

No. 41765-1-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

11 MAY 16 PM 1:33  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

---

IGNACIO CANO-GARCIA and MARIBEL CANO, husband and wife,  
and the marital community comprised thereof,

Appellants,

v.

KING COUNTY, WASHINGTON, a local government entity in the State  
of Washington, and JACOBS CIVIL INCORPORATED, a Missouri  
Corporation,

Respondents.

---

RESPONDENT KING COUNTY'S BRIEF

---

Geoffrey M. Grindeland  
WSBA No. 35798  
MILLS MEYERS SWARTLING  
Attorneys for Respondent King County

Mills Meyers Swartling  
1000 Second Avenue, Suite 3000  
Seattle, Washington 98104  
Telephone: (206) 382-1000  
Facsimile: (206) 267-6746

ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. RESTATEMENT OF THE ISSUES..... 2

III. STATEMENT OF THE CASE..... 3

A. Factual Background ..... 3

1. Appellant Ignacio Cano-Garcia’s employer, not King County, was the general contractor for the tunnel project where his injury occurred ..... 3

2. The general contractor had complete control over the manner in which it performed its work ..... 4

3. The general contractor had sole responsibility for site safety ..... 5

4. Mr. Cano-Garcia testified that the general contractor actually controlled every aspect of his work ..... 6

B. Trial Court Procedural History..... 8

IV. SUMMARY ARGUMENT ..... 8

V. ARGUMENT..... 10

A. Standard of review..... 10

B. The trial court correctly concluded that King County owed no common law duty to protect the employee of an independent contractor, since the County did not retain control over the manner in which the work was accomplished ..... 12

C.	King County was not responsible for ensuring compliance with safety regulations, because it was not the general contractor.....	15
D.	King County did not owe a statutory duty to provide a safe worksite, because it did not employ Mr. Cano-Garcia.....	17
E.	The Court should decline to consider the Cano-Garcias' premises liability theory, because they neither argued that theory to the trial court nor called the trial court's attention to any supporting evidence .....	18
F.	Alternatively, the Court should rule as a matter of law that the Cano-Garcias have failed to come forward with evidence supporting the essential elements of a premises liability claim.....	20
VI.	CONCLUSION.....	20

## TABLE OF AUTHORITIES

### Cases

<i>1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.</i> 101 Wn. App. 923, 6 P.3d 74 (2000) .....	19
<i>Bozung v. Condo. Builders, Inc.</i> 42 Wn. App. 442, 711 P.2d 1090 (1985).....	16
<i>Clapp v. Olympic View Pub. Co. L.L.C.</i> , 137 Wn. App. 470, 154 P.3d 230 (2007).....	11, 18
<i>Epperly v. City of Seattle</i> 65 Wn.2d 777, 399 P.2d 591 (1965) .....	13, 14
<i>Green v. Normandy Park</i> 137 Wn. App. 665, 151 P.3d 1038 (2007).....	18
<i>Hennig v. Crosby Group, Inc.</i> 116 Wn.2d 131, 802 P.2d 790 (1991) .....	12, 13, 14, 16
<i>Kamla v. Space Needle Corp.</i> 147 Wn.2d 114, 52 P.3d 472 (2002) .....	1, 12, 13, 14, 15, 16, 17
<i>Morris v. Vaagen Bros. Lumber, Inc.</i> 130 Wn. App. 243, 125 P.3d 141 (2005).....	17, 21
<i>Neil v. NWCC Investments V, LLC</i> 155 Wn. App. 119, 229 P.3d 837 (2010).....	14, 16
<i>Rones v. Safeco Ins. Co. of America</i> 119 Wn.2d 650, 835 P.2d 1036 (1992) .....	18, 19
<i>Rounds v. Nellcor Puritan Bennett, Inc.</i> 147 Wn. App. 155, 194 P.3d 274 (2008).....	11
<i>Sneed v. Barna</i> 80 Wn. App. 843, 912 P.2d 1035 (1996).....	10

