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No. 66404-2-I

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COURT OF APPEALS OF WASHINGTON - DIVISION ONE

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**TIMOTHY SMITH and SHERRI SMITH, husband and wife, and the  
marital community comprised thereof,**

**Appellants,**

**v.**

**FRYE BUILDING LIMITED PARTNERSHIP, a Washington  
Limited Partnership,**

**Respondent.**

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On appeal from King County Superior Court  
No. 09-2-31300-8 SEA  
Hon. Joan E. Dubuque

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**[CORRECTED]  
BRIEF OF APPELLANTS  
TIMOTHY SMITH AND SHERRI SMITH**

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## INTRODUCTION

The Defendant Frye Building Limited Partnership, which owned the premises where the Plaintiff Timothy Smith was injured on accumulated water due to a broken laundry room sink drain, failed to exercise reasonable care in maintaining the building where the injury occurred. The Defendant attempted to delegate maintenance duties of the premises, commonly known as the “Frye Building,” to an agent, the Archdiocesan Housing Authority (“AHA”), which employed the Plaintiff as Facility Manager, but failed to monitor whether AHA was keeping the building safe. It also promised AHA that it would adequately fund the maintenance effort; however, it diverted profits from the building to other social services projects instead. Proper funding and enforcement of the maintenance program would have prevented the Plaintiff’s injury. The Plaintiff, further, was fault-free for his fall.

The Plaintiff Timothy Smith and his wife brought suit against the Defendant for negligence, but the Superior Court dismissed the Plaintiff’s claims on Summary Judgment on the grounds that the Defendant delegated its duties to maintain the premises and could avoid liability in so doing; that the Plaintiff himself, not the Defendant, was primarily responsible for

maintaining the building; that even if it owed a duty to the Plaintiff to keep the premises safe, it had neither actual nor constructive knowledge of the leaking drain that injured him; and that the Defendant and the property manager AHA had acted reasonably in maintaining the premises with regard to the hazard that injured the Plaintiff.

### **ASSIGNMENTS OF ERROR**

1. The Superior Court erred in dismissing the Plaintiffs'/Appellants' ("Plaintiffs'") claim against the Defendant/Respondent Frye Building Limited Partnership (Defendant) by concluding that a building owner may delegate its duty to maintain a safe premises to a property manager and thereby avoid liability for injuries to invitees resulting from the building's negligent condition.

2. The Superior Court erred in dismissing the Plaintiffs' claim against the Defendant by concluding that an owner/developer of a large commercial building that is familiar with property management and maintenance may delegate its duty to provide a safe workplace to subcontractor employees at the premises.

3. The Superior Court erred in dismissing the Plaintiffs' claim against the Defendant by concluding that the Defendant owed no duty to

the Plaintiff Timothy Smith (“the Plaintiff”) to maintain the premises where he was injured in a safe condition because he was the maintenance manager for the Archdiocesan Housing Authority (“AHA”), the company with whom the Defendant had contracted to manage the premises.

4. The Superior Court erred in dismissing the Plaintiffs’ claim against the Defendant by finding that the Defendant had neither actual nor constructive notice of the specific hazard that injured the Plaintiff.

5. The Superior Court erred in dismissing the Plaintiffs’ claim against the Defendant by finding that the Defendant met its burden of reasonably maintaining the premises where the Plaintiff was injured.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Defendant/Respondent Frye Building Limited Partnership (Defendant), as the owner of the property where the Plaintiff Mr. Smith was injured, owed him a duty to maintain the premises in reasonably safe condition despite hiring the Archdiocesan Housing Authority (“AHA”) to serve as the property manager.

2. Whether the Defendant, as the owner of the property where the Mr. Smith was injured, owed him a duty to provide him with a safe

place to work even though he was the employee of an independent contractor.

3. Whether the Defendant, as the owner of the property where the Mr. Smith was injured, owed him a duty to maintain the premises in reasonably safe condition even though he was the maintenance manager for the building's property management company, AHA.

4. Whether, viewing the evidence in the light most favorable to the Plaintiffs, the Defendant had constructive notice of the hazard that injured Mr. Smith even though neither the Defendant, AHA, nor the Plaintiff had actual notice actual notice of the specific leak that caused the Plaintiff to fall where both AHA and the Defendant had constructive notice of dangerous conditions in the laundry room where the Plaintiff fell from years of water leakage from other sources but did nothing to remedy the hazard or warn against it; that AHA installed a plastic P-trap on a heavy duty utility sink instead of a metal one to save money, or save time, or simply due to mistake, then never inspected it for function; and the drain's failure was foreseeable.

5. Whether, viewing the evidence in the light most favorable to the Plaintiffs, the Defendant failed to maintain the premises in a

reasonably safe condition when the building was in remarkable disrepair, the Defendant focused on “curb appeal” during building inspections and high occupancy rates rather than maintenance issues, and the Defendant failed to comply with the terms of its property management contract requiring it to adequately fund AHA’s maintenance program so that AHA could maintain the building in a reasonably safe condition.

