

No. 42013-9-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY
DEPUTY

JULIE EASTMAN,

Respondent(s),

V.

PUGET SOUND BUILDERS NW, INC., a Washington
corporation,

Petitioner,

and

COMMERCIAL INTERIORS, INC., a Washington
corporation, STAR DOG FLOORING, INC., a Washington
corporation, THE FLOOR GUYS,

Respondents.

**PUGET SOUND BUILDERS NW, INC.'S
APPELLATE BRIEF**

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ORIGINAL

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INTRODUCTION

On October 29, 2009, plaintiff Julie Eastman filed a complaint against defendant Puget Sound Builders NW, Inc. (hereinafter referred to as “PSB”) and codefendant Commercial Interiors, Inc. (hereinafter referred to as “Commercial Interiors”) for injuries and damages she sustained in an accident that occurred on November 18, 2006 at Macy’s, Inc.(hereinafter referred to as “Macy’s”) in Puyallup. Clerk’s Papers (CP) at 1-3. Prior to this incident, PSB had entered into an agreement with Macy’s on July 24, 2006 to perform work for the Puyallup Macy’s Mall Expansion (remodel) project. CP at 66. As a general contractor on the project, PSB contracted with Commercial Interiors to remove and replace carpeting for the remodel project. CP at 26. Commercial Interiors then contracted with subcontractors Star Dog Flooring, Inc. (hereinafter referred to as “Star Dog”) and “The Floor Guys” to perform this work. CP at 55-60. Plaintiff later amended her complaint to include both Star Dog and The Floor Guys as codefendants in the case.

PSB filed a summary judgment motion requesting that the court enter an order dismissing all claims against PSB because there were no genuine issues of material fact which would establish the negligence of PSB as a proximate cause of the injury sustained by the plaintiff. CP at 11-12. Codefendants Commercial Interiors and Star Dog then responded

in opposition to PSB's summary judgment motion. CP at 113-186.

Plaintiff did not respond to PSB's motion, but simply joined in codefendants' response in opposition. CP at 187.

On February 25, 2010, the summary judgment motion was heard by the Honorable Bryan E. Chushcoff from Pierce County Superior Court Dept. 4. Report of Proceedings (RP) (Feb 25, 2010) at 1. At the hearing, Adam Cox, attorney for Commercial Interiors, argued that the "Lump Sum Agreement" between PSB and Macy's "in fact" showed that PSB "stepped into the shoes of Macy's" and that based on certain provisions in the contract PSB was a "possessor of the property under statute, under *Stute*, and under common law." RP (Feb 25, 2010) at 19 (1-13). The trial court ultimately stated that it was persuaded by Mr. Cox's argument and ruled that PSB stood in the shoes of Macy's "for purposes of tort liability" and denied PSB's motion for summary judgment. RP (Feb 25, 2010) at 42. The trial court further concluded that whether PSB owed plaintiff a legal duty as a possessor of the property was a question of fact for the jury. RP (Feb 25, 2010) at 41-42.

PSB's motion for reconsideration of the trial court's order was subsequently denied. CP at 310-11. On April 15, 2011 PSB filed a notice of discretionary review to the Court of Appeals and an order granting PSB's motion for discretionary review was filed on June 16, 2011. The

primary issue before the Court is whether the trial court committed obvious error when it ruled that PSB, as a matter of law, “stepped into the shoes of Macy’s” as a “possessor” of the property on which plaintiff Mrs. Eastman was injured.

ISSUES ON APPEAL

1. Did the trial court commit reversible error when it denied PSB’s motion for summary judgment and ruled that PSB “stood in the shoes” of Macy’s “for purposes of tort liability”?
2. Even assuming that PSB owed plaintiff a legal duty, are there genuine issues of material fact that would preclude summary judgment as a matter of law in this case?

STATEMENT OF THE CASE

- A. ***Plaintiff Julie Eastman sustained her injury while she was working as an employee of Macy’s during business hours when the store was open to the public.***

On November 18, 2006 Julie Eastman was working as an employee at the Macy’s South Hill Mall in Puyallup in the Women’s Sportswear section when she stepped on a hidden depression in the carpeted area where she was working, allegedly causing her to stumble and sustain an injury. CP at 12; CP at 244. After the incident, Shelley Louderback, the Puyallup Macy’s store manager at the time of the

incident, inspected the area where the incident is said to have occurred. CP at 232. Mrs. Louderback stated that she looked at the carpeted area “where the supposed hole was,” and put her foot on the area to determine if there was an indentation there. CP at 232. She observed that there was an approximately 2-inch indentation under the carpet where Mrs. Eastman allegedly stumbled, but that the defective condition itself “wasn’t visible,” even during such a close inspection. CP at 232-34.

Christopher Fergelic, the maintenance technician for Puyallup Macy’s at the time of the incident, discovered that the indentation was caused by an uncovered electrical outlet box that was carpeted over; he then installed a brass electrical outlet cover over the outlet box. CP at 238-242. Macy’s maintenance records show Mr. Fergelic repaired the defective condition and also followed up with the store manager, Mrs. Louderback, after he completed the repair. CP at 253.

