

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS
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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JULIE EASTMAN,

Respondent(s),

V.

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

Petitioner/Appellant,

and

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

Respondents.

REPLY BRIEF OF APPELLANT PSB

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ORIGINAL

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ARGUMENT

A. The Trial Court Committed Obvious Error By Ruling That PSB “Stood In the Shoes” Of Macy’s For Purposes Of Premises Liability Based On The Lump Sum Contract.

Respondent Julie Eastman suggests that PSB failed to provide assignments of error in the Appellate brief and that the Court “may refuse” to consider the arguments set forth in said brief. (Brief of Resp. Eastman, p. 4). However, this case is before the Court upon a ruling granting PSB’s motion for discretionary review. The ruling clearly states the basis for this Court’s review: the potential that the trial court committed obvious legal error by ruling that PSB “stood in the shoes” of Macy’s for purposes of liability based on the lump sum contract. (Ruling Granting Review, p.6).

The legal authority cited by respondent Eastman to support the argument that the appellant “must provide ‘concise statements of each error’ that the lower court allegedly committed” simply does not apply to this case. The law also states that the standard of review of a trial court’s denial of a summary judgment motion is *de novo*, and, in fact, respondent Eastman stated as much in her brief. (Brief of Resp. Julie Eastman, p.5). There is simply no basis to disregard any of PSB’s arguments.

B. Respondents Have Failed To Make A Showing Of Any Genuine Issue Of Material Fact In This Case.

In reviewing a summary judgment motion the Court construes all evidence and reasonable inferences in the light most favorable to the nonmoving party, but if the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” summary judgment is proper. *Young v. Key Pharmaceuticals Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986)). Also, the nonmoving party may not rely on speculation or “mere allegations, denials, opinions, or conclusory statements” to establish a genuine issue of material fact. *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wash.App. 736, 744, 87 P.3d 774 (2004) (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 359, 753 P.2d 517 (1988)). The adverse party must set forth specific facts showing that there is a genuine issue for trial; if specific facts are not set forth, summary judgment shall be entered against the party. CR 56 (e).

1. There is no evidence that Roger Redden or any PSB employee removed any electrical outlet covers during the Puyallup Macy’s remodel project.

Respondents do not dispute the fact that Mr. Redden was the only PSB employee working at night on carpet pad 15 from the period of October 21, 2006 through November 23, 2006, the time frame in which

carpet pad 15 was re-carpeted. CP at 213. Respondents also do not directly dispute Roger Redden's deposition testimony stating that he never removed any outlet covers during the Puyallup Macy's remodel project. CP at 209. Instead, Respondents argue that Mr. Redden's time card for the week of November 18, 2006, which indicated "Demo for carpet" and "Carpet," could somehow be used as evidence that he removed outlet covers. CP at 138.

However, Mr. Redden explained in his deposition that he merely moved fixtures off and on the carpet pads during the carpet demolition and installation process. There is simply no evidence that his time card for the week of November 18, 2006 is evidence of anything other than time he spent removing fixtures during the demolition process and then putting them back on the carpet pad once the installation of the new carpet had been completed. Respondents have failed to produce any witness stating that Mr. Redden removed or replaced any outlet covers on carpet pad 15 during the demolition and installation process.

Respondent Star Dog references Ben Adamski's declaration, suggesting that some PSB employees may have removed outlet covers during the remodel project, but there is nothing in the declaration regarding Roger Redden or carpet pad 15. (Resp. Star Dog's Brief, p.4); CP at 57. In fact, Mr. Adamski simply declares:

It is common practice for the general contractor to assist in the removal of outlet covers between 25-50 percent of the time, and **it is my belief** that on the Puyallup Macy's project some of the outlet covers were removed by Puget Sound Builders employees because of the need to work as a collaborative team and turn over the particular carpet pad overnight. CP at 57.¹

This is a conclusory statement based on supposition, not personal knowledge. There is no competent evidence to suggest "common practice" was followed on this Macy's project. Also, this declaration does not create a genuine issue of material fact because Mr. Adamski fails to state whether he specifically saw **anyone** from PSB actually remove any outlet covers during the demolition process. He merely provided his opinion, or belief, that some PSB employees removed outlet covers based on "common practice." This is insufficient evidence to create a genuine issue of material fact because it lacks any personal knowledge and should be inadmissible pursuant to CR 56(e). However, even if the Court does consider this portion of Mr. Adamski's declaration admissible, there is still no evidence that Roger Redden or any PSB employee removed the outlet cover where Mrs. Eastman was allegedly injured. In fact, Mr. Adamski stated that he worked in close proximity to Mr. Redden during the course

¹ Declaration of Ben Adamski, p.3 (Emphasis Added).

of the remodel project and he never observed Mr. Redden remove **any** outlet covers during that time. CP at 56.

