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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

PACIFIC GUARDIANSHIP SERVICES, INC., in its capacity  
as guardian of the Person and Estate of MARIANO ROMERO  
ROMERO; and GUADALUPE ROMERO ROMERO and  
MARIA ROMERO GUZMAN, and the marital community  
comprised thereof,

Appellants,

v.

NWCC INVESTMENT V, L.L.C., a Washington limited liability  
company,

Respondents.

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**REPLY BRIEF OF APPELLANTS**

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## I. SUMMARY STATEMENT OF STRICT RESPONSE

Respondent persists in urging the court to accept the inaccurate proposition that, in the civil liability context, general contractor status is only given to those individuals and entities that actually exert physical control over the day to day conduct of the work. Respondent maintains that the general contractor must be physically present on the job site daily to exercise control before general contractor status is reached. This proposal finds no support in the law, and requires the court to ignore the plain meaning of the language in RCW 18.27.010(1) which, in relevant part, defines a contractor as

“Contractor” includes any . . . entity who or which, in the pursuit of an independent business undertakes to construct, alter, repair . . . improve, develop . . . any building . . . excavation or other structure project development or improvement attached to real estate . . . ; or who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided in this chapter. “Contractor” **also** includes a consultant acting as a general contractor. “Contractor” **also** includes any person . or other entity covered by this subsection, whether or not registered as required under this chapter, or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, development, or improvements for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned. (Emphasis added).

Based on the disjunctive wording of the statute, it is clear that the legislature intended to establish several ways for any person or entity to fall within the definition of contractor. Such individuals and entities would thereby acquire the rights and duties commensurate with general contractor status.

The definition of general contractor incorporates the definition of contractor, and in RCW 18.27.010(5), specifies:

“General contractor” means a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit. A general contractor **also** includes one who superintends, or consults on, in whole or in part, work falling within the definition of contractor. (Emphasis added).

Again, here we have two alternative, independent ways to be a general contractor as a matter of law.

Respondent NWCC V, inexplicably, states that RCW 18.27 et seq., does not provide a legally enforceable definition of general contractor. Absolutely no authority in support of this bare assertion is cited. Respondent NWCC V provides no alternative definition of general contractor from either case law or statutory law.

From the unfounded premise that it is not a general contractor, Respondent NWCC V asserts its status was solely that

of owner of the project where Appellant Romero was injured. Respondent NWCC V then embarks on an owner's liability analysis and concludes it has no safety enforcement duties relative to appellant Romero.

Respondent's analysis ignores the fact that the actual, physical construction of the improvements on Respondent's real estate development were undertaken by the usual range of subcontractors from a variety of trades or crafts. These subcontractors were contractually engaged directly by Respondent NWCC V to work "upon a single job or project." It was in the course of construction of the Respondent's project that Appellant was injured. Since Respondent NWCC V meets the only known legal test used in defining a general contractor, it must be found to occupy that status.

## **II. LEGAL ARGUMENT**

- (1) RESPONDENT NWCC V CAN CONTRACTUALLY SHIFT RESPONSIBILITY FOR THE JOB SITE SAFETY TO ANOTHER, BUT CANNOT DELEGATE ITS DUTY TO ENFORCE WISHA REGULATIONS TO A THIRD PARTY.

Respondent NWCC V incorrectly concludes that it is relieved of its duty as general contractor based on contractual delegation of on site

construction site management to its agent, Defendant B&B. The contractual relationship between Defendant B&B and Respondent NWCC V related to the project creates rights and obligations only as between Respondent NWCC V and Defendant B&B. The contract has no effect on the legal duties imposed on Respondent NWCC V as general contractor, as those duties relate to safety obligations for the protection of subcontractor employees. It is fundamental law that the activities of the agent (here Defendant B&B) are imputed to the principal (here Respondent NWCC V) as if the acts or omissions of the agent were those of the principal. In Combes v. Snow, 56 Wn.2d 122, 125; 351 P.2d 419 (1960), the court summed up the rule and policy reason for the rule, as follows:

The liability in such cases is founded upon a theory of agency, that is, that the acts of the agent are imputed to the principal. It is now generally admitted that such imputed liability does not find its justification in any actual negligence on the part of the principal, but in public policy which decrees that the principal, for whose benefit and with whose consent the act is done, should bear responsibility to an injured third person.

Respondent NWCC V is free to discharge its duty as general contractor to ensure compliance with safety regulations in any manner it sees fit. However, a general contractor's duty to enforce

WISHA regulations are non-delegable based on the rule thoroughly discussed in Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 788, P.2d 545 (1990). The ultimate responsibility of WISHA enforcement consequently remains with the general contractor, here Respondent NWCC V.