B. The PSB representative on the job site did not supervise the flooring subcontractors' actual work.

The incident occurred during the Puyallup Macy’s remodel project and after the flooring subcontractors had removed and replaced carpeting in the area where plaintiff claims to have been injured.¹

¹ The carpeted areas at Macy’s were divided into numbered pads and it was determined by Samuel Dimaggio, the owner of The Floor Guys, and a flooring contractor who assisted Star Dog Flooring during the Puyallup Macy’s remodel project, that the area where Mrs. Eastman sustained her injury was pad number “15”. See CP 59-62.

PSB, as the general contractor of the remodel project, contracted with Commercial Interiors to remove and replace carpeting throughout the store. CP at 26. However, in order to replace the carpeting without interfering with business and to address safety concerns regarding customers, PSB coordinated with Macy's to prepare and designate carpet pads where the carpeting would be removed and installed after business hours. CP at 46. Roger Redden, PSB's night supervisor during the Puyallup Macy's project, was primarily responsible for facilitating this process by moving "fixtures" (clothes racks, displays, etc.) off of the designated carpet pads prior to the demolition process and then moving the "fixtures" back on after the flooring subcontractors finished the carpet installation. CP at 14-15.

Brett Carr, the vice president of PSB, and 30(b)(6) representative of the corporation, defined "fixtures" as anything on top of the carpet and not intrinsic to the carpet itself. CP at 46. For example, "fixtures" include wall perimeters that have merchandise touching the carpet or large display tables on the carpet itself. CP at 46-47. Outlet covers, however, are not considered fixtures. CP at 225. The flooring subcontractors would typically remove the outlet covers during demolition of the old carpet. CP at 225. Mr. Redden stated in his deposition that he never removed any outlet covers during the Puyallup Macy's remodel project. CP at 209.

From the period of October 21, 2006 through November 23, 2006, the time frame in which carpet pad 15 was re-carpeted, Mr. Redden was the only PSB representative present while the flooring subcontractors removed and replaced carpeting. CP at 213. Mr. Redden stated that his primary responsibility was clearing the merchandise out of the flooring subcontractors' way, although he also stated that he was there to answer any general questions the workers may have had. CP at 214. However, Mr. Redden was not there to supervise the actual work done by the flooring subcontractors because they were independent contractors with expertise in carpet removal and replacement. CP at 26. (The standard procedure for PSB was to clear the old carpet of fixtures before demolition of the carpet by the flooring subcontractors, and then replace the fixtures on the newly installed carpet, allow the flooring subcontractors to move slightly ahead of the PSB representatives or behind them during re-laying and carpet demolition). CP at 48.

C. The specific duties of the flooring subcontractors included removing electrical outlet covers, removing the old carpet, relaying the new carpet, and notching or cutting out the new carpet to indicate where there was an uncovered electrical outlet, and then replacing the electrical outlet covers.

Samuel Dimaggio, the owner of The Floor Guys, was a flooring subcontractor hired by Commercial Interiors on the Puyallup Macy's remodel project in November 2006. CP at 59. Mr. Dimaggio stated that

he assisted Ben Adamski, owner of Star Dog, another flooring subcontractor hired by Commercial Interiors, to place carpeting during the remodel project. Mr. Dimaggio revisited the site where Mrs. Eastman sustained her injuries and stated that the specific pad where she was injured was carpet pad number 15. CP at 59-62. After careful inspection of the pad, Mr. Dimaggio stated that Mr. Adamski and Star Dog performed the carpeting work in the area where Mrs. Eastman was injured. CP at 59-60.

Mr. Adamski stated that the PSB representative on site was primarily responsible for moving all of the retail items off of the carpet pads while the carpet layers would demolish the old carpet and remove the outlet covers. CP at 218. Roger Redden and Brett Carr from PSB also stated that the removal and replacement of outlet covers was the responsibility of the flooring subcontractors. CP at 211; CP at 225. Mr. Adamski added in his deposition that no one from PSB ever directed Star Dog, or any of its employees, how to undertake the carpet removal and installation process; in addition, no one from PSB ever provided any tools to Star Dog to assist them in the performance of their job, or ever told any employee from Star Dog how to do their job. CP at 219-220. After the old carpet had been removed, Star Dog was responsible for laying down the new carpet and notching, or cutting out, the areas where

there was an electrical outlet opening. CP at 218. He emphasized that it was the sole responsibility of the carpet layers to either cut out the carpet or notch it in some way to indicate “where the hole is” so that it was not carpeted over. CP at 218. PSB did not have control over the carpet layers in regard to the work they performed. CP at 26.

D. PSB had a duty to inspect the final product of the flooring subcontractor's work after the completion of the work.

Brett Carr explained that if there was any control PSB had over the carpet layers, it related only to scheduling and ultimately inspection of their final product. CP at 26. This inspection was generally a visual inspection of the new carpeting with a representative of the owner, Macy's, present. CP at 26. Mrs. Louderback, the store manager, also stated that after the new carpet was laid, and before the store was reopened to the public, a representative from Macy's would inspect the carpet pads with a PSB representative to ensure that fixtures were replaced appropriately, and that the carpet pad itself was safe to open to the public. CP at 88-89. In particular, Macy's representatives would review the carpet pads to ensure that there were no tripping hazards, holes in the floor, and/or any other hazards that would make the carpet pads unsafe for members of the public. CP at 89.