### **STATEMENT OF THE CASE**

The Defendant Frye Building Limited Partnership owned the building commonly known as the “Frye Building.” CP 14. The Defendant entered into a contract with AHA whereby AHA agreed to manage the property. CP 21. The contract made several provisions pertinent to this case:

- (1) AHA was to maintain the building in a safe condition; CP 28.
- (2) The Defendant was responsible for the expense associated with maintaining the building in a safe condition; CP 28.
- (3) The Defendant retained responsibility for determining the condition of the premises that it considered to be acceptable; CP 28.

(4) The Defendant reserved the right to approve or disapprove yearly property management budgets; CP 29.

(5) The parties agreed that AHA would manage the Frye Building as an agent of the principal Defendant; CP 30.

(6) The parties agreed to indemnify each other for payments each made for claims and lawsuits arising from the fault of the other; in particular, AHA agreed to indemnify the Defendant for claims and suits brought by employees against the Defendant arising from labor law violations and brought by anyone arising from AHA's breach of the management contract or its gross negligence, and the Defendant agreed to indemnify AHA for claims or suits attributable to negligence on the part of the Defendant. CP 33.

While the Defendant contracted with AHA to manage the Frye Building, the Defendant's general partner, the Low Income Housing Institute, was experienced in property management in its own right and handled maintenance and management of most of its other properties itself. CP 118.

Neither the Defendant nor AHA maintained the building in a safe condition. The building suffered from numerous major maintenance

issues, e.g., basement clutter, an inefficient unit turn-over system, ineffective building security, poor garbage collection practices and contracts, units requiring built-in furniture, and microorganisms destroying plumbing and pipework throughout the building causing serious leaks on multiple floors and in the basement. CP 60-61. The building also suffered from countless minor maintenance issues, e.g., appliances, sinks, and furniture requiring repair; pipe leaks on the upper floors. CP 60. The Plaintiff accompanied the AHA facility manager on a City of Seattle building inspection before his official hire date; the inspection revealed so many emergent and overwhelming problems that the facility manager “raised his hands and said, ‘I can’t handle the stress,’ handed [the Plaintiff] the keys to the building, and left.” CP 66. Despite the numerous major and minor maintenance concerns, many of which were safety issues, unit turn-over, a required undertaking to maintain high occupancy rates and rent revenues, was AHA’s highest priority in hiring the Plaintiff. CP 66. Turning over units necessarily took time that the Plaintiff and his maintenance staff could have devoted to making the building safer; having a crew dedicated to turning units over would have helped AHA use its maintenance staff more effectively, but there was no room in the budget

for a separate crew. CP 61. The Frye Building produced hundreds of thousands of dollars in net income per year, and AHA encouraged the Defendant to provide more funds for maintaining the building and making capital improvements, but the Defendant “tightened the screws on funding to operate the property” instead and elected to use the net revenue to fund other social services projects. CP 61-62, 70-97, and 120. The Defendant did not concern itself with minor repair needs of the Frye Building, but rather with major capital needs and the building’s “curb appeal.” CP 120.

Before the Plaintiff’s injury, AHA was well-aware of water leakage problems in the Frye Building’s laundry room. CP 61. It was among the many issues AHA raised with the Defendant when discussing the need for greater financial support for maintenance efforts. CP 61. In April, 2007, just before the Plaintiff was injured, he and other AHA staff accompanied the City of Seattle on a building inspection, which uncovered countless immediate action items affecting the safety of residents and employees working in the Frye Building; the results of the inspection were communicated to the Defendant in writing in August but also verbally immediately following the inspection. CP 98-116.

The Plaintiff was injured at the Frye Building on July 5, 2007, when he slipped on water that had accumulated on the floor from a broken sink drain in the laundry room. CP 68-69. He had not seen the water on the floor before he slipped on it. CP 69. His fall injured his low back, and although he resorted to chiropractic care, physical therapy, lumbar injections, and ultimately surgery, his condition remains symptomatic and disruptive and is likely permanent.

The Plaintiff filed suit against the Defendant August 21, 2009. CP 1-5. The Defendant filed its Motion for Summary Judgment on October 1, 2010. CP 14-20. In its original Motion the Defendant alleged that dismissal was appropriate because (a) the Defendant had delegated maintenance responsibilities for the Frye Building where the Plaintiff was injured to the Plaintiff's employer; (b) the Plaintiff, as maintenance manager, bore the duty to keep the building in a safe condition; and (c) the Defendant had no notice of the leaking laundry room basin that caused the pool of water on which the Plaintiff slipped. CP 14-15. In its Reply, for the first time, the Defendant raised and provided authority for the general rule that a company owes no duty to provide a safe workplace for its

independent contractors' employees unless it retains control over the manner in which the contractor performs its work. CP 122.

The Court ultimately granted the Defendant's Motion without entering written Findings of Fact or Conclusions of Law but reasoning orally, primarily, that the Defendant effectively delegated its duty to maintain the Frye Building to AHA; that the Plaintiff himself had the primary duty to maintain the sink drain to prevent the water leakage; that the Defendant did not have adequate notice of the hazard that injured the Plaintiff; and that the Defendant and/or AHA acted reasonably because one of AHA's custodians mopped the laundry room floor every day. RP 20-22.

