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COURT OF APPEALS
STATE OF WASHINGTON
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No. 64421-1-I

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

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.

BRIEF OF RESPONDENTS G. WOLF ENTERPRISES, INC. and
GEORGE O. WOLF and JANE DOE WOLF

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ORIGINAL

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I. INTRODUCTION

Respondents G. Wolf Enterprises, Inc. and George and Jane Doe Wolf (hereinafter “Wolf”) submit this brief in opposition to Appellants’ appeal. The Appellants Dale and Robin Nelson (hereinafter “Nelson”) appeal the trial court’s (1) Amended Order Granting Reconsideration; and (2) Amended Order Granting Defendants’ Motion for Summary Judgment. RAP 2.1(a)(1); 2.2(a)(1).

The appellate standard of review of the trial court’s Amended Order Granting Defendants’ Motion for Summary Judgment is *de novo*. *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 376 (2007).

II. STATEMENT OF THE ISSUES

1. Whether Nelson was an “invitee” on premises he leased as a commercial tenant conducting activity solely for the benefit of his business, Food Concepts, Inc. (hereinafter “Food Concepts”)?
2. Whether Wolf owed a common law duty of care to Nelson as a commercial tenant where the alleged dangerous condition was open and obvious when the parties entered the lease agreement, and Nelson acknowledged his awareness of the condition?

3. Whether Wolf owes Nelson WISHA duties where no employer/employee relationship exists, and Nelson was not an independent contractor subject to Wolf's direction and control?

III. STATEMENT OF THE CASE

Wolf owns a facility that provides specialty food processing and packaging. CP 65. Nelson owns a business called Food Concepts that develops and sells specialty foods. Nelson is not an employee of Wolf. CP 117. Wolf never paid or contracted with Food Concepts or Nelson to perform consulting services for the development of foods. CP 65; CP 94-5. Wolf did not supervise or control Nelson or Food Concepts' work. CP 107.

Nelson rented office space to Food Concepts inside the Wolf warehouse. CP 112. The roof of the office leased to Food Concepts was used for storage of packing materials owned by Food Concepts. Wolf employees loaded and retrieved all the materials stored at the facility, including items owned by Food Concepts. CP 96. The actual moving of Food Concepts' items from delivery trucks to the roof storage and warehouse space was performed by Wolf employees. CP 80. Wolf employees retrieved all items when they were needed by Nelson. CP 81.

Wolf never directed Nelson to store or retrieve materials. CP 66. Wolf never provided Nelson with a ladder to retrieve the stored materials. Id. Wolf never authorized Nelson to use a Wolf ladder to retrieve the stored materials. Id.

In the three years that Food Concepts operated its business at the Wolf facility prior to the accident, Nelson never used a ladder to retrieve the stored materials. CP 96. Nelson knew of the risk associated with using a ladder to retrieve the packing material on the roof of the office. CP 120. On August 17, 2005, Wolf employees were present on site, and could have retrieved the packing materials for Nelson if asked to do so, as was the agreed upon practice. CP 76. Instead, Nelson made the decision to retrieve packing peanuts from the roof of the Food Concepts office to fill an order. CP 97; CP 119. Nelson used a Wolf ladder without Wolf's authorization. CP 97; CP 66. Nelson claims the ladder "kicked out" while he was descending, and he fell to the floor. CP 120.

Nelson filed suit against Wolf alleging claims of negligence based on alleged WISHA violations and common law premises liability. CP 141-43. On July 14, 2009, the trial court granted Defendants' motion for summary judgment in part and denied it in part. CP 63-4. The trial court dismissed Nelson's claims based on alleged WISHA violations. Id.

On July 23, 2009, Wolf moved the trial court for reconsideration of the trial court's denial of Wolf's Motion for Summary Judgment seeking dismissal of Nelson's common law premises liability claim. CP 51-62.

On August 19, 2009, the trial court requested additional briefing relative to Nelson's common law liability claim. CP 39.

