

NO. 50046-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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Jeff McGee,

Appellant,

v.

Dan Graziano and Joyce Farley Graziano, husband and wife,  
and the Marital community composed thereof;  
Eric Stroh, an individual; and EDJ Properties, LLC,  
a Washington limited-liability company,

Respondents.

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BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

### ***Assignments of Error***

1. The Superior Court erred in granting summary judgment to Respondents.

### ***Issues Pertaining to Assignments of Error***

1. Did the Superior Court err in dismissing Appellant's negligence claim against Respondents when Respondents breached their duty as possessors of land to Appellant, a business invitee?

## **II. STATEMENT OF THE CASE**

### **A. Facts**

This is a personal-injury claim arising from Appellant's stepping on a carpet staple in a house on which he was performing renovations/repairs. This occurred in December 2015. The house that Appellant was working in is owned by Respondent Eric Stroh. CP 2. Mr. Stroh and two other Defendant/Respondents, Joyce Farley and Dan Graziano, are the three members of EDJ Properties, LLC. *Id.* The house, located at 304 Bryan Avenue in Bremerton, was operated as a rental property generating income for Respondents. *Id.* In November 2015, Respondents undertook to perform some renovations and repairs. *Id.* They hired Appellant for two separate projects as part of the renovation and repair. CP 49.

Appellant was a long-time friend of Respondent Dan Graziano, and Mr. Graziano had hired Appellant in the past for odd jobs, including a previous job at 304 Bryan Avenue. *Id.* In approximately October of 2015, Mr. Graziano hired Mr. McGee to pressure wash the 304 Bryan Avenue house. *Id.* Graziano had previously hired Appellant to pressure-wash another rental house owned by Respondents in Bremerton. CP 48.

In early November 2015, Respondents hired Mr. McGee for another project: removal of carpeting from the house at 304 Bryan Avenue. CP 49. The parties agreed that Respondents would pay Appellant \$300 to remove the carpeting, floor tacks and rubber matting in the house. *Id.* Appellant performed this work in early November 2015, removing the carpeting and other materials. *Id.* He placed the carpeting and other materials in the driveway of 304 Bryan as instructed by Respondent Farley. *Id.* He also swept the interior of the house to remove any residual debris. *Id.* The carpeting and carpeting materials remained in the driveway of the house for several weeks at least. *Id.* This was the only work with respect to carpet-removal or floor work that parties agreed to or that Appellant performed. *Id.*

Several weeks later, Respondents contracted with Appellant to do additional work on the 304 Bryan Avenue house. *Id.* The agreement between Appellant and Respondents was that Appellant would paint the interior of the house and install trim boards for \$2,500 plus the cost of materials. *Id.* As part of the agreement, Appellant and his girlfriend at the

time, Robin Poitras, were allowed to live in the house while they were performing the work. *Id.*

Appellant moved into the house at 304 Bryan Avenue around Thanksgiving 2015, and Appellant began performing the agreed-upon work of painting and replacing trim. *Id.* He was not performing any floor work. *Id.* Respondent Farley hired another person, George Armitage, to sand and finish the hardwood floors. *Id.* Appellant's understanding was that Mr. Armitage was supposed to clean the floors and sand them and prepare the floor for finishing. *Id.* Mr. Armitage was in and out of the house for several days in December. *Id.*

On December 21, 2015, Appellant felt something in his left big toe. CP 50. Ms. Poitras examined the shower shoes that Appellant was wearing, and saw that a carpet staple had punctured the sole of the shower shoes and penetrated Appellant's toe. *Id.* Ms. Poitras removed the staple. *Id.* Within days Appellant developed an infection in his toe, which resulted in a series of amputations of his left foot and leg. *Id.*

#### **B. Procedural History**

Mr. McGee filed his First Amended Complaint against Respondents on June 16, 2016. After limited discovery, Respondents moved for summary judgment. The Superior Court granted Respondents' motion on January 27, 2017. CP 61-63. This appeal followed.