## **ARGUMENT**

### **1. Standard of Review**

On appeal, the standard of review of an Order of Summary Judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

The function of summary judgment is to avoid a useless trial; however, trial is not useless, but absolutely necessary, where there is any

genuine issue as to any material fact. *Regan v. Seattle*, 76 Wn. 2d 501, 503-4, 458 P.2d 12 (1969). A summary judgment motion may be granted, after considering the evidence in the light most favorable to the nonmoving party, only if reasonable persons could reach but one conclusion. *National Concrete Cutting, Inc. v. Northwest GM Contractors*, 107 Wn. App. 657, 660, 27 P.3d 1239 (2001), *review denied*, 145 Wn.2d 1027, 42 P.3d 974. “Like the trial court, [the reviewing Court] considers facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party.” *Marks v. Wash. Ins. Guar. Ass’n.*, 123 Wn. App. 274, 277, 94 P.3d 352 (2004).

A cause of action for negligence requires the Plaintiff to establish the existence of a duty owed, breach of that duty, a resulting injury, and proximate causation between the breach and the injury. *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

**2. The Defendant Owed a Duty to Maintain its Property and the Plaintiff’s Workplace in a Safe Condition**

The Defendant owed the Plaintiff a duty to maintain the Frye Building in a safe condition; and its property management contract with AHA reinforced that duty rather than delegating it.

(A) Property Owners Like the Defendant Owe a Duty to Invitees Like the Plaintiff to Maintain their Premises in a Safe Condition

The Defendant owned the Frye Building, so it is liable to the Plaintiff, an invitee, for injuries caused by a condition on the land when it knew, or should in the exercise of reasonable care have known, that the condition presented an unreasonable risk of harm; could not reasonably expect its invitees to realize the risk themselves; and failed to make the condition reasonably safe or warn the invitee. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 127 P.3d 5 (2005). For a defendant to be held liable for maintaining a dangerous condition, proof as to foreseeability of the particular manner or nature of the occurrence is not necessary; it is sufficient if the general type of danger is reasonably foreseeable. *Thomas v. Housing Authority of City of Bremerton*, 71 Wn.2d 69, 72, 426 P.2d 836 (1967). There is no question that a property owner like the Defendant has a duty to invitees like the Plaintiff.

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(B) A Property Owner's Duty is Not Delegable to a  
Property Manager

A property management contract purporting to delegate a property owner's maintenance responsibilities to a manager like AHA does not absolve the property owner of its duties to maintain a safe premises; the delegation is simply inapplicable to third-parties who are injured on the premises. *Griffiths v. Henry Broderick, Inc.*, 27 Wn.2d 901, 909-10, 182 P.2d 18 (1947), *overruled on other grounds by Jones v. Strom Const. Co., Inc.*, 84 Wn.2d 518 (1974). *Griffiths* involved a premises liability claim against a property owner, Griffiths, who had delegated property management duties to an agent, Henry Broderick, Inc. The injured party brought and prevailed in a suit against Griffiths. Griffiths sued Henry Broderick, Inc. for indemnity pursuant to the management contract. In its discussion of the indemnity provision of the contract, the Court further explained that the contract did not influence the rights of third-parties:

No third person's rights were affected by either contract. The contract of the parties in the instant case does not purport to, and could not possibly, affect or in any way limit the right of recovery of any person injured by the negligent condition of the Griffiths premises. The Loggins chose to sue the owner of the building, that is, the plaintiff in this action. We assume that he did not plead the management contract as a defense, and we may affirm, with

complete confidence, that, if he did, it was stricken from the pleadings. Neither could Henry Broderick, Inc., have pleaded the management contract as a defense had the Loggins brought suit against it. The management contract directly affects the rights of the parties to it only, that is no say, the parties to this case, and no other persons.

*Id. at 909.* Therefore, while the Defendant may have delegated property management duties to the Plaintiff's employer, AHA, the delegation does not provide a defense to the Plaintiff's claims; rather, it simply informs the relationship between the Defendant and AHA with regard to whether AHA must eventually indemnify the Defendant for payments the Defendant makes to the Plaintiff that arguably resulted from AHA's mismanagement of the property. Any duty that AHA had to maintain the building arising from the property management contract remained, at minimum, a concurrent duty of the Defendant's.

(C) The Defendant / AHA Property Management

Contract Expressly Established a Principal-Agent Relationship

An agency relationship may exist, either expressly or by implication, when one party acts at the instance of and, in some material degree, under the direction and control of another. *Matsumura v. Eilert*, 74 Wn.2d 362, 444 P.2d 806 (1968). Both the principal and agent must

consent to the relationship. *Moss v. Vadman*, 77 Wn.2d 396, 463 P.2d 159 (1969).

Here, the Property Management Agreement between AHA and the Defendant, to which both parties consented, expressly established a principal-agent relationship. CP 30.

The rule is well-settled that the principal is liable for the negligent acts of his agent, within the scope of his agency in the course of his duties, resulting in injuries to the person or property of another. *Carlson v. P.F. Collier & Son Corp.*, 190 Wash. 301, 316, 67 P.2d 842 (1937). Moreover, the knowledge of the agent will be imputed to the principal where it is relevant to the agency and the matters entrusted to the agent. *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.*, 29 Wn. App. 311, 316-7, 627 P.2d 1352 (1981).