Respondent NWCC V directly contracted with virtually all of the subcontractors working on its development project. The contract signed by Mr. Boyer, principal of defendant B&B, with Appellant's employer, Green Valley Drywall, was signed in his capacity as agent for Northwest Capital Corporation. This corporation is a parent company, and one percent owner, of Respondent NWCC V. To the extent that Respondent NWCC V relied on Defendant B&B to enforce safety regulations on the job site, it did so at its peril.

- (2) THE ONLY DEFINITION OF GENERAL CONTRACTOR IN STATUTORY OR CASE LAW IS FOUND IN RCW 18.27, ET SEQ.

Respondent urges the court to accept that there is a special definition of general contractor which should be applied in the context of civil liability claims other than that which is contained in the statutory definition of general contractor found in RCW 18.27.010(1)(5)(supra). No case law provides this proposed alternative definition,

nor is such a definition to be found elsewhere in the Revised Code of Washington. Respondent seeks to divert the court's attention from its duty as a general contractor, and urges this court to apply the test for WISHA enforcement applicable to an owner as detailed in Kamla v. Space Needle Corp., 147 Wn.2d 114, 53 P.3d 472 (2002). This case ruling imposes a duty to enforce WISHA regulations on the owner of a project only if that owner asserts actual, on-site physical control over the direct performance of the subcontractor's work, or reserves the right to do so.

Appellant Romero's opening brief discussed, at length, the fact that an owner can play a dual role as owner and general contractor on a construction project. Such is the holding in Hinton v. Johnson, 87 Wn.App 670, 674, 942 P.2d 1061 (1997) (review den. 134 Wn.2d 1022 (1998)); Weinart v. Bronco National Company, 58 Wn.App 692, 795 P.2d 1167 (1990), and Husfloen v. MTA Construction, 58 Wn.App 686, 689, 794 P.2d. 859 (1990). See Appellant's Brief p. 14-20. In the circumstance where an owner falls within the definition of general contractor, duties of a general contractor vis-a-vis enforcement of WISHA regulations is imposed.

In arguing, without citing authority, that the statutory definitions of RCW 18.27 do not apply on this case, Respondent NWCC V then takes the position the RCW chapter 18.27 does not create liability under the facts of this case. (Respondent's brief, p. 17.) Liability is not the issue before the court. Duty is the issue to be determined. What RCW chapter 18.27 does is provide clear and detailed definitions, determined by the legislature, which specify the criteria upon which a finding of contractor and general contractor must be made. Duties of a general contractor are defined in the case law. These duties apply when the statutory definition of general contractor is met. Liability stems from a factual determination that the duties imposed by law upon a general contractor are violated, and that question plays no role in this appeal. The issue before the court is determining duty, and here, in its capacity of general contractor, Respondent NWCC V has the duty described in Stute v. P.B.M. C, Inc., 114 Wn.2d 454, 788 P.2d 545 (1990) which held

In Washington prior to the adoption of WISHA, the court held that RCW 49.16.030 (WISHA's predecessor) created a non-delegable duty on general contractors to provide a safe place to work for employees of subcontractors. Kelley, 90 Wn.2d at 335<sup>1</sup> fn 1

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See also Jones v. Robert E. Bailey Construction Company, 37 Wn.App 357, 674 P.2d 676 (general contractor had non-delegable duty to provide a reasonably safe work place for subcontractor employees) overruled on other grounds in Brown v. Prime Constr Co. 102 Wn.2d 235, 684 P.2d 73 (1984).

The policy reasons behind the court's rulings have not changed and give added force to the language of WISHA. Stute at 462.

The fact that Respondent NWCC V chose to engage Defendant B&B to discharge its WISHA code enforcement duties does not supplant Respondent's primary duty to ensure WISHA compliance on the job site.

The general contractor's right of control is intrinsic to the general contractor's position. That is what is meant when the general contractor's right of control is "per se" – it comes with the position itself. As noted in Stute, "the test of control is the right to exercise control and not the actual exercise of control." Stute, p 461. Citing

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Footnote, Kelley v. Howard S. Wright Construction, 91 Wn.2d 323, 582 P.2d 500 (1978)

Kelley v. Howard S. Wright Construction Company, 90 Wn.2d 323, 330, 582 P.2d 500 (1978).

- (3) RCW 18.24.090 SPECIFYING EXEMPTIONS FROM THE REGISTRATION REQUIREMENTS OF RCW 18.24 ET SEQ. DO NOT ALTER THE DEFINITION OF GENERAL CONTRACTOR.

RCW 18.27.090 provides a list of circumstances where the **registration requirements** of the statutory scheme do not apply. In relevant part, that statute provides

RCW 18.27.090 exemptions

**Registration Provisions** of this chapter do not apply to: (1) through (18) (emphasis added).

Whether the exemptions cited by Respondent, RCW 18.27.090(8) and RCW 18.27.090(11). (Respondent brief, p. 16) apply or not is immaterial to the question before the court. The subsections of RCW 18.27.090 do not state that the statutory definitions are inapplicable in the circumstance exempted under subsections 1 through 18. Only registration requirements are not required if an exemption is qualified for.