### **III. ARGUMENT**

#### **A. The Superior Court Erred in Granting the Respondents' Motion for Summary Judgment When There Are Genuine Issues of Material Fact.**

## **1. Standard of Review**

The standard for appellate review of an order of summary judgment is well established. The appellate court is to “engage in the same inquiry as the trial court considering all facts and reasonable inferences which can be drawn from such facts in the light most favorable to the nonmoving party.” *Schumacher Painting Co. v. First Union Mgmt., Inc.*, 69 Wn. App. 693, 698, 850 P.2d 1361 (1993). The appellate court’s review is, thus, “de novo.” *DeWater v. State*, 130 Wn.2d 128, 133, 921 P. 2d 1059 (1996). The appellate court may uphold an order granting summary judgment only if, from all the evidence, reasonable persons could reach only one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

## **2. Factual Discrepancies Must Be Construed in the Light Most Favorable to Appellant.**

There are significant factual discrepancies in this case that must be construed in the light most favorable to the Appellant, Jeff McGee. For example, Respondents claim that the carpet-removal project was included in the work Appellant was to perform for \$2,500 and free rent. CP 2. In fact, this was a separate project for which the parties had a separate agreement and a separate payment. CP 49. Respondents also allege that Appellant removed the carpeting in December 2015, while he was living at the 304 Bryan house. CP 2. In fact, Appellant removed the carpeting in early November 2015, before he moved into 304 Bryan Avenue, and approximately a month and a half before he stepped on the staple. Respondents also imply that Appellant was the only person performing

work on the floor of 304 Bryan Avenue prior to Appellant's injury. CP 49. However, as Appellant stated in his Declaration, another worker named George Armitage was in and out of the house at 304 Bryan Avenue prior to Appellant's injury presumably performing the floor work that he was hired to perform. CP 49. Finally, Respondents assert that it is "undisputed that McGee was responsible for the creation of the hazard." CP 3. This is not an accurate statement—there is no evidence that the staple that he stepped on on December 21 was one of the ones that he removed from the house in early November. For the purposes of this appeal, all facts in dispute must be resolved in favor of the Appellant.

**B. There Are Genuine Issues of Material Fact that Preclude Dismissal of Appellant's Case on Summary Judgment.**

**1. There Exist Genuine Issues of Material Fact As to the Nature of the Relationship Between the Parties.**

In their Motion for Summary Judgment, Respondents attempted to redefine the relationship between themselves and Appellant as one of Landlord-Tenant, and argue that landlord-tenant law governs this case. CP 4. This is inaccurate. Respondents cite the 1944 case *Najewitz v. City of Seattle*, 21 Wn.2d 656, 152 P.2d 722 (1944), in support of their argument that nature of the parties' relationship in this case was that of a landlord and tenant. However, that case is not factually on point, and the passage of the Residential Landlord-Tenant Act of 1973 ("RLTA") renders its holding obsolete.

In *Najewitz*, the Plaintiff/Appellant worked for the City of Seattle and was provided housing as part of his employment. *Najewitz*, 21 Wn.2d at 658. The agreement between the parties was that the Appellant would reside at a gravel pit near Juanita Bay and act as caretaker and watchman of the gravel pit. *Id.* He was to be allowed to remain in the house until he was terminated for good cause or until the City no longer used the quarry. *Id.* When the City sought to evict the Appellant absent either of these two conditions, he sought an injunction prohibiting the City from evicting him. *Id.* at 657-58.

In his complaint against the City, the Appellant framed the dispute as being an employment claim. *Id.* at 657. However, the Court of Appeals concluded that the real issue was whether the agreement between the City and Appellant was an employment agreement or an agreement for the occupancy of real property. *Id.* at 658. The Court concluded it was the latter. *Id.* Based on the Court's determination that the parties' relationship was that of Landlord-Tenant, it concluded that the rental was a tenancy at will. *Id.* at 659. As a result, held the Court, the City was within its rights to evict Mr. Najewitz. *Id.*

However, it is clear from the agreement between Appellant and Respondents in this case that the relationship between them was not that of landlord and tenant; moreover, *Najewitz* has limited relevance to this case.

First, there was no rental agreement between the parties in this case, as Respondents concede. Under Washington's Residential Landlord-Tenant Act, "[a] 'tenant' is any person who is entitled to occupy a

dwelling unit primarily for living or dwelling purposes **under a rental agreement.**” RCW 59.18.030(27) (emphasis added). Respondents concede that there was no rental agreement between themselves and Appellant. CP 6. Thus, this is not a landlord-tenant relationship.