<i>Snohomish County v. Rugg</i> , 115 Wn. App. 218, 61 P.3d 1184 (2002).....	3, 11
<i>Seybold v. Neu</i> 105 Wn. App. 666, 19 P.3d 1068 (2001).....	11
<i>Straw v. Esteem Constr. Co.</i> 45 Wn. App. 869, 728 P.2d 1052 (1986).....	16
<i>Stute v. P.B.M.C., Inc.</i> 114 Wn.2d 454, 788 P.2d 545 (1990) .....	17
<i>Titus v. Williams</i> 844 So. 2d 459 (Miss. 2003).....	21
<i>Washington Fed'n of State Employees v. Office of Fin. Mgmt.</i> 121 Wn.2d 152, 849 P.2d 1201 (1993) .....	12, 19
<i>Weinert v. Bronco National Co.</i> 58 Wn. App. 692, 795 P.2d 1167 (1990).....	16, 17
<b>Statues and Court Rules</b>	
RCW 49.17.060 .....	17, 18
RAP 2.5(a).....	11, 18
RAP 9.12.....	12, 18
CR 56(c).....	11
<b>Miscellaneous</b>	
Restatement (2d) of Torts § 343 (1965).....	20
Restatement (2d) of Torts § 343A (1965).....	20, 22
Restatement (2d) of Torts § 414 cmt. c (1965) .....	13

## I. INTRODUCTION

Appellant Ignacio Cano-Garcia was injured while working as a laborer for his employer, the general contractor on a construction project. The general contractor supervised and controlled every aspect of Mr. Cano-Garcia's work: it told him where he would work each day, what to do, and how to do it. The general contractor also provided his safety training, his tools, and his personal protective equipment. King County was merely the project owner and had no involvement whatsoever in directing Mr. Cano-Garcia's work.

In *Kamla v. Space Needle Corp.*, the Washington Supreme Court enunciated a bright-line rule that a project owner does not share the general contractor's duty to ensure compliance with safety regulations on the jobsite, unless the project owner retains control over the manner in which the work is performed. 147 Wn.2d 114, 127, 52 P.3d 472 (2002).

When King County moved for summary judgment, Mr. Cano-Garcia and his wife failed to come forward with evidence sufficient to support their contention that the County retained control over the manner in which the general contractor performed its work. Therefore, the trial court properly granted summary judgment dismissing all their claims.

Even though King County's motion for summary judgment expressly sought "dismissal of all claims," the Cano-Garcias never

indicated to the trial court that they were continuing to pursue a premises liability theory. They neither briefed nor argued a premises liability theory to the trial court, and did not take exception to the order dismissing all their claims with prejudice. They should not be permitted to raise this new argument on appeal.

Even if this Court chooses to consider their premises liability argument, however, it should be rejected as a matter of law. Wet concrete that Mr. Cano-Garcia and his employer were themselves introducing onto the jobsite at the time of the injury is not a “condition on the land.” Moreover, Mr. Cano-Garcia knew the risks associated with wet concrete, so there was no duty to warn him, and King County was entitled to assume he would protect himself. Therefore, the premises liability claim, if not waived, fails as a matter of law.

## **II. RESTATEMENT OF THE ISSUES**

**A.** Did the trial court properly grant summary judgment dismissing a general contractor’s employee’s personal injury claim against the project owner, when the general contractor had assumed sole responsibility for site safety and the means and methods of construction, and the project owner did not retain control over the manner in which the work was accomplished?

**B.** Should the Court refuse to consider a premises liability

argument that the appellants did not make to the trial court or, alternatively, should a construction worker's premises liability claim against a project owner be dismissed as a matter of law when the worker failed to produce evidence supporting essential elements of the claim?

### III. STATEMENT OF THE CASE

#### A. Factual Background

This case involves a construction site injury. Appellant Ignacio Cano-Garcia, a laborer working for the general contractor on a tunneling project, sustained chemical burns when he failed to realize that wet concrete had come into contact with his legs. Mr. Cano-Garcia and his wife sued King County, which was the project owner, and Jacobs, which the County engaged to help administer the County's contract with the general contractor.