Therefore, the Defendant is vicariously liable to the Plaintiff for any careless acts or omissions on the part of AHA, and any knowledge of AHA concerning the condition of the premises shall be imputed to the Defendant.

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(D) The Defendant Had a Non-Delegable Duty to  
Provide the Plaintiff a Safe Place to Work

For all work sites, the well-known and exhaustively-litigated exception to the general rule for non-liability for injuries to employees of independent contractors arising from workplace safety rule violations is where the party seeking to avoid liability “retained control” over the means and methods by which the employer performed its work. In such a case, the superior contracting party - the Defendant in this case - is *per se* liable for injuries that result from workplace safety rule violations. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002); *Afoa v. Port of Seattle*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (Div I No. 64545-5, February 22, 2011) (“In general, one who employs an independent contractor is not liable for injuries sustained by an independent contractor’s employees. But a well established exception to the general rule is where an employer of an independent contractor retains control over some part of the work, in which case, the employer has a duty within the scope of that control to provide a safe place to work.”). *Kamla* sought to absolve property owners from the non-delegable duties to provide a safe workplace that

Washington law places on property owners at work sites. The Court reasoned,

Although jobsite owners may have a similar degree of authority to control jobsite work conditions, they do not necessarily have a similar degree of knowledge or expertise about WISHA compliant work conditions. Jobsite owners can run the gamut from an owner/developer with the same degree of knowledge about WISHA compliant work conditions as that of a general contractor to a public corporation without any knowledge about WISHA regulations governing a specific trade. Because jobsite owners may not have knowledge about the manner in which a job should be performed or about WISHA compliant work conditions, it is unrealistic to conclude all jobsite owners necessarily control work conditions. Instead, some jobsite owners may reasonably rely on the contractors they hire to ensure WISHA compliance because those jobsite owners cannot practically instruct contractors on how to complete the work safely and properly.

If a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to “comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW].” RCW 49.17.060(2). As we already discussed, Pyro was an independent contractor. Space Needle did not retain the right to control the manner in which Pyro and its employees completed their work; it simply hired the independent contractor and owned the jobsite where Pyro worked. We hold Space Needle is not liable under WISHA for the manner in which Pyro and its employees completed their work.

*Id. at 124-125.* The Space Needle Corporation was subject to the same type of injury claim - injury to a pyrotechnician installing a fireworks on its structure in a subsequent claim, *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85 P.3d 918 (2004), where the Court affirmatively imposed liability on the SNC for providing a safe place to work when it retained control over the means and methods by which the pyrotechnician's employer performed its work. The Court held, "While jobsite owners are not per se liable under the statutory requirements of RCW 49.17, they may retain a similar degree of authority to control jobsite work conditions and subject themselves to WISHA regulations." *Id. at 248.* *Kinney* further explained the well-settled rule that "The test of control is not the actual interference with the work of the subcontractor, but the right to exercise such control." *Id. at 247* (citing *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330-31, 582 P.2d 500 (1978)). Therefore, if the Defendant's *retained the right to exercise control* control over the manner in which AHA performed its work, then the Defendant is *per se* liable for ensuring that workplace safety rules were followed even if the Defendant, in practice and by intention, concerned itself more with the building's "curb appeal" than with its safe operation.

The trial court asserted, at RP 23, that “The argument with regard to non-delegable duty of the property owner mixes together construction cases and imposes a higher duty than the Restatement (Second) of Torts does. A property owner is not an insurer.” But Washington law imposes the non-delegable duty to insure a safe workplace on any property owner who retains control over an independent contractor’s work, even outside the construction context. *See Kamla*, 147 Wn.2d 114 (pyrotechnics installation at tourist attraction); *Kinney*, 121 Wn. App. 242 (same). The work need not even be “ultra-hazardous” as the Defendant alleged in its Motion. *See* CP 17; *Afoa*, \_\_\_ Wn. App. \_\_\_ (Div I No. 64545-5, February 22, 2011) (involving airport tarmac operations); *Weinert v. Bronco Nat’l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990) (“The basis for imposing the duty to enforce those laws on a general contractor exists with respect to an owner/developer who, like the general contractor, has the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations.”); RCW 49.17.060(2) (“Each employer shall comply with the rules, regulations, and orders promulgated under this chapter.”).

The parties in this case established an express agency relationship, and therefore the Defendant retained control over AHA's work as a matter of law. It is well-settled that in a principle-agent relationship, the primary characteristic is the principle's right to control the manner in which the agent performs its duties. *Moss v. Vadman*, 77 Wn.2d 396, 402-3, 463 P.2d 159 (1969); *O'Brien v. Hafer*, 122 Wn. App. 279, 281, 93 P.3d 930 (Div. I 2004) (citing *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 896-97, 521 P.2d 946 (1974)). Crucially to this case, Washington law holds that *it is the right to control, not its exercise, that is decisive*. *Id.* at 284 (citing *Pagarigan v. Phillips Petroleum Co.*, 16 Wn. App. 34, 37, 552 P.2d 1065 (1976)). Here, the parties expressly consented and established in their property management contract that AHA would act on the Defendant's behalf as its agent. Therefore, both parties consented and established that the Defendant retained the right to control the manner in which AHA performed its work. Whether the Defendant actually exercised its right to control AHA's means, methods, and priorities is immaterial; the express agency relationship alone gave the Defendant the right to control if it chose to exercise it.