After receiving the parties' briefs, the trial court granted Wolf's Motion for Reconsideration and Defendants' Motion for Summary Judgment dismissing Nelson's common law premises liability claim. CP 7-8.

IV. ARGUMENT

A. Nelson's common law premises liability claim is without merit.

1. Nelson was not an "invitee" at the time of his injury.

Nelson was a commercial tenant at the time of the incident. He was not an invitee of the Wolf business. Nelson is the owner of Food Concepts, a commercial tenant that was leasing space at the Wolf warehouse at the time of the accident. Nelson and Wolf entered into an oral agreement for the lease of space at the Wolf facility. Wolf's obligations to Nelson are limited to the terms of the contractual agreement between the parties.

Under the common law, a landlord has no duty to repair non-common areas absent an express covenant to repair. *Lincoln v. Farnkoff*,

26 Wn.App. 717, 719 (1980). There are no terms in the contractual lease agreement between the parties that provide a basis for Nelson's claim for liability. The accident happened in a non-common area while Nelson was accessing materials owned by Food Concepts. Nelson was fully aware of the condition at the premises during the entire time of the tenancy.

2. A commercial landlord owes no duty to commercial tenants for open and obvious conditions.

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 the lease. *Charlton v. Day Island Marina*, 46 Wn.App. 784, 789 (1987); *Peterson v. Betts*, 24 Wn.2d 376 (1946); Stoebuck, 49 Wash.L.Rev. at 353. A commercial landlord is only liable to a tenant for damages caused by a concealed, dangerous condition known to the landlord and unknown to the tenant. *Younger v. United States*, 662 F.2d 580, 582 (9th Cir. 1981). This is called the "latent defect theory" of liability. Under the latent defect theory, the landlord has no duty to discover obscure defects or dangers and there is no duty to repair. The only obligation is to notify the tenant of known dangers that are not likely to be discovered by the tenant. *Flannery v. Nelson*, 59 Wn.2d 120, 123 (1961). In this context, "defect" is synonymous with a "dangerous condition" which would lead a reasonable person to suspect the existence of an unreasonable risk of harm. See W. Prosser, Law of Torts (4th ed.

1971), section 63 at 401-402. If a person knows the actual conditions and the dangers involved, the person is free to make an intelligent choice as to whether the advantage gained is sufficient to incur the risk.

The storage of Food Concepts packing materials and the use of a ladder to access the materials were open and obvious from the beginning of the lease. When Nelson decided to locate his office at the Wolf facility, Wolf told Nelson that Food Concepts materials would be stored in the roof rafters. CP 95. Nelson acknowledged that he was aware of the risk associated with using a ladder to retrieve the packing material on the roof of the office. CP 120. Thus, even assuming that the use of the ladder to access the storage platform may be considered a defect, such a defect would not be latent or obscure, but obvious or patent and therefore not a basis for liability on the part of Wolf. *Charlton v. Day Island Marina, Inc.*, 46 Wn.App. 784, 789 (1987).

3. *Sjogren v. Properties of the Pacific Northwest, LLC* is distinguishable from this case.

Nelson's reliance on *Sjogren v. Properties of the Northwest, LLC*, 118 Wn.App. 144 (2003), is misplaced. In *Sjogren*, a guest of a residential tenant fell down an unlit staircase in an apartment. The court found an issue of fact existed as to whether the burned out light bulb and dark stairway were "open and obvious" conditions. Unlike *Sjogren*, this case involves the commercial lease of office space to a commercial tenant who operated his business on the premises for three years prior to the

injury. CP 106. Unlike the guest of a residential tenant in *Sjogren*, Nelson was familiar with the premises, and acknowledged that he was aware of the general risk associated with the use of a ladder to retrieve stored materials. CP 120. 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. CP 76. Instead, Nelson decided to retrieve the packing material himself without consulting anyone from Wolf. CP 97; CP 66. Nelson chose the ladder he used at the Wolf site without Wolf's authorization. Id.