**1. Appellant Ignacio Cano-Garcia's employer was the general contractor for the tunnel project where his injury occurred**

Brightwater is a regional wastewater treatment system currently under construction. CP 148. Brightwater will serve portions of King and Snohomish counties. *Id.* The new facilities will include a treatment plant, a conveyance system, and a marine outfall. CP 149. The conveyance system consists of pipes and other facilities that carry wastewater to the treatment plant and highly-treated effluent from the treatment plant to the

marine outfall. *Id.* The Brightwater conveyance system will include 13 miles of pipeline built in underground tunnels 40 to 440 feet below the surface. *Id.*

Different general contractors are responsible for constructing discrete sections of Brightwater, such as the treatment plan, stretches of conveyance tunnel, and the marine outfall. The Kenny/Shea/Traylor Joint Venture is the general contractor for the east portion of the conveyance tunnel, which encompasses the jobsite where Mr. Cano-Garcia was injured. CP 149. Appellants conceded at the summary judgment hearing that KST is the general contractor. *See* RP (Feb. 4, 2011) at 12:14.

It is also undisputed that KST, the general contractor, employed Mr. Cano-Garcia as one of its construction workers. CP 56.

**2. The general contractor had complete control over the manner in which it performed its work**

Kenny/Shea/Traylor had complete control over the manner in which it completed its work. CP 149, 159. Its contract with King County provides that KST “shall supervise and be solely responsible for the proper performance of the Work in accordance with the Contract, including the construction means, methods, techniques, sequences, procedures, and for coordination of all portions of the Work.” CP 159. KST created the project schedule and supervised the day-to-day work of

its employees and subcontractors. CP 149. King County neither directed any of the day-to-day work on the project nor reserved the right to do so. *Id.*

King County contracted with Jacobs Civil, an engineering and construction management firm, to inspect KST's work for the sole purpose of ensuring compliance with the contract. CP 149, 162 ("The County may, at any reasonable time and at its own cost, conduct inspections and tests as it deems necessary to ensure that the Work is in accordance with the Contract."). Neither King County nor Jacobs supervised KST's personnel or controlled the manner in which work was accomplished—they merely monitored the progress of the project to ensure that it was proceeding as scheduled and conformed to the contract. CP 149.

KST was responsible for acquiring and maintaining all materials, tools, and machinery necessary to execute and complete the project. CP 149. King County did not provide any materials, tools, or machinery. *Id.*

**3. The general contractor had sole responsibility for site safety**

Its contract with King County allocates sole responsibility for project safety to Kenny/Shea/Traylor. CP 149-50, 163. The contract requires "that all Contractors adhere to applicable federal, state, and local safety and health standards." CP 163. The contract also provides that the

“contractor and subcontractors shall be solely responsible for identifying and determining all safety codes, standards, and regulations that are applicable to the work.” *Id.* Finally, the contract required KST to prepare a site-specific safety program and to designate a safety officer responsible for implementing the safety program. CP 160.

From time to time, Jacobs personnel might make general safety suggestions, but they were not supervisors or safety monitors. CP 149-50. In fact, the contract specifies that it is “not the intent of the County to develop, manage, direct, and administer the safety and health programs of contractors or in any way assume the responsibility for the safety and health of their employees.” CP 163.

In the face of this clear contractual allocation of all responsibility to KST, the Cano-Garcias produced no evidence whatsoever that King County retained the right to control how KST accomplished its work.

**4. Mr. Cano-Garcia testified that the general contractor actually controlled every aspect of his work**

Kenny/Shea/Traylor told Mr. Cano-Garcia, its employee, where on the jobsite he would work each day. CP 417. KST told him what to do and how to do it. *Id.* KST also provided his personal protective equipment, CP 415, and his tools, CP 416.

Each morning, Mr. Cano-Garcia attended a “take five” safety

meeting run by KST. CP 418. At other times, KST foremen and crew leaders would correct Mr. Cano-Garcia if they saw him doing something unsafe. CP 417-18.

Mr. Cano-Garcia does not know of any King County employees involved with the project. CP 414. His understanding of the role of Jacobs employees is that they are inspectors and nothing else. CP 419. No Jacobs employee ever gave Mr. Cano-Garcia orders or told him how to do his job. CP 420.