Moreover, the Defendant is not among the class of property owners that the *Kamla* Court sought to protect. The *Kamla* Court was concerned that “Jobsite owners can run the gamut from an owner/developer with the same degree of knowledge about WISHA-compliant work conditions as that of a general contractor to a public corporation without any knowledge about WISHA regulations governing a specific trade.” The Defendant in this case is not an ignorant corporation; its general partner and sole governor, the Low Income Housing Institute, is an experienced property manager. The Frye Building was one of the only properties in LIHI’s vast real estate holding that it did not manage itself. *LIHI has recently taken over management of even the Frye Building.* CP 135. LIHI’s staff, acting in their capacity as agents of the Defendant, have perfectly adequate knowledge about WISHA compliance in property management and are, therefore, not in the class of Defendants that the *Kamla* court sought to protect.

(E) The Defendant is Liable for AHA Negligence Under  
Comparative Fault Laws

AHA is immune from liability to the Plaintiffs under Title 51  
RCW because it employed Mr. Smith when he fell. *See* RCW 51.04.010;

*Goyne v. Quincy-Columbia Basin Irrigation Dist.*, 80 Wn. App. 676, 681, 910 P.2d 1321 (1996). Because AHA is immune under Title 51, RCW 4.22.070 prohibits the finder of fact from apportioning to it any fault for the Plaintiffs' damages. RCW 4.22.070.

The Defendant must bear the burden of AHA's fault. Defendants owing a non-delegable duty may not use the "empty-chair" defense in an action like this one. The Washington legislature amended RCW 4.22.070 in 1993 to prevent fault from being assessed to an employer with immunity under Title 51 in order to overrule *Clark v. Pacificorp*, 118 Wn.2d 167, 822 P.2d 162 (1991), which required a jury to apportion fault to all entities responsible for a workplace injury, including the injured worker's employer, in effect carving away part of the worker's recovery. This is no longer the case. In *Gilbert H. Moen v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 757, 912 P.2d 472 (1996), where Moen was a general contractor with a non-delegable duty to ensure a safe workplace for subcontractor employees, the Court declared, "RCW 4.22.070 was amended in 1993 in response to *Clark* . . . to exclude an employer with immunity under Title 51 as an entity against which fault could be assessed. In other words, it is now clear an entity in Moen's position could not use

the empty chair defense, and would be liable for the employer's share of the fault." *Moen*, 128 Wn.2d at 759 n. 7.

While *Moen* and other cases stemming from *Stute v. PMBC*, 114 Wn.2d 454, 788 P.2d 545 (1990), relate to non-delegable duties imposed on general contractors, the principle is the same in this case because the Defendant Frye Building's duty to maintain a safe premises was non-delegable, as well, under *Griffiths v. Henry Broderick, Inc.*, *Carlson v. P.F. Collier & Son Corp.*, and *Kamla v. Space Needle Corp.*

*Moen* affirmed a general contractor's right to seek contribution from its subcontractors for their share of any damages it must pay a worker as a result of the subcontractor's negligence. The Defendant and AHA had the same arrangement under their property management contract. *Moen* thereby acknowledged that where a Defendant owes a non-delegable duty, (1) the law imputes delegatee's negligence to the party holding the non-delegable duty, and (2) evidence of the delegatee's negligence may only reduce liability of the party holding the non-delegable duty in an indemnification proceeding outside the context of the injured party's direct action. Only a few months later the Washington Supreme Court emphasized its message further in *Edgar v. City of Tacoma*, 129 Wn.2d

621, 919 P.2d 1236 (1996), when, at 623, it observed, “Under the 1993 version of RCW 4.22.070(1), the percentage of fault attributable to an immune employer is not a relevant issue of fact because it has no legal effect on the respective liability of the parties.” Again, while *Moen* and *Edgar* involved construction site liability, the relationship between the employer’s fault and the Defendant’s fault for an employee’s injuries applies to *any* case involving a concurrent and non-delegable duty to that employee, and such a concurrent and non-delegable duty exists in this case. The Supreme Court’s message is direct and unambiguous: the Defendant, as a party holding a non-delegable duty to maintain a safe premises for invitees, is responsible to the Plaintiff for their its own negligence and any negligence a fact-finder could assign to AHA were it allowed to do so.

**3. The Defendant Breached its Duty to Maintain a Safe Premises and a Safe Workplace**

The Defendant, both independently and through AHA’s carelessness, violated the Defendant’s duty to provide the Plaintiff with a safe premises in which to work.

(A) AHA Carelessly Failed to Maintain the Building in  
a Safe Condition

There is no genuine dispute, given the testimony of Tamara Gonzalez and the CTED April, 2007 building inspection, that the Frye Building was in a state of catastrophic disrepair when the Plaintiff Timothy Smith took over as Facility Manager just two months before he was injured. Major building systems were failing or needed service and proper management; there was a constant stream of work orders for the maintenance crew to address; and staffing for the maintenance program was inadequate to cover necessary repairs and unit turn-overs. AHA did not take reasonable steps to ensure that staffing was adequate or that systemic repairs were addressed to allow sufficient time to properly address more minor issues.