During the course of PSB's inspections, Mr. Carr explained that PSB representatives would walk around the carpet, but unless they accidentally stepped directly onto an uncovered electrical outlet, there was no way to tell that the carpet layer had carpeted over an open electrical box. CP at 27. Typically, the carpet is stretched tightly and it is stiff and durable commercial carpet, which does not sag when stretched over a small opening. CP at 27. Mr. Carr further stated that it would be impossible to determine whether or not there was any need to check the carpets for missing plates and trim rings if there were no extra metal plates and/or trim rings brought to the attention of the supervising contractor. CP at 29. Finally, Mr. Carr stated that it would be virtually impossible for PSB agents or employees to stand over the carpet layers and observe every bit of work that they were doing, including the placement of carpet over an open electrical box. CP at 30.

There was no evidence presented by any party that a PSB representative was ever notified of any missing plates or trim rings on this particular job. However, Mr. Carr stated that it was possible that the previous carpet layer laid carpet over an uncovered box and that the carpet layer in November of 2006 just repeated that error without notifying the general contractor. CP at 29. Mr. Adamski admitted that there were times in other jobs when the flooring subcontractors would pull out the old

carpet and discover uncovered electrical outlet boxes underneath it, but there has been no evidence submitted by any party in this case to either substantiate or refute this possibility. CP at 221.

E. The trial court denied PSB's motion for summary judgment on the basis that PSB "stepped into the shoes" of Macy's for the purposes of tort liability.

On January 27, 2011 PSB filed a motion for summary judgment to dismiss all claims against PSB because there were no genuine issues of material fact, or inferences therefrom, which would establish the negligence of PSB as proximate cause of the injuries sustained by plaintiff Eastman. CP at 11-12. PSB further asserted that the flooring subcontractors hired by Commercial Interiors, Star Dog and The Floor Guys, were "independent contractors" based on the declaration and deposition testimony of the parties involved in the construction work. CP at 16. Accordingly, PSB argued that it could not be held vicariously liable for the negligent acts of the flooring subcontractors. CP at 16-22.

Codefendants Commercial Interiors and Star Dog then responded in opposition to PSB's motion for summary judgment. CP at 113-186. Without sufficient facts to show any negligence on the part of PSB, Commercial Interiors and Star Dog relied primarily on certain provisions within PSB's contract with Macy's, i.e. the "Lump Sum Contract," arguing that these provisions created an enhanced duty on the part of PSB

to protect third parties, such as the plaintiff, from the negligent acts of the flooring subcontractors. The following contractual provisions were cited by codefendants in support of their arguments:

The Contractor shall be **solely responsible for initiating, maintaining and supervising all safety precautions** and programs in connection with the performance of the Contract. The Contractor shall provide sufficient, safe and proper facilities and safeguards at all times for the prosecution of the Work and the inspection of the Work by the Owner and for the protection of the public from injury.

(Emphasis Added) “Lump Sum Contract” Paragraph 15(a), CP at 134-35.

The Contractor shall take all necessary precautions for the safety of employees on the Work, **and shall comply with all applicable provisions of federal, state, county and local safety laws and building codes to prevent accidents or injury to person on, about or adjacent to the premises where the work is being performed.** He shall erect and properly maintain at all times, as required by the conditions and progress of the Work, all necessary safeguards as required by the conditions and progress of the Work, all necessary safeguards for the protection of workers and the public, and shall post danger signs warning against the hazards created by such features of construction as protruding nails, hoists, elevator hatchways, scaffolding, window openings, stairways and falling materials; and he shall designate a responsible member of his organization on the Work whose duty shall be the prevention of accidents. The name and position of the person so designated shall be reported to the Architect and the Owner by the Contractor.

(Emphasis Added) “Lump Sum Contract” Paragraph 15(b), CP at 135.

The Contractor agrees that he is as fully responsible **to the Owner** for the acts and omissions of his Subcontractors and of persons either directly or indirectly employed by

them, as he is for the acts and omissions of persons directly employed by him.

(Emphasis added). “Lump Sum Contract” Paragraph 31(d), CP at 136.

Contractor shall do all work in accordance with the Contract Documents. In this Contract, the term “Work” shall mean (1) all the labor, materials, services, machinery, equipment, tools, plant facilities and other items required by the Drawings, Specifications and General and Supplementary Conditions and to fully comply with the requirements of this Contract, (2) the coordination of Contractor’s Work with that of the other trades and the other contractors and subcontractors, (3) all additional changes in the Work which Owner may order pursuant to Article IV hereof, and (4) the doing and performance of everything else required by the Contract.

“Lump Sum Contract” Article I Section (b); CP at 67

The Contractor shall supervise and direct the Work both at the site and at the fabricating shops. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work. He shall place a competent superintendent in charge of the Work at the site who shall be acceptable to the Owner and who shall remain until final completion and acceptance of the Work unless removed by reason of sickness, discharged for cause, or replaced by the Contractor, with the written consent of the Owner. The Contractor shall be responsible for all acts and omissions of his superintendent, **depending upon job requirements**, so that all operations can be satisfactorily supervised.

(Emphasis Added) “Lump Sum Contract” Paragraph 12(a); CP at 75.