On the date of the accident, KST assigned Mr. Cano-Garcia to help with the concrete pour. CP 402-03. KST transported him to the area where he worked that day. CP 403. KST's foreman showed him what to do. CP 403, 405, 406. The same foreman told him when he could stop for the day. CP 407. Occasionally, other people stopped by to watch the concrete pour for a bit, but he did not know who they were. CP 407. Mr. Cano-Garcia recognized that the KST foreman "was the one in charge." *Id.*

Mr. Cano-Garcia was aware that wet concrete could cause chemical burns. CP 401, 412-13. On the day of the accident, he asked KST's foreman for waders, but the foreman said the waders were locked away and he did not have a key. CP 408-09. The foreman said the depth of the wet concrete would be less than the height of the workers' 15-inch

boots, and Mr. Cano-Garcia duct-taped the hem of his rain pants closed around his boots as an added precaution. CP 409-10.

If Mr. Cano-Garcia thought the depth of the concrete might exceed the height of his boots, he would have insisted KST provide waders or he would have refused to do the work. CP 410. Similarly, if he had noticed wet concrete inside his rain pants and boots, he would have immediately stopped work and cleaned up. CP 412-13. Unfortunately, he did not notice until the end of the day that some wet concrete got inside his pant legs. CP 410-11.

These facts establish conclusively that KST—not King County or Jacobs—controlled the manner in which the work was accomplished.

#### **B. Trial Court Procedural History**

The Cano-Garcias filed their original complaint on February 10, 2010 and their first amended complaint on July 2, 2010. King County and Jacobs each filed motions for summary on October 1, 2010, but agreed to set the hearing on the motions out four months to allow the Cano-Garcias to conduct additional discovery. On February 4, 2011, after hearing oral argument from all parties, the trial court granted the defense motions for summary judgment and dismissed all claims. This appeal followed.

### **IV. SUMMARY OF ARGUMENT**

King County, which was merely the project owner, is not liable for

injury to an employee of the general contractor. Washington's common law recognizes that a project owner is not liable for injury to an employee of an independent contractor, unless the project owner controlled the manner in which the independent contractor performed the specific work that led to the injury. Similarly, a project owner does not share the general contractor's statutory duty to ensure compliance with safety regulations unless the project owner retains control over the manner in which the general contractor performs its work. Finally, the statutory duty to provide a safe jobsite is owed by an employer only to its own employees.

In order to resist summary judgment, therefore, the Cano-Garcias needed to come forward with evidence showing that King County retained control over the manner in which the general contractor's work was performed. The only evidence the Cano-Garcias presented to the trial court, however, related to steps King County took to ensure the general contractor complied with the contract. Under well-established Washington law, steps taken to ensure contract compliance do not constitute retained control. The trial court properly granted summary judgment in favor of King County, because the Cano-Garcias failed to come forward with sufficient evidence supporting their contention that King County retained control over the manner in which work was performed at the time of the injury.

Even though King County's motion for summary judgment expressly sought "dismissal of all claims," the Cano-Garcias never suggested to the trial court that they were continuing to pursue a premises liability theory. They neither briefed nor argued a premises liability theory to the trial court, and did not take exception to the order dismissing all their claims with prejudice. They should not be permitted to raise this new argument on appeal.

Alternatively, if this Court chooses to consider their premises liability argument, it should be rejected as a matter of law. Wet concrete that Mr. Cano-Garcia and his employer were themselves introducing onto the jobsite at the time of the injury is not a "condition on the land." Moreover, Mr. Cano-Garcia knew the risks associated with wet concrete, so there was no duty to warn him, and King County was entitled to assume he would protect himself. Therefore, the premises liability claim, if not waived, fails as a matter of law.

## **V. ARGUMENT**

### **A. Standard of review**

In reviewing a summary judgment, the appellate court engages in the same analysis as the trial court. *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996). The summary judgment was properly granted if there was no genuine issue as to any material fact and, considering the

facts in the light most favorable to the nonmoving party, the moving party was entitled to a judgment as a matter of law. *Id.* at 847.