Secondly, looking at the history of the interactions between the parties, it is clear that the parties’ agreement that the Appellant perform painting and trim work in the 304 Bryan house was simply one in a series of agreements for the performance of renovation/maintenance work. The parties had previously contracted for two pressure-washing jobs as well as the carpet-removal job. The simple inclusion of two months’ free rent in the terms of Appellant’s compensation for painting the 304 Bryan house does not transform their relationship from that of Principal and Independent Contractor to that of Landlord and Tenant. At the very least, there are questions of material fact regarding the nature of the parties’ relationship, so a grant of summary judgment based on a purported landlord-tenant relationship is error.

In addition, the case on which Respondents rely in support of their position—*Najewitz*—was decided in 1944, before Washington’s RLTA was enacted. The RLTA specifically addresses the living arrangement that was at issue in *Najewitz*—that of a hybrid employee/tenant—and exempts that relationship from the RLTA’s reach. RCW 59.18.140 identifies certain living arrangements that are exempt from the RLTA. One of these exempted living arrangements is “Occupancy by an

employee of a landlord whose right to occupy is conditioned upon employment in or about the premises.” Thus, the living arrangement that the Court deemed a landlord-tenant relationship in *Najewitz*, is now specifically exempted from the RLTA. To whatever extent the *Najewitz* case defined the landlord-tenant relationship between the parties in 1944, it has been superseded by the RLTA and provides no guidance in this case.

**2. Defendant Owed a Duty of Care to Appellant as a Business Invitee.**

Respondents owed a duty of care to Appellant based on his status as a business invitee. Under the common law, a landowner's duty of care to persons on the land is governed by the entrant's common law status as an invitee, licensee or trespasser. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). A business invitee is

(O)ne who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant is then engaged. To qualify as an invitee or business visitor under this definition, it must be shown that the business or purpose for which the visitor comes upon the premises is of actual or potential benefit to the owner or occupier thereof.

*McKinnon v. Washington Federal Sav. & Loan Ass'n*, 68 Wn.2d 644, 649, 414 P.2d 773, 776 (1966). Here, Appellant was working at 304 Bryan Avenue pursuant to an agreement between himself and Respondents to perform improvements on a rental home which was an investment property for Respondents. This is certainly of actual benefit to Respondents.

It is a question of material fact whether Respondents breached their duty of care to Appellant. Generally, a landowner owes the highest duty of care to an invitee. *Id.* at 993. **“Whether a landowner has taken reasonable precautions to protect business invitees is a question of fact.”** *Makoviney v. Svinth*, 21 Wn. App. 16, 29, 584 P.2d 948 (1978) (emphasis added). Summary judgment on this issue is inappropriate.

Washington courts have adopted Sections 343 and 343A of the Restatement (Second) of Torts (1965) “as the appropriate tests for determining landowner liability to invitees.” *Iwai v. State*, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). Section 343 states:

Dangerous Conditions Known to or Discoverable by

Possessor

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.

A landowner has a duty to inspect for dangerous conditions and, if necessary, repair, safeguard or warn invitees as reasonably necessary under the circumstances. *Iwai v. State*, 129 Wn.2d at 96. Comment d to

Section 343 of the Restatement states that the rule implies that a landowner will take reasonable care to ascertain the condition of the premises and will either make it reasonably safe or give warning of its condition.

Here, Respondents had a duty to inspect the premises prior to Appellant's moving in, and to make the premises safe for Appellant while he was working there. Appellant and his girlfriend pulled up the carpet, tack strips and padding weeks before he moved in. It was Respondents' duty to inspect the premises between the time Appellant pulled up the carpet and the time he moved in to ensure that the premises were safe.

The second element of the Restatement (Second) of Torts § 343 is also met here. Since several weeks elapsed between when Appellant pulled up the carpet and when he moved into 304 Bryan, there was no reason for Appellant to think that he would need to look out for staples that may have been left behind. It was not unreasonable for Appellant to assume that Respondents had inspected the property and made it safe prior to his moving in.

Finally, there are questions of material fact about whether Respondents failed to exercise reasonable care to protect Appellant. There is no evidence that Defendant did anything to make 304 Bryan safe prior to Appellant's moving in. There is no evidence that they warned Appellant that they had not inspected the property, and that it was potentially unsafe. It is a question of fact for the jury whether Respondents' complete failure

to take any kind of precautionary measures to prevent Appellant's injury was a breach of their duty to exercise reasonable care.