Neither Commercial Interiors nor Star Dog provided any legal authority to support the argument that the aforementioned contractual

provisions created a legal duty on the part of PSB to plaintiff.

Additionally, no party offered any testimony, expert or otherwise, that PSB failed to meet the standards of the industry, any statutory responsibility, or any other obligation of PSB as a general contractor.

On February 25, 2010, the Honorable Bryan E. Chushcoff heard oral arguments from each of the parties involved in the case. RP (Feb 25, 2010) at 1-2. Adam Cox, the attorney representing Commercial Interiors, reiterated the argument that certain provisions in PSB's contract with Macy's created a legal duty, during the course of the entire remodel project, for PSB to make the premises safe not only for employees of independent contractors during the construction process, but also to third parties even when no construction was in progress or had already been completed:

MR. COX: All right. Page 33 at Paragraph 15 of this contract says specifically, the contractor shall provide sufficient, safe, and proper facilities and safeguards at all times for the prosecution of the work and the inspection of the work by the owner and for the protection of the public from injury. This contract creates a continuing obligation during the course of the entire work at Macy's to make the premises safe. Just because Macy's opens up its doors from 8:00 a.m. to 6:00 p.m. does not make it a nonwork-site environment. It is still – it is still being under construction.”

RP (Feb 25, 2010) at 16 (4-15).

MR. COX: Stute, basically, says that you have an obligation to provide for the safety of employees, especially, for the general contractor. They stepped into the shoes of Macy's, the owner of the building. That is, in fact, what this contract says. This is a 56-page contract. Of course, I didn't give Your Honor the entirety. These sections that I did provide, clearly, support the idea that if the owner –the owner is contracted with PSB, and PSB is getting the benefit of that bargain, to step into the shoes of the owner and act with the duties and the rights and responsibilities of the owner on the job site. They are the possessor of the property under statute, under Stute, and under the common law.

RP (Feb 25, 2010) at 19 (1-13).

The trial court then questioned Thomas West, the attorney for PSB, regarding Mr. Cox's argument:

THE COURT: Mr. Cox' point is, you stand in exactly the same shoes as Macy's did under the circumstances

MR. WEST: He can say that all he wants, but where is the law to support that proposition?

THE COURT: He cited the contract –

MR. WEST: There is nothing in the contract that say we are responsible to the – you know, to the extent of Macy's. There is nothing to suggest that.

THE COURT: What he is saying is – well, in a way, he is, because he is saying that you had a responsibility under the terms of the contract to protect every cotton-picking entity that the lawyers could think of when you read that –

RP (Feb 25, 2010) at 40-41 (14-2)

Without any further analysis, the trial court adopted Mr. Cox's argument and found that PSB "stepped into the shoes of Macy's" for the purposes of tort liability and denied PSB's motion for summary judgment:

MR. WEST: Well, we are talking about contracts because that's the only way Macy's is going to be able to sue us is based on the contracts.

THE COURT: No, but it's not how Macy's would have got sued. Macy's would have got sued on the basis –

MR. WEST: Well, I don't know that Macy's would be responsible under those circumstances.

THE COURT: If it was a shopper and this happened to me?

MR. WEST: I don't know that they would.

THE COURT: I guess I would say this much, you might be right, but it would be a question of fact for the jury.

MR. WEST: Well, it would be a question of law. Right now, there is no law before you that says, number one, Macy's is liable if it had been – if there had been a –

THE COURT: I'm persuaded that that is not true. I'm persuaded by Mr. Cox' argument about premises liability here, and that effectively your client stood in the shoes of that.

MR. WEST: So, if we stand in the shoes of Macy's, are we immune because this is a labor-and-industry claim?

THE COURT: You can argue with me all day about that, but you stood in the shoes for purposes of tort liability. If you have some other defenses based on the workman

compensation laws, of course we will talk about that later, but I will deny the motion for summary judgment.

RP (Feb, 25 2010) at 41-42 (17-21).

The trial court then signed the order denying PSB's motion for summary judgment. CP at 258-261

F. The trial court denied PSB's motion for reconsideration.

On March 7, 2011 PSB filed a motion for reconsideration with the trial court regarding the motion for summary judgment. CP at 262. PSB argued that PSB was not the "possessor" of the land because Macy's had retained control of the area in which Mrs. Eastman was injured after the work by PSB and the flooring subcontractors had already been completed. CP at 269-270. Codefendants Commercial Interiors and The Floor Guys² argued that language within the "Lump Sum Contract" between PSB and Macy's made PSB the "possessor" of the property. CP at 278-281; CP at 290-291. On March 18, 2011 the trial court signed the order denying PSB's motion for reconsideration. CP at 310-312.

² Star Dog did not respond to PSB's motion for reconsideration regarding the issue of PSB as a "possessor" and instead joined in opposition to PSB's motion with Commercial Interiors and the Floor Guys.

ARGUMENT

A. Standard of Review

An appellate court reviews an order or denial of summary judgment de novo, performing the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c).

To defeat summary judgment in a negligence case, the plaintiff must show an issue of material fact as to each element-duty, breach of duty, causation, and damages. *Kennedy v. Sea-Land Serv., Inc.*, 62 Wash.App. 839, 856, 816 P.2d 75 (1991). A “material fact” is one on which the outcome of the litigation depends, in whole or in part.” *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974). The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298 (1993).