Summary judgment was proper if the appellants failed to make a *prima facie* case concerning any essential element of their claim. *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 162, 194 P.3d 274 (2008); *see also* CR 56(c). Once a defendant points out a lack of evidence supporting a plaintiff's claim, "the burden shifts to the plaintiff to produce evidence sufficient to support a reasonable inference that the defendant was negligent." *Rounds*, 147 Wn. App. at 162. The plaintiff, in attempting to meet this burden, must supply affidavits or other admissible evidence setting forth specific facts showing that there is a genuine issue for trial, and may not rely upon the allegations in his pleadings. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

While all *reasonable* inferences must be drawn in favor of the nonmoving party, unreasonable inferences that would contradict undisputed facts need not. *Snohomish County v. Rugg*, 115 Wn. App. 218, 229, 61 P.3d 1184 (2002).

The appellate court may affirm a grant of summary judgment on any basis supported by the record. *Rounds*, 147 Wn. App. at 161-62. The Court may, however, decline to consider assignments of error that consist of arguments not made to the trial court. RAP 2.5(a); *Clapp v. Olympic*

*View Pub. Co., L.L.C.*, 137 Wn. App. 470, 476, 154 P.3d 230 (2007).

When reviewing a grant of summary judgment, in particular, an appellate court “will consider only evidence and issues called to the attention of the trial court.” RAP 9.12; *Washington Fed’n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

**B. The trial court correctly concluded that King County owed no common law duty to protect the employee of an independent contractor, since the County did not retain control over the manner in which the work was accomplished**

King County owed no common law duty to protect Mr. Cano-Garcia from injury, because he was the employee of an independent contractor. *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 133-34, 802 P.2d 790 (1991) (“One who engages an independent contractor is not liable for injuries to the employees of the independent contractor.”). As the project owner, the County owed only the duty to avoid endangering him by its own negligence or affirmative act. The County owed no duty to protect him from the negligence of his own employer, KST. *Id.*

The general rule that a project owner is not liable for injuries to the employees of independent contractors is based upon the rationale that the project owner does not control the manner in which the independent contractor works. *Kamla*, 147 Wn.2d at 119. Thus, a common law exception to the general rule of non-liability exists only where the project

owner retains control over some part of the work, in which case the project owner “has a duty, *within the scope of that control*, to provide a safe place of work.” *Hennig*, 116 Wn.2d at 134 (emphasis added).

The Washington Supreme Court has consistently held that “the authority to merely inspect the work and demand contract compliance was not ‘retained control’ sufficient to strip away the common law liability insulation.” *Kamla*, 147 Wn.2d at 120; *see also Epperly v. City of Seattle*, 65 Wn.2d 777, 785, 399 P.2d 591 (1965); *Hennig*, 116 Wn.2d at 134.

In *Kamla*, the Washington Supreme Court characterized its prior decisions as straightforward application of the Restatement Second of Torts, which explains that “retained control” does not arise from mere retention of the right to “order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.” *Kamla*, 147 Wn.2d at 121 (quoting the Restatement (2d) of Torts § 414 cmt. c (1965)). Anyone who engages an independent contractor usually reserves such right, but that “does not mean that the contractor is controlled as to [its] methods of work, or as to operative detail.” Restatement (2d) of Torts § 414 cmt. c (quoted in *Kamla*, 147 Wn.2d at 121).

Appellants point out that King County inspected the work,

participated in semi-annual safety evaluations, and had authority to stop the work if it learned of an imminent threat to safety. Washington courts have repeatedly explained, however, that these things do not constitute retained control. *See, e.g., Kamla*, 147 Wn.2d at 120 (the right to control the timing of construction, inspect the work, and order the work stopped does not constitute retained control); *Hennig*, 116 Wn.2d at 134 (“It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor’s employees.”); *Epperly*, 65 Wn.2d at 785 (“The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship.”); *Neil v. NWCC Investments V, LLC*, 155 Wn. App. 119, 129, 229 P.3d 837 (2010) (“Thus, the undisputed evidence shows that [the contractor] controlled [the injured worker’s] jobsite performance and that [the project owner] was solely concerned with contract compliance.”).

Nor does the document submittal review process discussed in Appellants’ brief constitute retained control. As King County’s designated representative testified, documents were reviewed merely for contract compliance. *See, e.g., CP 395*. Documents were “accepted” if they met the contract requirements, not “approved.” *CP 396-97*. King

County's suggestions could be and sometimes were disregarded, because KST was "responsible for the means and methods" by which it accomplished its work. CP 397-98, 399.