2. Shelley Louderback's deposition testimony does not create a genuine issue of material fact related to PSB's knowledge of the alleged hazard.

Respondents claim that the deposition testimony of Shelley Louderback creates a genuine issue of material fact as to PSB's knowledge of the alleged hazard in this case. See Brief of Resp. Eastman, pp.29-30; Brief of Resp. Commercial Interiors, p.7. Specifically, Respondent Eastman argues that Macy's pre-printed inspection forms called for inspection of missing electrical floor outlets, that Macy's was aware of this hazard, and that PSB also would had been aware of this hazard. See Brief of Resp. Eastman, p.29.

First, it is necessary to distinguish between the contemplated hazard in the pre-printed inspection form of Macy's and the alleged hazard that is at issue in this case. The alleged hazard in this case was an uncovered electrical box that was not even visible upon close inspection because it had been completely carpeted over with commercial carpet. CP at 232-234. Even after Mrs. Louderback personally inspected the area where the "supposed hole was," she had to put her foot on it to discover that there was an indentation there because it was completely "carpeted over." CP at 232. The alleged hazard at issue in this case is extremely

different from simply a missing electrical outlet cover where one can see the electrical outlet box. Mrs. Louderback herself was only able to discover the approximately 2-inch indentation under the carpet after she stepped on it, but admitted that the condition itself “wasn’t visible,” even upon close inspection. CP at 234. This was not the contemplated risk addressed in Macy’s pre-printed inspection forms.

Further, not only was the alleged hazard in this case not contemplated in the Macy’s pre-printed inspection forms, but even Mrs. Louderback made it clear in her deposition testimony that the inspection forms themselves had absolutely nothing to do with the remodel project or PSB. CP at 233. The fact that Macy’s had pre-printed inspection forms that required Macy’s employees to look for missing outlet covers is completely irrelevant to this case. Respondents have failed to produce any evidence that PSB had knowledge of this particular hazard, and, in fact, Mrs. Louderback admitted that PSB was never notified of this particular hazard prior to the incident. CP at 233. Whether or not she notified any representative from PSB after the incident occurred is also irrelevant and does not create any genuine issue of material fact in this case.

3. There is no evidence that PSB failed to reasonably inspect the carpet and the trial court’s speculations as to what PSB could have done to discover the alleged hazard in this case are pure conjecture unsupported by the submissions of any party.

Respondent Eastman claims that there is evidence that PSB did not reasonably inspect the carpet and that expert opinion is not necessary to establish this because the jury “could reasonably infer that PSB, as the general contractor in charge, should have known about the hazard through reasonable inspection procedures[.]” See Brief of Respondent Eastman, p.32. However, Respondent Eastman has failed to show any evidence that PSB’s inspection of the carpet wasn’t reasonable or that it violated any industry standard or any law of any kind. CR 56(e) clearly requires an adverse party in a summary judgment motion to set forth **specific facts** showing that there is a genuine issue for trial and cannot rely on speculation or mere allegations.

It is telling that Respondent Eastman relies heavily upon the trial court’s own speculations as evidence of what PSB could have done or failed to do in order to identify the alleged hazard during its inspection after the installation of the new carpet. See Brief of Resp. Eastman, pp. 32-33. Respondent Eastman relies on the trial court’s speculations because there is no other evidence that PSB failed to reasonably inspect the carpet. All parties failed to provide any evidence that PSB violated some standard of care in its inspection of the carpet to defeat summary judgment. The trial court’s speculations notwithstanding, the trier of fact

cannot manufacture inferences based on speculation. That is, speculation upon speculation does not create a material fact. Therefore, there is no genuine issue of material fact because the plaintiff cannot present any evidence of negligence on the part of PSB and summary judgment is appropriate.

C. There Is No Genuine Issue Of Material Fact In This Case To Hold PSB Liable As A Possessor Of Land Under Restatement (Second) Of Torts §328E or §383.

1. PSB is not considered a legal “possessor” under §328E.

Respondent Eastman cites to *Gildon v. Simon Property Group, Inc.* as legal authority that the “duty of possessor” under 328E extends to those who exercise control over the property, even if they are not the true owners. See Brief of Resp. Eastman, p.8. Although this is true, the Supreme Court of Washington in *Gildon* made it clear that one of the elements under §328E would still have to be met before one could be considered a “possessor”:

([t]he existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care). A “possessor” of land is (a) a person who occupies the land with the intent to control it; or (b) a person who has occupied 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 (a) or (b) above.