A defendant can move for summary judgment by showing that there is an absence of evidence to support the plaintiff’s case. *Young v. Key Pharms., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989). If the

defendant shows an absence of evidence to establish the plaintiff's case, the burden then shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial. *Young*, 112 Wash.2d at 225, 770 P.2d 182.

B. The trial court committed reversible error when it ruled that PSB “stepped into the shoes” of Macy’s “for purposes of tort liability”.

1. The determination of whether the defendant owes a duty to the plaintiff is a question of law.

To establish negligence, plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) injury, and (4) proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Society*, 124 Wash.2d 121, 127-28, 875 P.2d 621 (1994). The determination of whether the defendant owes a duty to the plaintiff is a question of law. *Tincani*, 124 Wash.2d at 128, 875 P.2d 621. The existence of a duty may be predicated upon statutory provisions or on common law principles.” *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996).

2. PSB was not a “possessor” of the land under the common law.

In a premises liability action, before a court can conclude that the defendant owes a plaintiff a duty of care, it is first necessary to determine the status of the defendant in relation to the property at the time of the

injury, i.e. whether the defendant is a “possessor” of the property. *Gildon v. Simon Property Group, Inc.*, 158 Wash.2d 483, 496, 145 P.3d 1196 (2006). Washington courts have adopted the definition of “possessor” from the Restatement (Second) of Torts sec. 328E (1965):

A possessor of land is

(a) a person who is in occupation of the land with intent to control it or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land if no other person is in possession under Clauses (a) and (b).

Strong v. Seattle Stevedore Co., 1 Wn.App. 898, 901, 466 P.2d 545 (1970).

The comment to section 328E explains that “possession,” as used in the Restatement, refers strictly to possession in the factual sense, as opposed to “the legal relationship resulting from the facts.” Restatement (Second) of Torts sec. 328 cmt. a. A possessor of land is a “**person who is in occupation of the land with intent to control it[.]**” *Strong*, 1 Wash.App. at 900-01, 466 P.2d 545 (quoting Restatement(Second) of Torts sec. 328E (1965)) (emphasis added); see also *Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 524 (Iowa 1992) (“Who is a possessor of land under sec. 328E depends primarily upon the amount of control that a

particular person exercises over the property.”); see *Martin v. American Nat'l Can Co.*, 975 F.Supp. 1153, 1157 (1997) (“The person who controls the land can remedy any hazardous condition and has the right to prevent other[s] from entering the land; therefore the law imposes on the possessor the duty [to] keep the land safe for invitees.”)

The common law requirements of a “possessor” by one other than the landowner were addressed in *Strong v. Seattle Stevedore Co.* In *Strong*, the plaintiffs, the wife and children of a city fireman who was killed while fighting a fire at a pier on the Port of Tacoma, brought an action against defendant, who rented and operated a crane on the pier. *Strong*, 1 Wash.App. at 898-899, 466 P.2d 545. On the day of the fire, an employee of the defendant was operating the crane when a cable lying on the pier was pinched by the crane's wheels and started the electrical fire which ultimately killed the fireman. *Strong*, 1 Wash.App. at 899, 466 P.2d 545. In determining whether the defendant was a “possessor” of the property the court considered the actual occupation of the land by the defendant and the defendant’s nature of control over it.

The court noted that the gantry crane rented by the defendant on the pier only moved about on rails which were integrated into the surface of the pier. *Strong*, 1 Wash.App. at 901, 466 P.2d 545. The court then determined that the crane was “affixed” to and became a part of the pier

itself. *Id.* This, in addition to the defendant's rental of the crane from the Port of Tacoma, and its operation by an employee of defendant, under the supervision of another employee, clearly indicated the defendant's exercise of control over it. *Id.* However, the court only concluded that the defendant was a "possessor" of land because it occupied and exercised control over the crane which was immovable from the pier.

The duty owed by a possessor may also be owed derivatively by a person who acts on behalf of the possessor. *Jarr v. Seeco Constr. Co.*, 35 Wn.App. 324, 328, 666 P.2d 392 (1983); Restatement (Second) of Torts Sec. 383 (1965); CP 291. However, a close analysis of *Jarr* shows that it is clearly distinguishable from the facts in this case. In *Jarr*, the plaintiff attended an open house at the Lion's Creek Town House Condominiums, which were under construction at the time. *Jarr*, 35 Wash.App. at 325, 666 P.2d 392. The plaintiff was met at the construction site by an agent of defendant, the real estate broker, Terrace Realty, Inc. *Id.* The agent of defendant told plaintiff to have a look around the condominiums, and while the plaintiff was inspecting an unfinished unit, a pile of sheetrock fell on him, causing injuries. *Id.*

The plaintiff brought an action for damages against the owner of the condominiums, Seeco Construction, Inc., but also filed suit against the real estate broker who allowed him to inspect the property. *Id.* The claim

against the real estate broker was allowed to proceed under Sec. 383 on a theory of premises liability. *Id.* at 328. In answer to defendant Terrace's requests for admissions, Seeco Construction stated that "on the day of the accident Terrace Realty **was in complete charge** of the open house and had the responsibility to control prospective purchasers viewing the property and Terrace Realty was in control of the site and buildings as they related to the showing of certain units." (Emphasis added). *Id.* at 329. The court found that this allegation was sufficient to create a factual issue as to Terrace's status as a "possessor" of the land under Sec. 383 for purposes of tort liability. *Id.* In addition, Terrace conceded at oral argument that it was a "possessor" for purposes of premises liability. *Id.*