KST told Mr. Cano-Garcia, its employee, where on the jobsite he would work each day. CP 417. KST told him what to do and how to do it. *Id.* KST also provided his personal protective equipment, CP 415, and his tools, CP 416. King County had no involvement whatsoever in the concrete pour where Ignacio Cano-Garcia was injured, and did not supervise or retain control over the manner in which KST performed that work. In fact, Mr. Cano-Garcia does not even know of any King County employees involved with the project. CP 414. Therefore, the trial court properly granted summary judgment in favor of King County.

**C. King County was not responsible for ensuring compliance with safety regulations, because it was not the general contractor**

King County, which was merely the project owner, was not responsible for ensuring compliance with occupational safety regulations, which govern such things as training and proper protective equipment. While the project's general contractor has a duty to ensure that such regulations are observed on the jobsite, a project owner does not share that responsibility unless it retains control over the manner in which its independent contractors' employees perform their work. *Kamla*, 147

Wn.2d at 119.

King County did not retain control over the manner in which KST performed its work. As in the context of common law duty analyzed above, the mere authority to inspect the contractor's work and demand contract compliance is not retained control sufficient to make the owner responsible for jobsite safety. *Id.* at 120 (citing *Hennig*, 116 Wn.2d at 134); *Neil*, 155 Wn. App. at 132. Nor does the right to control the timing of construction or even order the work stopped constitute retained control. *Kamla*, 147 Wn.2d at 120 (citing *Straw v. Esteem Constr. Co.*, 45 Wn. App. 869, 875, 728 P.2d 1052 (1986) and *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 447, 711 P.2d 1090 (1985)). Instead, only retention of "the right to interfere with the manner" in which the contractor performs its work constitutes retained control. *Kamla*, 147 Wn.2d at 121.

There is no such thing as a "big project" or "sophisticated owner" exception to the general rule that owners who engage general contractors are not responsible for ensuring safety regulation compliance. The Cano-Garcias' reliance on general language about "innate overall supervisory authority" in *Weinert v. Bronco National Co.*, 58 Wn. App. 692, 696, 795 P.2d 1167 (1990), is misplaced for two reasons. First, unlike the "owner/developer" acting essentially as its own general contractor in *Weinert*, King County engaged a general contractor who was responsible

for site safety. In *Weinert*, if the owner/developer was not responsible for site safety, nobody was. Second, since *Weinert* was decided, the Supreme Court has enunciated a single, bright-line rule that an owner who does not “retain control over the manner in which an independent contractor completes its work” does not owe a duty to enforce safety rules on the jobsite. *Kamla*, 147 Wn. 2d at 125. To the extent *Weinert* is inconsistent with *Kamla*, if at all, it has been implicitly overruled.

King County did not reserve the right to interfere with the manner in which KST performed its work, so it was not responsible for ensuring compliance with safety regulations on the jobsite.

**D. King County did not owe a statutory duty to provide a safe worksite, because it did not employ Mr. Cano-Garcia**

King County, which was merely the project owner, did not owe a statutory duty to provide a safe work environment. Only Mr. Cano-Garcia’s employer, KST, owed him a general duty to provide a safe jobsite. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990) (RCW 49.17.060(1) “imposes a general duty on employers to protect *only the employer’s own employees* from recognized hazards not covered by specific safety regulations”). The project owner does not owe any such general duty. *Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wn. App. 243, 253, 125 P.3d 141 (2005) (“a jobsite owner does not have per se liability

under RCW 49.17.060”).

**E. The Court should decline to consider the Cano-Garcias’ premises liability theory, because they neither argued that theory to the trial court nor submitted any supporting evidence**

The Court should decline to entertain the Cano-Garcias’ premises liability argument, because they never made that argument in their briefing to the trial court, did not raise it as an issue at the hearing, did not submit any evidence in support of it, and did not take exception to the trial court’s order dismissing “all claims.” King County’s motion specifically sought “dismissal of all claims against it,” CP 127, and pointed out that the Cano-Garcias could not prevail “on any of their legal theories against King County,” CP 135. If the Cano-Garcias intended to pursue a premises liability theory, they should have argued that in response to the motion. Since they did not, this Court may decline to consider their untimely argument. RAP 2.5(a); *Clapp* 137 Wn. App. at 476 (“Generally, we do not consider arguments a party first makes on appeal.”); *Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007) (issues pleaded in complaint but not argued in opposition to summary judgment are “abandoned” and may not be raised on appeal).