Gildon v. Simon Property Group, Inc., 158 Wn.2d 483, 496, 145 P.3d 1196 (2006) (citing Restatement 2nd of Torts §328E (1965)).

Respondent Eastman then conveniently sidesteps the question of whether PSB fulfilled any of the elements of a “possessor” under §328E despite the fact that one of these three elements must be met. Instead, respondent Eastman misapplies the law of *Morris v. Vaagan Brothers Lumber, Inc.*, inferring that PSB could be liable to a third party simply for exercising control over the construction area where the incident ultimately occurred. See Brief of Rep. Eastman, p.8. However, it is clear that *Morris* was only referring to a general contractors “retained control” over an independent contractor, not over property:

Retained Control. Under the common law, an employer generally has no liability for injuries to an employee of an independent contractor. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wash.2d 323, 330, 582 P.2d 500 (1978). However, there is an exception to this rule when the employer of the independent contractor retains control over the right to direct the work. *Kamla*, 147 Wash.2d at 121, 52 P.3d 472. The test of control is not the amount of actual interference with the work, but the right to exercise such control. *Id.* at 119–22, 52 P.3d 472. When determining whether the right to control exists, a court can consider such factors as the parties' conduct **and the terms of their contract.** *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wash.App. 741, 750, 875 P.2d 1228 (1994).

Morris v. Vaagan Brothers Lumber, Inc., 130 Wash.App. 243, 251, 125 P.3d 141 (2005) (Emphasis Added).

There is no evidence that this analysis would be applied to PSB as a possessor of property under §328E, particularly in regard to the terms of the contract between PSB and Macy's when PSB does not even meet the requirements of a "possessor" under §328E. In fact, in *Williamson v. Allied Group, Inc.*, 117 Wash.App. 451, 458, 72 P.3d 230 (2003), the Court of Appeals (Div. 1) specifically stated that the defendant's **derivative liability does not depend on the specific terms of defendant's contract with the owner of the property.**

2. PSB did not have exclusive control over the site of the accident.

Respondent Eastman argues that under the Restatement (Second) of Torts §383 PSB had a legal duty and may be liable derivatively as a possessor of land at the time the plaintiff was injured. However, the only legal authority cited by respondent Eastman to support this argument is *Jarr v. Seeco Const. Co.*, 35 Wash.App. 324, 327-28, 666 P.2d 392 (1983). See Brief of Resp. Eastman, p.20. However, as already stated in PSB's appellate brief, the case in *Jarr* involved the defendant's "complete charge" of the area where the injury occurred and the defendant's own admission as a "possessor" for purposes of premises liability. See Brief of App. PSB, p.22. No other legal authority has been offered by any of the Respondents to support the argument that PSB would be held liable under

§383 when it clearly did not have “complete charge” of the area when the incident occurred. In fact, there is no evidence that any PSB employee was even on site at the time of the injury, nor is there any evidence that PSB had any right to interfere with Macy’s business during that time by occupying the area where the injury occurred.

D. PSB Does Not Owe Macy’s Employees A Nondelegable Duty.

Respondent Eastman claims that PSB “owed Macy’s employees a nondelegable duty to ensure that its floors were properly installed by its agents and subcontractors.” See Brief of Resp. Eastman, p.13. To support this argument, respondent Eastman cites to *White Pass Co. v. John*, 71 Wn.2d 156, 427 P.2d 398 (1967).

The *White Pass* rule states that when one contracts to perform a specified service or supply a product of a certain quality, liability for negligent performance of the contract cannot be escaped by engaging an independent contractor to perform the very duty which the contract requires. *Bd. Of Regents of the Univ. of Washington v. Frederick & Nelson*, 90 Wn.2d 82, 84, 579 P.2d 346 (1978) (citing *White Pass*, 71 Wn.2d 156, 427 P.2d 398).

The *White Pass* rule is one of contract, not tort, and one who is not a party to the contract cannot hold a party to the contract liable for negligent performance of its terms. See *Stewart v. Griffith Industries, Inc.*,

158 Wash.App. 1005 (2010). The Supreme Court's language in the *White*

Pass case makes this clear:

...the duty to lay the flooring in a careful and prudent manner **so as not to damage the property of the owner was a nondelegable duty** of the general contractor.