The facts in this case are clearly distinguishable from *Jarr*. First, the plaintiff in this case sustained her injuries during business hours while she was working as an employee of Macy's. CP 244. Second, there is no evidence that any PSB representative or employee was on site or that any construction was in progress at the time she was injured. In fact, according to Mrs. Louderback, Macy's store manager, PSB and the flooring subcontractors were required to complete all work on the designated carpet pads before Macy's opened the store to the public for business. CP at 88-89. In addition, a Macy's employee would have inspected the carpet pads after the work was completed to ensure that all

of the fixtures were replaced appropriately and that each carpet pad itself was safe for the public prior to opening the store for business. CP at 89. All of the declaration and deposition testimony indicates that no construction was in progress at the time of plaintiff's injuries and that the area was completely turned over to Macy's to resume business. There is no evidence that any PSB representative either occupied the area or intended to assert control over it after the carpet pad had been re-carpeted.

Further, there is no evidence that PSB had the right to either prevent others from entering the premises at the time of the incident, or even to remedy any hazardous condition that may have been discovered on the premises. This is further substantiated by the fact that Macy's own maintenance technician, Christopher Fergelic, fixed the condition immediately after the incident occurred. CP at 238-239. There is no factual basis under the common law to find that PSB was a "possessor" of the property at the time of plaintiff's injuries and the trial court erred in denying PSB's motion for summary judgment on the basis that it "stepped into the shoes" of Macy's for the purposes of tort liability.

3. PSB's "Lump Sum Contract" with Macy's did not in effect make PSB the "possessor" of the property.

Codefendants argue that certain provisions within PSB's "Lump Sum Contract" with Macy's in effect made PSB the "possessor" of the

property. CP at 278-281; CP at 290-91. However, there is nothing in the contractual provisions cited by any of the codefendants that states PSB agreed to “step into the shoes” of Macy’s for purposes of tort liability. In fact, the contractual provisions related primarily to PSB’s promise to Macy’s to provide adequate safety measures while construction work was ongoing. Paragraph 12(a) requires that PSB have a supervisor on the work site until the work is completed and accepted by Macy’s (CP at 75); Paragraph 15(a) requires that PSB maintain and supervise all safety precautions in connection with the performance of the work (CP at 135-36); Paragraph 15(b) requires that PSB comply with all federal, state, county and local safety laws to prevent accidents while the work is being performed (CP at 135). There is no evidence presented by any party that PSB failed to meet any of these requirements under the contract or that PSB failed in any way to take all the necessary safety precautions related to the work being performed.

In paragraph 31(d) PSB agrees to be fully responsible to Macy’s for “any acts and omissions of the subcontractors”, but there is no legal authority to support the argument that this agreement also extended to third parties who were on the mall’s premises during the remodel project. CP at 136. Also, there is no evidence in the “Lump Sum Contract” that PSB agreed to “step into the shoes” of Macy’s for purposes of tort

liability. The trial court committed obvious error by denying PSB's motion for summary judgment on that basis and the decision should be reversed.

C. *There are no genuine issues of material fact to show that PSB breached any duty owed to the plaintiff.*

1. *Legal authority under the common law for premises liability.*

Washington has adopted sections 343 and 343A Restatement (Second) of Torts to define the landowner's duty to an invitee. *Kamala v. Space Needle Corp.*, 147 Wash.2d 114, 124, 52 P.3d 472 (2002). The Restatement (Second) of Torts § 343 reads as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

In other words, a possessor is not a guarantor but owes a duty to an invitee to exercise reasonable care to maintain the premises in a safe

condition. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash.2d at 53, 914 P.2d 728.

A business owner is liable to an invitee for an unsafe condition on the premises if the condition was “caused by the proprietor or his employees, or the proprietor [had] actual or constructive notice of the unsafe condition.” *Wiltse v. Albertson's Inc.*, 116 Wash.2d 452, 460, 805 P.2d 793 (1991). Further, reasonable care requires a possessor 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. *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d at 139, 875 P.2d 621.

Accordingly, **a plaintiff must either show that the possessor caused the hazardous condition or demonstrate that the possessor had actual or constructive notice of the danger**, and failed within a reasonable time to exercise reasonable care in alleviating the situation. *Geise v. Lee*, 84 Wash.2d 866, 871 529 P.2d 1054 (1975). Ordinarily, it is a question of fact for the jury whether, under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care. *Coleman v. Ernst Home Ctr., Inc.*, 70 Wash.App. 213, 220, 853 P.2d 473 (1993). However, if plaintiff fails to provide evidence that the possessor had actual or

constructive notice of the dangerous condition, then summary judgment is granted to the defendant as a matter of law. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wash.App. 183, 127 P.3d 5 (2006); *Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wash. App. 243, 125 P.3d 141 (2005).