Whether the exemptions in RCW 18.27.090 apply or not, the definitions under the Act stay the same. In Bremmeyer v. Peter Keiwit Sons, Co., 90 Wn.2d 787, 791-792; 585 P.2d 1124 (1978), the

court found that none of the registration requirements in RCW 18.27 et seq. applied in actions between the subcontractor and a general contractor. Despite finding inapplicability of the Act's registration requirements, the court still utilized the definition section of the statutory scheme, RCW 18.27.010, to determine the status of the parties. Appellant Bremmeyer was found to have the status of contractor based on the definition found in RCW 18.27.010(1). In distinguishing Bremmeyer's status from members of the general public, the court cited the Act, noting

Moreover, the public to be protected from contractors are those customers who themselves who are not routinely in the business of acting as contractors as defined by RCW 18.27.010.

Hence, even though the relationship exempted the parties from the registration requirements, the definitions contained in the statute were utilized to determine status.

In Hinton v. Johnson, (supra), the court also applied the statutory definitions in RCW 18.27.010, as it had in Bremmeyer (supra). In Hinton, an owner/developer Johnson hired Hinton to perform grubbing and clearing on a development Johnson was building on land Johnson owned. Johnson had directly contracted

with between 8-16 contractors to do different types of work on his development. Some were unregistered. Johnson did not pay Hinton, who was unregistered, and who subsequently sued Johnson for the contract price. In determining Johnson's status as a contractor, the court applied the rule contained in RCW 18.27.010 (1) stating

Thus, we first consider whether Johnson is a contractor or routinely in the business of acting as a contractor. A contractor is defined in RCW 18.27.010(1) as:

Any person, firm or corporation who or which in the pursuit of an independent business undertakes to, or offers to undertake, submits a bid to, construct, alter, repair, add to, subtract from, improve, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, project, development or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith or who install or repair roofing or siding; *or, who, to do similar work upon his own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided herein.*

Johnson does not dispute he employed members of more than one trade, including Hinton, to work on Cascade Ridge. He is therefore a contractor as defined in the above section. *Id.* 673, 674. (Italics in original.)

The court did not reach the question of whether Johnson was a general contractor, as to do so was unnecessary to the disposition

of the case. The court did note, however, that RCW 18.27.010(2) would be the operational definition to use had it been necessary to make that determination. Id. p. 674 footnote 7.<sup>2</sup>

Like the owner in Hinton who was defined as a contractor, Respondent's principal, Mr. McDonald, does not dispute that he contracted directly with all but two subcontractors working on the development project where appellant Romero was injured., CP. 57 II. 5-8. Mr. McDonald specifically agreed that the business of Respondent NWCC V, and its parent company, Northwest Capital Corporation, was developing and managing commercial real estate that these entities owned. CP. 49, II. 13-17; CP. 51, II. 17-19. The statutory definition of general contractor is unequivocally met by Respondent NWCC V in every respect. Appellant Romero only seeks to have the duty to enforce WISHA regulations on its job site imposed on Respondent, in the same manner that duty is imposed

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In Foot note (7) the court cites RCW 18.27.010(2) as the operative definitional section for general contractor. This appears to be a typographical error as RCW 18.27.010(2) defines "director" as director of the Department of Labor & Industries. The general contractor definition is found at RCW 18.28.010(5) as earlier detailed. The point here is not which definitional subsection is cited by the court, but rather that the definitional subsection of RCW 18.27.010 are utilized in determining whether an individual or entity is a contractor or general contractor.

on every other general contractor doing business in the State of Washington.

### III. CONCLUSION

Throughout Respondent's brief, it analyzes its duty exclusively as an owner of the project where Appellant was injured. Respondent does not dispute that a general contractor has a non-delegable duty to enforce WISHA safety regulations on the project site. Respondent does not dispute that it fell within the statutory definition of general contractor. The sole defense posed to Appellant's claim is that the statutory definition of general contractor is not applicable law, yet no alternative definition is cited to the Court. Additionally, it is clear on the face of the exception statute that only registration is exempted to those qualifying under the provisions of RCW 18.27.090. In no way does the exemption statute suspend the definitions provided elsewhere in the Act.

In the event the legislature chooses to articulate a second definition of general contractor to be utilized in the civil liability context, it is free to do so. Until then, however, the only definition in law is contained in RCW 18.27.010(1)(5). Respondent fully met the terms of that definition though its conduct in this case.

Consequently, the duties of a general contractor should be imposed upon it.

DATED this 5<sup>th</sup> day of October, 2009.

**RUMBAUGH RIDEOUT BARNETT & ADKINS**

By   
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Attorney for Appellant

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**CERTIFICATE OF SERVICE  
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