporations, SFC Homes Services, LLC, and SFC Homes LLC, both under UBI number 602231397. CP 128. A general contractors search under UBI 602231397 led to Washington's General and Specialty Contractor website, which listed SFC Homes as a Construction Contractor. CP 130, 132. The specialty listed for SFC Homes is "General." CP 132. SFC's Declarant, Mr. Atsuski Iwasaki, is one of the managers of this general contractor company. CP 130, 132.

Beyond that, the Washington Labor and Industries website listed SFC Homes LLC under UBI 602231397, as a Construction Contractor with a specialty license as a general contractor. CP 132. The Washington Corporations website lists SFC Homes, LLC under

UBI 602231397 as a Washington Corporation with Mr. Atsushi Iwasaki as one of its managers. CP 135. The Department of Revenue lists SFC Homes LLC under the same UBI number as a company engaging in "New Single-Family Housing Construction." CP 138.

SFC Homes is owned by Sumitomo Forestry Group. CP 144. The Website for Sumitomo Forestry Group holds itself out as being "in the Housing Business." CP 144. Under "Our Business" it lists SFC Homes LLC, stating that SFC Homes LLC is engaged in the "Construction and subdivision sales of detached houses." CP 144.

All of these public records were submitted with Plaintiffs' Response to Defendant's Motion for Summary Judgment pleading at Exhibits 1 through 9, on January 22, 2015. CP 109; 124-144. Yet the Superior Court granted summary judgment finding no genuine issue of material fact as to whether SFC Homes was the general contractor and/or owner developer of this jobsite. This was error.

In his declaration, SFC owner Atsushi Iwasaki stated that SFC "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

plead that FRDS was treated like an independent contractor, therefore, the duties imposed upon general contractors by *Stute* could not apply to SFC. 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, he pled that the subcontractors were independent contractors and were left to supervise themselves. CP 20-23, 106. Mr. Iwasaki's position was clear: SFC was not a general contractor, so *Stute* duties could not apply to SFC. CP 20-23, 106. Because SFC is a general contractor (as proven by Garcia Titla, and as admitted by SFC later in the record) this Declaration proves the violation of construction law in Washington State, and *Stute* duties can apply to SFC.

B. Negligence and Causation are Properly Left to the Trier of Fact

Garcia-Titla properly preserved the issue of WAC violations for the trier of fact, since such violations are merely evidence of negligence, and negligence is not an issue ripe for summary judgment. Similarly, causation is an issue reserved for the trier of

fact that is not ripe for summary judgment. SFC Homes states at page 7 in its Response to PFR: "Garcia-Titla failed to present evidence in response to the summary judgement motion of safety or health WISHA violations. Thus, remedies under *Stute* are unavailable...by contrast, SFC Homes submitted testimony from its safety expert who stated that WISHA does not require fall protection for framers at heights of under ten feet." However, SFC Homes' expert Declaration is a red herring. It discusses only the fall protection rule of 10 feet, and our client fell from a height under 10 feet. That does not mean that there is no WAC regulation for fall protection at heights of under 10 feet. Indeed, the WAC requires fall protection from heights at 6 feet and 4 feet. (WAC 296-155). It requires protection from open sided areas and protection from open holes (WAC 296-155). A violation of WAC 296-155 is exactly what was plead by Garcia-Titla. The lower court judge stated that Garcia-Titla had not proven that there was a WISHA violation because there was no citation given by the Department of Labor and Industries. However, sometimes, a Plaintiff cannot show a WISHA violation. Rarely is a citation given by the Department of Labor and Industries. Inspectors for the Department only come out to the scene of an

injury after there has been a death, and here there was not. Safety experts cannot testify as to WISHA violations. They can only testify as to the standard of care in the construction industry, and whether a party fell below the standard of care. Therefore, SFC Homes' expert Declaration was not only off point but legally inappropriate. He did not address the appropriate fall protection WACs and so there was nothing for Garcia-Titla's safety expert to counter with a Declaration. Also, there was no opportunity to counter because SFC provided its experts Declaration in its Reply brief, and Garcia-Titla had no further opportunity to Reply.

SFC's brief at page 30 states that Garcia-Titla needed to avoid summary judgment by showing a genuine issue of material fact regarding duty, breach, causation and damages. BR 30. Here, a genuine issue of material fact exists as to whether SFC Homes was the owner/developer/general contractor at this jobsite. If it was, then a genuine issue of material fact exists as to whether it therefore owed a duty of care to workers on its jobsite. If it did, then a genuine issue of material fact exists as to whether the duty was breached by lack of oversite for safety on the part of SFC Homes. If SFC breached the duty of safety through lack of oversight and violation of WAC 296, then genuine issues of material fact exist as

to whether that breach caused damages to Garcia-Titla.

CONCLUSION

If the new standard to be met by injured construction workers is that they must prove that a general contractor who was also the owner of the development was in fact choosing to act as the general contractor for their specific site at the time of injury, no injured construction worker will be able to meet it. Certainly, there is no requirement for a construction site to have an owner in control. The requirement is that every construction site have a general contractor on site to monitor safety, and if it does not, then by default, the owner becomes the owner in control of safety and inherits the *Stute* duties. That is what occurred with SFC Homes. This Court should reverse the trial court's order granting Defendant's Summary Judgment Motion.

RESPECTFULLY SUBMITTED this 24th day of June, 2016.

BETSY RODRIGUEZ, PS

Betsy Rodriguez, WSBA #28096
Counsel for Appellant
4008 S. Pine Street PO Box 11245
Tacoma, WA 98411-0245

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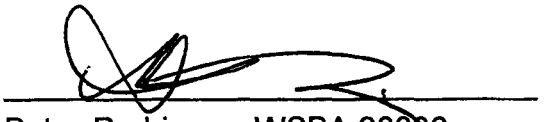
I certify that I caused to be mailed, a copy of the foregoing **STRICT REPLY OF APPELLANT**, postage prepaid, via U.S. mail on the 24th day of June 2016, to the following counsel of record at the following addresses:

Counsel for Respondent

Pamela M. Andrews
Kristen Dorrity
Andrews Skinner, P.S.
645 Elliot Ave. W Suite 350
Seattle, WA 98119



Betsy Rodriguez, WSBA 28096
Counsel for Appellant

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To: 'Betsy Rodriguez'
Cc: Sally Gannett; 'Pamela Andrews'; cristina@brodriguezattorneys.com; kristen.dorrity@andrews-skinner.com; jane.johnson@andrews-skinner.com
Subject: RE: Garcia-Titla Strict Reply of Appellant PFR No.93141-1

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From: Betsy Rodriguez [mailto:betsy@brodriguezattorneys.com]
Sent: Friday, June 24, 2016 12:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Sally Gannett <sally.gannett@andrews-skinner.com>; 'Pamela Andrews' <pamela.andrews@andrews-skinner.com>; betsy@brodriguezattorneys.com; cristina@brodriguezattorneys.com; kristen.dorrity@andrews-skinner.com; jane.johnson@andrews-skinner.com
Subject: Garcia-Titla Strict Reply of Appellant PFR No.93141-1

Attached please find Petitioner's Strict Reply brief, for filing in the above referenced case. Thank you. Sincerely,

Betsy Rodriguez
BETSY RODRIGUEZ, P.S.
Catastrophic Injury Attorneys
Private Counsel to the Mexican Consulate
PO Box 11245/4008 S. Pine Street
Tacoma, WA 98411-0245

Telephone: (253) 566-0127
Fax: (253) 566-0129