Moreover, according to Ms. Gonzalez, AHA was aware of water leakage in the laundry room for a long time before the Plaintiff Mr. Smith arrived at the Frye Building, but in all that time it did nothing to ameliorate the slip-and-fall risk that water leakage presented to residents and employees. AHA did not warn Mr. Smith about the water leakage in the laundry room or advise him that it was a critical issue to address.

Rather, during his interview, they advised him that his primary responsibility would be improving the rate of unit turn-overs to preserve high-occupancy and rental revenues; according to Ms. Gonzalez, he spent the months preceding his injury dealing with even more pressing matters that had long been neglected by the maintenance staff that preceded him.

Finally, AHA maintenance technicians were responsible for repairing the P-Trap in the laundry room sink that failed on the day the Plaintiff was injured and caused the water leak on which he slipped in the first place. They did so using substandard methods and materials, causing the drain to fail and leak.

As the Defendant's agent, AHA's careless acts and omissions, not only in terms of prioritizing the maintenance program's work, but also in terms of directly addressing water leakage in the laundry room, are imputable to the Defendant.

(B) The Defendant Failed to Properly Fund the Maintenance Program at the Frye Building Despite Knowledge of its State of Disrepair

Even if the Defendant was not responsible for AHA's carelessness, the Defendant should be held liable for the Plaintiff's injuries because the

Defendant itself failed to discharge its own direct responsibilities in maintaining the premises. The Defendant promised AHA that it would adequately fund the maintenance program. All maintenance was to be done at the Defendant's expense pursuant to a budget that the Defendant reserved the right to approve; and the condition of the premises was to be maintained in a manner acceptable to the Defendant. CP 28. However, according to Tamara Gonzazlez, AHA made the Defendant well-aware of the serious capital needs of the Frye Building as well as the maintenance department's inability to address necessary repairs given the budget available, and the Defendant nonetheless required AHA to operate with a skeleton crew of maintenance custodians, technicians and managers. Worse, the Defendant had every opportunity to properly fund the maintenance program because the Frye Building produced hundreds of thousands of dollars per year in net revenue according to AHA's budget documents, but the Defendant chose to divert those resources to other projects in its umbrella of overall social services. CP 71-97, 120.

The parties agree that the Defendant did not concern itself with minor repair needs of the Frye Building, but rather with major capital needs and, according to Sharon Lee, Executive Director of the Low

Income Housing Institute (the Defendant's sole and General Partner), the building's "curb appeal." CP 119. That is not the behavior of a diligent property owner.

(C) The Plaintiff's Workplace Was Unsafe Under  
WISHA Core Rules

The Plaintiff's employer failed to provide him with a safe place to work under Washington's workplace safety regulations, and the Defendant failed to ensure compliance with the same. WISHA Core Rules apply to all employers. WAC 296-800-100. AHA was responsible for providing the Plaintiff with a safe workplace free from recognized hazards. WAC 296-800-110; WAC 296-800-11005. AHA was required to do everything reasonably necessary to protect the life and safety of its employees. WAC 296-800-11010. But AHA knew that the laundry room utility basin had leaked before, AHA staff repaired it poorly before Mr. Smith arrived, and AHA staff further knew that water leakage was a common problem from multiple sources in the laundry room and never warned Mr. Smith about the same. AHA was required to "Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice." WAC 296-800-11035. Instead, AHA had no system for

identifying minor problems that were likely to cause injury except for the work order system that required the problem to arise before it was addressed, leaving a gap in time when the hazard was present between its discovery and its resolution. AHA further failed to provide staffing sufficient to cover the various competing priorities to which its maintenance department was subjected, e.g., unit turn-overs, major mechanical and sanitary projects, enhancing “curb appeal,” responding to resident work orders, etc.

The Defendant is at least partially to blame for these violations. AHA pled with the Defendant for proper funding since the Frye Building was a revenue-positive enterprise, but the Defendant “tightened the screws” on operations instead. Therefore the Defendant both actively and passively breached its duty to ensure that the Plaintiff had a safe place to work.

#### **4. Causation**

If the Defendant, by its own actions or by the diligence of its agent, AHA, had properly maintained the building, the Plaintiff would not have been injured.

(A) Specific Notice of the Hazard and Opportunity to Mitigate or Warn

The Plaintiffs allege, based on testimony from Tamara Gonzalez, that AHA was aware, before Mr. Smith arrived at the Frye Building, that water consistently leaked onto the laundry room floor, creating a hazard; and that the Defendant is charged with that knowledge as AHA's principal. Neither party took adequate steps to remedy the hazard or warn Mr. Smith about it. The day he was injured was the first time he had encountered water on the laundry room floor. It may have been the first time the P-trap had leaked. However, it was not the first time the laundry room had been dangerous, and the leak in the P-trap was a reasonably foreseeable risk. The trial court should not have excused the Defendant's persistent and obvious failure to fund the building's maintenance program and set priorities for maintenance that would have made the accident less likely to happen by promoting more rigorous inspection of building safety components like the P-trap, installation of mats on the laundry room floor, or notifying the Plaintiff of well-known slip hazards instead of instructing him to focus on unit turn-overs so that he could do his job to ameliorate

the risk. If either AHA or the Defendant had mitigated the hazard or warned Mr. Smith about it, the injury would not have happened.

