

No. 47462-0-11

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

ANGEL GARCIA-TITLA, individually, and LETICIA SARMIENTO
FLORES, individually and the marital community composed
thereof

Appellants,

v.

SFC HOMES, LLC, a Washington

Corporation, Respondent.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This appeal asks whether the Supreme Court case of *Stute v. PBMC., Inc.* 114 Wn.2d 54, 788 P.2d 545 (1990) applies to a construction site injury where the owner/developer of the property (SFC Homes) contracted with subcontractors, considered them to be independent contractors, and provided no safety oversight. This owner/developer (SFC Homes) was also a general contractor with a general contractor's license, held itself out as a general contractor, and was in the business of building and then selling new residential homes. Here a framer, (Garcia-Titla) fell and was injured due to the absence of proper safety equipment. Per *Stute*, general contractors and owner/developers at construction sites owe a non- delegable duty of care to subcontractors working for them.

The trial court dismissed Garcia-Titla's case on summary judgment. According to the court, SFC Homes did not have to comply with the *Stute* mandates regarding duty care for safety of workers because it fell under the protections of *Kamla v. Space Needle*, 147 Wn.2d 114, 52 P.3d 472 (2002). *Kamla* does not impose a duty of care upon owners who are not in the business of constructing new homes. This Court should apply *Stute*, not *Kamla*, and remand for trial.

REPLY RE STATEMENT OF THE CASE

SFC Homes states at page 1 of its response that "Garcia-Titla engaged in no written discovery and took no depositions." BR 1. However, there is no rule requiring a Plaintiff to take depositions in a Superior Court case. Here, Garcia-Titla's counsel was quite familiar with SFC Homes' safety expert and could anticipate his testimony. There was no need to depose him. SFC Homes' medical expert had already requested a CR 35 examination and Garcia-Titla had already agreed to it. The CR 35 exam report would be forwarded to Garcia-Titla and so there was no need to depose that expert either. Counsel for both SFC Homes and Garcia-Titla had jointly determined that neither side would call an economist or vocational expert. There were no eye-witnesses available other than Garcia-Titla, and he had already provided eight hours of discovery deposition testimony. There was simply no need (and no requirement) for Garcia-Titla to engage in costly deposition testimony. Written discovery certainly was propounded to SFC Homes. See CP 154; 116,117. However, based upon a dispute regarding discovery extension deadlines, that discovery was never answered. CP 154; 116,117. What did need to be investigated pre-trial was SFC Homes' Answer to Garcia-Titla's Complaint. In that Answer, SFC Homes indicated that it was the property owner at the site of injury, but denied that it was a general contractor. CP 5.

Upon receipt of SFC's Answer, Garcia-Titla immediately began the relevant and necessary investigation into whether SFC Homes was a general contractor. Seven public records tying SFC Homes either to the jobsite or to "being in the business of residential construction" including an active general contractor's license - were discovered. All were produced in response to SFC Homes' summary judgment motion. CP 124-144. Those public records proved that SFC Homes is a General Contractor and that SFC Homes was granted the subject parcel of land for purposes of building a single family home upon it. This evidence raises genuine issues of material fact as to whether SFC Homes was the general contractor at the jobsite at the time of Garcia-Titla's injury.

SFC also stated in its response that "plaintiff had presented no evidence of any applicable WISHA violation." BR 1. This is incorrect. In Garcia-Titla's original response to SFC Homes' summary judgment motion dated January 22, 2015, he went into great detail about what safety devices could have been provided by the management, and how (despite Garcia-Titla's best efforts) a joist that was not provided by him or his company broke under his feet, sending him to the ground. CP 72. Garcia-Titla plead: "Defendants violated the WAC and are responsible for Plaintiff's injuries." CP 118. "This case is governed by *Stute*, and WAC 296-155." CP 118-19. "Such working conditions violate WAC 296-155 in

its entirety, as well as the Supreme Court case of *Stute v. PBMC* and its progeny." CP 120.