When reviewing an order granting summary judgment, in particular, an appellate court “will consider only evidence and issues called to the attention of the trial court.” RAP 9.12; *see also Ronex v.*

*Safeco Ins. Co. of America*, 119 Wn.2d 650, 656, 835 P.2d 1036 (1992) (“As a general rule, this court will not consider an issue which was neither presented to nor considered by the trial court.”); *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932, 6 P.3d 74 (2000) (“This argument was not made to the trial court, and we therefore decline to consider it.”). The purpose of this rule is to ensure that the appellate court engages in the same inquiry as the trial court. *Washington Fed'n of State Employees*, 121 Wn.2d at 157.

*Rones v. Safeco Insurance* is illustrative of the general rule that an appellate court will decline to consider theories raised for the first time on appeal. In that case, an insured sued her automobile insurance carrier after it denied her claim for personal injuries sustained while she was a passenger in her own car. *See* 119 Wn.2d at 652-53. The insurer moved for summary judgment, arguing that the claim was barred by the 3-year statute of limitations applicable to the tort of negligence. *Id.* at 653. The trial court instead granted the insured’s cross motion for partial summary judgment, ruling that the 6-year statute of limitations applicable to written contracts governed. *Id.* The Court of Appeals reversed, holding that the 3-year limitation period applied. *Id.* When the Supreme Court affirmed the Court of Appeals, it refused to consider the insured’s alternative arguments that there was coverage under the UIM portion of the policy or

that the insurer was estopped from relying on the 3-year statute of limitations. *Id.* at 656. Although either argument theoretically might have prevented summary judgment if it had been timely presented, the Supreme Court declined to consider these theories, because they “were not raised at the trial level.” *Id.* In this case, the Court should similarly decline to consider arguments the Cano-Garcias failed to raise with the trial court.

**F. Alternatively, the Court should rule as a matter of law that the Cano-Garcias have failed to come forward with evidence supporting the essential elements of a premises liability claim**

Even if the Court chooses to consider the Cano-Garcias’ premises liability claim, it fails as a matter of law, because the Cano-Garcias did not satisfy their burden of producing admissible evidence supporting the essential elements of the claim.

Washington follows sections 343 and 343A of the Restatement (Second) of Torts, which define a landowner's duty to invitees. *Kamla*, 147 Wn.2d at 125. Section 343 provides that a possessor of land is liable for injuries to invitees caused by “a condition on the land” only if the possessor: (a) knows or reasonably should know of a condition that poses an unreasonable risk of harm to the invitees; (b) should expect that the invitees will not realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger. *Kamla*, 147 Wn.2d at 125-26. Section 343A clarifies that a

possessor of land is not liable for injuries to invitees caused by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. *Kamla*, 147 Wn.2d at 126.

Premises liability law does not apply under the circumstances of this case, because the wet concrete that Mr. Cano-Garcia and his employer themselves were introducing onto the jobsite at the time of the injury does not constitute a “condition on the land.” In *Morris v. Vaagen Bros. Lumber, Inc.*, the Court of Appeals rejected the argument that construction activity constitutes a condition on the land, at least with respect to the workers involved in the activity. See 130 Wn. App. at 250 (worker’s death when building collapsed because equipment being dismantled helped anchor the walls of the building was not related to a condition on the land). Indeed, it would be illogical to impose a duty to warn regarding a hazard created by the invitee himself. See, e.g., *Titus v. Williams*, 844 So.2d 459, 467-68 (Miss. 2003) (store owner had no duty to warn shooting victim of “a situation which he created himself”).

Moreover, the Cano-Garcias produced no evidence whatsoever supporting an essential element of a premises liability claim: that King County knew or reasonably should have known the general contractor was pouring wet concrete that day. The failure of evidence on this element

alone is a sufficient basis to reject the premises liability claim.