(B) The mere failure of the P-Trap established its negligent installation by AHA before the Plaintiff arrived at the Frye Building, and that negligence should be imputed to the Defendant as AHA's principal

AHA staff, long before Mr. Smith arrived at the Frye, had installed a cheap plastic drain on an industrial basin that staff used to empty large mop buckets instead of using an appropriate metal pipe and fitting. The principles of *res ipsa loquitur*, recently applied in *Curtis v. Lien*, \_\_\_ Wn.2d \_\_\_, 239 P.2d 1078 (No. 83307-9, September 16, 2010), apply in this case. The Court refused to find that the record contained direct evidence that the P-trap was negligently installed or maintained; however, that level of proof is not required under Washington law.

The Plaintiff's deposition testimony, presented in the Summary Judgment proceeding, established that, before the Plaintiff arrived at the Frye Building, AHA, as the Defendant's agent, installed a plastic P-trap on a high-water-volume industrial utility basin used, in part, for dumping large quantities of mop-bucket water; and that after he was injured by this

hazardous condition, the Plaintiff, having 30 years of building maintenance experience, replaced the P-trap with a strong, metal version that has since held securely in place.

The jury should be entitled to infer from the P-trap's failure itself that a stronger piece should have been installed long before he was injured; and also that the P-trap should have been subject to inspections to determine its integrity. *See Tincani v. Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) ("Reasonable care requires the landowner to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for the invitee's protection under the circumstances.'"). Daily mopping by a custodian with no knowledge of plumbing fixtures does not constitute appropriate inspection of the drain component that failed in this case.

For the doctrine of *res ipsa loquitur* to apply, "(1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence." *Curtis*, 239 P.2d at 1082. The first element is satisfied "when the general experience

and observation of mankind teaches that the result would not be expected without negligence.” *Id.* In *Curtis*, the Plaintiff relied upon this scenario, arguing that general experience and observation teaches that a wooden dock does not give way under foot unless it is negligently maintained. The Defendant and the Court of Appeals rejected the argument, claiming that there was no evidence that the defect in the dock was discoverable. But the Court held that upon the application of *res ipsa*, the burden shifts to the Defendant to prove that the defective condition was undiscoverable, and agreeing that the first element of *res ipsa* is satisfied but imposing a burden on the Plaintiff to prove discoverability is reversible error. *Id.*, (citing *Penon v. Inland Empire Paper Co.*, 73 Wash. 338, 132 P. 39 (1913) (scaffold collapse)).

In this case, the general experience of humankind teaches that a sink drain, properly-installed with proper materials and proper inspection for integrity, can last for decades or in perpetuity without a failure of its fittings. Clogs are within the ordinary experience for drains; as are corrosion over long periods of time. But the total failure of a drain due to its fittings coming apart permits the inference that the materials or installation were negligent. A proper inspection by a qualified technician

could, at any point before the Plaintiff's injury, have identified defects in the materials or installation or the progressive weakening of the system. At minimum, a proper inspection would have tested for tightness and fit, as well as the capacity of the plastic compression fitting to withstand the pressure of the water flow intended. The jury, under *res ipsa* principles, is entitled to infer negligence from AHA's installation itself (and, under agency principles, apply that error vicariously to the Defendant), as well as AHA and the Defendant's failure to inspect.

Moreover, the facts of this case satisfy the second and third elements of control. The P-trap was within AHA's and the Defendant's exclusive control before the Plaintiff arrived at the Frye Building. The Defendant's control is established not only by its retained right to control AHA's work at the Frye, but also by its express reservation in the property management contract to dictate what condition of the premises it considered to be acceptable. *Griffiths* is further applicable to the extent that any delegation of control to AHA merely affects the rights of the Defendant and AHA with respect to each other, not to invitees onto the premises. Once the Plaintiff arrived, he did not assume control over the P-trap. He was tasked by AHA to turn units over in a timely fashion to

maintain revenue and solve much more pressing, urgent, wide-sweeping problems in the building, and he did his job. AHA did not provide him with the staff, time, or resources to inspect the P-trap, and that was because the Defendant did not provide AHA with the resources it promised to provide.

Therefore, considering the evidence and inferences therefrom in the light most favorable to the Plaintiffs, the jury should be allowed to find that the Plaintiff was injured by the Defendant's negligence, and the Court should not have so casually dismissed the Plaintiff's theory as applied directly to the P-trap that failed.

