

No. 64421-1-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

DALE AND ROBIN NELSON husband and wife and the
marital community comprised thereof,

Appellants,

v.

G. WOLF ENTERPRISES, INC., A WASHINGTON
CORPORATION d/b/a WOLF PACK, and GEORGE O. WOLF
and JANE DOE WOLF, husband and wife and the
marital community comprised thereof,

Respondents.

REPLY BRIEF OF APPELLANTS

Brian K. Leonard, P.S.

By: Brian K. Leonard
Attorney for Appellants

100 2nd Avenue, S., Suite 200
Edmonds, WA 98020
(425) 778-1838
WSBA No. 18087

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2011 JUN 24 PM 3:51

Filed
6/21/10
88P.

INTRODUCTION

Viewing the evidence in the light most favorable to Dale and Robin Nelson, plaintiffs-appellants, a jury could find (1) the scope of Mr. Nelson's lease agreement with Wolf included Mr. Nelson's access to the mezzanine storage area where his supplies and product were stored; (2) the unsafe condition of the ladder that Wolf left at the base of the mezzanine storage area and that provided the sole mode of access to the storage area was not open or obvious to Mr. Nelson, and (3) the ladder and access to the mezzanine were part of the building's "common areas" that were Wolf's responsibility to maintain in safe condition.

WISHA does extend protection to independent contractors in work sites in which the owner retains control of the operation of the premise. In this case there are numerous examples of the owner not only retaining the authority to manage the premise, but also exercising that authority.

Wolf in its brief makes no effort to explain why the evidence supporting these inferences should be disregarded by this Court in reviewing the trial court's grant of summary judgment in Wolf's favor. Instead, Wolf cites and relies solely on its view of the evidence. Its argument disregards the summary judgment review standard. The order granting Wolf summary judgment and dismissing Nelson's claims should be reversed.

ARGUMENT

A. Jury Could Find That Nelson's Invitee Status Extended to the Ladder Area

Wolf claims (somewhat confusingly) that Nelson, a "commercial tenant," was not an "invitee" at the time of his injury because the "accident happened in a non-common area while Nelson was accessing materials owned by Food Concepts." Wolf Br. at 5-6. Wolf's point, apparently, is that the area was exclusively Nelson's per the lease agreement, so Nelson was responsible for any hazards there. But the evidence overwhelmingly shows that the access site to the mezzanine storage area *was* a *common* area in the building. It was most often used by *Wolf* employees to store or retrieve materials, (although, as discussed below, there was no restriction on Nelson's right or ability to access the mezzanine himself). CP 95-96.

A Jury Could Find That The Unsafe Condition – The Dangerous Ladder – Was Not Open or Obvious To Nelson.

The unsafe condition that is the focus of Nelson's claim is the ladder, which lacked regulation cleats or safety feet that secured the ladder to the floor, or any means of securing it to the storage platform. (CP 104-04). Without explanation, Wolf ignores this evidence and instead asserts that the dangerous condition was "use of the ladder to access the storage platform." Wolf Br. at 7. Wolf then states that as a matter of undisputed fact, this "condition" was "obvious or patent." *Id.*

Wolf is correct that Nelson knew that the only means of accessing the storage area was via ladder. But this is beside the point. The pertinent evidence is the undisputed fact that Nelson did *not* know that the ladder

that Wolf furnished at the site was not to code and was dangerous. (CP 96-97)

While it is true, as Wolf acknowledges, that “there is no liability on the part of a commercial landlord if an alleged defect in the leased premises is open and visible to the tenant at the time of lease,” the converse is also true: that a commercial landlord *is* liable to a tenant when injured by a defect that is *not* “open and obvious.” *See* Wolf Br. at 6. Here, a jury could readily find that the condition of the ladder was not open or obvious to Nelson, and thus that Wolf is liable for his injuries due to the ladder failure.

A Jury Could Find That The Scope of Wolf’s Invitation to Nelson Included Nelson’s Access of the Mezzanine

Wolf claims that Wolf “did not invite Nelson to use the Wolf ladder to access the packing material,” Wolf Br., at 10-11, so Wolf cannot be liable, as a matter of law, for Nelson’s injuries. The *record* is not so clear. Since there was no written contract the parameters of the agreement and the scope of the “invitation” are not well defined. But the evidence, viewed in the light most favorable to Nelson, shows that Nelson’s lease included access to the entire warehouse including the mezzanine storage platform, which is where he had stored his supplies and product throughout the lease term, CP 112, that Wolf had never stated or implied that Nelson was forbidden from accessing his own product and materials in the mezzanine level because he was directing the storage of supplies in rafters all over the warehouse and leaving Nelson to search for his supplies, CP 96, that Nelson had indeed accessed the mezzanine at least once prior to the day of the accident, CP 115, and that there was some blurring of the lines between the two businesses, in that Nelson assisted

Wolf and his employees from time to time with packing and shipping assistance and operating Wolf's forklift to help unload Wolf product from delivery trucks, CP 95.