Finally, SFC states at page 5 of its response that "the Department of Labor and Industries (L&I) conducted an investigation and determined that no safety violations had occurred as a result of the incident." BR 5. This is not true. L&I conducted no investigation because L&I does not inspect all of the work sites after injuries in Washington State. As a rule, L&I only investigates jobsites through planned and/or unannounced inspections, or after fatalities. Nothing in this record supports SFC's assertion.

ARGUMENT

A. *Stute* and its progeny hold that SFC Homes was the contractor/developer, and SFC's claims of "no right to control" do not nullify its duty.

The Supreme Court of Washington held that the general contractor and the owner/developer of the jobsite owe workers on construction jobsites a duty of care to comply with safety regulations. *Stute v. PBMC*, 114 Wn.2d 454, 788 P.2d 545 (1990). This duty of care is non-delegable. *Id.* It stems from their "innate supervisory authority." *Id.* *Stute* involved the employee of a subcontractor at a construction site falling off a roof. The worker did not have a harness and lanyard on, so there was nothing to arrest his fall, or restrain him from falling in the first place. *Stute*, 114 Wn.2d at 1. This lack of safety

equipment violated RCW 49.17.010 and WAC 296-155. *Stute*, 114 Wn.2d at 7.

Here, the testimony in evidence proves that there were no safety meetings at this site. CP 79. Safety meetings must be site specific, because each site has its specific hazards. WAC 296-155-100; 110. No safety meetings occurred at this job site (CP 79) proving the violation of WAC 296-155.

SFC Homes argues that *Stute* is not on point, and instead cites *Kamla v. Space Needle* 147 Wn.2d 114 (2002). *Kamla* is inapposite. It involved an owner (the Space Needle) who was not a general contractor, and an independent contractor who was not a subcontractor. *Kamla*, 147 Wn.2d at 1. Independent contractors differ from subcontractors. The title itself explains the difference: Independent contractors are independent, like the plumber who fixes your sink. Subcontractors at construction sites work under a higher contractor – the general or prime contractor. The general or prime contractor is responsible for the safety of his subcontractors under *Stute*.

Kamla does not apply here. The Space Needle was not a general contractor, and it did not hire subcontractors to build a residential home. The Space Needle hired a fireworks company to put on a fireworks show. The Court found that nonetheless, if the

Space Needle had been in the business of fireworks, it could have been considered an owner who retained control of the fireworks display at issue in that case. Since the Space Needle was not an owner in the fireworks business, it was not an owner in control. The Space Needle was "not similar enough to a general contractor to justify imposing the same non-delegable duty of care to ensure WISHA [WAC] compliant work conditions." *Kamla*, 147 Wn.2d at 5. The Space Needle did not place another entity between itself and the fireworks independent contractor, the independent contractor was not a subcontractor, and the Space Needle was not building a residential or commercial home. The Space Needle was simply an owner that hired an independent contractor. In our case SFC Homes is in fact a general contractor that builds homes. Clearly, it is "similar enough to a general contractor to justify imposing the same non-delegable duty of care to ensure WISHA [WAC] compliant work conditions." *Kamla* at 5.

SFC Homes' argument regarding the application of *Kamla* further fails because *Kamla* applies to independent contractor cases. Our case involves subcontractors to a general contractor and/or owner/developer. Our case involves liability for breach of the duty of safety at a construction site. That has nothing to do with independent contractors and owners outside of construction sites where no such duty is owed.

SFC Homes quotes *Kamla*, claiming that *Kamla* addresses "whether jobsite owners play a role sufficiently analogous to general contractors to justify imposing upon them the same non-delegable duty to ensure WISHA compliance when there is no general contractor. We hold that they do not." BR 23. This partial quote from *Kamla* is incomplete. It has to do with job site owners who are not general contractors and who are not in the business of building houses. When it states "when there is no general contractor" it means "when no general contractor is required," not "when the owner/developer of land does not feel like hiring a general contractor" – as was the case here.