Respondents repeatedly contend that Appellants claim fails because he created the hazard. CP 3, 6, 7, 8, 9, 10, 12. This argument is unpersuasive. After Appellant removed the carpet and padding in early November 2015, he swept the house and deposited all the carpeting material in a dumpster in the driveway, where it remained for the next several weeks—weeks in which he was not residing at 304 Bryan Avenue. There is simply no evidence to sustain Respondents' assertion that the staple that Mr. McGee stepped on on December 21 was one that he removed in early November. For the purpose of a motion for summary judgment, in which facts and inferences therefrom must be construed against the non-moving party—the Respondents in this case—it is improper to conclude that Appellant created the hazard and therefore Respondents are absolved of liability.

**3. Defendant Owed a Duty to Care to Appellant as an Employer, Jobsite Owner, or General Contractor.**

Respondents owed a duty of care to Appellant arising from their role as Employer, Jobsite Owner, or General Contractor in the renovation work being done at 304 Bryan Avenue. As stated above, the exact nature of the relationship between the parties is not clear. It could be that of Employer-Employee; Jobsite Owner-Independent Contractor; or General Contractor-Subcontractor. Regardless of which of these three most closely describes the relationship between the parties, Respondents had a duty arising from Washington's workplace safety laws, the Washington

Industrial Health and Safety Act of 1973 (WISHA), to provide Appellant with a safe worksite. WISHA requirements create a duty on Employers, General Contractors and Jobsite Owners to protect **all** workers on the work premises. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 460, 788 P.2d 454 (1990).

The Washington Industrial Health and Safety Act of 1973 is codified at chapter RCW 49.17, and RCW 49.17.060 provides that:

Each employer:

- (i) shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury to his employees . . . and
- (ii) shall comply with the rules, regulations and orders promulgated under this chapter.

WAC 296-155-040, promulgated under RCW chapter 49.17, provides in relevant part that:

- (i) Each employer shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees.
- (ii) Every employer shall require safety practices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every thing reasonably necessary to protect the life and safety of employees.

RCW 49.17.060 creates, in effect, two separate duties: a general duty to protect an employer's **own** employees from recognized hazards and a specific duty to protect **all** workers working on-site (including independent contractors or those working for other employers) by complying with WISHA regulations.

Our Supreme Court has addressed an employer's duty to provide a safe worksite to non-employees in a line of cases beginning with in *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990). The defendant in *Stute* was a general contractor constructing a condominium complex. *Stute*, 114 Wn.2d at 456. The Appellant was an employee of S&S Gutters, one of P.B.M.C.'s subcontractors. *Id.* Appellant slipped on the rain-slick roof and fell three stories. *Id.* No scaffolding or net existed to break the fall. *Id.* Stute sued PBMC for failing to provide necessary safety devices at the job site. PBMC was granted summary judgment on the grounds that the general contractor did not owe a duty to provide safety equipment to an employee of a subcontractor because PMBC had not contractually and voluntarily assumed this duty. *Id.*

Upon review, the Supreme Court paraphrased the legislative purpose of WISHA – to ensure safe and healthy working conditions for every person in Washington. *Id.* at 458. The Court then stated that “the specific duty clause of RCW 49.17.060(2), requiring employers to comply with applicable WISHA regulations, applies to employees of subcontractors.” *Id.*

The Court went on to raise and dismiss the possibility that before WISHA liability to subcontractor employees attaches, the contractor/employer must control the work of the subcontractor. *Id.* at 460. “The general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor’s innate supervising authority constitutes sufficient control over the workplace.” *Id.* at 464. In bolstering the policy behind this holding the Court pointed out that WISHA’s predecessor (RCW 49.030) created a non-delegable duty on general contractors to provide a safe place to work for employees of subcontractors and that the policy reasons behind this had not changed. *Id.* at 463 (citing *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 333, 582 P.2d 500 (1978)). Thus, in Washington, general contractors have a nondelegable specific duty to ensure compliance with all WISHA regulations. *Id.* at 464.