Sjogren v. Properties of the Pacific Northwest, LLC is inapposite to the present case as the limited circumstances in *Sjogren* do not exist here. The trial court correctly dismissed Nelson's common law premises liability claim.

4. Nelson exceeded the scope of his invitation on the premises.

Wolf does not agree that Nelson was in "invitee." As demonstrated above, Nelson was a commercial tenant acting solely for his own benefit at the time of his injury. Significantly, he acted without Wolf's authorization or consent to use the ladder. Therefore, even if Nelson may be considered an "invitee" for purposes of Food Concepts' rental of space, Nelson's status as invitee on the Wolf premises was limited by the scope of Wolf's invitation. Liability of a landowner to an "invitee" is limited by the extent of the invitation, and does not extend to injuries received on a portion of the owner's premises not covered by the

invitation. *Christensen v. Weyerhaeuser Timber Co.*, 16 Wn.2d 424, 434 (1943). If a person, although on the premises by invitation, goes to a place not covered by the invitation, the owner's duty of care owed to such person as an invitee ceases forthwith. *Id.*

In *Christensen v. Weyerhaeuser Timber Co.*, the plaintiff was an employee of a ship that moored to a wharf owned by Weyerhaeuser. The plaintiff's estate alleged that because of the negligent maintenance of the wharf and certain electrical apparatus thereon, he sustained an electrical shock causing death. The critical issue was whether the ship's employee exceeded the scope of Weyerhaeuser's express or implied invitation to use the wharf. The Supreme Court first determined there was no express invitation to use the electrical facilities of the wharf, then analyzed whether Weyerhaeuser impliedly invited the ship's crew to use the electricity from its wharf.

The test for determining whether there has been implied invitation to come upon the premises of an owner or occupant is mutuality of interest in the subject to which the business of the visitor relates. *Id.* The *Christensen* Court determined,

Most important of all is the fact that the evidence fails absolutely to disclose any mutuality of interest between respondent on the one hand and the ship owners and their employees on the other, **in the alleged errand of the deceased at the time immediately preceding his death.**

It is true that the ship, through the members of its crew,

made use of respondent's facilities.... **In any event, the practice employed was solely for the benefit of the ship and its crew, and had nothing to do with any operation in which the respondent was concerned.**

Christensen v. Weyerhaeuser Timber Co., 16 Wn.2d at 436.
(emphasis added.)

As such, the *Christensen* Court held that the deceased was a "mere licensee" at the time of his death, and not an "invitee" of the respondent. *Id.* at 438. Because there was no proof of wanton or willful misconduct on the part of Weyerhauerser, the Court found there was no basis for recovery and affirmed the dismissal of the claims. *Id.*

As a matter of law, Nelson was not an "invitee" at the time of his injury. First, Nelson was a commercial tenant. As such, Wolf's obligations to Food Concepts were limited to those agreed between the parties in the oral lease agreement. Second, Wolf did not expressly invite Nelson to use a Wolf ladder to access the stored packing material in connection with Wolf's business. CP 66; CP 96. Nelson contends on appeal that there were no restrictions, express or implied, on Nelson's access or use of the facility. This assertion is completely devoid of any merit either factually or legally regarding the parameters of commercial leases. The record does not support Nelson's contention, nor does Nelson cite to any portion of the record for support. Further, this contention is contrary to Nelson's assertion that "[t]he indoor warehouse storage use and

location was determined and directed entirely by Wolf. He directed his employees to store supplies-his and Nelson's—in the roof rafters and the mezzanine above Nelson's office.” Appellants' Brief, pg. 5. Based on the uncontested evidence, Wolf did not invite Nelson to use the Wolf ladder to access the packing material.