(C) General Notice of the Hazardous Condition of the Building as a Whole

The Plaintiffs restate the rule cited above, that for a defendant to be held liable for maintaining a dangerous condition, proof as to foreseeability of the particular manner or nature of the occurrence is not necessary; it is sufficient if the general type of danger is reasonably foreseeable. *Thomas v. Housing Authority of City of Bremerton*, 71 Wn.2d 69, 72, 426 P.2d 836 (1967) (citing *Fleming v. City of Seattle*, 45 Wn.2d 477, 275 P.2d 904 (1954)). The *Thomas* Defendant, a public

housing authority, did not know that its tenant's hot water heater had been set to a scalding temperature, but they knew that it could be set that high, had the opportunity to check the setting, but failed to do so; when a young child was burned, she prevailed in her lawsuit against the building owner, and the Supreme Court refused to reverse the verdict despite the Defendant's lack of actual knowledge of the particular setting of the particular hot water heater that scalded the child. In this case, given the various government inspections that occurred before the Plaintiff's injury, given the Defendant's site visits before the Plaintiff's injury, and based on the testimony of Tamara Gonzalez, both AHA and the Defendant were aware that the Frye Building suffered from major safety issues across multiple independent systems. The building was a free-standing injury-waiting-to-happen. Given the Defendant's fiscal priorities regarding its management; given AHA's priorities ensuring prompt unit turn-over at the expense of other pressing projects; given Ms. Gonzalez's opinion that having a crew dedicated to unit turn-over would have freed up valuable time for the existing maintenance staff to address needed repairs in a timely and proper manner, the Defendant's properly funding the

maintenance program instead of maximizing the building's net revenues for use in other projects would have prevented the injury.

## **5. Comparative Fault**

The Plaintiff was not at fault for his own injuries. Contributory fault is conduct performed by the person claiming injury that falls below the standard to which he or she is required to conform for his own protection and which is a proximate cause of the injury claimed. *Johnson v. Mobile Crane Co.*, 1 Wn. App. 642, 645 (1969). In determining whether a Plaintiff engaged in contributory negligence, the inquiry is whether that person exercised that level of care for his or her own safety that a reasonable person would have exercised under the same or substantially similar circumstances, and, if not, whether such conduct caused the injury claimed. *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180 (1966).

There was nothing Mr. Smith could have done to prevent this injury, either in his capacity as Facility Manager at the Frye Building or in his individual capacity. As the Facility Manager, he had the means of repairing and maintaining building systems, but in this case he had no knowledge of the leakage problems in the laundry room. Even though his

employer knew about the problems, he did not. In his individual capacity, he did not cause his own injury by taking inadequate care to watch where he was going or do something unreasonably dangerous by simply walking through the laundry room.

Given that the Plaintiff is fault-free, anyone bearing fault for his injuries is liable for the entire measure of his damages under RCW 4.22.070(1)(b). Even if AHA, as the Plaintiff's employer, bears the lion's share of the fault for failing to establish a functioning maintenance program before the Plaintiff arrived at the Frye, the Defendant has some share of its own and is therefore liable to the Plaintiff for all his damages.

## **6. Conclusion**

In Washington, a building owner familiar with property management should not be allowed to overlook its duty to provide a safe premises and workplace merely by delegating that responsibility to someone else, particularly where it engaged in years of neglect, focusing on the building's "curb appeal" and "tightening the screws" on funding for building operations when the building produced sufficient revenue to maintain it in a safe condition and the company to which it attempted to pass the buck regarding safety consistently complained that the owner was

not providing sufficient resources for the manager to carry out its contractual obligations.

The Plaintiff Timothy Smith's injury, or one like it, was an inevitable consequence of the pattern and practice of gross neglect and greed on the part of the Defendant, and excusing the Defendant for the Plaintiff's injury excuses its knowing and wanton disregard for safety at the Frye Building.

This case is *not* about a slip-and-fall on eggs or a banana peel at a clean, well-maintained grocery store. It involves a scenario with a paucity of directly applicable case law yet substantial questions of public importance for tenants and employees throughout Washington. General Restatement principles about notice and foreseeability do not take into account the unique contractual relationship between the Defendant and AHA, the status of the Frye Building as the Plaintiff's workplace, or the Defendant's pattern and practice of ignoring actual maintenance issues in the building, diverting profits from the building that could have been used for maintenance to fund other social services projects for its parent company and general partner, the Low Income Housing Institute, and then,

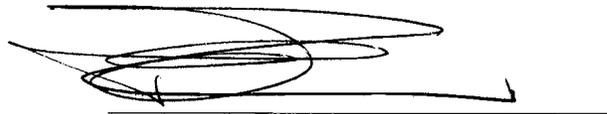
when confronted with taking responsibility for an injury, using its ignorance, deliberately obtained, as a defense.

When the evidence is viewed in the light most favorable to the Plaintiffs, there are genuine issues of material fact regarding the Defendant's actual or constructive knowledge of the hazardous condition and the Defendant's failure to maintain the premises and maintain a safe workplace for the Plaintiff.

Dismissing the Plaintiffs' claims and excusing this inexcusable behavior merely because it is so wanton as to have not appeared in an appellate opinion does not further the interests of justice, the trial court erred in granting the Defendant's Motion for Summary Judgment, and the dismissal should be reversed.

Dated: 03 / 07 / 2011

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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

TIMOTHY SMITH and SHERRI SMITH,  
husband and wife, and the marital community  
comprised thereof,

Plaintiff(s)/Appellants,

v.

FRYE BUILDING LIMITED  
PARTNERSHIP, a Washington Limited  
Partnership,

Defendant(s)/Respondents.

No. 66404-2-1

CERTIFICATE OF SERVICE

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4 the following document(s): [Corrected] Brief of Appellants Timothy and Sherri Smith (one  
5 original and one copy to Court); Certificate of Service.

6 DATED 03 / 07 / 2011

7 Wattel & York, LLC

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