Finally, Mr. Cano-Garcia testified that he already knew about the risks associated with wet concrete, CP 401, 412-13, so there was no need for King County to warn him. King County could reasonably assume that construction professionals working with wet concrete would take the proper precautions, so section 343A of the Restatement does not come into play. In a similar situation, the Washington Supreme Court held as a matter of law that, given the general contractor's expertise and the injured worker's personal experience and knowledge, no reasonable trier of fact could find the landowner should have anticipated the worker would fail to protect himself. *Kamla*, 147 Wn.2d at 127 (reversing the Court of Appeals on this point). This is a sufficient, independent basis for rejecting the premises liability claim.

This Court should not consider the Cano-Garcias' untimely argument that premises liability law applies to this case. If the argument is considered, however, the claim should be rejected because wet concrete being introduced onto the jobsite by Mr. Cano-Garcia and his employer is not a "condition on the land" and because the Cano-Garcias did not come forward with evidence to support the other elements of this claim.

## **VI. CONCLUSION**

Appellants Ignacio Cano-Garcia and Maribel Cano failed to come

forward with evidence that King County retained control over the manner in which the general contractor accomplished its work generally, much less the concrete pour on the date of Mr. Cano-Garcia's injury. Therefore, the trial court properly granted summary judgment in favor of King County.

The Cano-Garcias' untimely premises liability claim fails as a matter of law because the wet concrete being introduced onto the jobsite by Mr. Cano-Garcia and his employer is not a "condition on the land" and because the Cano-Garcias did not come forward with evidence to support the essential elements of this claim.

RESPECTFULLY SUBMITTED May 16, 2011.

MILLS MEYERS SWARTLING



Geoffrey M. Grindeland  
WSBA No. 35798  
Attorney for King County

11 MAY 16 PM 4:30  
STATE COURT CLERK  
BY

CERTIFICATE OF FILING AND SERVICE

I, Christine Stanley, hereby certify that I filed the foregoing via

legal messenger for service upon the following counsel of record:

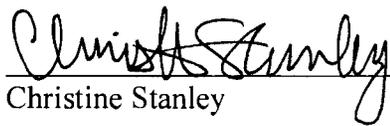
Attorneys for Appellant:

Bishop Law Offices, P.S.  
Raymond E.S. Bishop  
Derek K. Moore  
19743 First Avenue South  
Seattle, WA 98148

Attorneys for Respondent Jacobs Civil, Incorporated:

Lane Powell, P.C.  
Stanton Phillip Beck  
Andrew Gabel  
1420 Fifth Avenue Suite 4100  
Seattle, WA 98101-2338

DATED this 16<sup>th</sup> day of May 2011.

  
Christine Stanley

COURT OF APPEALS  
DIVISION II

No. 41765-1-II

11 MAY 16 PM 1:33

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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

---

IGNACIO CANO-GARCIA and MARIBEL CANO, husband and wife,  
and the marital community comprised thereof,

Appellant,

v.

KING COUNTY, WASHINGTON, a local government entity in the State  
of Washington, and AJCOBS CIVIL INCORPORATED, a Missouri  
Corporation,

Respondent

---

PROOF OF SERVICE

---

Geoffrey M. Grindeland  
WSBA No. 35798  
MILLS MEYERS SWARTLING  
Attorneys for Respondent King County,  
Washington

Mills Meyers Swartling  
1000 Second Avenue, Suite 3000  
Seattle, Washington 98104  
Telephone: (206) 382-1000  
Facsimile: (206) 386-7343

ORIGINAL

The undersigned declares 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 the within and foregoing document upon the following persons:

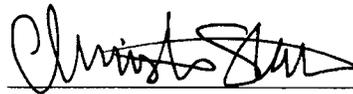
DATED this 16<sup>th</sup> of May, 2011.

Attorneys for Appellant:

Bishop Law Offices, P.S.                      ( ) U.S. Mail  
Raymond E.S. Bishop                      ( X ) Legal Messenger  
Derek K. Moore  
19743 First Avenue South  
Seattle, WA 98148

Attorneys for Respondent Jacobs Civil, Incorporated:

Lane Powell, P.C.                      ( ) U.S. Mail  
Stanton Phillip Beck                      ( X ) Legal Messenger  
Andrew Gabel  
1420 Fifth Avenue Suite 4100  
Seattle, WA 98101-2338



Christine Stanley