Third, similar to the decedent in *Christensen*, there was no mutuality of interest in Nelson's actions at the time immediately preceding his injury. As discussed above, Nelson was acting solely for the benefit of Food Concepts at the time of his injury. CP 81. In *Christensen*, the Court determined that the decedent was not an “invitee” by implication because, “the practice employed was solely for the benefit of the ship and its crew, and had nothing to do with any operation in which the [premises owner] was concerned.” *Christensen v. Weyerhaeuser Timber Co.*, 16 Wn.2d at 436. The same is true for Nelson's activity at the time of his injury.

B. Wolf did not owe Nelson a statutory duty of care under WISHA.

1. Nelson is not Wolf's employee.

An employer's liability under the Washington Industrial Safety and Health Act is limited to injuries suffered by employees. *Kamla v. The Space Needle Corporation*, 147 Wn.2d 114, 119 (2002). The scope of the statute is generally limited to employment, and imposes duties only upon employers to employees. RCW 49.17.060; RCW 49.17.020; RCW

49.17.050.

Nelson was not an employee of Wolf, nor did he contractually undertake to perform services for Wolf. CP 65; CP 117. As Nelson is not an employee of Wolf his claims are outside the scope of RCW 49.17 and are without merit.

2. Nelson seeks an unmerited extension of WISHA liability.

Under limited circumstances, an employer's liability under WISHA may extend to injuries suffered by *independent contractors*, if the employer retains control over the manner in which the independent contractor performs its work. *Kamla v. The Space Needle Corporation*, 147 Wn.2d 114, 119 (2002).

Neither Food Concepts nor Nelson was an independent contractor of Wolf for any purpose. *Hollingbery v. Dunn*, 68 Wn.2d 75, 79 (1968). Wolf never paid or contracted with Food Concepts or Nelson for consulting services for the development of foods to market. CP 65; CP 94-5. Wolf did not supervise Nelson's work. CP 107. Therefore, Nelson's reliance on this case law addressing a jobsite owner's liability to an independent contractor is misplaced.

Liability of a general contractor to a subcontractor's employees in the construction context is based upon the general contractor's supervisory authority over the independent contractor. *Stute v. P.B.M.C.*, 114 Wn.2d 454, 464 (1990); *Shingledecker v. Roofmaster*, 93 Wn.App. 867, 526 (1999). The contractual and supervisory authority a general contractor has

over a subcontractor in the construction context is not analogous to the present case. Wolf had no contractual or supervisory authority over Nelson. This case involves a commercial tenant that was injured when he used a ladder solely in furtherance of his own business without the landlord's authorization or knowledge. Nelson's attempt to apply *Stute v. P.B.M.C* and its progeny to the present case would amount to an unwarranted extension of WISHA liability to all commercial landlords. This far exceeds the intent of the legislature with respect to the scope of WISHA. Such an unmerited extension of the law would amount to imposing WISHA liability upon commercial landlords for all commercial tenants. The WISHA duties and liabilities do not apply to this case, and the trial court correctly dismissed Nelson's claim.

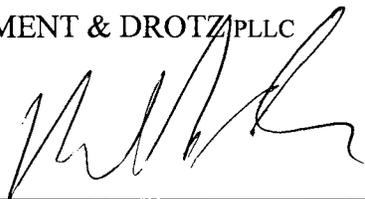
V. CONCLUSION

The trial court properly dismissed Nelson's claims. First, Nelson was not an "invitee" on Wolf's premises. Second, Wolf owed no common law duty to Nelson because the alleged dangerous condition was open and obvious, and Nelson acknowledged his awareness of the condition.

As a matter of law, Wolf did not owe Nelson a statutory duty under WISHA because the parties did not have the necessary employment relationship to create a duty of care within the scope of the statute.

DATED this 21st day of April, 2010.

CLEMENT & DROTZ PLLC

By 

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DECLARATION OF SERVICE

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ORIGINAL

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing **RESPONDENT'S BRIEF** and this **DECLARATION OF SERVICE** on the following in the manner indicated:

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SIGNED this 21 day of April, 2010.


Debra Rakentine