Given that Nelson had no place to store his product and materials other than the mezzanine, that Wolf knew this, and that there was no express prohibition on Nelson's accessing that area to get his materials, the jury could certainly find that Wolf's invitation extended to the storage platform. This case is unlike *Christensen v. Weyerhaeuser Timber Co.*, on which Wolf relies, because Nelson was injured while working within the very area that that was contemplated by Wolf's and Nelson's agreement, not an off-limits section of the warehouse not used for Nelson's business. Wolf claims there was no "mutuality of interest" in Nelson's accessing the area, but this statement disregards that Wolf was receiving payment for Nelson's lease of Wolf's space, *including* the mezzanine area.

Wolf at times confuses the issue of its liability with arguments that look like comparative fault: "On the day of the accident, Wolf employees were on-site and would have retrieved the packing material for Nelson had they been asked to do so." Wolf Br., at 8. But this argument only underscores that summary judgment on Wolf's liability was not appropriate. Wolf is free to argue that Nelson was comparatively negligent – but Nelson should be allowed to put on his case to the trier of fact.

A Jury Could Find That By Employing NELSON To Perform Many Miscellaneous Services WISHA Is Extended

Substantial testimony regarding the amount of control Wolf exercised over the premises raised issues of material fact as to whether the scope of those statutes should extend to Nelson. Nelson did performed product shipping, production consulting, Quality control and supply truck unloading. CP 95.

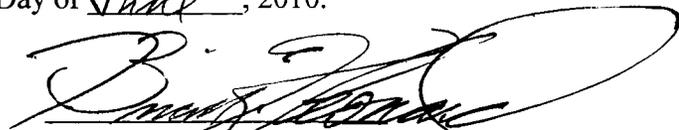
A Jury Could Find That by Directing the Receiving and Storage Asserting Unfettered Access To Nelson's Office WISHA Is Extended Pursuant To The Retained Control Exception

There is substantial testimony regarding Wolf's control over the operation of the entire facility. He directed receipt and storage of Nelson supplies and his employees used Nelson's office to use the phone and cleaned up the office as well. CP 95. This is not an arms length commercial lease situation. A full exploration of the unusual blurring of the lines of operation of these two businesses is warranted by the facts. WISA would extend if Wolf's substantial and unusual actions rise to a level of active control.

CONCLUSION

The trial court's order granting summary judgment of dismissal should be reversed. Genuine issues of disputed fact exist as to each of the central claims in this case.

DATED this 21 Day of March, 2010.



BRIAN K. LEONARD, WSBA# 18087
Attorney for Plaintiff/Appellants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WASHINGTON COURT OF APPEALS
DIVISION I

DALE NELSON and ROBIN NELSON)
husband and wife and the marital)
community composed thereof,)
Appellants/Plaintiffs,)
vs.)
G. WOLF ENTERPRISES, INC., a)
Washington Corporation d/b/a WOLF)
Pack, and GEORGE O. WOLF and JANE)
DOE WOLF, husband and wife and the)
marital community composed thereof)
Respondants/Defendants.)

NO. 644-21-1-I

CERTIFICATE OF SERVICE
Reply Brief

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2011 JUN 24 PM 3:51
LFL
6/31/11
110

I, Brian K Leonard, hereby certify that on the 21st day of June, 2010, Respondant/Defendants listed below were served by FAX pursuant to agreement, the documents described below:

1. Appellants Reply Brief

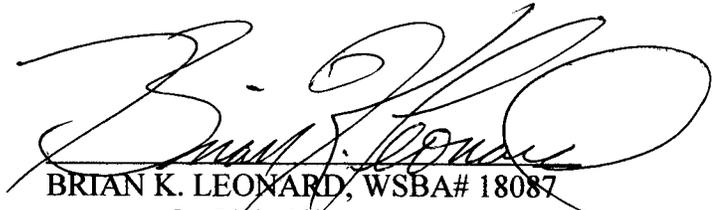
Clement & Drotz PLLC
Attorneys at Law
Pier 70- 2801 Alaskan Way Suite 300
Seattle, Washington 98121
Fax (206) 448-2235

CERTIFICATE OF SERVICE

LAW OFFICES OF BRIAN K. LEONARD, P.S.
P.O. Box 935
100 2nd Avenue S., Ste. 200
EDMONDS WASHINGTON 98020

1 I declare under the penalty of perjury under the laws of the State of Washington this

2 DATED this 21st Day of June, 2010

3
4
5 
6
7 BRIAN K. LEONARD, WSBA# 18087
8 Attorney for Plaintiffs
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25