White Pass, 71 Wn.2d at 160, 427 P.2d 398. (Emphasis Added). The *White Pass* case clearly does not apply here. The plaintiff in this case brought a tort action against PSB and did not allege any breach of contract theory in her complaint; however, even if the plaintiff had pursued a breach of contract action against PSB, she would not prevail because she is not a party to the contract between PSB and Macy's.

E. There Is No Public Policy Reason To Hold PSB Liable Under §426 And §429 Of The Restatement (Second) Of Torts.

Neither §426 or §429 of the Restatement (Second) of Torts has been adopted in Washington. In fact, §426 has been applied only once before, to state the existing law, that a party who hires an independent contractor is absolved from liability for the independent contractor's negligent acts. *Woodrome v. Benton County*, 56 Wash.App. 400, 407, 783 P.2d 1102 (1989). Respondent Eastman is attempting to change this law on public policy grounds. See Brief of Resp. Eastman, pp.19-20.

Respondent Eastman argues that "[t]here is no good reason for allowing the general contractor to escape liability for damages to the

owner's employee," referring to PSB's general position of authority as a the contractor on site, with "complete charge over the work and safety issues" and responsibility to hire responsible subcontractors. Brief of Resp. Eastman, pp19-20. However, respondent Eastman fails to indicate where PSB failed to meet any safety standards under any statute, regulation, or any standard of the industry, or where it breached its duty under the common law. Also, respondent Eastman failed to show any evidence as to why PSB should have been aware that any of the subcontractors on site showed any signs of negligence or had a history of failing to meet any standards as to the quality of their work.

There is simply no legal authority or evidence in this case that would suggest PSB should be liable under either §426 or §429. Further, there is no public policy reason to overturn existing law and essentially hold a general contractor strictly liable for the negligent acts of a subcontractor, particularly when there is nothing precluding the plaintiff from pursuing a negligence action against that subcontractor.

F. There Is No Genuine Issue Of Material Fact To Show That PSB Is Liable Under §384 or §385 Of The Restatement (Second) Of Torts Because The Work Was Not In Progress At The Time Of The Accident And PSB Did Not Create The Condition.

1. When the plaintiff sustained her injury Macy's was open to the public and there was no work "in progress" at that time.

The circumstances under which a building contractor such as PSB can become vicariously liable for the landlord's duties are circumscribed as set forth in Restatement (Second) of Torts §384 (1965); *Williamson*, 117 Wash.App. 451, 72 P.3d 230. However, to have the liability of the possessor of land, the contractor must create a dangerous condition on the land "while the work is in his charge":

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to the same liability, and enjoys the same immunity from liability, as though he were the possessor of the land, for the bodily harm caused to others within and without the land, while the work is in his charge, by the dangerous character of the structure or other condition.

Restatement (Second) of Torts Sec. 384 (1965); *Williamson*, 117 Wash.App. at 456-57, 72 P.3d 230.

In *Williamson*, the plaintiff tenant was injured after she slipped and fell on an unimproved grassy slope adjacent to her apartment building where she was forced to walk because the defendant contractor had temporarily closed the footbridges connecting the parking lot to the second-story units. *Id.* at 454. The incident occurred while the defendant contractor was painting the footbridges. *Id.* The defendant argued that they should be excused from liability because they had not contractually assumed a comprehensive duty for safety at the accident site. *Id.* at 458.

However, the court stated that whether the defendant had derivative liability under Sec. 384 did not depend on the specific terms of defendant's contract with the landlord. *Id.* Rather, the court stated that derivative liability depended upon whether the defendant created the dangerous condition on the land **while the work was in progress**. *Id.* at 459.

The *Williamson* case is distinguishable in many ways from this case. The contractors in *Williamson* had blockaded a footbridge that allowed residents of the apartment building to walk to and from their apartments. The contractors were clearly still working on the footbridge when their blockade forced residents to walk into a hazardous area. Here, PSB had completed all the work that was necessary in the area where the plaintiff was injured. Macy's had inspected the area with a PSB representative and the site was cleaned and opened up to the public. The store resumed normal business hours and there is no evidence that any PSB employee was anywhere near the area. There was no blockade or construction area set up during that time. The work was not "in progress" in any way during that time.