In *Fredrickson*, the plaintiff was a customer at defendant Bertolino's coffee shop sitting on a chair when the chair suddenly broke, causing the plaintiff to sustain injuries. *Fredrickson*, 131 Wash.App. at 186, 127 P.3d 5. The plaintiff then sued defendant for negligently furnishing and maintaining its premises. Defendant moved for summary judgment and the trial court granted defendant's motion. On appeal, the plaintiff argued that defendant's inspection procedures were inadequate in detecting the dangerous condition, but offered no evidence that defendant failed to inspect the chairs or that the inspection routine did not meet industry standards. *Id.* at p.190. The appellate court affirmed the trial court's ruling and found that defendant was entitled to summary judgment as a matter of law because defendant did not have actual or constructive notice of the dangerous condition. *Id.* at p.191.

In *Morris*, a husband filed a wrongful death action against defendant sawmill company for the death of his wife when the building in which she was working while sawmill was being disassembled collapsed. *Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wash. App. 243, 244-45, 125

P.3d 141. The defendant hired a construction company to disassemble the sawmill and the trial court found the construction company negligently disassembled it which caused the building to collapse. *Id.* The plaintiff submitted into evidence a contract between the companies to show the defendant's negligence, but the court ruled that summary judgment for defendant was appropriate because there were no facts indicating defendant could have discovered the danger by the exercise of reasonable caution or that defendant should have realized the sawmill equipment involved an unreasonable risk of harm to plaintiff. *Id.* at p.250. Most importantly, the court found that there were no facts indicating defendant should have anticipated that the construction company would fail to take reasonable care when completing the disassembly process. *Id.* at p.251.

2. There is no genuine issue of material fact to support a breach of common law duty of PSB under premises liability theory.

In the "Lump Sum Contract" between PSB and Macy's, PSB agreed to "comply with all applicable provisions of federal, state, county and local safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises **where the work is being performed.**" (Emphasis added). CP at 135. There has been no testimony, expert or otherwise, provided by any party in this case to show that PSB failed to comply with *any* law or statute, or that it violated any industry

standard in the performance of its obligations as the general contractor of the Puyallup Macy's remodel project. In addition, there is no evidence indicating that PSB created the hazardous condition, failed to use reasonable care during the inspection process, or had actual or constructive notice of the hazardous condition, or was a possessor subject to the foregoing legal authority.

Brett Carr explained that PSB did not directly supervise the carpet layers as a standard procedure because the carpet layers would move slightly ahead of them, or behind them, as a PSB representative moved the fixtures. CP at 226. After the carpet installation was completed, there was no way the PSB representatives could tell that the carpet installers had carpeted over an open electrical box. CP at 27. There is no evidence that anyone contacted a PSB representative regarding the uncovered electrical outlet in question.

Ben Adamski of Star Dog indicated that when the carpet installers were laying down the new carpet, they would either put a notch in the carpet to show where an electrical opening was, or just cut it out. CP at 218. Mr. Adamski also admitted that typically the carpet installers would "notch it out" right away so that they didn't lose the spot where the electrical opening was while they laid down the new carpeting. CP at 218. He clearly stated that it was the responsibility of the carpet installer to

either cut out the carpet or notch it in some way to indicate “where the hole is” so that it was not carpeted over. CP at 218. There are no facts indicating that the carpet layers notched or cut out the carpet, creating a known or obvious condition that could be identified by PSB.

Also, according to Shelley Louderback, the store manager, there was no evidence that a PSB representative was made aware of the condition prior to the incident with Mrs. Eastman. CP at 233. There has been no evidence submitted by any party to suggest that carpeting over an uncovered electrical outlet was a contemplated hazard that PSB should have anticipated during the course of its inspection.

Without evidence that PSB was put on notice about the uncovered electrical outlet that was carpeted over, PSB cannot be held liable as a possessor of the property.

3. *There is no sufficient evidence to establish that PSB would be vicariously liable for the negligent acts of Star Dog as an employee of PSB.*

The material facts concerning the nature of Star Dog's work and relationship to PSB are undisputed. Where the material facts are undisputed, the determination of whether one is an independent contractor or an employee is a question of law. *Hartford Fire Ins. Co. v. Leahy*, 774 F.Supp.2d 1104, 1117, W.D.Wash. (2011); *Bloedel Timberlands Dev., Inc. v. Timber Industries, Inc.*, 28 Wash.App. 669, 626 P.2d 30, 33 (1981).

An independent contractor is generally defined as one who contracts to perform services for another, but who is not controlled by the other or subject to the other's right to control with respect to his physical conduct in performing the services. *Hollingbery v. Dunn*, 68 Wash.2d 75, 411 P.2d 431 (1966); *Miles v. Pound Motor Co.*, 10 Wash.2d 492, 117 P.2d 179 (1941); Restatement (Second) of Agency s 2(3) (1958). In *Massey v. Tube Art Display, Inc.*, 15 Wash.App. 782, 551 P. 2d 1387, 1390 (1976), the Washington Court of Appeals identified ten factors, found in section 220(2) of the Restatement (Second) of Agency, for determining the status of a worker as either an employee or an independent contractor. Those factors include:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work,
- (b) whether or not the one employed is engaged in a distinct occupation or business
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision,
- (d) the skill required in the particular occupation,
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work
- (f) the length of time for which the person is employed
- (g) the method of payment, whether by time or by the job

