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64052-6
SD

NO. 64052-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DEBRA STEWART,

Appellant,

v.

GRIFFITH INDUSTRIES INC DBA ET AL,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JEFFREY RAMSDELL

BRIEF OF APPELLANT

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COURT OF APPEALS
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A. ISSUES PRESENTED

- 1. DID THE TRIAL COURT ERR WHEN IT DETERMINED THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT WITH THE ISSUE OF WHETHER OR NOT ROSALES WAS AN AGENT OF RESPONDENT?**
- 2. DID THE TRIAL COURT ERR WHEN IT DETERMINED THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT WITH THE ISSUE OF WHETHER OR NOT RESPONDENT HAD A NON-DELEGABLE DUTY TO AVOID NEGLIGENCE COMMITTED BY ROSALES?**

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Appellant Debra Stewart is a resident of the Booth Garden Apartments. Booth Gardens Apartment is a small handicapped facility strictly for persons with disabilities. Plaintiff has been a resident at the Booth Garden Apartments for 14 years, including the date of August 9, 2006. 35RP 58. In August, 2006 Booth Garden Apartments bought carpet and linoleum from Respondent Griffith Industries. Respondent was also hired to install the new flooring. One of the units Respondent was hired to install new

carpet and linoleum was Appellant's unit. Respondent hired Rosales Carpet (Rosales) to install the flooring. 22RP 33.

It is Respondent's business practice to hire others to do the actual work of laying down flooring. Respondent worked with Rosales from 2005-2007. During this time they never entered a written contract. 36RP 66. The contract was oral and it is unknown to Respondent which person in the company entered into the oral contract with Rosales. 45 RP 115-116, 36RP 72, 79-80. Respondent did not create a written contract until 2008. 36 RP 74. Respondent created a written contract in part due to an audit by the Department of Labor and Industries. The Department of Labor and Industries audited Respondent and determined that Respondent had violated their guidelines for establishing subcontractor relationships. 45RP 116-117, 36RP 67. In his June 12, 2009 deposition Respondent (owner Andrew Griffith) admitted that The Department of Labor and Industries felt there were not enough indicators to establish independent contractor status. 36RP 67.

In addition to not having a written contract, Respondent did not have an oral or written safety policy for employees, hired workers or customers. 45RP 117-118. Respondent did nothing to

ensure that workers hired to lay flooring in their customer's homes were trained in safety or clean up procedures. 45RP 118-119.

On August 9, 2006 workers came to Appellant's apartment. Neither Appellant nor Booth Garden Apartment knew that Respondent had hired Rosales to lay down the flooring in the apartment. 35RP 58. The workers showed up 4-5 hours late and were in a rush. Appellant was at her apartment when the workers arrived. Appellant was recovering from recent knee replacement surgery so she stayed in her bedroom while the workers laid down linoleum in the front entry way. 35RP 58. The workers never warned Appellant to be aware of any problems with the linoleum. After they completed their work the workers left. As they left Appellant came out of her room and walked into the front entryway. Appellant's foot got stuck on glue left on top of the linoleum by the workers. She fell forward and landed hard on her left hip. 35RP 58. The glue area was a diameter of approximately three to four inches and was five inches wide with glue intermittently in these areas. 35RP 59.

2. PROCEDURAL FACTS

On March 20, 2008 Appellant filed suit against Respondent and Rosales. 1RP 1-4. Respondent in its' Answer asserted that

Appellant's injuries were caused by individuals or entities over which Respondent had no control. 9RP 19. Respondent then filed a Motion for Summary Judgment. 31 RP 21-28. On July 24, 2009 after considering the Motion for Summary Judgment, Appellant's responding Memorandum opposing the Motion, Respondent's Reply and oral argument the trial court granted Respondent's Motion for Summary Judgment. 42RP 108-110. Appellant then filed Notice of Appeal to the Court. 43RP 111-112.

C. **ARGUMENT**

1. **THE TRIAL COURT ERRED WHEN IT FOUND THAT THERE WAS NO QUESTION OF FACT FOR THE JURY TO DETERMINE THE LIABILITY OF RESPONDENT AS CONTRACTOR FOR THE NEGLIGENCE OF SUBCONTRACTOR ROSALES**

A decision to grant a Motion for Summary Judgment is reviewed de novo. *Bunnell v. Blair*, 132 Wn.App. 149, 152, 130 P.3d 423 (2006) (citing *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). When the Court reviews an order granting summary judgment de novo, the Court engages in the same inquiry as the trial court and considering all facts and reasonable inferences in the light most favorable to the nonmoving party. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is proper if the record before the court shows that there are no genuine issues of material

fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004). The moving party is held to a strict standard. Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. *Atherton Condo. Assn. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). All facts submitted and reasonable inferences therefrom are considered in the light most favorable to the nonmoving party – here, the Appellant.