The Court of Appeals has expressly extended *Stute's* nondelegable duty of ensuring WISHA compliant work conditions to parties other than general contractors. In *Weinert v. Bronco National Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990), Bronco, an owner/developer, hired a contractor to install siding. The contractor, in turn, subcontracted with Adrey Construction, by whom Weinert was employed. After Weinert fell off scaffolding erected by Adrey Construction, he sued Bronco arguing Bronco owed him a specific duty to comply with WISHA [now DOSH and WAC] regulations. Holding Bronco could be liable, the Court of Appeals pointedly noted, "*Stute* rejected the contention that before the duty could be imposed, there must be proof the general

contractor controlled the work of the subcontractor." *Weinert*, 58 Wn. App at 696.

B. The public records provided in response to summary judgment prove there is a genuine issue of material fact as to whether SFC Homes is the contractor/developer of this jobsite. Without considering the building permit the same genuine issues remain.

According to the State of Washington, the general contractor of the project where Garcia-Titla fell was SFC Homes. The Assessor-Treasurer's office listed SFC Homes as the grantor for the construction site, and listed a parcel number for the construction site, parcel number 4002540225. CP 126. Investigation into the parcel led to the record confirming that this was a "new construction" site belonging to SFC Homes. CP 126. A Corporations search of SFC Homes led to two corporations, SFC Homes Services, LLC, and SFC Homes LLC, both under UBI number 602231397. CP 128. A general contractors search under UBI 602231397 led to Washington's General and Specialty Contractor website, which listed SFC Homes as a Construction Contractor. CP 130, 132. The specialty listed for SFC Homes is "General." CP 132. SFC's Declarant, Mr. Atsushi Iwasaki, is one of the managers of this general contracting company. CP 130, 132.

Beyond that, the Washington Labor and Industries website listed SFC Homes LLC under UBI 602231397, as a Construction Contractor with a specialty license as a general contractor. CP 132. The Washington Corporations website lists SFC Homes, LLC under

UBI 602231397 as a Washington Corporation with Mr. Atsushi Iwasaki as one of its managers. CP 135. The Department of Revenue lists SFC Homes LLC under the same UBI number as a company engaging in "New Single-Family Housing Construction." CP 138.

SFC Homes is owned by Sumitomo Forestry Group. CP 144. The Website for Sumitomo Forestry Group holds itself out as being "in the Housing Business." CP 144. Under "Our Business" it lists SFC Homes LLC, stating that SFC Homes LLC is engaged in the "Construction and subdivision sales of detached houses." CP 144.

All of these public records were submitted with Plaintiffs' Response to Defendant's Motion for Summary Judgment pleading at Exhibits 1 through 9, on January 22, 2015. CP 109; 124-144. Yet the Superior Court granted summary judgment finding no genuine issue of material fact as to whether SFC Homes was the general contractor and/or owner developer of this jobsite. This was error.

Thereafter, only one additional document was added with Plaintiffs Request for Reconsideration, the building permit. CP 197-203. Although the building permit information is clearly dispositive on the issue of whether SFC Homes was the general contractor at the site and at the time of Garcia-Titlas' injury, it was not crucial to the defeat of summary judgment, as all of the previously submitted documentation was enough (or should have been enough) to

defeat summary judgment.

However, the building permit does make the link to SFC Homes very clear and completely undeniable. SFC Homes' WA State contractor registration number is listed on the building permit application as well as on the building permit for this jobsite. CP 427; 198-203. SFC Homes' name, address, and phone number are listed on the building permit application both under "owner" and under "contractor." CP 427. SFC Homes is listed as the contractor in charge of being present for all of the city inspections that took place at this job site. CP 427, 432. We can link this contractor to this lawsuit because here, the parcel of land and the address of this jobsite are identified as the place where SFC Homes chose to build the house where Garcia-Titla fell. CP 125.

SFC Homes is both the owner/developer and general contractor for this parcel, and the only party to sue in this case. Even if this Court does not consider the building permit submitted on reconsideration, enough public records information was provided to the Superior Court in response to SFC's summary judgment motion that summary judgment should never have been granted because these are genuine issues of material fact for the trier of fact to decide.