(h) whether the work is part of a regular business of the employer

(i) whether or not the parties believe they are creating the relation of master and servant, and

(j) whether the principal is or is not in business. *Id.*

The court in *Massey* found that all of these factors are of varying degrees of importance and not all need be present, except the element of control. *Id.* The court found that “[i]t is the right to control another's physical conduct that is the essential and oftentimes decisive factor in establishing ... whether the person controlled is a servant or nonservant agent.” *Id.*

In *Hartford Fire Ins. Co. v. Leahy*, the U.S. District Court ruled that a signpost installer was not an “employee” of a real estate broker (Prudential) as a matter of law based on the fact that 1) the physical process of installing and removing signposts, how to use tools, how to dig a hole, or how to fill an empty hole, were entirely controlled by the sign post installer, and not Prudential; and 2) both parties testified that Prudential never gave the sign post installer specific instruction, or retained control over the manner in which he installed or removed signposts, except to identify the property upon which the signpost was to

be installed, as well as the date by which the post was to be installed and removed. *Hartford Fire Ins. Co. v. Leahy*, 774 F.Supp.2d at 1119-20.

The court in *Hartford* stated that the sign post installer was not an employee, but an independent contractor as a matter of law after considering the factors set forth in the Restatement (Second) of Agency and finding that it was “the only reasonable conclusion based on the undisputed facts” in the case. *Id.* at 1120. The court rejected the argument that the sign post installer was an employee of Prudential’s simply because Prudential owned the signs. *Id.* In addition, the court rejected the argument that Prudential retained control over the location of the signs, citing the Washington Supreme Court case, *Miles v. Pound Motor Co.*, 10 Wash.2d 492, 117 P.2d 179, stating that Prudential only controlled the result of the work (location and timing), and not the means (how the hole is actually dug, the post secured in the hole, and the hole eventually filled). *Id.*

Here, similarly, it is undisputed that the physical process of demolishing the old carpet and installing the new carpet was entirely controlled by Star Dog. Ben Adamski, the owner of Star Dog, readily admits in his deposition testimony that no one from PSB ever told anyone from Star Dog how to undertake the carpet removal and installation process, no one from PSB ever provided any tools to Star Dog to assist

them in the performance of their job, and no one from PSB ever told anyone from Star Dog how to do their job. CP at 219-20. According to Mr. Adamski, Star Dog was a “subcontractor” hired by Commercial Interiors for the sole purpose of performing carpet removal and installation. CP at 55-56.

Mr. Adamski’s statement that Star Dog was a “subcontractor” is consistent with Brett Carr’s statement that PSB did not supervise the actual work done by Star Dog or any of the subcontractors of Commercial Interiors because they were independent contractors with expertise in carpet removal and replacement. CP at 26. In fact, Mr. Carr explained that the standard procedure was to allow the flooring subcontractors to either move slightly ahead of PSB representatives, or behind them, during the carpet demolition and re-laying process. CP at 226. The responsibility of laying down the new carpet was not PSB’s, nor were any representatives from PSB in any position to supervise or direct carpet installers on how to lay the carpet.

Roget Redden, the night supervisor for PSB during the demolition and re-laying carpet process, did have some responsibilities as a supervisor, but they did not include control over the carpet installer’s work. His responsibility as a supervisor was to answer any questions as to where the work needed to be completed, to answer any questions the

workers may have had, and to ensure worker safety, but he did not exercise control over their actual work. CP at 214. There is no evidence to show that PSB retained the requisite control over Star Dog for them to be considered “employees” under the common law. In fact, based on all of the evidence, including the declaration and deposition testimony of Star Dog’s owner, Mr. Adamski, it is clear that Star Dog was an independent contractor under the common law and that PSB would not be vicariously liable for any negligent acts by Star Dog.

CONCLUSION

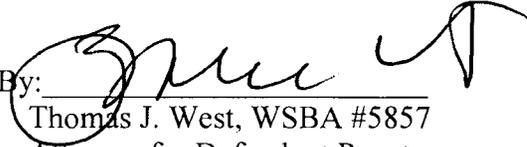
The trial court committed an obvious error when it denied PSB’s motion for summary judgment on the basis that PSB “stepped into the shoes” of Macy’s “for purposes of tort liability.” The trial court’s decision should be reversed. The work that was performed on carpet pad 15 was completed and the area was completely turned over to Macy’s at the time of the incident. Macy’s had inspected the re-carpeted area, accepted the work, and opened the store to the public for business. Macy’s retained complete control of the area and there is no evidence that PSB had any right to control the area or interfere with Macy’s business during that time. In fact, Macy’s own maintenance technician repaired the condition of the carpet immediately after the incident. The contractual provisions in PSB’s

“Lump Sum Contract” do not establish any evidence that PSB was a “possessor” of the property at the time of the incident and they do not change the facts in this case.

There is no genuine issue of material fact regarding any negligence of PSB and the trial court’s order denying PSB’s summary judgment motion should be reversed.

RESPECTFULLY SUBMITTED this 31st day of August 2011.

KRILICH, LA PORTE, WEST & LOCKNER, P.S.

By: 
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CERTIFICATE OF SERVICE

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I certify that on the 31st day of August, 2011, I caused a true and correct copy of this Statement of Arrangements to be served on the following in the manner indicated below:

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