In this case Respondent claims that it was the general contractor for Rosales. 22RP 30. Respondent asserts that a principal is not liable for the tortious acts of its independent contractor Rosales. However, this claim flies against Washington State caselaw. In general a principal is liable for an independent contractor's negligence when it occurs within the scope of the contractual duties. *White Pass Co. v. St. John*, 71 Wash.2d 156, 427 P.2d 398 (1967) *see also Board of Regents of the University of Washington v. Frederick & Nelson*, 90 Wash.2d 82, 579 P.2d 346 (1978).

In *White Pass Co. v. St. John White Pass Co.*, 71 Wash.2d 156 the property owner contracted with St. John to enlarge a ski lodge. St. John then hired another subcontractor. The subcontractor was negligent in applying a volatile floor material which caused a fire and extensive damages. *White Pass Co.* at 157. The trial court dismissed the claim

against St. John finding that the subcontractor was an independent contractor and that the owner knew the subcontractor was performing the work and did not object. *Id* at 158. The Court found error, stating:

We find error assigned to the trial court's conclusion that because the subcontractor who laid the flooring was an independent contractor over whom the respondent exercised no supervision and control, the respondent was not responsible for the negligent act of the employees of the subcontractor. As appellant contends, the duty to lay the flooring in a careful and prudent manner so as not to damage the property of the owner was a nondelegable duty of the general contractor. The fact that the respondent, by virtue of its contract with the subcontractor, exercised no supervision and control over the manner in which the work was performed could not absolve it from its responsibility under its contract with appellant. *Id.* At 160.

The Court goes on to state that the trial court was also wrong to find it relevant that the owner knew the subcontractor was doing the work as mere knowledge of this fact should not be sufficient to relieve the general contractor of his contractual obligation. *Id.* at 162, citing 29 A.L.R. 736 (1924).

In *Board of Regents of the University of Washington v. Frederick & Nelson*, 90 Wash.2d 82 the University contracted with Frederick & Nelson to provide furniture. Frederick & Nelson then subcontracted with furniture manufacturer Rademacker. *University of Washington* at 83. The University has problems with the quality of the furniture and Rademacker sent workers to the University to sand, oil and finish the furniture. Rademacker workers left oily rags at the site which caused a fire. *Id.* at

83-84. The Court cited *White Pass Co.* and held that “when one contracts to perform a specified service or supply a product of a certain quality, liability for negligent performance of the contract cannot be escaped by engaging an independent contractor to perform the very duty which the contract requires. *University of Washington* at 84.

Here, Respondent had a nondelegable duty to ensure that the linoleum was laid down properly, and that no glue remained on the floor. Because of Respondent’s duties and the contract Respondent entered and used Rosales to fulfill Respondent cannot now claim it is not liable.

In addition to Washington State case law liability for the general contractor for the tortious acts of the independent contractor within the scope of the contractual duties is also supported by the Restatement (Second) of Torts. *Restatement (Second) of Torts sec. 429 Negligence in Doing Work Which is Accepted in Reliance on the Employer’s Doing the Work Himself (1965)* states:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

The Comments go on to describe the extent of the rule and states:

The rule stated in this Section subjects the employer of the contractor to liability irrespective of whether the negligence of the contractor consists in supplying defective appliances by which the services are to be rendered or in carelessness in the detail of

rendering them. Thus, if an undertaker who has contracted to conduct a funeral, instead of supplying his own cars, contracts with an automobile company to supply transportation for the family and mourners, the undertaker is liable to either a member of the family or a mourner, who is injured by the defective condition of the car supplied by the automobile company or by the careless driving of one of its chauffeurs.

Restatement (Second) of Torts sec 429 cmt b (1965).

Here neither Appellant or Booth Garden Apartments knew that Respondent had contracted with Rosales to do the job. In fact, in his deposition Andrew Griffith stated that they do not tell customers that they use subcontractors unless asked. 36 RP68-69.

In addition to the above Restatement is Restatement (Second) of Torts sec 426 (1965) which states:

Except as stated in sec.sec. 428 and 429, an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if

- (a) the contractor's negligence consists solely in the improper manner in which he does the work, and
- (b) it creates a risk of such harm which is not inherent in or normal to the work, and
- (c) the employer has no reason to contemplate the contractor's negligence when the contract was made.

The Comments go on to describe collateral negligence:

The kind of negligence covered by this Section, for which the employer is not liable, is commonly called by the courts "collateral negligence," meaning negligence collateral to the contemplated risk. Sometimes it is called "casual negligence." It has sometimes been described as negligence in the operative detail of the work, as distinguished from the general plan or method followed or the result to be accomplished. Frequently this distinction can be made, since negligence in operative details will often not be within the contemplation of the employer when the contract is made. The

distinction is not, however, essentially one between operative detail and general method. It is rather one of negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk.