In his declaration, SFC owner Atsushi Iwasaki stated that SFC "had no control" over its framing subcontractor FRDS, and had

"no right to control" FRDS. CP 106. It did not control the jobsite, and it did not control Garcia-Titla's employer FRDS. CP 106. SFC plead that FRDS was treated like an independent contractor, therefore, the duties imposed upon general contractors by *Stute* could not apply to SFC. CP 20-23, 106. It plead that "SFC Homes reasonably relied on FRDS to ensure WISHA compliance." CP 22.

Such reliance on a subcontractor for safety oversight is a violation of WAC 296-155. Mr. Iwasaki did not state in his Declaration that any other group was hired by SFC Homes to act as the general contractor. Instead, he pled that the subcontractors were independent contractors and were left to supervise themselves. CP 20-23, 106. Mr. Iwasaki's position was clear: He was not a general contractor, so *Stute* duties could not apply to him. CP 20-23, 106. His declaration is an admission of the violation of construction law in Washington State.

C. The correct defendant has been named; there is no legal or contractual basis to sue a different party; and the issues of negligence and causation are properly left to the trier of fact.

During oral argument on Garcia-Titla's Motion for Reconsideration, counsel for SFC Homes stated to the court that she had a contract that governed this case. CP 475-476. SFC Homes alleged there was a contract that lead to another entity called Henley USA, LLC, as having contracted with the subcontractors at the subject jobsite. CP 367-368. By this point in

the proceedings, SFC Homes was admitting that it was a general contractor as well as the owner of the parcel at issue. CP 146,147. SFC Homes admitted in a footnote in its brief "SFC Homes does have such a license." CP 146.

Now, SFC states at page 11 of its brief that "Garcia-Titla argued that the contract did not pertain to the project in question, thus waiving his claim for reconsideration on the basis of that contract." BR 11. But it was SFC Homes that relied on a purported contract that governed the parties relationship, not Garcia-Titla. The Court inquired whether this contract would conclusively resolve this issue. CP 476. In the words of defense counsel yes, it had a contract that governed this case and yes, the contract would "resolutely" resolve the whole issue. CP 475-475. The Court requested the contract. CP 475,476. However, the contract did not pertain to the project in question, and it did not resolve any issue related to this case. The trial court granted summary judgment anyway.

Even if there had been a legitimate contract produced by SFC Homes, a new contract between other parties would not change the general contractor on this site. It would not change the owner for this site. If another entity contracted with the subcontractors, that entity could be another subcontractor, a labor broker, or a safety superintendent hired by SFC Homes. That still

would not affect Garcia-Titla's right to sue the general contractor and owner/developer of the site where he fell.

If SFC Homes chose not to act in the capacity of general contractor, it was still the owner/developer in control and allowed the framers to supervise themselves. At most, this evidence creates genuine issues of material fact for the trier of fact.

Finally, Garcia-Titla properly preserved the issue of WAC violations for the trier of fact, since they are merely evidence of negligence, and negligence is not an issue ripe for summary judgment. Similarly, causation is an issue reserved for the trier of fact that is not ripe for summary judgment.

SFC's brief at page 30 states that Garcia-Titla needed to avoid summary judgment by showing a genuine issue of material fact regarding duty, breach, causation and damage. BR 30. Here, a genuine issue of material fact exists as to whether SFC Homes was the owner/developer/general contractor at this jobsite. If it was, then a genuine issue of material fact exists as to whether it therefore owed a duty of care to workers on its jobsite. If it did, then a genuine issue of material fact exists as to whether the duty was breached by lack of oversight for safety on the part of SFC Homes. If SFC breached the duty of safety through lack of oversight and violation of WAC 296, then genuine issues of material fact exist as to whether that breach caused damages to Garcia-Titla.

CONCLUSION

This Court should reverse the trial court's order granting Defendant's Summary Judgment Motion, and should reverse the trial Court's Denial of Garcia-Titla's Motion for Reconsideration. This Court should remand this case for trial.

RESPECTFULLY SUBMITTED this 17th day of September, 2015.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **REPLY BRIEF OF APPELLANT**, postage prepaid, via U.S. mail on the 17th day of September, 2015, to the following counsel of record at the following addresses:

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