The Court of Appeals extended this duty to provide a safe workplace in *Doss v ITT Rayonier, Inc.*, 60 Wn. App. 125, 126, 803 P.2d 4 (1991), an employee of a subcontractor hired to clean Defendant’s boiler was killed in an accident that could have been prevented if Defendant had complied with a WISHA regulation requiring a safety net. Citing RCW 49.17.060, (requiring employers to comply with WISHA regulations), the Court concluded that Rayonier owed a duty to Nick Swagerty, the worker who was killed, to comply with WISHA regulations. The Court acknowledged that *Stute* imposed the duty of compliance with WISHA on the general contractor based on the general contractor’s “supervisory

authority.” *Id.* at 128 (citing *Stute*, 114 Wn.2d at 464). Drawing on *Stute*’s reasoning, the Court in *Doss* concluded, “Rayonier, as **the owner of the site**, had innate supervisory authority that gave it control over the workplace. The *Stute* holding applies to this case; Rayonier had a duty, running to [the boiler-cleaning company]’s employees, to comply with the safety-net regulation.” *Id.* at 128-29. The Court noted that ITT Rayonier was a **jobsite owner** and not a general contractor as in *Stute*, but the *Doss* Court found “**no significant difference ... between an owner-independent contractor relationship and a general contractor-subcontractor relationship.**” *Id.* at 127 n.2 (emphasis added). Thus, as owners of 304 Bryan Avenue and general contractor for the work being done at the house, Respondents are subject to the holdings of *Doss* and *Stute*. As owner and possessor of the property where Appellant was performing work, Respondents had “innate supervisory authority that gave it control over the workplace.” They owed a duty of care to Appellant to provide a safe worksite. Their failure to do so breached their duty to Appellant.

**4. Implied Primary Assumption of the Risk Does Not Apply in this Case.**

Finally, Respondents that Appellant’s implied primary assumption of the risk obviates their liability. This theory does not apply to the facts of this case. There is simply no evidence that any of the three elements of this theory are present.

To show implied primary assumption of the risk, Defendant would have to show that Appellant “(1) had full subjective understanding (2) of

the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). There is simply no evidence here that Appellant understood that there would still be carpet staples at 304 Bryant Avenue weeks after he removed the carpet and before he moved in; that he accepted this risk; or that he voluntarily chose to encounter this risk.

Respondents’ argument hangs on their assertion that Appellant created the hazard when he removed the carpet, but, again, this work was done weeks before he moved into the house—weeks during which Respondents should have inspected 304 Bryan to identify and remove hazards. As set forth above, for the purpose of summary judgment it cannot be assumed that Appellant created the hazard. Indeed, he was clearly unaware of the presence of the carpet staple or he would have avoided it.

Defendant also argues that by wearing shower shoes, Appellant demonstrates knowledge that there was a risk he could step on an exposed staple. This is certainly a leap, as there could have been any number of reasons why Appellant was wearing shower shoes. It is error to contrive the fact of wearing shower shoes in favor of Respondents and conclude that it demonstrates Appellant’s knowledge of the condition.

With regard to the third element—whether Appellant voluntarily undertook the risk of the carpet staple—Respondents argue unconvincingly that Appellant deliberately undertook the risk by failing to take a “feasible and safe alternative course of action.” CP 11. This

analysis is problematic for several reasons. First, it is clear that Mr. McGee was unaware of the presence of the carpet staple approximately six weeks after he removed the carpet. Second, Respondents claim that Appellant “could have ensured that all carpet staples were removed when he pulled up the carpet, or, if he was unsure whether any staples remained, could have restricted his access or taken better precautions until the staples could be removed.” *Id.* Mr. McGee swept up the debris from the carpet removal in early November 2015 and deposited them in Respondents’ dumpster. He was then absent from the house for approximately two weeks until he moved in around Thanksgiving. He had no knowledge of what Respondents had done to the house during his absence or what action they had taken, if any, consistent with their duty to inspect the premises and make it safe for business invitees such as himself who were performing work on the house. Respondents’ assumption-of-the-risk argument should be rejected.

#### IV. CONCLUSION

Mr. McGee presented sufficient evidence to create triable questions of fact for the jury on his negligence claims against Respondents. Accordingly, he respectfully submits that the trial court erred in entering summary judgment in favor of Respondents, and that the order dismissing this action should be reversed and this action be remanded to the trial court for further proceedings.

DATED this 25<sup>th</sup> day of May, 2017.

EMERALD LAW GROUP, PLLC

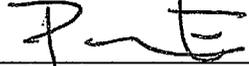


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I certify under penalty of perjury under the laws of the State of Washington, that on this date I sent via E-mail and U.S. Mail a copy of the document to which this certificate is attached, for delivery to Jill Haavig Stone, Lori Marie Bemis, and Melanie Stella, Esqs.:

DATED: 05/25/2017



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Patricia Ekpo

# EMERALD LAW GROUP

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