2. PSB did not create the condition which allegedly caused plaintiff's injuries.

Both §384 and §385 apply only where the contractor actually created the condition that caused the harm. *Williamson*, 117 Wash.App. at 460, 72 P.3d 230; (Restatement 2nd of Torts Sec. 384 Comment d. “...**a general contractor employed to do the whole of the work may**, by the authority of his employer, **sublet particular parts of the work to subcontractors**. In such a case, the rule stated in this Section applies to subject the particular contractor or subcontractor to liability for only such harm as is done by the particular work entrusted to him).

The flooring subcontractors in this case were responsible for removing and replacing electrical outlet covers during the demolition and installation process. CP at 225. There is no evidence that PSB either removed or replaced any electrical outlet covers during the Puyallup Macy’s project. Also, the flooring subcontractors were responsible for removing the old carpet and replacing the new carpet. Ben Adamski of Star Dog admitted 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,” when an electrical outlet cover had been removed, so that it was not carpeted over. CP at 218. This was solely the responsibility of the flooring subcontractor. There is no question that this condition was fully entrusted to the flooring subcontractors and that the condition was created by the flooring subcontractors..

Further, under the Restatement (Second) of Torts §385, a builder or construction contractor is liable for injury or damage to a third person **as a result of negligent work**, even after completion and acceptance of that work, **when it was reasonably foreseeable that a third person would be injured due to that negligence.** *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wash.2d 413, 427, 150 P.3d 545 (2007).

The purpose of the decision in *Davis* was to prevent negligent builders from insulating themselves from liability simply by the act of delivery. *Davis*, 159 Wash.2d at 419-20, 150 P.3d 545. Therefore, even if the *Davis* case does somehow apply to PSB, there must be some material fact that PSB failed to exercise a degree of skill, care, and learning possessed by members of their profession in the community. *Rusing v. Skeers Const., Inc.*, 142 Wash.App. 1020 (2008) (citing *Riggins v. Bechtel Power Corp.*, 44 Wash.App. 244, 250, 722 P.2d 819 (1986)). Respondents have failed to produce any evidence of this kind.

G. There Is No Genuine Issue of Material Fact To Show That PSB Is Vicariously Liable For The Negligent Acts Of Star Dog As An “Agent” Of PSB.

Respondent Star Dog relies primarily on *Massey v. Tube Art Display, Inc.*, to support the argument that Star Dog was an employee or “agent” of PSB. See Brief of Resp. Star Dog, pp. 11-16. Respondent Star Dog argued that “the close proximity, collaboration, and required quick

turnaround,” in addition to PSB’s supply of materials, creates a genuine issue of fact in this case as to Star Dog’s status as an “agent” of PSB. See Brief of Resp. Star Dog, p.15. However, Star Dog failed to provide any legal authority to support the argument that Roger Redden’s presence as a night supervisor, overseeing general work safety (as required under the Washington Administrative Code) as a representative of PSB, and overseeing the timing and location of work, would somehow transform Star Dog from a self professed independent contractor into an employee or “agent” of PSB.

Star Dog also failed to distinguish this case from *Hartford Fire Ins. Co. v. Leahy*, which rejected the argument that an independent contractor will be deemed an agent or employee simply because the general contractor may have owned materials used by an employee and retained control over the location and timing of the work. *Harford Fire Ins. Co v. Leahy*, 774 F.Supp.2d 1104, 1120, W.D. Wash. (2011). Star Dog admitted that it was an independent subcontractor hired by Commercial Interiors for the sole purpose of performing carpet removal and installation. CP at 55-56. There is no question that Star Dog controlled all aspects of the carpet removal and installation process as it related to their work, except the timing and location of their work. Pursuant to *Hartford*, Star Dog has failed to create a genuine issue of material fact for trial regarding its status

as an “agent,” and the only reasonable conclusion, based on the undisputed facts in the case, is that Star Dog was not an employee, but an independent contractor as a matter of law.

CONCLUSION

Appellant PSB requests that the Court find that PSB is entitled to summary judgment as a matter of law and that the trial court committed an obvious error when it ruled that PSB “stood in the shoes” of Macy’s for purposes of liability based on the lump sum contract between PSB and Macy’s. There is no legal authority to support this argument and respondents have failed to show any genuine issue of material fact as to PSB’s negligence under any legal theory; therefore, summary judgment is appropriate.

RESPECTFULLY SUBMITTED this 23rd day of November 2011.

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

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of November, 2011, I caused a true and correct copy of Reply Brief of Appellant to be served on the following in the manner indicated below:

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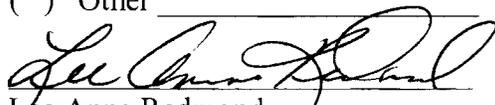
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