Thus an employer may hire a contractor to make an excavation, reasonably expecting that the contractor will proceed in the normal and usual manner with bulldozer or with pick and shovel. When the contractor, for his own reasons decides to use blasting instead, and the blasting is done in a negligent manner, so that it injures the plaintiff, such negligence is “collateral” to the contemplated risk, and the employer is not liable. If, on the other hand, the blasting is provided for or contemplated by the contract, the negligence in the course of the operation is within the risk contemplated, and the employer is responsible for it.

Restatement (Second) of Torts sec. 426 cmt. A (1965).

In this case there is no issue to the fact that it is normal to use glue to lay down linoleum. In his deposition Gene Hood was questioned on whether or not it was acceptable to the Respondent to leave glue on top of the linoleum. Mr. Hood responded, “No. They would have probably needed to clean it. I’m not sure—any time, there should be no glue on the sheet vinyl. There should be none. They should have used a solvent to get it clean, to get it off.” 36RP 84. This negligence-failing to clean up the glue was therefore within the risk contemplated.

2. THE TRIAL COURT ERRED WHEN IT FOUND THAT THERE WAS NO QUESTION OF FACT FOR THE JURY TO DETERMINE WHETHER OR NOT ROSALES WAS AN AGENT OF RESPONDENT

Respondent asserted in its Motion for Summary Judgment that Rosales was an independent contractor and therefore not an agent of Respondent. Respondent states that agency is a question of law when the facts are undisputed or permit only one conclusion. In its Motion Respondent cites *Uni-Com NW v. Argus Publishing* 47 Wn.App. 787, 737 P.2d 304 (1987). 21RP 28. *Uni-Com* does in fact state that the existence of a principal agent relationship is a question of fact unless the facts are undisputed. *Uni-Com* at 796. Respondent also cites *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc.*, 125 Wn. App. 227, 103 P.3d 1256 (2005). In *Kelsey*, the Court was able to examine the contract between the parties and used the contract to determine whether or not an agency relationship existed. *Kelsey* at 236-237.

In this case the facts are disputed. Unlike *Kelsey*, no such details exist in this case. The two people who should be able to explain the exact nature of the contract between Respondent and Rosales-the owner and operations manager of Griffith cannot do so. They don't know who entered into the contract with Rosales. They cannot say who from Rosales agreed to the contract. They cannot describe with any specific detail what the terms of the contract were. The only information Respondent has provided is that it was an oral contract and that certain items in general were gone over during an oral contract meeting. What we do know is that

the relationship that Respondent had with its claimed subcontractors was so unclear that the Department of Labor and Industries was confused and sought correction.

D. CONCLUSION

The Appellant respectfully requests that the Court reverse the order of the trial court granting summary judgment to Respondent. Genuine issues of material facts exist as to whether Respondent and Rosales had a principal/agent relationship or a general contractor/subcontractor relationship. If the Court finds that there are no genuine issues of material fact with regard to Rosales being an agent, the Court should find that Appellant entered a contract to lay down linoleum and that its nondelegable duties to Appellant still exist regardless of the fact that Rosales was the one who acted with negligence.

DATED this 19th day of November, 2009.

RESPECTFULLY submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

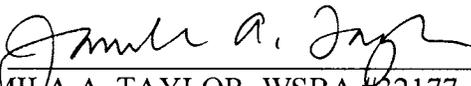
DEBRA STEWART,)	
)	
Appellant,)	NO. 64052-6-I
)	
vs.)	CERTIFICATION OF SERVICE
)	
GRIFFITH INDUSTRIES)	
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Respondent.)	
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I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of revised Brief of Appellant to:

Mark A. Thompson Fallon & McKinley, PLLC 1111 3 rd Ave Suite 2400 Seattle, Wa 98101 <p style="text-align: right;"><i>Attorney for Respondent</i></p>	VIA E-MAIL <input checked="" type="checkbox"/> [X] VIA REGULAR MAIL <input checked="" type="checkbox"/> [X] VIA CERTIFIED MAIL <input type="checkbox"/> [] VIA FACSIMILE <input type="checkbox"/> [] HAND DELIVERED <input type="checkbox"/> []
Robert Reinhard Law Offices of Kelly J. Sweeney 1191 2 nd Ave Suite 500 Seattle, Wa 98101 <p style="text-align: right;"><i>Attorney for co-defendant</i></p> <p><i>Rosales Carpet</i></p>	VIA E-MAIL <input checked="" type="checkbox"/> [X] VIA REGULAR MAIL <input checked="" type="checkbox"/> [X] VIA CERTIFIED MAIL <input type="checkbox"/> [] VIA FACSIMILE <input type="checkbox"/> [] HAND DELIVERED <input type="checkbox"/> []

DATED this 19th day of November, 2009.

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